Essex CHAMBERS

MENTAL CAPACITY REPORT: COMPENDIUM

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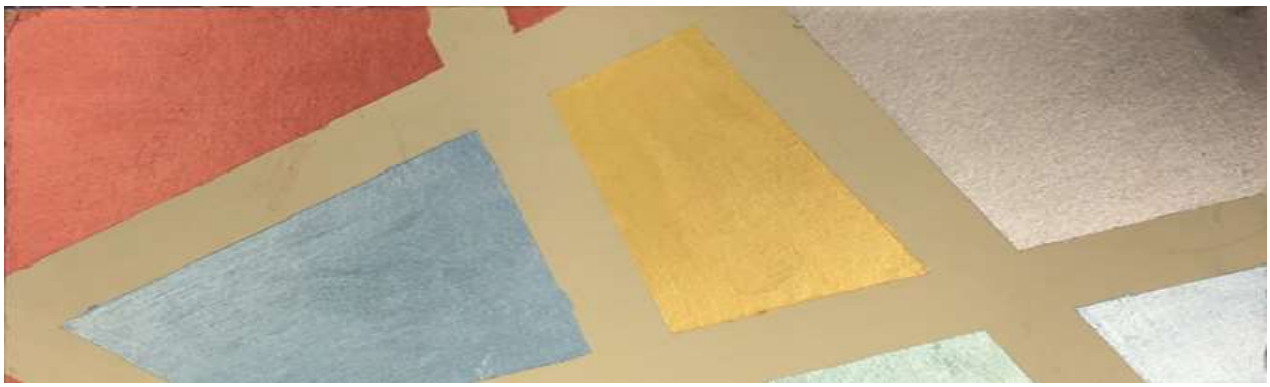

Welcome to the December 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court takes on capacity, learning to learn, and capacity and illicit substances;

(2) In the Practice and Procedure Report: the Court of Appeal's concern about judicial visits, and reporting restrictions and accountability;

(3) In the Wider Context Report: Parole Board guidance on mental capacity, and how consumer law can help navigate care home dilemmas;

(4) In the Scotland Report: a truly shocking report of institutional inhumanity, and the extent of incapacitation under s.67 of the Adults with Incapacity Act 2000.

Because there's not a huge amount to report, there is no Property and Affairs Report this month. However, a reminder of this consultation currently underway, closing on 12 January 2022 about third-party access to limited funds. Dr Lucy Series has provided an excellent overview of the consultation here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides.

You may notice some changes next year, as coordination duties are being taken over by Arianna whilst Alex is on sabbatical, but rest assured that this will remain a one-stop shop for all the capacity news which is fit to print. In the meantime, and for those for whom it is not an empty hope, we wish you happy holidays, and will see you (probably virtually) in 2022.

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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.

Contents

HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Capacity and best interests guides updated

To take account of the decision of the Supreme Court in *JB*, and of other case-law developments over the past few months, we have updated both our capacity and best interests guides.

The Supreme Court takes on capacity

A Local Authority v JB [2021] UKSC 52 (Court of Appeal (Supreme Court (Briggs, Arden, Burrows, Stephens and Rose SCJJ))

Mental capacity – assessing capacity – sexual relations

Summary

The Supreme Court has for the first time looked in detail at what it means to have or lack capacity to make a decision, and has done so in a very high-stakes context: that of sexual relations. In *A Local Authority v JB* [2021] UKSC 52, the central question was whether the man in question, JB, had to be able to understand, use and weigh the information that any prospective sexual partner must be able to, give, and maintain consent to any sexual activity he was initiating. In turn, this led to a profound question: is that something that anyone should be able to understand? If it is, then it would not be discriminatory to hold a person with a cognitive impairment such a JB to such a standard; if it is not, then it would be.

The factual background to the case is set out in some detail in the judgment of the Supreme Court, although, as Lord Stephens emphasised (paragraph 9), there have been no final factual findings, even if much of the evidence is not disputed. For present purposes, of most importance is the fact that the expert evidence relating to JB was to the effect that he could not understand or weigh the concept of consent by another sexual partner, and could not do so in consequence of an impairment of his mind (autism). As Lord Stephens identified (at paragraph 36), if the relevant information for purposes of the capacity test included the need for such consent, then JB would not satisfy the test. No-one could therefore make a decision on his behalf to engage in sexual relations by virtue of the ban in s.27(1)(b) MCA 2005.

The first judge to consider the question, Roberts J, approached matters on the basis that the relevant issue – the 'matter' for purposes of the capacity test in s.2 MCA 2005 – was JB's ability to consent to sexual relations. She reached the conclusion that the other's consent was not information that JB had to be able to understand, use and weigh to be able to consent, the essential underpinning of her judgment being that such would be discriminatory. In essence, she considered that, given that those without cognitive impairments are not judged in advance, the questions of whether JB (or others in his position) might be committing offences in consequence by initiating sexual relations with a person who was not consenting should be examined through the criminal law in retrospect.

The Court of Appeal took a different course, firstly by reformulating the question as being one of whether JB had capacity to make the decision to engage in sexual relations, on the basis that "the word ''consent' implies agreeing to sexual relations proposed by someone else," but that in JB's case it was JB who wished to initiate sexual relations with others. The Court of Appeal also placed heavy emphasis upon the fact that, whilst the MCA enshrines the principles of autonomy and protection of those with potentially impaired decision-making capacity, the MCA and the Court of Protection do not exist in a vacuum, but are part of a wider system of law and justice, and must therefore take into account – where relevant – the need to protect others. The Court of Appeal therefore upheld the local authority's appeal against the decision of Roberts J and considered that the relevant information included the need for the others' consent.

As JB's litigation friend, the Official Solicitor appealed against the decision of the Court of Appeal.

JB's circumstances

Lord Stephens, giving the judgment of the court, set out an overview of JB's factual circumstances, including – as noted above – the expert evidence as to the effect of his cognitive impairments upon his 'factual' capacity to make decisions in relation to sexual activity. He also identified the expert evidence relating to the risks posed by JB to women (including those with learning disabilities) and the consequential risks to JB, including physical or psychological harm from others, including relatives or friends of the potential victims, incarceration (giving rise to 'significant harm' to his mental health) or hospitalisation. As Lord Stephens noted (at paragraph 41), the relevance of these matters was that "*if section 1(4)(a) MCA the reasonably foreseeable consequences of JB deciding to engage in or to consent to sexual relations, when the other person is unable to consent or does not consent throughout the sexual activity, is that JB could harm himself and/or the other person, then that would be information relevant to the decision. If it is, then under section 3(1)(a) MCA, JB should be able to understand that information and under section 3(1)(c) he should be able to use or weigh it as part of the decision-making process*" (paragraph 41). Lord Stephens also identified the work that had been proposed to ameliorate JB's risk to women in circumstances where one expert identified that his "'*sole goal,' if his account to her is correct' as being to have physical and sexual contact with a woman and any woman*" (paragraph 23); as Lord Stephens had noted previously (para 11), JB's current care plan imposed restrictions upon him, including 1:1 supervision when out in the community and in particular in the presence of women.

The MCA and the concept of capacity

Lord Stephens gave an overview of the concept of capacity within the MCA, including a commentary upon the principles in s.1. Of note, perhaps, is the fact that he carefully delineated the scope of s.1(4), which is often misunderstood as conferring a right to make unwise decisions. As he identified:

> *Legal capacity depends on the application of sections 2 and 3 of the MCA together with the principles in section 1. It does not depend on the wisdom of the decision. Furthermore, an important purpose of the MCA is to promote autonomy. That purpose aids the interpretation of sections 2 and 3 of the*

> *MCA. If P has capacity to make a decision then he or she has the right to make an unwise decision and to suffer the consequences if and when things go wrong. In this way P can learn from mistakes and thus attain a greater degree of independence.*

Lord Stephens then turned to the concept of capacity, identifying how that enshrined in the MCA represents a functional approach, as opposed to the outcome or status approach (see paras 57-62). Following the Court of Appeal in *York City Council v C* [2013] EWCA Civ 478 (sometimes also called *PC v NC*), he identified that section 2(1) – the core determinative provision – requires the court (and hence anyone else, outside court) to address two questions.

First, is the person unable to make the decision for themselves? As he noted:

> *67.* […] *The focus is on the capacity to make a specific decision so that the determination of capacity under Part 1 of the MCA 2005 is decision-specific as the Court of Appeal stated in this case at para 91. The only statutory test is in relation to the ability to decide. In the context of sexual relations, the other vocabulary that has developed around the MCA, of "person-specific", "act-specific", "situation-specific" and "issue-specific", should not be permitted to detract from that statutory test, though it may helpfully be used to identify a particular feature of the matter in respect of which a decision is to be made in an individual case.*
>
> *68. As the assessment of capacity is decision-specific, the court is required to identify the correct formulation of "the matter" in respect of which it must evaluate whether P is unable to make a decision for himself: see York City Council v C at paras 19, 35 and 40.*
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> *69. The correct formulation of "the matter" then leads to a requirement to identify "the information relevant to the decision" under section 3(1)(a) which includes information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision: see section 3(4).*

This has the important consequence that the relevant information has to be identified within the specific factual matrix of the case. This has some very important consequences in relation to sexual relations. Ordinarily, "*it will ordinarily be formulated in a non-specific way because, in accordance with ordinary human experience, it will involve a forward-looking evaluation directed to the nature of the activity rather than to the identity of the sexual partner*" (paragraph 71). However, Lord Stephens disagreed with the Court of Appeal's determination *In re M (An Adult) (Capacity: Consent to Sexual Relations)* [2014] EWCA Civ 37 that, largely for reasons of pragmatism, the test could only be looked at on a general specific-basis:

> *71.* […] *Pragmatism does not require that consent to future sexual relations can only be assessed on a general and non-specific basis. Furthermore, such a restriction on the formulation of the matter is contrary to the open-textured nature of section 2(1) MCA. A general and non-specific basis is not the only appropriate formulation in respect of sexual relations as even in that context, "the matter" can be person-specific where it involves, for instance, sexual relations between a couple who have been in a long-standing relationship where one of them develops dementia or sustains a significant*

> *traumatic brain injury. It could also be person-specific in the case of sexual relations between two individuals who are mutually attracted to one another but who both have impairments of the functioning of their minds.* (emphasis in original)

If, on the facts of the case, the formulation could properly be described as person-specific, Lord Stephens identified, there were two consequences:

> *72.* […] *then the information relevant to the decision may be different, for instance depending on the characteristics of the other person, see TZ at para 55 (risk of pregnancy resulting from sexual intercourse is not relevant to a decision whether or not to engage in, or consent to, sexual relations with someone of the same sex) or the risks posed to P by an individual who has been convicted of serious sexual offences, see York City Council v C at para 39. Moreover, the practicable steps which must be taken to help P under section 1(3) MCA may be informed by whether "the matter" in relation to sexual relations may be described as person-specific. For instance, it might be possible to help P to understand the response of one potential sexual partner in circumstances where he will remain unable to understand the diverse responses of many hypothetical sexual partners. Furthermore, if the matter can be described as person-specific then the reasonably foreseeable consequences of deciding one way or another (see section 3(4)(a) MCA and para 73 below) may be different. There may, for example, be no reasonably foreseeable consequence of a sexually transmitted disease in a long-standing monogamous relationship where one partner has developed dementia. Finally, the potential for "serious grave consequences" may also differ.*

Lord Stephens emphasised the need to be clear about reasonably foreseeable consequences for two reasons. The first is that this can include consequences for others (for instance, on the evidence before the court, for a person whom JB might sexually assault or rape). The second is that where there are "serious grave consequences," then, as the Code of Practice says (at paragraph 4.19), it is even more important that the person understand the information in question. That having been said, Lord Stephens made clear, there has to be a limit in terms of envisaging reasonably foreseeable consequences, so that:

> *75.* […] "*the notional decision-making process attributed to the protected person with regard to consent to sexual relations should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity": see In re M (An Adult) (Capacity: Consent to Sexual Relations) [2015] Fam 61, para 80. To require a potentially incapacitous person to be capable of envisaging more consequences than persons of full capacity would derogate from personal autonomy.*

When the relevant information has been identified, it is necessary to test whether the person can (for instance) understand it. In relation to 'using and weighing,' Lord Stephens endorsed the observation of the Court of Appeal in *Re M* that the person's ability "*should not involve a refined analysis of* the sort which does not typically inform the decision … made by a person of full capacity," noting that "[i]*t would also derogate from personal autonomy to require a potentially incapacitous person to undertake a more refined analysis than persons of full capacity*."

If the court concludes that P cannot make the decision, then the second question is whether there is a "*clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain*." Silently putting comprehensively to bed the error in the current iteration of the Code of Practice (which guides people to start with the so-called 'diagnostic' element), Lord Stephens was clear (at paragraph 78) that the two questions in s.2(1) were to be approached in the sequence set out above, i.e. starting with the functional aspect.

The Official Solicitor's challenge

The first limb of the challenge mounted by the Official Solicitor was that the Court of Appeal was incorrect to recast the "matter" as engaging in sexual relations. Lord Stephens had little hesitation in dismissing this ground:

> *90. I agree with the Court of Appeal that formulating "the matter" as engaging in, rather than consenting to, sexual relations better captures the nature of the issues in a case such as this, where JB wishes to initiate relations with others, rather than consent to relations proposed by someone else.* […] *It may be helpful to observe that the terminology of a capacity to decide to "engage in" sexual relations embraces both (i) P's capacity to consent to sexual relations initiated by the other party and (ii) P's capacity to understand that, in relation to sexual relations initiated by P, the other party must be able to consent to sexual relations and must in fact be consenting, and consenting throughout, to the sexual relations.*
>
> *91. I also agree with the Court of Appeal at para 93, with my addition in brackets, that the formulation of engaging in sexual relations "is how the question of capacity with regard to sexual relations (under the MCA) should normally be assessed in most cases".*

The second limb of the challenge was as to the inclusion of the requirement that other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. On JB's behalf it was argued that: (1) this inappropriately extended the requisite information in order to protect the other person or members of the public; (2) that this was not the purpose of the MCA, which was confined to the protection of P, and did not extend to the protection of members of the public; and (3) the protection of the public was the purpose of the criminal law and that such protection could also be obtained by making a sexual risk order under section 122A of the Sexual Offences Act 2003.

Lord Stephens disagreed:

> *92.* [….] *The information relevant to the decision includes information about the "reasonably foreseeable consequences" of a decision, or of failing to make a decision, which consequences are not limited to the consequences for P: see para 73 above. The consequences for other persons or for members of the public are therefore a part of the information relevant to the decision. Furthermore, I agree with the Court of Appeal, at para 6, that:*
>
> > *"as a public authority, the Court of Protection has an obligation under section 6 of the*

> *Human Rights Act 1998 not to act in a way which is incompatible with a right under the European Convention of Human Rights, as set out in Schedule 1 to the Act. Within the court, that obligation usually arises when considering the human rights of P, but it also extends to the rights of others."*

> *93. In this way the court as a public authority, in determining what information is relevant to the decision, must include reasonably foreseeable adverse consequences for P and for members of the public. In practice, by doing so, the court under the MCA protects members of the public. As the Court of Appeal observed, at para 98:*
>
> > *"Although the Court of Protection's principal responsibility is towards P, it is part of the wider system of justice which exists to protect society as a whole."*
>
> *Finally, the protection of the public provided by the criminal justice system or by a sexual risk order cannot detract from the protection which is provided in practical terms by including in the information relevant to the decision the reasonably foreseeable adverse consequences for P and for members of the public. For all these reasons I reject the submission that the purpose of the MCA is solely confined to the protection of P.*

The Official Solicitor also argued that including this information impermissibly recast the test as person-specific, contrary to the consistent case-law to the contrary. Lord Stephens rejected this:

> *First, the statutory test is decision-specific: see para 67 above. Second, the issues in this case (but, as I have stressed at paras 71-72 above, the position can be different in other cases) do not relate to sexual relations with any particular person. What is required is a generalised forward-looking evaluation in relation to JB's capacity to have sexual relations with any woman. The inclusion of the consent of the other in the relevant information for the purposes of that evaluation does not introduce the specific characteristics of any individual person into the evaluation, but instead reflects the consensual nature of all sexual activity. It is not, therefore, "person-specific."*

The Official Solicitor also argued that the concepts in question were: "*too extensive and nebulous for JB or for others with mental impairments to understand. Accordingly,* [Leading Counsel] *argued, JB and others were being set up to fail. The appellant was supported in this submission by Respond's* [a charity providing therapeutic and support services to those with learning disabilities and/or autism] *submission that the Court of Appeal had promulgated "an elevated abstract test" which was likely to give rise to problems in real life situations*." The Official Solicitor relied, in particular, upon the legal complexities of the criminal law relating to consent, but Lord Stephens did not agree, in particular that the person in question would need to be able to understand and apply the different ways in the absence of consent could be proved:

> *95.* […] *However, that is not the sort of refined analysis which typically informs the decision to engage in sexual relations made by a person of full capacity (see para 77 above). A potentially incapacitous person is simply required to understand that the other person must be able to consent and does in fact consent throughout. For my part the only alteration that needs to be made to the summary of the information relevant to the decision to engage in sexual relations, set out by the Court of Appeal*

> *(see para 84 above) is to change the words "must have capacity to" in (2) to "must be able to". Subject to that change, I consider that the concepts are not too nebulous or refined, nor do they amount to an elevated abstract test, nor do they require a detailed understanding of the Crown Court Compendium.*

Next, the Official Solicitor argued that to include the information "*imposes a discriminatory cerebral analysis on the potentially incapacitous*," a submission rejected by Lord Stephens:

> *96.* […] *As the Court of Appeal observed, at para 96, "amongst the matters which* ***every person*** *engaging in sexual relations must think about is whether the other person is consenting" (emphasis added). If that is properly viewed as cerebral or as involving a degree of analysis, a decision to engage in sexual relations is necessarily cerebral or analytical to that extent.*

The Official Solicitor then argued that the approach taken by the Court of Appeal created an impermissible difference between the civil and criminal law. Lord Stephens started by identifying (as had Munby J in *Re MM* [2007] EWHC 2003 (Fam)) that there is no necessary requirement for the test for capacity to consent to sexual relations to be the same in the two fields, and that there were already existing differences in relation to the *application* of the test for capacity which may lead to different conclusions in civil and criminal trials, two such differences being the different standard of proof, and the second being that there focus of the criminal law is retrospective focusing on the person's capacity to consent at the time of the alleged offence, whereas a court assessing capacity to engage in sexual relations under the MCA ordinarily needs to make a general, prospective evaluation which is not tied down to a particular time. However, Lord Stephens agreed with previous judicial observations that, all else being equal, it is in principle desirable, though not necessary, that there should be the same test for capacity in both the civil and criminal law, that there were sound policy reasons to have the two tests aligned, and that that the civil law test for consent cannot impose a **less** demanding test of capacity than the criminal law test. However, he considered that it remained possible for the civil law to impose a different and more demanding test of capacity:

> *106.* […]*. In that respect, there are countervailing and overriding policy reasons supporting the clarification of the test for capacity under the MCA: namely, the protection of others and the protection of P, see para 92 above. Those policy reasons would amply justify any differences that might arise between the civil and criminal law tests for capacity. As the Court of Appeal stated in this case (at para 97) the fundamental responsibilities of the Court of Protection include the duty to protect P from harm. The protection given by the requirement that P should understand that P should only have sex with someone who is able to consent and gives and maintains consent throughout "protects both participants from serious harm" (see the Court of Appeal in this case at para 106). I agree. On that ground alone I would dismiss the argument that any differences between the civil and criminal law test for capacity which have been or may have been created by the clarification of the test under the MCA, are "impermissible". Accordingly, this argument falls at the first hurdle.*
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> *107. In addition, while I agree with Munby J that, in general terms, both the criminal law and the civil law serve the same function in this context of protecting the vulnerable from abuse and exploitation,*

> *that should not conceal the different purposes of the civil and criminal law and the different ways in which they carry out their functions. The primary purpose of the criminal law is the prosecution of behaviour that is classified as criminal and the punishment of offenders by the state. In civil proceedings under the MCA the courts must balance the promotion of the autonomy of vulnerable persons with their protection from harm, all while, so far as required by general principles of law and the court's obligations as a public authority under the Human Rights Act 1998, having regard to the rights of others. Viewed in this way, the differences between criminal proceedings and civil proceedings under the MCA suggest that it may be permissible to adopt different tests of capacity in the civil and the criminal law.*

Importantly, however, Lord Stephens made clear that the question of whether the clarification of the test of capacity under the MCA by his decision resulted in any differences with the test for capacity in the criminal law is best left to be decided on the facts of individual criminal cases and may turn on the particular criminal offence in question. As he identified at paragraph 108, "[n]*ot only are the potential differences more appropriately left to individual cases, but the restricted way in which this appeal was conducted did not allow all the similarities or differences between the civil and criminal law to be fully explored*". Having done so, he then gave a series of obiter observations about the issue, in particular that:

> *111.* […] *the clarification of the test for capacity under the MCA creates a difference with the criminal law in the context of the offences created by sections 30-33 SOA* [offences in relation to persons with a mental disorder impeding choice]. *That difference is not impermissible, however, because it is capable of being identified and accommodated in any criminal trial.*
>
> *112. Furthermore, and more broadly, in relation to the position of P as a complainant in respect of most other offences under the SOA (such as rape or sexual assault contrary to sections 1 or 3 SOA) the primary issue would relate to P's capacity to "consent to" not to "engage in" sexual relations. These are two different concepts. The capacity to "engage in" sexual relations encompasses both P as the initiator of those relations and P as the person consenting to sexual relations initiated by another. The information relevant to a decision whether to initiate sexual relations includes the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. That is not information relevant to an evaluation of whether P has the capacity to "consent to" sexual relations initiated by another person. As the Court of Appeal stated in this case (at para 93) "The word "consent" implies agreeing to sexual relations proposed by someone else." The capacity to consent to sexual relations for the purposes of the criminal law is concerned with the understanding of the complainant (who I have been referring to as P) about matters which are relevant to their autonomy, not those which are relevant to the autonomy of the alleged perpetrator. I do not consider that the criminal law requires that a complainant understands that their assailant must have the capacity to consent and in fact consents before the complainant can be considered to have capacity. I do not discern any difference in this regard between the civil and criminal law.*
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> […]

> *114.* [Turning to the position where P is an accused, rather than complainant, and rejecting a submission that the Court of Appeal's approach required more of a P than an accused under the SOA 2003, who would be not guilty of certain offence if they 'reasonably believed' that the other person was consenting] *I consider this to be a distinction without a difference. An accused may have a reasonable belief that the complainant was consenting, but the accused in that situation will understand that the complainant was able to and must consent throughout and the accused has to use or weigh that information as part of the process of forming a reasonable belief. If P is able to understand the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity, and if P is able to use or weigh that information as part of the process of making the decision as to whether to engage in sexual relations, then P is in the same position as an accused in the criminal context. I am therefore not persuaded that there are any unnecessary differences in this regard as between the civil or criminal law (which in any event need not be identical).*
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> *115.* [if P is accused of an offence under ss.30-33 SOA 2003], *P's knowledge of the complainant being unable to refuse includes the reasonably foreseeable consequences of what is being done but it does not include a requirement that the complainant should have any understanding of the fact that the alleged perpetrator (that is, the other person) must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. Again, I do not discern any difference in this regard between the civil and criminal law.*

Lord Stephens gave short shrift to the arguments based upon Article 8 ECHR, identifying that it was not clear whether the Official Solicitor on JB's behalf was "*advancing an argument that JB's article 8 ECHR rights have been breached (and, if so, by whom) or an argument as to how the MCA should be construed compatibly with article 8. Neither argument was advanced at first instance or in the Court of Appeal, so the appellant requires permission to bring them*" (paragraph 117). He did not consider that there was any merit in the compatibility argument and that permission should be refused:

> *118.* […] *I have explained, information relevant to the decision under the MCA takes into account not only the interests of P but also the interests of others and of the public. Furthermore, section 1(3) MCA provides that a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success which ensures that the interference with article 8, if it is engaged, is proportionate. I consider that the operation of the MCA is compatible with article 8.*

As to the question of whether there was a breach of Article 8 ECHR on the facts, Lord Stephens observed that there was considerable force in the respondent's contention that there had been no factual findings which could ground such an assertion, nor did the court have the complete factual picture, for instance as to the steps taken to support him to gain capacity to make decisions in relation to sexual relations (in circumstances where the Court of Appeal had only made an *interim* declaration that there was reason to believe that he lacked capacity to decide whether to engage in sexual relations); and (2) the steps being taken to secure his ability to develop safe relationships with women, including the ongoing education being provided by a clinical psychologist:

> *119.* […] *But in any event, any interference would be in accordance with the MCA, and therefore in accordance with the law. Furthermore, a legitimate aim of any interference with JB's article 8 rights, if that article is engaged, would be the protection of the health, both mental and physical, of both JB and of others. Other legitimate aims would be the protection of the rights and freedom of others as well as the prevention of disorder or crime. There have been no factual findings in relation to the proportionality of any interference in pursuit of those legitimate aims. For all these reasons I would refuse permission to raise this argument.*

Lord Stephens gave equally short shrift to the argument based upon Article 12 CRPD that a separate standard or test for capacity was being created for people with disabilities, and that this would be incompatible with Article 12(2):

> *There is no separate standard or test for persons with disabilities. The fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity applies to everyone in society. This ground of appeal therefore fails at the first hurdle, but in any event the contention that this court should examine whether the United Kingdom has violated provisions of an unincorporated international treaty (which is the effect of the appellant's contention at (b)) has recently been considered, and rejected, by this court in R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26; [2021] 3 WLR 428, paras 77-96.*

Disposal of the appeal

At paragraph 121, Lord Stephens reiterated that:

> *The evaluation of JB's capacity to make a decision for himself is in relation to "the matter" of his "engaging in" sexual relations. Information relevant to that decision includes the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. Under section 3(1)(a) MCA JB should be able to understand that information and under section 3(1)(c) MCA JB he should be able to use or to weigh it as part of the decision-making process.*

Applying the test in section 2(1) MCA on the available information, Lord Stephens considered that JB was unable to make a decision for himself in relation to that matter because of an autistic impairment of his mind. Importantly, however, Lord Stephens agreed with the Court of Appeal that, "*because this information was not fully considered or analysed during the hearings before the judge, it would not be appropriate to make a final declaration that JB does not have capacity to make a decision to engage in sexual relations. The right course is therefore to remit the matter to the judge for reconsideration in the light of this judgment*."

Comment[1]

[1] Note, this comment is written by Alex. His fellow authors – and the other members of the Court of Protection team – are not necessarily to be held to agree with every word!

A recording of the webinar by members of 39 Essex Chambers held on 25 November discussing the case can be found here.

It is very important to preface this comment by making clear, as did Lord Stephens, that this is a situation where JB's individual case is to be remitted to the first instance judge; this comment is therefore not about his own circumstances.

The Supreme Court has previously considered the purpose of the best interests test, how that test is a choice between available options, what deprivation of liberty means for both adults and adolescents with impaired decision-making capacity, and when cases involving medical treatment have to come to court. Given its foundational importance, it is perhaps surprising that it took 14 years for the question of the proper approach to take to decision-making capacity to reach the Supreme Court. It is perhaps not entirely surprising, though, that it has done so in the context of sexual relations, because this has proven one of the most difficult and contentious areas of the law in this area. That the case involved a person who actively wishes to initiate sexual activity means – importantly – that the Supreme Court was faced with the issue in almost its starkest form for two reasons.

The first is that, unlike many areas where capacity is in play, those involved are not considering whether a person can consent to something being proposed by others (often professionals). Rather, the question is whether and on what basis the law should respond where the person is an active agent – who may by seeking to exercise their agency harm others. Put another way, and as faced head-on by the Supreme Court, securing one person's autonomy may come at a cost for others.

The second reason is asking questions about capacity in this context makes profoundly clear that there is a normative element. The courts have been clear for many years that identification of information is important in terms of its consequences – for instance, that it is necessary to focus upon the salient information, because requiring "too much" information will make it more likely that the person in question will not be able to process it. This decision highlights that the identification of information is important for another reason – it represents choices as to the information that should be considered relevant. In JB's case, that gave rise to the important question of what sexual consent should mean for everyone. In this regard, it is perhaps striking that the Supreme Court was entirely content, and indeed perceived it as a fundamental part of its role, metaphorically to roll up its sleeves and descend into the arena of identifying the information relevant to decision-making in relation to sex, when only a couple of months previously the Court of Appeal had firmly chastised the Divisional Court in the *Tavistock* case for having done exactly the same thing in relation to decision-making by children in respect of puberty-blockers.

The court is perhaps also notable for the swift dismissal of arguments relating to the CRPD, following the line previously taken by the current constitution of the Supreme Court. However, the case will (or should) give rise to reflection by those concerned with the CRPD for at least two reasons:

1. The implications of Lord Stephens' conclusion that requiring the same information to be

understood by all is non-discriminatory.

2. In relation to the interaction between the MCA (and other forms of capacity legislation) and the criminal law. Whilst there has been much debate about the validity of the concept of mental capacity in the civil context (a debate before, but which clearly did not attract the Supreme Court), the workings out of the 'hard-line' CRPD approach in the criminal sphere are still much less developed. This case would provide a good test to bring home sometimes abstract arguments about these issues.

At a practical level, the case has the following implications:

1. Forms which are based upon the 'two-stage' test contained in the Code of Practice should be reviewed, so that they direct the assessor to consider the person's functional ability first (see further our guidance note).

2. Determinations made in respect of those with impaired decision-making ability in the sexual context should be revisited to identify whether they remain valid. Particular attention will be required in any situation where: (1) decision has been made on a "generalised forward-looking evaluation" basis that the person lacks capacity to make decisions about engaging in sexual relations; but (2) there is proper reason to consider that in the specific context of the person's life a different approach needs to be taken.

3. Although contact was not specifically addressed by the Supreme Court, it is likely that the approach now taken may mean there is a closer alignment between contact and sex. In other words, it may well be possible for there to be a greater alignment between the approach to a person's ability to make decisions about sexual relations with a specific identified person, and their ability to make decisions about contact with that person. That having been said, there may well still be cases where the *TZ* approach is still required: i.e. that, on a 'generalised forward-looking basis' the person has capacity to make decisions about engaging in sexual relations, but they lack capacity to make decisions about contact, such that best interests decisions need to be undertaken to enable a proper calibration of risk (as this case makes clear, that risk being be to or by the person).

Learning to learn – capacity and the awareness of choice

Re ZK (No.2) [2021] EWCOP 61 (HHJ Burrows)

Assessing capacity – contact – residence

Summary

This case is the sequel to one reported upon earlier here, and contains some important observations in relation to assessment of capacity and the revisiting of best interests decisions. In summary, the case concerned a man, ZK, who had as a child, developed Landau-Kleffner Syndrome (also known as acquired aphasia with epilepsy). ZK was not deaf but not unable to understand aural language. Until

September 2020, he lived with his mother. In 2017, concerns had been expressed about whether he was to be married, leading to a Forced Marriage Protection Order application. This led to proceedings before the Court of Protection, during which it became clear that, despite ZK's profound communication difficulties, it was possible for him to make progress in language development. By September 2020, ZK was consistently expressing a wish to leave the home he shared with his mother. He expressed the wish to leave quickly. He did not wish his mother or family to have notice of his move. The Local Authority conducted a best interests meeting on 11 September 2020, having assessed ZK as lacking the capacity to make the decision. The decision was to move him out. In January 2021, the Court of Protection had to decide whether his best interests were served by him remaining where he was and then moving to another Placement 2, enjoying a consistent package of care from the local authority that enabled him to continue to benefit from immersion in British sign-language (BSL), or whether he should return to his mother's home, where the consistency and availability of such a package and support was far from certain. At that point, HHJ Burrows decided that it was vital for his best interests that he remained at the placement in which he was residing, with a view to moving to another, better placement within a short period of time.

At this second hearing, listed as a pre-trial review/early final hearing, there was agreement as to most aspects of ZK's decision-making capacity, except for the issue of contact. HHJ Burrows was also asked on behalf of ZK's mother and some of his family to consider re-opening the issue of residence and to schedule another final hearing to decide whether ZK's best interests would be served by him moving home.

Capacity

In relation to ZK's capacity, HHJ Burrows made two observations of particular interest.

In relation to residence, ZK was given two options to consider: placement 2 and his family home (in line with *LBX v K & Others* [2013] EWHC 3230 (Fam)). As HHJ Burrows identified at paragraph 19:

> *He was able to understand the characteristics of each place, and that he would have access to his family at Placement 2, as well as the support workers using BSL. ZK has no apparent memory difficulties, although he may appear to have when he has not properly understood something. The "most complex aspect" of the assessment is "weighing up". Dr O'Rourke says: "We attempted 'weighing up' as described above and ZK demonstrated he could do this to an extent. In particular, he was 'weighing' the fact that his family would be upset if he went to Placement 2 and [MD][1] would be 'upset' if he goes to the family home. He was also able to indicate a greater level of stress in the family home". This led her to conclude that ZK "almost has capacity in this area" but that his cognitive and developmental limitations mean that he is unable to make a decision for himself where he is "in the middle". Her use of the term "almost has the capacity" was naturally picked up by the parties and resulted in questions. The expert recognises in her answers that the MCA test is binary. However, and significantly, she identifies what she considers the real issue to be for ZK in the following answer to the question whether she is mistaking lack of capacity with the effects of undue influence (emphasis added):*

> *I am not suggesting that he is currently subject to undue influence or pressure, although he is aware of being in the middle of a dispute about where he should live. My comments reflect that, in order to make a decision, first one needs to be aware that one is in a position to make a decision. [ZK] has only recently begun to make very small decisions and assert his needs and is used to others telling him what to do. He does not experience himself as having agency and my concern is any 'decision' made by him would be a response to what he perceives others to want, rather than a consideration of what he himself would prefer.*

As HHJ Burrows identified at paragraph 20:

> *It seems to me this is the crux of the matter. ZK is having to learn that he can choose, as well as how to choose. If and when he develops that "skill", he will almost certainly have capacity to make the decision.*

That led HHJ Burrows onto his third comment, relating to the issue in dispute – contact. The family and (it appears) the local authority sought to persuade him to make a declaration that ZK lacked capacity to make decisions around contact with those outside his family, but had capacity in relation to those within his family. HHJ Burrows noted that the case of A Local Authority in Yorkshire v SF [2020] EWCOP 15, Mr Justice Cobb declared that SF possessed capacity to decide on contact with her husband but not with others. However, HHJ Burrows identified that there was, in that case, "*a very firm evidential basis for distinguishing between decision making capacity with 'her husband' and 'other people' on the basis of the evidence and circumstances in that case*" (paragraph 26). However, on the fact of ZK's case, HHJ Burrows could see "*no such justification in this case having considered all the expert's evidence. ZK is unable to assess risk in relation to anyone. He is also unable to appreciate he can make a decision as to contact with anyone. I see no logical basis for the expert to express her conclusion as she did.*" HHJ Burrows asked himself whether he should adjourn, direct further questions of the expert and (if necessary) for her to attend for questioning at a further hearing? However, at paragraph 27, he decided that the answer was "no":

> *Although the evidence given by experts, particularly those who are single jointly instructed experts carry much weight, the decision on the question of capacity rests with the Court. In my judgment, the expert's conclusion on this one issue does not follow from its evidential premises. It is unnecessary and would be disproportionate to direct further questions or to list a further hearing. I am also conscious that my finding on the issue of capacity for contact will have no real adverse consequences for family members or ZK since he is already able to have contact with members of his family as he wishes.*

HHJ Burrows therefore declared that ZK lacked capacity to make decisions on each of the issues before the court, and (at paragraph 29), that:

> *It is in his best interests for him to continue to receive instruction and education, particularly in respect of sexual relations and relationships (including marriage/civil partnership). I say this because unlike the other areas of the decision making, whether the decision can be made for ZK, and he can enjoy the consequences of that decision, the same does not apply to sex and marriage. These issues should be kept under close scrutiny.*

Revisiting the earlier decision

HHJ Burrows accepted that working relationships had improved, and that it was entirely legitimate for the family to focus on the failure of Placement 2 to materialise in the way anticipated at the time of the earlier decision. However, he made clear (at paragraph 35) that:

> *in my judgment in January my focus was on how immersion in BSL had enabled ZK to become more autonomous and happier. I had hoped that the damage caused by conflict in the past would be mended, and the family and the carers would learn to work together. It seems that has happened. It seems ZK has benefitted from it happening. At para [33] of my judgment I was concerned that if an order was made that ZK should return to his home the prospects of maintaining any package of care that may be available would be reduced by the "suspicion and hostility" towards those providing it. However, and importantly, I was concerned about the apparent inability of ZK's family to understand what has happened and is happening to him. That is the product of a long history during which the prospects of ZK ever becoming autonomous have been written off by professionals.*

HHJ Burrows had reached the conclusion that the proceedings should come to an end:

> […] *This litigation began in 2017, when there was concern that a forced marriage was imminent. The Court of Protection proceedings have been ongoing since February 2018- not far off four years. It is impossible to know what levels of uncertainty and insecurity litigation has had on everyone in this case: on ZK's family, his carers, the professionals involved and, of course, on ZK himself, but it is likely to be considerable. I am also mindful of the effect it has on the deployment of resources- the local authority's, the family's, the carers' and the Court's. I am reminded of the words of Mr Justice Peter Jackson (as he then was) in Cases A & B (Court of Protection: Delay and Costs) [2014] EWCOP 48 at [12]:*
>
> > *"Just as the meter in a taxi keeps running even when not much is happening, so there is a direct correlation between delay and expense. As noted above, the great majority of the cost of these cases fell on the state. Public money is in short supply, not least in the area of legal aid, and must be focussed on where it is most needed: there are currently cases in the Family Court that cannot be fairly tried for lack of paid legal representation. Likewise, Court of Protection cases like these are of real importance and undoubtedly need proper public funding, but they are almost all capable of being decided quickly and efficiently, as the Rules require."*
>
> *I will also quote another part of that judgment that is equally relevant here (at [14]):*
>
> > *"Another common driver of delay and expense is the search for the ideal solution, leading to decent but imperfect outcomes being rejected. People with mental capacity do not expect perfect solutions in life, and the requirement in Section 1(5) of the Mental Capacity Act 2005 that "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests." calls for a sensible decision, not the pursuit of perfection."*
>
> *37. It seems to me that these comments by Peter Jackson, J. must also be read with those of Poole,*

> *J* [in *An NHS Trust v AF and another* [2020] EWCOP 55]*, when I come to consider whether to re-open a clear determination on best interests, and thereby prolong litigation.*
>
> *38. My conclusion is that I have already determined best interests on the basis of evidence that remains essentially the same, save that Placement 2 has not yet materialised, but the plan still is that it will, and where the family and ZK's carers are getting on better than they were (which was always part of the hope behind that judgment). In the context of this litigation, its prolonged nature, and the cost it must have had on all those concerned, it is not appropriate, necessary or proportionate for me to prolong matters further.*

HHJ Burrows therefore dismissed the application to reconsider, as well as the local authority's application to adduce further evidence that ZK's family were trying to exert pressure on him to move back to his family home, making clear that, although he had read the material, he did not take it into account in any way in reaching his decision.

Comment

This judgment is of very considerable interest for a number of reasons, not least because, given the trajectory identified in the first judgment, it might have appeared that ZK would be found to have capacity to make the relevant decisions by the time of the second. It appears that the trajectory continues to be upwards, and hence HHJ Burrows' observations about the possible future direction of travel.

The other point of particular interest is in relation to the importance identified by the expert of the importance of a person having to learn that they can choose – an issue which very comes up very often, but has rarely been captured with such clarity as was done by the expert, Dr O'Rourke.

The case, finally, is of interest for containing something, again, which happens not infrequently, but is not often recorded: i.e. the court saying "enough is enough," and bringing a halt to proceedings. It serves as a useful reminder of the observations made by Peter Jackson J (as he then was) in the *A & B* cases about – in essence – the perfect sometimes being the enemy of the good, and the application of those principles (and those from *AF*) to a not uncommon scenario.

cases about – in essence – the perfect sometimes being the enemy of the good, and the application of those principles (and those from *AF*) to a not uncommon scenario.

Empowerment, safety and illicit substances

MM v A City Council [2021] EWCOP 62 (HHJ Burrows)

Assessing capacity – best interests –residence

Summary

The case related to a young man, 'Michael' or 'MM.' Michael had diagnoses of mild learning disabilities,

dissocial personality disorder and had ongoing problems with using illicit substances. He regularly engaged in challenging or violent behaviour, which had led to the breakdown of several care placements for him. He had also been detained under the Mental Health Act following wounds to his neck, stating he was going to take his own life.

Michael had been living in a residential care placement where he was subject to a 10pm curfew and prohibited from using drugs or alcohol on-site. Subject to a standard authorisation, by March 2021 Michael was regularly absenting himself, often not returning for several days and often found by the police who did not consider that they had powers to return him to the placement by force.

Michael objected to the restrictions, and was regularly threatening staff and absconding. The local authority proposed a care plan with a greater level of restrictions at a new placement (ultimately, the new placement withdrew its offer to provide care for him due to his perceived level of risk to other residents). Michael's RPR brought proceedings under s.21A.

The capacity assessment concluded that Michael had a mild learning disability, but his mental state was 'complicated by the long history of polysubstance misuse' (para 26). It found that he presented consistently with having Dissocial Personality Disorder, and a 'a history of substance misuse which is consistent with a Dependency Syndrome' (para 27). Dr O'Donovan concluded that Michael was not able to make decisions as to his residence and care, his property and affairs, and the consumption of illicit drugs and alcohol. Declarations were made that he lacked capacity to manage his property and finances and "make decisions to use and consume illicit substances" (para 29). She did not reach a conclusion regarding his capacity on contact or use of the internet and social media due to his non-engagement. However, as no orders were sought for these matters, the issue was not pursued further.

The court noted the independent social worker found that Michael was 'troubled by and resentful' of attempts to protect him, and as he saw it, 'control his life.' Michael did not agree that he was vulnerable, despite evidence that he likely had been financially exploited by others. The ISW concluded Michael was highly likely to object to living in a more restricted environment. A move to a locked facility would likely be unsuccessful, and potentially lead to his arrest or detention under the Mental Health Act. There would be some benefits in the severance of 'antisocial links' that Michael had developed, but that severance would itself harm Michael's autonomy. The court considered that:

> *23. …the crux of the ISW's opinion is contained in the next quoted passage:*
>
> > *"It is unlikely that any of the available options I could present to the court are likely to keep [MM] "safe". [MM] has both responded poorly to restrictions placed upon his liberty and benefitted from the security provided by robust wraparound care. The nature of his needs indicate that he is likely to, at times, attach undue weight to options which immediately meet his needs, but may place himself at risk. However, whilst he opposes the current restrictions, he appears to find them tolerable at present and has evidenced greater ability to comply with these, resulting in a more settled mental state and positive engagement with his staff team at [Placement 1].*

> *……[MM] has a longstanding pattern of struggling to assess risks in the context of the choices he makes. Whilst I note his poor engagement with health professionals previously involved in his care, he did engage well with me during my assessment and note that he has had episodic periods of engagement with various professionals, including SALT. I note that he will not discuss topics he is uncomfortable with, and he will refuse to engage with others when he identifies their attitudes or approaches as paternalistic. However, in interview, he accepted challenge and was able to discuss these proceedings, including the restrictions placed upon him."*

The ISW recommended that Michael remain at his current placement with access to 24-hour support and a curfew, but no effective deprivation of his liberty. The proceedings ultimately concluded by consent. The standard authorisation was necessary and proportionate to secure his safety, insofar as it could be secured:

> *11. The final Order in this case gives Michael a considerable amount of freedom, which he could use in a way that causes harm to himself. Both the Council and those acting for Michael in these proceedings, and DF in particular, have decided that removing risk with increased restrictions would not be in Michael's best interests. He would feel completely crushed. His life would have little interest. He would become frustrated, angry and resentful. He would become impossible to manage, unless even more restrictive measures were to be introduced…*
>
> *13. On the other hand, Michael will be left with the ability to go out and associate with potentially exploitative people, as well as use drugs and alcohol. He will therefore be exposed to seemingly unnecessary and avoidable risks. In my judgment, whether a risk is unnecessary or avoidable depends on the context in which it is to be taken.*

Comment

As the judge said, this case has "no legal novelty" and is a "fairly common sort of case to come before the Court of Protection". As such, it illustrates the common challenge in this field of balancing empowerment and safety. It is noteworthy that the police were sceptical about using MCA ss.5-6 to return him to his placement (for which LPS could provide more legal reassurance).

We note that Michael was declared to lack capacity "to make decisions to use and consume illicit substances". This is in the context of a potential high-risk offender, on probation for stealing cars, whose convictions included possession of cannabis. Like many other cases, it does raise the more general question as to the impact incapacity declarations can/ought to have on P's future criminal conduct. If, for example, Michael was arrested for cannabis possession (a necessary precursor to using or consuming), how would/should the prosecuting authorities approach the matter, given this declaration of incapacity?

Using/consuming is not a criminal offence, but possession is. One can possess without using/consuming, but not vice versa. It seems likely therefore that it would not prevent a prosecution for possession, and is more likely to be relevant to mitigation. In those circumstances, what is this declaration intended to achieve? A best interests decision as to whether P should use and consume

illicit substances seems unlikely. So perhaps, like alcohol cases, the issue is more to do with the reasonably foreseeable consequences of using/consuming illicit substances on other matters, such as residence and care/support. For example, in *London Borough of Tower Hamlets v PB* [2020] EWCOP 34, Hayden J evaluated "*whether PB understands the impact on his residence and care arrangements of his continuing to drink, potentially to excess*". Perhaps by focusing on the care/treatment for which a defence under MCA s.5 is required, this will help to identify the "matter" in respect of which a declaration is sought.

Places like home?

For some extremely thought-provoking reading over the holiday period (even if, for many, we are aware that the 'holiday' may be notional), we strongly recommend this blog post by Dr Lucy Series reflecting upon a question that had pre-occupied in writing her forthcoming book, *Deprivation of Liberty in the Shadows of the Institution*. The blog post digs into what makes a place a 'home,' and how does that differ from an 'institution.'

PRACTICE AND PROCEDURE

Interim declarations

A working group[2] of the Ad Hoc Rules Committee met following reports of inconsistencies in the use of interim declarations as to capacity, and also a question having been raised as to the power of the court to make such interim declarations in light of the decision in *DP v LB Hillingdon* [2020] EWCOP 45 (leading to a question as to whether Rule 10.10(1)(b) of the Rules was ultra vires).

The group met on 18 November 2021. The relevant part of the note provided back to the Ad Hoc Rules Committee set out the following conclusions:

1. The question of the vires of Rule 10.10(1)(b) and the power of the court to grant interim declarations as to capacity was one that might fall for consideration in a suitable case but it was not necessary for the working group to venture into the debate.

2. There was agreement that the following wording to be contained in within a recital was (1) within the powers of the court; and (2) appropriate:

   The Court is satisfied that there is reason to believe, for the purposes of section 48 of the Mental Capacity Act 2005, that [P] lacks capacity to:

   (1) conduct these proceedings;

   (2) make decisions about…

   and that it is in [P]'s best interests to make this order without delay.

3. Any variation in wording from this should not use the phrase "may lack capacity," as this was not the statutory wording in s.48.

4. The recording of the s.48 precondition in the order should suffice to enable any appeal to be brought against the court's conclusion in this regard. In any event, in most cases, any appeal would be unlikely to be against the interim conclusions as to capacity, but any substantive orders made on the basis of that conclusion.

This is **not** part of the note, but the template (compendium) all-singing, all-dancing directions order on the Court of Protection Handbook website reflects this, and has been updated to reflect other recent case-law.

[2] Senior Judge Hilder, Rhys Hadden, Joe O'Brien and Alex Ruck Keene.

The black box of the judicial visit to P – the Court of Appeal's concerns and requirements

Re AH (Serious Medical Treatment) [2021] EWCA Civ 1768 (Court of Appeal (Sir Andrew McFarlane P, Moylan LJ and Patten J))

Practice and procedure (Court of Protection) – other

Summary

The Court of Appeal has made some very important observations about the role of judicial visits in Court of Protection cases.

In *AH*, it was asked to overturn the decision of the Vice-President, Hayden J, that it was not in the best interests of a woman, AH, to continue to receive ventilatory treatment after a short period to enable family members to travel to see AH.

The decision of the Vice-President in a case he described as involving the most complicated COVID patient in the world is analysed here, but in summary concerned a woman who had suffered substantial neurological damage as a result of the virus, and was being cared for in a critical care unit, dependent on mechanical ventilation, continuous nursing care, nutrition and hydration delivered via a nasogastric tube, and receiving various medications.

AH's children sought permission to appeal (through legal representatives acting pro bono). The Trust resisted their application; the Official Solicitor was initially neutral but by the time her Leading Counsel came to make submissions supported the children.

The children's appeal was on five grounds.

The first was that Hayden J gave insufficient consideration to what was said to be AH's earlier capacitous decision that she wished to receive "full escalation" of treatment. Moylan LJ identified that this referred to the ReSPECT form that had been completed. As he said at paragraph 43:

> […] *It is a computer form which is completed by a clinician who has had, what is called, "a ReSPECT discussion" with a patient. The discussion is intended to ascertain the patient's views as to their priorities in the event of treatment being required in an emergency, if they are unable to make or express a choice. I would note, in passing, that it is not, as set out in the judgment and some of the written submissions, a form which is "completed" by AH.*

Moylan LJ agreed with Hayden J that the form did not bear the weight that the family sought to ascribe to it, holding at paragraph 46 that:

> *It is directed, as is clear from the title, to* ***emergency*** *care and treatment. It is not directed to long-term treatment and so provides very little assistance to whether AH would want treatment to continue in her current condition which is very far from an emergency* (emphasis in the original).

The second was that Hayden J had failed to appreciate the overwhelming importance to AH of her religious and cultural views and the impact of those views in relation to the withdrawal of medical treatment. As Moylan LJ identifed, this was closely connected to the third ground because, in effect, it was a submission that the judge's conclusion as to AH's wishes and feelings, or as he described it as, what she "would want", was flawed because he failed to give sufficient weight to AH's religious and cultural views when determining her wishes and feelings. Moylan LJ considered that this was not sustainable, holding at paragraph 48 that:

> *The Judge was aware of, and took into account at [93], that "AH's religious and cultural views are integral to her character and personality". This was consistent with the submissions made by Ms Khalique that religion "was a central part of [AH's] life". The Judge clearly considered all the evidence and was entitled to conclude, at [93]:*
>
> > *"… I am not prepared to infer that it would follow that those views would cause her to oppose withdrawal of ventilation in these circumstances …"*
>
> *I would add that the weight to be given to a particular factor is for the trial judge and not for this court.*

The third ground was that Hayden J had failed adequately to consider AH's past and present wishes and feelings. Moylan LJ dismissed this:

> *52. In my view it is clear, first, that the Judge did consider AH's wishes and feelings. The contrary is not arguable because the Judge expressly considered, from [79], AH's "likely wishes and feelings in respect of the medical options in her present circumstances". Further, the Judge returned to this issue when considering whether the continuation of ventilation was or was not in AH's best interests.*
>
> *53. Secondly, I am not persuaded that the Judge did not "adequately" consider AH's wishes and feelings. As referred to above, the Judge considered these between [79]-[95] and again when setting out his conclusions. What is in reality challenged is his conclusion that AH would not want ventilatory treatment to continue and, subject to ground 5, this was, in my view, a decision which the Judge was entitled to reach.*

The fourth ground was that Hayden J had failed properly to balance the interference with AH's rights under the ECHR; Moylan LJ found that the ground added nothing, the balance to be applied being clear, namely that applied by Hayden J: i.e. "whether to continue to provide ventilatory treatment is or is not in AH's best interests" (paragraph 55).

The fifth ground related to Hayden J's visit to see AH in hospital, which the children submitted that the visit, and what he appeared to take from it, was flawed and wholly undermined the fairness of the process and the validity of his decision. The circumstances of the visit were set out in the judgment thus:

> *14. From the outset of the hearing, it is plain from the transcript that the Judge was considering going*

to see AH in hospital. There were a number of occasions during the hearing at which it was suggested, including on behalf of the family, that the Judge should go to the hospital. However, it is also clear that at no stage was there any discussion about the purposes of any proposed visit or how, procedurally, it would fit within or affect the hearing.

15. At the conclusion of the hearing, the Judge indicated that he would visit AH in hospital. This led to a very brief exchange with one of AH's children (A) as to whether, when the Judge visited, he would "ask her yourself". This was because, as A explained, he had gained the impression when he had been giving his oral evidence that the Judge "felt when I asked, she was saying to please me". This was a reference back to an exchange which had occurred during the course of A's oral evidence.
16. It appears from the transcript that A gave evidence of his belief that his mother had shaken her head when he had asked whether she wanted to end her life. The Judge had suggested to A that the response AH gave would or might depend on how the question was phrased. The Judge commented that the answer might be different if she was asked "are you tired, do you want some peace".

17. A few days after the end of the hearing, the Judge went to see AH in hospital. He spent some time with AH with only a nurse and a representative of the Official Solicitor present. As referred to above, a careful Note was taken by the latter. The Judge spoke to AH, who appeared to be distressed and was crying. The Judge said that he did not know what AH wanted and that "it's very, very hard for you to tell me". He then said, "I think it may be that you want some peace". Later, he said: "It is not easy for you to communicate, but I think I am getting the message".

18. The Judge then left the ward and saw two of AH's children. A asked the Judge whether he had asked her "the question". The Judge replied that he "got the clear impression she wanted some peace, she showed me that she did".

On behalf of the children, it was submitted that Hayden J took into account what occurred when he visited the hospital when making his decision, in other words that:

60. He used it as "an evidence gathering exercise to establish what AH's views were and the visit likely influenced his overall conclusion". Mr Devereux submits that this is a reasonable inference from the Judge saying to AH, "I think maybe you want some peace" and "It is not easy for you to communicate, but I think I am getting the message"; and saying to the children at the hospital that he "got the clear impression she wanted some peace, she showed me that she did". He submits that this resonates with the Judge's use of the word "peace" during the hearing (as referred to in paragraph 16 above) and his conclusion in the judgment, at [107], that, "The time has come to give AH the peace which I consider she … wants".

61. This was, he submits, procedurally unfair because AH's children did not have an opportunity to make submissions on the Judge's assessment of his visit. Mr Devereux acknowledges that the effect of the visit is partly speculative but submits that this is because the purpose of the visit was not determined in advance and because the Judge did not subsequently tell the parties whether, and if so how, it informed his decision.

It was further submitted that Hayden J was not equipped to draw from his visit any conclusions or

insights as to what AH might want: "[t]*he medical evidence shows that AH is in a "Minimally Conscious State-plus"; is unable to communicate; and has only a very limited ability to move, meaning that it is not easy to evaluate any response she might give. Dr Danbury, for example, concluded that he was not able to establish AH's wishes*" (paragraph 63).

Moylan LJ, "very regrettably," came to the conclusion that Hayden J's decision could not stand and must be set aside:

> *69.* […] *I say, very regrettably, because he clearly gave this case a great deal of careful consideration, as is accepted by all parties, and the description of AH's current situation and prognosis is, indeed, bleak. But, in a case which concerns the continuation of life-sustaining treatment it is particularly important that the process leading to the decision is not procedurally flawed.*
>
> *70. I agree that what happened when the Judge saw AH in hospital is capable of more than one interpretation. However, in my view, it is clearly capable of being interpreted as submitted by Mr Devereux. The language used by the Judge is capable of indicating that he did consider that AH had given him some insight into her wishes. The words, "I got the clear impression she wanted some peace, she showed me that she did" are capable of that interpretation.*
>
> *71. If that is right, the Judge's decision is undermined for two reasons. First, it is strongly arguable that the Judge was not equipped properly to gain any insight into AH's wishes and feelings from his visit. Her complex medical situation meant that he was not qualified to make any such assessment. If the visit was used by the Judge for this purpose, the validity of that assessment might well require further evidence or, at least, further submissions.*
>
> *72. Secondly, in order to ensure procedural fairness, the parties needed to be informed about this and given an opportunity to make submissions.*
>
> *73. As referred to above, Miss Gollop* [on behalf of the Trust] *submits that any procedural unfairness did not impact on the Judge's decision and does not make his decision unjust. The problem I have with that submission, apart from the importance of fairness, is that, although she may be right, I am not persuaded that she is necessarily right. I consider it certainly possible that it might have had an effect on the Judge's ultimate determination. Certainly, it would have had an impact on the Judge's assessment of a key factor, namely AH's wishes and feelings and, therefore, might have had an impact on his ultimate determination.*
>
> *74. I do not, therefore, consider that the Judge's decision can be upheld. Accordingly, I propose that permission to appeal is granted and the appeal allowed. There will need to be a rehearing which will have to take place as soon as possible.*

At paragraph 75, Moylan LJ also noted that:

> *Finally, we were told at the hearing that some judges hearing cases involving life-sustaining treatment will often, if not frequently, visit P. Having regard to what has happened in the present case, it seems clear, as suggested by the Official Solicitor, that further consideration needs to be given as to what*

*guidance should be given, additional to or in place of that set out in the Guidance issued by Charles J [*i.e. practice guidance "Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings", issued on 3 November 2016*].* However, *until that takes place, it is clear that the following matters should be addressed and, if possible, addressed in advance of the final hearing so that any visit can be included as appropriate within the court process. Clearly, these matters will need to be determined before any visit takes place and after hearing submissions or observations from the parties:*

(a) Whether the judge will visit P;

(b) The purpose of any visit;
(c) When the visit is to take place and the structure of the visit (in other words, how the visit it to be managed; what is to happen during it; and whether it is to be recorded and/or a note taken);

(d) What is to happen after the visit. This will include, depending on the purpose of the visit, how the parties are to be informed what occurred; when and how this is to happen; and how this will fit within the hearing so as to enable it to be addressed as part of the parties' respective cases.

In a concurring judgment, Sir Andrew McFarlane P noted that:

78. This appeal has demonstrated that it is now the practice of some, and it may be many, judges in the Court of Protection ['CoP'] to visit the subject of the proceedings, P, when it is not possible for P otherwise to join in the proceedings. Such a practice may well be of value in an appropriate case. It is, however, important that at all stages and in every case there is clarity over the purpose of the encounter and focus on the fact that at all times the judge is acting in a judicial role in ongoing court proceedings which have yet to be concluded.

79. In the present case there was, regrettably, a lack of clarity over the purpose of the visit and the role of the Judge in undertaking it. If, as my Lords and I have accepted, it may have been the case that Hayden J was seeking to obtain some indication of AH's wishes and feelings, then great care was needed both in the conduct of the judicial interview and the manner in which it was reported back to the parties so that a fair, open and informed process of evaluation could then be undertaken within the proceedings.

89, More generally, the light shone by this case on the apparently developing practice of judicial visits to P indicates that there is a pressing need for the CoP to develop some workable guidance for practitioners and judges in a manner similar to that which is available in the Family Court with regard to judges meeting with children who are subject to contested proceedings. Whilst the circumstances in a children case, and the reasons for any judicial encounter, may differ from those that apply in the CoP, the need for clarity of purpose and procedural fairness are likely to be the same. In recent times, the CoP has established a multi-disciplinary forum known as 'The Hive in which matters of professional and jurisdictional importance are debated and developed. I propose to invite 'The Hive' urgently to consider the issue of judicial meetings with P so that a Practice Direction or Presidential

Guidance on the topic may be issued. Pending such direction or guidance, I would endorse the approach described by Moylan LJ at paragraph 75 of his judgment.

Comment

The Court of Appeal were at pains in this case to make clear that this was not a case where it considered that Hayden J had necessarily reached the wrong decision as to where AH's best interests lay. The case is therefore very different to that of *AB*, where the Court of Appeal found that Lieven J had reached the wrong conclusion as to whether it was in the best interests of a woman with learning disabilities to undergo a termination. And the Court of Appeal were at pains to identify that Hayden J had, in principle, adopted the right approach to evaluating AH's best interests – including, for instance, by reference to the place of her religious beliefs.

The problem was a different one, arising out of the 'black box' of the judicial visit undertaken by Hayden J. The Court of Appeal was clearly troubled both about the procedural fairness of such a visit – not the principle of visiting – but the lack of clarity about what exactly the visit was for, and the lurking sense of unfairness that it gave rise to.

Whilst this case was not about capacity, it is important to identify that similar issues might well arise in this context as well. The Court of Appeal was concerned that AH's "complex medical situation" meant that Hayden J was not qualified to gain an insight into her wishes and feelings, but there are many situations where the complexity of P's cognitive impairments could well make it equally difficult for the judge to evaluate the person's capacity when they are engaging with them and – in effect – matching up the expert evidence that they have heard with their impression of the person. It is to be hoped the guidance that the Court of Appeal is inviting on a pressing basis also addresses this situation.

Pending the promulgation of the guidance, the matters set out by Moylan LJ at paragraph 75 will need to be considered on each occasion a judicial visit is under consideration. More broadly, many may well find of interest the article by Dr Paula Case, *When the judge met P: The rules of engagement in the Court of Protection and the parallel universe of children meeting judges in the Family Court*, which, as the abstract identifies "*interrogates the under-explored domain of the prevalence and forms in which 'P' has engaged directly with the judge (particularly by meeting with the judge without giving formal evidence) with the aid of a database of over 200 'health and welfare' judgments. An integrated approach is adopted, drawing from these judgments, but also cross-referencing the far more advanced literature and case law on children meeting judges in the Family Court to explore some of the issues*."

Entirely separately, it is also helpful that Moylan LJ put to bed a persistent confusion about the ReSPECT form (which also applies to other forms of advance planning in this area) – this is a form, capturing a discussion, either with the person or those interested with their welfare if they cannot participate, recorded by the clinician and forming clinical recommendations. It is not a form completed by the person – if the person themselves wants to set down what they want to happen (or not happen),

then they need to make use of such tools as advance decisions to refuse treatment or appointing a health and welfare attorney. For more on these areas, see Alex's shedinar.

Tony Hickmott – Reporting Restrictions and Accountability

PH and RH v Brighton and Hove City Council & Others [2021] EWCOP 63 (Senior Judge Hilder)

Media – court reporting

Summary

On 23 November 2021, Senior Judge Hilder gave judgment on an application made by the BBC and Sky to disapply the reporting restrictions in proceedings relating to Tony Hickmott – a 44 -year-old man with learning disabilities and autism who has been detained for over 20 years in hospital. The application was supported by Mr Hickmott's parents but opposed by the provider and the Official Solicitor as his litigation friend.

The standard approach in Court of Protection proceedings is that hearings are in public subject to a Transparency Order in order to reconcile the personal nature of information disclosed in such proceedings with the public's need to understand and have confident in the Court's decision-making process. This approach had been adopted in Mr Hickmott's case.

The anonymity provisions can, however, be relaxed by applying the balancing test between Articles 8 and 10 of the European Convention on Human Rights, as laid out by Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at para 17:

> *First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."*

Mr Hickmott's situation had already been widely reported in national and online media. Thus, the BBC and Sky argued that the substance of the proceedings was already very much in the public domain – linking him to these proceedings is *"merely the final piece of the story"* (para 15). Further, they argued, given the information is already in the public domain, the Transparency Order effectively prevented any reporting of his case because of the risk of jigsaw identification. They argued that interference with the applicants' Article 10 rights was therefore disproportionate and not what the Transparency Order was intended to achieve.

The applicants also argued that the facts of the case cried out for scrutiny through responsible reporting. They stressed that he had been detained for almost two decades, and that public and decision-making bodies needed to know that the matter required the involvement of the Court of Protection for informed scrutiny and for lessons to be learned.

Their argument was supported by Mr Hickmott's parents. They emphasised that, given the duties to arrange aftercare, the conduct of the Local Authority and the Clinical Commissioning Group was of considerable public interest, particularly in the context of the 'Transforming Care' agenda. They also submitted that his wishes and feelings would be to go home; and therefore he would want *"every effort to be made to shine a light on his situation"* (para 21).

The provider, CareTech, submitted, in opposing the application, that if the provisions were disapplied, his privacy would be undermined. The provider contended that the impact on hospital staff and service as a whole would be significant, as well as on Mr Hickmott's presentation and relationships between the provider and his parents. The provider's evidence included an account of Mr Hickmott exhibiting an increase in behavioural disturbance, and the provider submitted that he would pick up the tensions surrounding the publicity.

The Official Solicitor acknowledged: (i) the over-reliance on hospital settings for adults with learning disabilities and (ii) that there is *"much in a name"* – stories are more attractive to readers when they concern an identifiable individual. She, however, opposed the application on Mr Hickmott's behalf. She argued that the Transparency Order correctly balances the competing interests; and there was nothing to suggest that Mr Hickmott wished to give up anonymity or that the publicity would benefit him.

Senior Judge Hilder allowed the application. She considered that the circumstances of the case *"unquestionably fall into the domain of proper public interest"*; and she had *"no doubt"* that it was an issue in relation to which there should be open debate on an informed basis (para 29(i)). She gave significant weight to the fact that, given there is already a great deal of information about Mr Hickmott in the public domain, the reporting restrictions effectively prohibit any reporting of his case, because of the risk of jigsaw identification. She was also satisfied that the applicants intended to report the case responsibly.

Balanced against that, Senior Judge Hilder was particularly concerned about the risk that granting the application might destabilise Mr Hickmott's current care arrangements and make his future care more difficult to arrange (para 30(ii)). Ultimately, however, she was not satisfied that the risk was realistic – in particular, she was not satisfied that incidents of challenging behaviour in the past were causally linked to incidents of challenging behaviour.

Comment

This judgment shows that the balancing exercise in relation to Article 8 and 10 ECHR rights in the context of reporting restrictions is ultimately very case specific. Indeed, the fact that Mr Hickmott's circumstances, including his name, his photograph, the location of his institution, were already very much in the public domain weighed heavily in the balance in favour of acceding to the application. The lifting of the restrictions would not therefore lead to a significant further intrusion into Mr Hickmott's privacy rights, but to leave the restrictions in place would leave a *"black hole of information"* in relation to the Court of Protection proceedings in his case. Furthermore, the case can be contrasted with, for example, Sir Andrew McFarlane's judgment in *Abbasi & Anr v Newcastle-upon-Tyne Hospitals NHS*

Foundation Trust [2021] EWHC 1699 (Fam) in which he refused the parents' application to discharge the reporting restrictions order, following the death of their children. Their application was concerned, in particular, with the prohibition on identifying the treating clinicians and staff. It was thus a far cry from Hickmott, where the focus was on Mr Hickmott, his circumstances, and the public decision-making bodies, rather than targeting individuals involved in someone's care and treatment.

Litigation capacity, judicial review, and judicial assessment of capacity

R(BL) v LB Islington [2021] EWHC 3044 (Admin) (Andrew Thomas QC (sitting as a Deputy High Court Judge))

Other proceedings – judicial review

Summary

This case concerning litigation capacity in the judicial review context is not merely relevant to such cases but also poses interesting question for proceedings before the Court of Protection.

The Claimant was a litigant in person with diagnoses of autistic spectrum disorder, emotionally unstable personality disorder, anxiety and depression. She brought a claim against her local authority for its failure to award her medical points under its Housing Allocation Scheme while at the same time pursuing a claim against her former landlord in the County Court.

The Defendant having raised the issue of the Claimant's capacity to conduct proceedings in its Summary Grounds of Defence, Andrew Thomas QC, sitting as a Deputy High Court Judge, considered and determined the matter, noting explicitly that:

> *I have also had the advantage of hearing from the Claimant herself. That has informed my decision on the issue of capacity, including whether adjustments to assist the Claimant's understanding may help overcome her impairment for the purpose of these proceedings* (paragraph 14).

The procedural history of the case is unusual (see para 15 of the judgment). The Claimant had brought a County Court claim against her landlord which had been struck out on the basis that she lacked capacity to conduct proceedings, although the judgment does not give any further details as to why steps had not been taken in those proceedings to appoint a litigation friend. That decision was set aside on appeal. In the interim, the Defendant in the judicial review proceedings, unaware of the successful appeal, relied on the strike-out and evidence therein of the Claimant's lack of capacity to conduct proceedings in the ongoing judicial review proceedings. As a result, the judicial review claim was stayed pending the nomination of a litigation friend or the filing of further evidence to show that the Claimant had the requisite capacity to conduct proceedings.

Andrew Thomas QC considered the evidence on which the conclusion that the Claimant lacked capacity was based: a single pro forma GP decision noting that the Claimant was *"unlikely to understand*

the purpose or process of the legal action, why there is a court hearing, what is required of her in Court and what the role of the court members are" (paragraph 19).

Considering the relevant law under the MCA 2005 and Rule 21.1 of the CPR (but without reference to either *Masterman-Lister* or *Dunhill v Burgin*), Andrew Thomas QC noted the difference in roles between a legal representative and a litigation friend and observed that *"Having discussed this with the Claimant during the hearing, I am satisfied that she understands the distinction. The practical difficulty which she would encounter is that there is no relative or other trusted person who might volunteer to act as her litigation friend, hence her need for professional legal advice*" (paragraph 21).

Andrew Thomas QC noted the Claimant's own recognition of the difficulties arising from her disabilities, notably her difficulties in making and maintaining relationships and working with others and the need for appropriate reasonable adjustments (paragraph 23). Considering the GP's evidence, he noted the absence of any consideration of reasonable adjustments by him. He concluded (at paragraphs 27-9):

> *27. In this case, the Defendant is a local authority whose staff are familiar with the Claimant and already involved in providing her with support services. Their staff are experienced in communicating information in a manner which is adjusted to meet the needs of vulnerable service users. They are represented in these proceedings by Counsel who has been able to assist the Claimant to understand today's proceedings.*
>
> *28. Addressing the specific concerns raised by the Claimant's GP, I am satisfied on the evidence of her written and oral submissions that the Claimant understands the purpose of these proceedings, namely that they concern a challenge to a decision on her priority for housing allocation. She knew that the hearing before me was her application to set aside a previous order of the Court. Although she sometimes required assistance to maintain focus, the Claimant was able to respond to all of my questions by providing relevant answers and giving relevant information. She had no difficulty in identifying the different participants in the Court room. I also note that the Claimant is educated to degree level. Although English is not her first language, she is both articulate and able to follow the proceedings when others are speaking.*
>
> *29. The Claimant has rightly identified that the key issue is that the Court must take all practicable measures to ensure her access to justice. Given the difficulties in identifying a litigation friend, it is highly likely that the practical consequence of refusing her application would be that the proceedings would be stayed without any decision being made on the merits of the claim. In any event, the Court should not intervene to deprive the Claimant of her autonomy to take decisions unless it is necessary to do so.*

Comment

This case is interesting, for the coincidence of County Court and Administrative Court proceedings, for the arguments (rightly) advanced by the Claimant herself as to the requirements upon the court to support her, and also for the use of judicial conclusions as to capacity in the absence of supporting

medical evidence. The sole "expert" evidence appears to have been that of the GP concluding the Claimant lacked litigation capacity; the only party asserting she was capacitous was the Claimant herself. In this situation, the judge took on the role of assessor and drew appropriate conclusions on the basis of the Claimant's presentation in court. In this case, doing so on its face both served the Claimant's interests and did not to lead the judge into dangerous terrain. As noted in the report upon *AH*, there may be other situations in which it may be more difficult for a judge simply to rely upon their own skills in interpreting the presentation of the person.

THE WIDER CONTEXT

People at the Heart of Care: Adult Social Care Reform White Paper

The DHSC social care White Paper, 'People at the Heart of Care', was published on 1 December 2021. The paper announces several new funding streams, and provides details on previously-announced power for the CQC and Secretary of State to monitor local authority performance of Care Act duties. It does not contain any new information on the cap on care costs (or how this will interact with the Liberty Protection Safeguards, a matter of considerable importance).

We would highlight:

- The Government has confirmed a plan to allow self-funders to access local authorities' own contracted care home rates. This appears to be a change to a long-standing gap in the Care Act that local authorities are only obliged to provide care in care homes for self-funders under certain limited circumstances.
- New funding streams:
    - £500m in social care workforce development over the next three years. 'This dedicated investment in knowledge, skills, health and wellbeing and recruitment policies will improve social care as a long-term career choice.'
    - £300m to integrate housing into local health and care strategies
    - £150m for improvements in care-related technologies
    - £70m for investment in *'market-shaping, commissioning and contract management capability in local authorities…this offer includes a focus on…access to continuous professional development, support for developing a clear career path for commissioners, and strengthening leadership.'*
    - £25m for services for informal carers
    - £30m '*to help local areas innovate around the support and care they*
    - *provide in new and different ways'*
    - £5m for improving information and advice
- CQC duties:
    - *'We will introduce a duty for the Care Quality Commission (CQC) to independently review and assess local authority performance in delivering their adult social care duties under Part 1 of the Care Act 2014.*
    - *'We are putting in place new legal powers for the SSHC to intervene in local authorities to secure*

improvement where there are significant failings in the discharge of their adult social care functions under Part 1 of the Care Act 2014.'

- Statutory interventions for local authorities are to be used in *'exceptional circumstances, where CQC has identified a serious and persistent risk to people's safety and where other forms of support are insufficient to drive improvement.'*
- *'We will lay secondary legislation in due course, to specify which functions of local authorities under Part 1 of the Care Act 2014 will form the basis of the assessments'*

Parole Board guidance: mental capacity assessments and litigation friends

The Parole Board has published guidance for its members on ensuring that prisoners who may lack mental capacity to participate in their parole reviews receive appropriate assessments, and are appointed litigation friends if necessary. We set out the headline points below.

The guidance sets out the relevant decision as being 'in effect "to conduct the parole proceedings"'. It analogises this to the *Masterman-Lister* test for litigation capacity, also noting at 1.4 that *'[t]his includes capacity to give instructions to anyone the prisoner appoints to represent them in the parole process, who may or may not be legally qualified.'*

The responsibility rests with the panel '*to identify cases where capacity is in doubt and take appropriate steps to ensure that these prisoners are adequately assisted and/or represented*.' (1.5)

'Where a prisoner is found to lack mental capacity, the Board, working with the Public Protection Casework Section (PPCS), has in place a process whereby a litigation friend can be appointed to make decisions and enable effective participation, either directly or by instructing a legal representative.' (1.5)

The guidance anticipates that under the Mental Capacity Act, the prisoner may have *'already appointed someone to manage their affairs, which may include matters relating to parole. Panels will need to check whether the appointment of such a person also enables that person to make decisions about Parole Board proceedings.*' (2.2) It is not entirely clear whether it is suggested that a health and welfare LPA would hold this power, although this would be doubtful.

The guidance offers further detail on the proposed relevant information at 3.3 as:

- the issues on which the prisoner's consent or decision is likely to be necessary in the course of the proceedings;
- understanding the advice of their representative; and
- giving instructions relevant to their case.

The guidance reminds Parole Board members of the need to ensure that communication is appropriate and accessible for the prisoner, whether or not the prisoner has been assessed as lacking capacity.

The guidance recommends at 5.1 that '*Individuals working with the prisoner should be alive to signs or indications that suggest the prisoner may lack capacity to make decisions about their parole review, and this should be addressed as soon as possible*.' The examples included extend to both the prisoner's representatives, but also prison staff, or local authority or medical staff working with the prisoner, or anyone in the prisoner's life. It notes that if the Mental Health Casework Section is involved with the prisoner, this may be a source of information to consider concerns about mental capacity.

The guidance sets out the process for considering a mental capacity concern at 5.4:

> *'Once PPCS is aware of a potential mental capacity concern, they will convene a case meeting to bring together the relevant individuals to decide next steps. This will include taking a view on whether a mental capacity assessment should be commissioned…Where the prisoner is assessed as lacking mental capacity for the purposes of conducting their parole review, the steps set out in the PPCS process map will be followed, which briefly will be:*
>
> *• Mental capacity assessment confirms prisoner lacks capacity;*
>
> *• PPCS will add a flag on PPUD;*
>
> *• PPCS will look to identify a litigation friend;*
>
> *• PPCS will submit a request to the Board (via an SHRF) to appoint a nominated person to act as the prisoner's litigation friend or advise that no suitable person can be found.'*

A panel may re-refer a prisoner to the PPCS process or seek further information if the prisoner has been found to have capacity, but the panel continues to have concerns.

The guidance specifies that the capacity evidence should be recent, and relate directly to the decision as to whether to participate in a parole board hearing. The guidance leaves somewhat open the question of whether a medical professional is required to complete the assessment, but it is clear that this is strongly recommended.

It is for the panel to appoint a litigation friend and must consider whether any particular appointment is in the prisoner's best interests. The panel may convene a hearing to determine the appropriateness of a litigation friend if that is in question. The criteria for a litigation friend in a Parole Board hearing track the normal requirements for appointment of a litigation friend, though it is noted that conflicts of interests for a litigation friend in respect of co-defendants should be avoided. The Official Solicitor may be appointed as a litigation friend of last resort. Neither an IMHA or an IMCA are obliged to act as a litigation friend in a parole hearing. *'However, on the rare occasion where this may be proposed, and they agree, it would be independent of their role as an IMHA or IMCA.'* (6.7) A solicitor who is not the prisoner's legal representative may be appointed per *R (EG) v Parole Board* [2020] EWHC 1457; another prisoner may also be appointed, but the guidance notes care should be taken with such a request.

Funding may be required to cover the cost of a litigation friend; there is currently no funding for Legal Aid to do so and the parole board does not cover these costs. *'However, where a family member or friend is acting as the litigation friend there may be access to small Parole Board funds to cover travel and subsistence costs. This would not extend to professional fees or lost earnings.'* (11.2)

At the hearing, the panel should use its discretion '*to make directions for arrangements to enable participation in parole hearings. This is particularly important where a prisoner has cognitive difficulties, learning difficulties, a mental disorder or for any other reason may be lacking mental capacity to make decisions and participate effectively in their parole review*.' (13.2) The guidance recommends taking the following steps at 13.2:

- *The composition of the panel should be considered, and it is recommended that a specialist member (ideally a psychiatrist) is appointed as a co-panellist;*
- *Additional time should be allocated to such oral hearings;*
- *The Board should support and facilitate engagement between the legal representative, the litigation friend, and the prisoner, issuing directions as required.*

The panel should also consider other adaptations, including (13.3):

- *Tailoring questions to the prisoner's needs and abilities. Clear and simple language is often vital. Avoid questions which carry a high risk of being misunderstood or producing unreliable answers, such as leading, or tag questions. Panels should consider breaking down questions into smaller sections, preparing the prisoner for each stage of the communication. Panels should take care to not rush prisoners facing such difficulties. Such prisoners may need longer to process the questions and think about their answers;*

- *Discussing whether a communication specialist, such as a Speech & Language Therapist, or intermediary is required to facilitate communication both prior to and during any oral hearing;*

- *Adjusting the setting and conditions to facilitate participation for vulnerable prisoners, such as the way the room is set out;*

- *Adjusting the hearing procedure to facilitate participation. For example, the prisoner may be given regular breaks in their hearing if it is known that they have a short attention span, or listing only one case for that day, to ensure the panel has sufficient time available if needed;*

- *Directing a person to carry out assessments which may be needed for the panel to understand how to facilitate participation in the hearing. A person directed to make such an assessment could be a professionally qualified mental health specialist, either working within or retained by the prison estate, or from or on behalf of the social services department of the relevant local authority. An appropriately qualified member of the Board may be able to assist a panel to form a view on whether an assessment is needed;*

- *Directing that adaptations be made to facilitate participation, such as by provision of an easy*

read version of documents or information. An appropriately qualified member of the Board may be able to assist a panel to form a view on what adaptations are needed;

- *Directing witnesses from local authority social services departments to attend to assist in explaining matters to and supporting the prisoner, and to explain how they will provide care to the prisoner as part of the risk management plan for release.*

Panels must consider whether '*non-disclosure of information about victims may be linked to the mental capacity of the prisoner, either at the time of the offence, or at another time, or during the parole review, which contribute to their inability to disclose the information. Panels will need to explore whether capacity has, at any time, been an influencing factor on the failure to disclose information about victims.* […] *In particular, where a prisoner has not disclosed the whereabouts of the remains of a victim; or if the prisoner has not identified a child subject in indecent photographs they were convicted of possessing, there is a legal duty for the Parole Board to take this into account for initial release cases*.'

Of note, in addition, is what the guidance does not cover. This guidance is very firmly addressed to the participation of the prisoner in the parole process. As it makes clear at 16.11, separate guidance is being published to help panels navigate the difficult waters of DoLS and licences.

When is mental capacity not mental capacity?

Campbell v Advantage Insurance Company Ltd [2021] EWCA Civ 1698 can be added to the growing list of cases which appear to be about the MCA 2005 but in fact are not. As Dingemans LJ identified at paragraph 1, the appeal in personal injury proceedings raised "*a short but interesting point of law about whether a claimant can rely on his own drunkenness, and consequential lack of insight, either to avoid a finding of contributory negligence or to reduce the apportionment of responsibility for his contributory negligence*." The question arose in circumstances whether the first instance judge had asked himself whether the claimant (who was drunk) had had capacity to consent to being move from the front to the back seat of the car in which he was a passenger, and to being driven by the driver (who was also drunk). The judge had applied the Mental Capacity Act 2005 to the question, found that the presumption of capacity was not displaced in respect of either question. Together with other factors irrelevant for these purposes, this led the judge to make a reduction of 20% for the claimant's contributory negligence.

On appeal, it was asserted that the judge had wrongly applied a test of capacity under the MCA 2005. Dingemans LJ analysed the position thus:

> *28. It appears that the judge raised the issue of the Mental Capacity Act 2005 with the parties at the beginning of the trial because of the terms of the Particulars of Claim. At paragraph 8(12) it had been pleaded that Mr Dean Brown* [the driver] *had placed Mr Lyum Campbell* [the Claimant] *in the rear seat "well-knowing that the Claimant was unable to reach a capacitous or informed decision as to whether he wished be driven away from the position outside the club by Dean Brown". In the light of the statement of case it was not surprising that the judge decided to address the formal position*

under the Mental Capacity Act 2005.

29. Section 1 of the Mental Capacity Act 2005 establishes relevant principles which apply for the purposes of the Act. These principles include: "(2) A person must be assumed to have capacity unless it is established that he lacks capacity." As was noted in the submissions before the Court this provision mirrors the common law position set out in Masterman-Lister v Jewell [2002] EWCA Civ 1889; [2003] 1 WLR 1511 at paragraph 17 where it was said "it is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved".

30. In these circumstances where the issue of capacity had apparently been put in issue on behalf of Mr Lyum Campbell, the judge cannot be criticised for addressing the issue of capacity. The judge's treatment of the issue was in accordance with the express terms of the Mental Capacity Act 2005. All that the judge did was to point out that a person is presumed to have capacity until the contrary is proved, and this did not amount to an impermissible reversal of the burden of proof in relation to the issue of contributory negligence.

We would, with respect, go further than did Dingemans LJ. As he himself noted at paragraph 29, the principles under s.1 MCA 2005 apply for purposes of the MCA 2005. The MCA 2005 does not set down a universal test of mental capacity for all purposes, and there are large parts of the law which are not governed by it (for instance, the test for entry into a contract, making a lifetime gift or – controversially – the test for capacity to make a will, at least when looked after the event). As the court in this case was concerned with a common law claim – for personal injury – we suggest that the actual answer to the ground of appeal was that the MCA 2005 was irrelevant, and that the judge was considering the position by reference to the common law presumption in favour of (legal) capacity applicable to adults. The judge could certainly, if required, have directed himself that he wished to apply the analytical components of the test for mental capacity contained in the MCA 2005 to the question of whether, at common law, the claimant had or lacked the capacity to decide to take the decisions he did. But that would be to develop the common law, rather than to apply the MCA 2005.

Mental Health Units (Use of Force) Act 2018

Olaseni 'Seni' Lewis died at the age of 23 when he was restrained by 11 police officers in a mental health hospital. Seni's law – the Mental Health Units (Use of Force) Act 2018 – was passed to make hospitals safer by reducing the use of force. Seni's death, the law, and its wider context, were the subject of a powerful film.

Accompanied by statutory guidance, the law finally came into force on 7 December 2021. Use of force in mental health units is at an all-time high, with restrictive interventions rising to over 151,000 in 2020-21. The legislation is aimed at English hospitals providing care and treatment to those with mental disorder (whether detained or not) and covers how to meet legal obligations under the Act, best practice advice, and the obligations on officers from Wales when in English mental health units.

Use of force is defined as including physical, mechanical or chemical restraint of a patient, or the

isolation of a patient (which includes seclusion and segregation). The Act defines the types of force as:

- physical restraint: the use of physical contact which is intended to prevent, restrict or subdue movement of any part of the patient's body. This would include holding a patient to give them a depot injection
- mechanical restraint: the use of a device which is intended to prevent, restrict or subdue movement of any part of the patient's body, and is for the primary purpose of behavioural control
- chemical restraint: the use of medication which is intended to prevent, restrict or subdue movement of any part of the patient's body. This includes the use of rapid tranquillisation (see NICE guideline (NG10) Violence and aggression: short-term management in mental health, health and community settings).

Under the Act, a responsible person must be appointed who must publish a policy on the use of force in the unit, and information for patients about their rights. That person must ensure the staff receive appropriate training in the use of force and keep records of its use, with statistics reported annually to the Secretary of State for Health and Social Care. If the police attend to assist staff, they must wear and operate a body camera at all times when reasonably practicable.

Capacity and care homes – consumer law to the rescue?

After it was withdrawn temporarily in the summer, the Competition and Markets Authority have re-issued an updated version of its guidance: "UK care home providers for older people – advice on consumer law." Designed in the first instance for care home providers, it provides useful guidance at the same time for situations where others are concerned about whether a particular care home provider is (colloquially) doing the right thing.

Of particular relevance are the sections on visiting (paragraphs 4.80-4.83) and termination by the care home (paragraphs 4.93-4.103, reminding providers, in particular, of the fact that "*most care home residents in England and Wales are legally entitled to a minimum of 28 days' written notice to vacate a care home under the Protection from Eviction Act 1977 (or the period set out in your contract, if longer)*").

National Autistic Taskforce forum

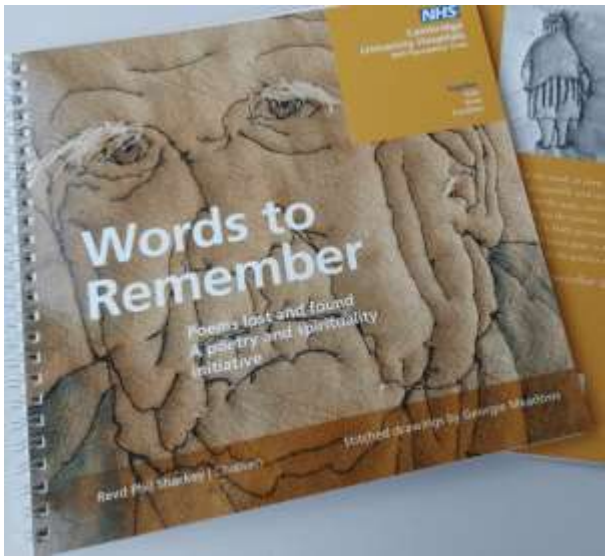
The National Autistic Taskforce Forum: High Quality and Effective – The Future of Autism Care was held virtually on 23rd September 2021 for an invited audience, which included representatives from a range of local authorities, NHS bodies, care inspectorates and care providers from across the UK. The Forum focussed on the NAT publication: An independent guide to quality care for autistic people. A series of short videos (approx. 5 mins each) were made in advance of the Forum by a series of guests, who were asked to introduce each of the recommendations of the guide. Workshops held during the forum focused on discussing these recommendations and their implications for care and support for autistic people. This page contains links to both the videos and summaries of the discussions of the

recommendations at the forum.

Book Review

Words to Remember (Revd Phil Sharkey, Independent Publishing Network 2021)

I was recommended this book shortly after having also been recommended another book about dementia in hospital, Wandering the Wards: An Ethnography of Hospital Care and its Consequences for People with Living with Dementia, by Katie Featherstone and Andy Northcott. The book, published by Routledge, is freely available in e-book form. Drawing on five years of research embedded in acute wards in the UK, the authors follow people living with dementia through their admission, shadowing hospital staff as they interact with them during and across shifts. It provides an almost unrelentingly grim picture of the organisation and delivery of routine care and everyday interactions at the bedside, which reveal the powerful continuities and durability of ward cultures of care and their impacts on people living with dementia. Much of the grimness stems from watching, vicariously hard-pressed and caring staff only just keeping the system together through routines, how singularly ill-suited those routines often are (and the staff know that they are) to the individual needs of those with dementia, and how little space or time there is to respond to the patients' voices.



Reading Words to Remember by the Revd Phil Sharkey was made all the more powerful against this backdrop. This short book, available from the Addenbrooks Charitable Trust website (cost £10; the profits going to the Trust) is a remarkable work, not least because it shows what happens when time can be carved out. The Reverend Phil Sharkey is Chaplain at Addenbrooke's Hospital, and led a reminiscence project, funded by a grant from the Royal Voluntary Service, to use poetry to facilitate memory recall amongst those patients living with dementia. As the author explains, "[a]*s the project developed and I was given words by the patients in response to poetic stimulus and conversations, I began to realise that the fractured sentences, and sometimes newly coined expressions, were becoming their poetic response to the situation and reflected, in a non-linear form, their effort to communicate to me, who they were, and what was important to them. Loss, despair, loneliness and confusion were common themes, but laughter, love and fun also shone through.*" The second stage of the project was to have been to train chaplaincy volunteers to take the work further, but COVID then hit. Returning to the poems from the patients, Sharkey was then moved to write his own poems "back" to them as a creative, spiritual response. On each page, therefore, the patient's own poem first appears (including, where relevant,

the supporting 'editorial' information required where the words needed to be amplified by actions), mirrored by the author's own response. The third element to the book are a number of powerful, and above all intensely personal stitched drawings images by Georgie Meadows.

If the (sometimes unquestioned) reality of hospital care for those with dementia may all too often that portrayed by Featherstone and Northcott, the attentiveness to the individual voice (even at or beyond the words) of Sharkey provides at least some light to the shade, and inspiration to aim for.

Alex Ruck Keene

SCOTLAND

Institutional inhumanity?

The most shocking scenario that this author has encountered in several years of writing for the Report is portrayed in "Significant case review: report into P19", published by Angus Council on 25th November 2021. Both the Executive Summary and the full report may be accessed via this link.

The lead team for the review comprised the hugely experienced authors of the review report, Fiona Rennie and Grace Gilling, and Fred McBride, who provided external support and supervision. A report of otherwise outstanding quality is perhaps only marred by the absence of a suitably qualified and experienced lawyer from those disclosed as having played a leading role. That may have been a factor in the dismissal in the report of the possibility that European Convention on Human Rights ("ECHR") might have been relevant to the circumstances in which the adult identified as P19 died in pain and squalor, without even adequate care, despite "significant involvement with 19 services across a wide range of agencies and organisations in the months leading up to death", and despite him having been identified as an "adult at risk" in terms of the Adult Support and Protection (Scotland) Act 2007 ("the 2007 Act") some four months before his death at the age of 50 in December 2018, his family not having been warned that he was dying. The cause of death was certified as Disseminated Malignancy (a condition in which cancer is spread widely throughout the body).

This Mental Capacity Report item addresses three areas of particular relevance to lawyers and legal practice. To the extent that it does so critically, that should not be seen as detracting from the impressive quality and huge general relevance of the review report as a whole, which certainly provides a substantial list of issues which will require to be fully and carefully addressed by the Scottish Mental Health Law Review towards creating a regime which makes good in law and in practice the aspirations to ensure realisation of basic human rights principles for people most in need of the protection of those principles.

At time of death, P19 was emaciated, weighing only 42kgs and with a BMI of 14.2. Multiple sclerosis had been diagnosed in December 2014, and the bowel screening kit which he used in October 2017 tested positive. Prior to August 2018 he was already known to a variety of services, some of which had had significant involvement with him (his gender is not disclosed in the review report) over a number of years, whilst others were involved on a more ad hoc basis for specific interventions. He had a history of alcohol abuse, but in the last week of life he was no longer drinking alcohol, and he was eating and drinking very little. The conditions of the house were described by staff as "horrendous". He was incontinent of both faeces and urine and was heavily soiled, as were carpets and furnishings. He was in much pain and unable to mobilise. His skin was sore and peeling due to the level of incontinence. Two days before he died, staff had to use a basin to undertake personal care as he was unable to mobilise to reach the bathroom. Pre-Covid, staff wore white suits, gloves, aprons, shoe covers, oversleeves, protective eye gear and masks whenever they entered the house, but they found

the smell unbearable, and some staff would be physically sick and/or in tears at his situation.

Managers of the care-at-home provider decided that they could no longer continue to provide support in view of the effects of the situation on staff. This was discussed at a core group meeting six days before his death, and the day of his death was the last day that the care-at-home provider was providing support. There were still no contingency plan in place, although a variety of options were being explored. A hospital admission had been attempted and refused. All nursing homes across a wide area had been contacted, but there were no vacancies available.

Did those circumstances breach Article 3 of ECHR? Article 3 provides that: "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment". These elements are separable, and indeed separated by use of the word "or". Inhuman treatment breaches Article 3. Degrading treatment breaches Article 3. The review report discloses multiple chaotic failures in management and coordination, throughout a range of statutory agencies, which clearly caused the horrendous circumstances in which P19 declined and died. Upon an ordinary use of language, which - in terms of the Vienna Convention on the Law of Treaties - is the principal way in which international instruments should be interpreted, it is difficult to suggest that P19 was not, at the hands of the statutory agencies responsible for those failings, the victim of "inhuman treatment" and "degrading treatment".

To any lawyer reading the review report, a warning light immediately flashes when on page 52 it quotes from what it asserts to be a definition of "inhuman treatment or punishment" in the Human Rights Act. Neither in that Act nor anywhere else in statute is there any such definition. The non-existing definition is quoted as including:

- serious physical assault
- psychological interrogation
- cruel or barbaric detention conditions or restraints
- serious physical or psychological abuse in a health or care setting; and
- threatening to torture someone if the threat is real and immediate.

The review report comments:

> *"The ECHR was developed following the second world war to ensure that governments would never again be allowed to dehumanise and abuse people's rights. In this context, the definitions [meaning, it seems, the non-existent definition referred to above] of inhuman treatment covered by the HRA do not appear applicable to the lack of dignity and the degrading living conditions P19 died in."*

Interpretation of Article 3 is a matter of balance between two broad ways of approaching that interpretation, as was expressed some 20 years ago by Reed and Murdoch in "A guide to human rights law in Scotland". On page 172 they wrote that:

> *"Both questions involve an assessment often essentially subjective in nature: there can be an unresolved tension between recognition of the Convention as a 'living instrument' to be interpreted in a purposive manner reflecting contemporary expectations, and awareness of the historical legacy which underpinned inclusion of this guarantee at the heart of protection of physical integrity."*

The review report appears to take account only of the latter consideration, to the exclusion of the former, which one might reasonably expect to have carried significant weight in the circumstances.

In many cases, an element in findings of "degrading" treatment is that the object of the treatment was to humiliate and debase the person concerned. "However, the absence of such a purpose cannot rule out a finding of a violation of Article 3" (Council of Europe, Human Rights Handbook No 6 "The prohibition of torture: a guide to the implementation of Article 3 of the European Convention on Human Rights").

A second matter of particular interest is encapsulated in "Research question 4": "How effective are the current processes for requesting a capacity assessment within NHS Tayside and how these processes are applied in practice?", addressed on pages 32 – 38 of the review report. In short, many of those with responsibility for P19 treated his refusals of assistance and treatment, despite a history of alternating refusals and acceptances, as capacitous and requiring to be accepted. They did so on the basis that a consultant psychiatrist "had assessed P19 as having capacity". It seems that no-one checked "capacity for what?" or "continuous capacity?", nor asked to see the supposed assessment. In fact, the consultant had not undertaken a general assessment of capacity. The consultant had assessed P19 on an undisclosed date for the purposes of proceeding under section 47 of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act"). The findings in this section of the review report commenced with: "*No one person took responsibility for obtaining a capacity assessment*". The findings also included that: "*There is no clear pathway for people to access an assessment of capacity, including people with alcohol issues*". It would appear that only the authors of the review report, and no-one engaged with P19 during his lifetime, identified that many of the symptoms described could have been indicative of alcohol-related brain damage, which possibility should have been addressed, including in the context of whether such a diagnosis would potentially "*have afforded the protection of the Adults with Incapacity Act*". On the contrary, the review report narrates that: "*Professionals were advised from medical staff that they had to wait for P19 to be free from the influence of alcohol to have a capacity assessment undertaken*". The review report concluded in this context that: "*As a consequence, staff often felt disempowered and assumed that there was little that they could do to intervene, particularly when P19 was still consuming alcohol.*"

The third notable area for lawyers follows upon that last-mentioned observation. Intervention under the 2007 Act is not dependent upon an assessment of incapacity. Indeed, where the 2000 Act followed upon the Scottish Law Commission's "Report on Incapable Adults" No 151 of 1995, the 2007 Act followed upon the Commission's next and separate work in the area, in its "Report on Vulnerable Adults" No 158 of 1996, which proceeded under explanation that: "*In this Report vulnerable adults are taken to be people aged 16 or over who are unable to safeguard their welfare or property …*" It explained that the

proposals in that Report were made to replace "*the existing statutory provisions on removal of … adults living uncared for in insanitary conditions under … National Assistance legislation*". Even 70 years ago, under the National Assistance Act 1948 section 47 (as amended by the National Assistance (Amendment) Act 1951), if P19's condition and circumstances had come to the notice of the local authority, he would have been promptly removed and cared for. Not least shocking of the review report's findings is that (page 50): "*There is no evidence that powers under the Adult Support and Protection (Scotland) Act 2007 were considered in relation to P19*". The review report describes the nature, application and potential relevance of assessment orders and removal orders under the 2007 Act. The review report points out that an assessment order might have facilitated a capacity assessment, the progression of welfare guardianship, and a formal diagnosis to inform treatment and support "*as P19 was an adult at risk and was asking for help*". Somewhat charitably, the review report commented that: "*The difficulty in utilising this order [a removal order] would have been identifying and securing a suitable place to remove P19 to, given that the sheriff requires to be satisfied as to the availability and suitability of a place to which the adult at risk is to be moved.*" That would appear to be no answer at all to a situation in which there was a glaring imperative that P19 be removed and cared for and that the possibility of using powers under the 2007 Act appears not even to have been considered. In consequence, P19 suffered and died in the appallingly inhumane circumstances that the review report describes.

The Crown Office was not informed of the full circumstances surrounding P19's death. It is not disclosed that there was a report to Health and Safety Executive as regards the effects on front-line care workers, as well as P19. One might speculate as to what might have happened if a child had endured until death similar inhumanity attributable to parents aware of the child's suffering and responsible for the child's care.

Adrian D Ward

The extent of incapacitation under section 67 of the 2000 Act

Is the definition of "transaction" in section 67(1) of the Adults with Incapacity (Scotland) Act 2000 limited to transactions in the generally understood sense of that word, or does it go beyond most dictionary definitions to include acts and decisions in relation to personal health and welfare matters?

The Sheriff Appeal Court provided its answer to that question (though not framed as above) in *RM and SB as joint guardians of the adult PKM (Appellants) v Greater Glasgow Health Board (Respondent)*, 2021 SAC (Civ) 33, an appeal from Dumbarton Sheriff Court. The sheriff at first instance had refused an application by PKM's joint guardians for two orders under section 70(1)(a) of the 2000 Act. By the time of final disposal of the appeal, the parties had agreed the terms of an amended order, and the Appeal Court granted an amended order in those terms. The route by which Greater Glasgow Health Board ("the Board") moved from opposition to the orders originally sought, to agreement with the amended order, involves issues of suggested conflict between medical decision-making and the decisions of guardians holding relevant powers. That route is significant and is addressed first. However, although the Appeal Court pointed out that the decision at first instance had become irrelevant because the

order sought before the Appeal Court differed from that before the sheriff, the Appeal Court narrated that "Before us and before him [the sheriff at first instance] a question of law arose upon which we express an opinion", that point being the question regarding the scope of section 67(1) identified above.

At the heart of the matter was whether the adult PKM should receive dialysis despite his objections to doing so.

To understand the change in the Board's position, one has to start with the terms of the two orders originally sought, and the order that was agreed and granted. The orders originally sought were quite lengthy, which is perhaps why the Note delivered by Sheriff Principal Pyle on behalf of the Appeal Court briefly stated them "read short". For the benefit of readers of this Report, we are grateful to one of the solicitors involved for supplying the full terms of the two orders sought, which were as follows:

1. *An order under section 70(1)(a) requiring the Adult to comply with the decisions and directions of the joint Guardians in determining his healthcare and where he should attend for healthcare treatment as directed by the Joint Guardians.*

2. *An order under section 70(1)(a) requiring the Adult to comply with the following steps of treatment as directed by the Joint Guardians*

    a. *To attend for and have blood taken for the monitoring of the adults condition*
    b. *To attend for and undertake such procedures as necessary for the mapping of the adult veins*
    c. *To attend for and undertake such procedures as necessary for the insertion of a fistula*
    d. *To attend for and undertake the process of kidney dialysis by insertion of needles into the fistula and taping them in place*
    e. *To attend for and undertake such sedation as directed by the Joint Guardians to allow any necessary procedure for dialysis to take place*
    f. *To allow such restraint of the adult as is necessary to ensure the adult complies with this order under s70 of the Act.*

We are likewise grateful for a note of the grounds of appeal, which were as follows:

a. The Sheriff erred in law in considering the capacity of the Adult as a relevant factor in determining the grant of the order.

b. esto the Sheriff was entitled to consider the capacity of the adult in determining the grant of the order the evidence of the adults capacity should have allowed the Sheriff to find the adult lacked capacity or in the alternative taken further evidence on the adults capacity including evidence from the adult himself.

c. The Sheriff erred in law in not placing sufficient weight on the terms of s67 of the Act in allowing the Guardians to make decisions on matters that the Adult was no longer capable of deciding upon.

The order agreed and granted was a single order as follows:

> *"An order under section 70(1)(a)* [of the Act] *requiring the Adult to comply with the joint guardians' decision to consent to medical treatment by behaving in a manner that allows kidney dialysis treatment to occur and to attend whenever is required for that purpose."*

What was the difference? Sheriff Principal Pyle narrated that:

> *"The Health Board's primary concern before the sheriff and before this court was that the original orders sought would trespass upon matters which were for clinical judgment for the medical team and were both as a matter of principle and of practice otiose in that they sought what was in effect continuing compliance by the adult to medical treatment for the rest of his life in the face of his persistent declaration that he did not want the treatment and the medical opinion that he would not comply."*

In addition, the solicitor referred to has explained that when the original application was presented it was thought that dialysis could be done under sedation, but by the time of the hearing before the Appeal Court that was no longer possible.

The Appeal Court granted the order in the latter form upon acceptance by the guardians that "this was very much the last chance to secure the adult's consent", that if compliance by the adult did not materialise then "there would be no medical treatment", and that in any event "the order should not be construed in any way as interfering in clinical decisions which are wholly within the province of the medical team".

As the matter was ultimately dealt with on the basis of an agreement between the parties, we should perhaps be grateful that this Note was issued at all, and that it went as far as it did. However, the Appeal Court offered no definition of the scope, in this context, of "clinical decisions which are wholly within the province of the medical team". One would venture to suggest that, regardless of how section 67 might be construed, there is not in fact scope in the circumstances of this case for conflict between medical decisions and guardians' decisions. If they hold relevant powers, guardians can do and decide up to the limits of what the adult – if capable – could do and decide, but not beyond. It is well acknowledged that a competent patient can accept or reject treatment that is offered, and can make a choice where alternatives are offered, but cannot demand treatment that doctors are not willing to offer. In the present case, it would appear that the doctors were not prepared to offer dialysis. Perhaps there could have been an argument whether they ought not to have taken account of the adult's apparent refusal of consent, but it seems rather a long way from that to ordering them under section 70 to use force against their patient to carry out a procedure which the patient is resisting, in their belief capacitously in fact, the only objection to that view being the assertion of incapacitation under section 67(1).

That however was a point that the Appeal Court did not need to address, and did not address, but that leads to the question of proper construction of section 67(1), on which the Appeal Court did express its opinion.

Section 67 as a whole could be said to be both disempowering and empowering. Under section 67(1) the adult is incapacitated in relation to any "transaction" within the scope of the guardians' powers, whether in fact capable or not. Conversely, section 67(5) gives effective validity to any "transaction" by the adult known by the other party to that transaction to be acting within authority conferred on the adult by the guardian, regardless of any actual capability. The opinion of the Appeal Court would increase those areas of both disempowerment and empowerment by including acts and decisions in personal health and welfare matters in the definition of "transaction", in terms of that opinion for the purposes of section 67(1), but impliedly also for the purposes of section 67(5). See the Note for the full reasoning of the Appeal Court. The sheriff had taken the view that "transaction" was incapable of a wide interpretation such as to include consent to medical treatment. Counsel for the Board founded upon the references in section 67(2) and (3) to respectively property and financial affairs, and personal welfare. Counsel for the guardians relied upon the definition of "transaction" in section 9(d) of the Age of Legal Capacity (Scotland) Act 1991 expressly to include "the giving by a person of any consent having legal effect", an extension absent from section 67 of the 2000 Act.

In holding that "transaction" does include consent to medical treatment, the Appeal Court's reasons were (firstly) to accept the Board's reasoning as to the effects of section 67(2) and (3); and (secondly) to refer to "the general nature of the 2000 Act, which is to protect vulnerable adults who in most, if not all, cases will have complex medical needs which will require ongoing medical supervision and treatment", and that in consequence: "It would make no sense, therefore, for the scope of the guardians' powers to be restricted such that medical treatment should not be included within their responsibilities". While referring to the danger of taking a definition of a word in one statute to determine its definition in another, contrary to the view advanced on behalf of the guardians the Appeal Court took the view that the definition in the 1991 Act supported its view of the definition in the 2000 Act. The Appeal Court was also of the view that there was no inherent tension between section 67(1) and the principles in section 1(4), on the basis that in the construction, and application in practice, of the whole 2000 Act, the general principles in section 1 must be applied, that being no different to the approach which requires to be taken "in the application of the general principles contained in the European Convention on Human Rights" ["ECHR"] to all domestic law. The Appeal Court suggested that the difficulty which arose in the present case was that a medical opinion was sought on whether the adult had capacity, rather than what were the adult's present wishes and feelings: the extent to which the adult's present wishes and feelings should be taken into account inevitably depended "upon the extent to which the medical practitioner considered the adult's expression of wishes and feelings were genuinely held and were separate from his general medical condition", in the present case of schizophrenia. In other words, the issue for the medical practitioner was the ability, rather than the capacity, of the adult properly and accurately to express his wishes and feelings. Whether the adult's present wishes and feelings are followed by the guardians depends on the whole circumstances, not least upon that medical opinion.

The Appeal Court acknowledged "that any perceived tension between sections 67(1) and section 1 will

surface in specific situations and will have to be evaluated on the facts of the individual case". The court's opinion was expressed in the context of that particular case, and should not be seen as of general application, beyond the point that regard should be had to the whole circumstances and the weight to be given to the present and past wishes and feelings of the adult.

The Appeal Court concluded by stressing that "the powers of a guardian and, in particular, any order under section 70 must not trespass on decisions which as a matter of medical ethics but also as a matter of law are properly ones for clinical judgement". The court had been careful to obtain the guardians' assurance "that the decision whether to give dialysis treatment to the adult and the assessment of the extent, if any, of his consent to such treatment is a matter for the doctors, not the guardians – or even this court".

It would appear that the background provided by paras 6.130 to 6.136 of Scottish Law Commission Report No 151 (1995) was not considered, and that the Appeal Court was not addressed on the following points, some though not all of which might be matters for the Scottish Mental Health Law Review:

1. The powers of attorneys under welfare powers of attorney are expressly disapplied (by section 16(5)(b) of the 2000 Act) during periods when the granter is capable in relation to the matters in question. Did the legislature intend to distinguish the powers of attorneys compared with those of guardians, or on the contrary should section 16(5)(b) be taken as influencing the scope of the definition of "transaction"?

2. Is any interpretation of section 67(1) that effectively incapacitates the adult excluded by application of Article 8 of ECHR, particularly where – as is increasingly the case – ECHR should be interpreted having regard to the provisions of the UN Convention on the Rights of Persons with Disabilities?

3. Did it accord with the requirements of Article 6 of ECHR (requiring fair process), in circumstances where (we are told) a safeguarder had been appointed and at first instance had expressed views to the court clearly disputed by the adult, to proceed without the adult's representation before the court?

The inter-relationship between sections 64 and 70 of the 2000 Act was among the matters addressed by the Sheriff Appeal Court in *JK v Argyll and Bute Council*, on which we reported in the June 2021 Report. Those issues did not arise in the present case.

It is understood that further litigation between the same parties, potentially addressing similar issues, is current, and that it is possible that in view of the determination of the Sheriff Appeal Court in the present case, consideration of that further case may leapfrog the Sheriff Appeal Court for early consideration by the Inner House.

Adrian D Ward

[By way of editorial note from across the border from Alex, it should be noted that the approach under the 2000 Act is very different to that under the Mental Capacity Act 2005. A deputy appointed by the Court of Protection is statutorily prohibited by section 20(1) Mental Capacity Act 2005 from making decisions on behalf of the person where the person has capacity to do so, notwithstanding the fact that the court must (by definition) have been satisfied that a deputy needed to be appointed on the basis that the person did not (at the time) have capacity to make the decisions within the scope of the appointment. There is also no equivalent to section 70 of the 2000 Act within the Mental Capacity Act 2005]

Deprivation of liberty of children in cross-border situations

An aspect of the failure of the legislature to address the whole topic of deprivation of liberty in Scotland is the lack of provision for recognition in Scotland of orders of the High Court in England & Wales authorising the deprivation of liberty of vulnerable children from England & Wales who are placed in Scotland because of the availability of suitable placements here, but not in England & Wales. Pending suitable legislation, the Court of Session has been dealing with such situations by way of applications to the *nobile officium*. After having dealt with 22 previous such applications, and with more expected, the Court of Session took the opportunity of issuing, in *Lambeth Borough and Medway Council, Petitioners*, [2021] CSIH 59; 2021 SLT 1481, a Note to provide guidance to practitioners as to the appropriate procedure to follow in such petitions pending remedial legislation.

In the preliminary paragraphs of the Note, the Court of Session narrated the circumstances, and that the court had been advised by those representing the Scottish and UK Governments in the past that they were waiting for the decision of the UK Supreme Court in *In re T (a child)*, [2021] UKSC 35; [2021] 3 WLR 643; [2021] 2 FLR 1041, before deciding what statutory provisions were required. Child law practitioners will wish to follow the guidance in the Note in individual cases. It is appropriate to draw the attention of practitioners dealing with adult incapacity law to some general points in the Note.

Delivering the Note, Lord Menzies stressed three preliminary points. First, each child has their own particular needs and problems. What is appropriate as regards both care provision and deprivation of liberty will vary from case to case, and that will inform the appropriate procedure. The court has not provided a fixed formula which must be followed in every case. Second, the function of the court is not to rubber-stamp High Court decisions. While they are usually taken by a single judge, such petitions in Scotland require consideration by three Inner House judges. Lord Menzies acknowledged the heavy responsibility that they carry, particularly where the deprivation of liberty of a child is involved. Third, all such applications must be presented expeditiously. Lord Menzies narrated situations in the past where that had not happened, and commented: “That will not do”.

Also of interest to adult incapacity practitioners, the Note provides indications of further steps that might be necessary in the event of delay in providing a legislative solution. He commented in particular on the possibilities that there might be advantages in having a single designated judge able to acquire expertise in such cases, and to provide consistency of decision-making. Following the pattern under

Hague Convention cases of appointing a liaison judge "might promote greater dialogue between the judiciary in Scotland and England & Wales in this area". As Lord Menzies acknowledged, some of these matters would probably require amendment to the Rules of Court, and an Act of Sederunt. Adult incapacity practitioners may reflect that the administration of the adult incapacity jurisdiction is characterised by great variation, rather than consistency, with some cases in some courts dealt with by sheriffs who have specialised in the jurisdiction, but not so across the country, despite the recommendations of Scottish Law Commission that led to the Adults with Incapacity (Scotland) Act 2000 being predicated upon specialist sheriffs being allocated to adult incapacity cases (see Scottish Law Commission Report on Incapable Adults, No 151, of September 1995). Following the wholesale unlawful deprivations of liberty of elderly adults, and those with mental or intellectual disabilities, preceding and during the pandemic, and continuing despite having been prominently identified, we are a long way from the expeditious addressing of situations of adult deprivation of liberty in Scotland. Adults, as much as children, should not be deprived of their liberty in Scotland without appropriate lawful approval conferred with the care commendably described by Lord Menzies, sadly a principle characterised more by its cavalier and wholesale breach than by its observation. Any judicial liaison appears to take place on an ad hoc basis, and the Protocol for Children's Cases in Scotland, and England and Wales concluded in July 2018 (available here) sadly does not include express consideration of cases concerning deprivation of liberty.

Standing the apparent lack of interest by Government in addressing with the alacrity the long overdue lack of appropriate legislative procedures and provision for lawful deprivation of liberty of adults, one wonders how long the Court of Session may have to wait to be relieved of the task of dealing with such cases concerning incoming children.

Adrian D Ward

New Glasgow AWI Practice Note

Sheriff Principal Turnbull has issued Practice Note No 1 of 2021, which will be applicable to all applications made to Glasgow Sheriff Court under the Adults with Incapacity (Scotland) Act 2000 made on or after 1st January 2022, and to any other proceedings under that Act (appeals, and counter-proposals for the appointment of guardians contained in answers, being specifically mentioned in the Practice Note) commenced after 1st January 2022. Paragraph 6 of Glasgow Practice Note dated 3rd July 2006, and the whole of Practice Note No 2 of 2015 dated 30th September 2015, are superseded and revoked with effect from that date. The new Practice Note may be accessed here.

Adrian D Ward

Centre for Mental Health and Capacity Law webinars

The Centre for Mental Health and Capacity Law at Edinburgh Napier University will be running two webinars in early 2022.

The first is 'Investigation of Deaths in Mental Health Detention and Homicides' on 19th January 1pm-3pm (GMT) with speakers Deborah Coles (Director of Inquest), Dr John Crichton (Consultant Forensic Psychiatrist), Dr Ruth Ward MBBS, MRCPsych, Alison Thomson (Executive Director (Nursing), Mental Welfare Commission for Scotland) and Jackie McRae (Social Worker and Solicitor, currently with Scottish Parliament). Attendance is free but you must register via Eventbrite, where you can also find more information about the webinar.

On 23rd February at 1pm-13pm (GMT) there will be a webinar on 'Adult Support and Protection' with currently confirmed speakers Dr Amanda Keeling (Academic Fellow in Disability Law, University of Leeds) and Kate Fennell (Adult Protection Lead, Edinburgh Health and Social Care Partnership, Edinburgh City Council and Lecturer, Edinburgh Napier University). Once again, admission is free but registration via Eventbrite is required. The Eventbrite registration link will be available early in the new year, please email the Centre on cmhcl@napier.ac.uk to be placed on its email list if you wish to be alerted to this and other Centre events.

Jill Stavert

World Congress on Adult Capacity 2022

A reminder that the World Congress on Adult Capacity 2022 will be held in person in Edinburgh from 7th-9th June. For those looking for an excuse to escape from what might well now be rather reduced festivities, please note that there is still time to submit an abstract with the submission deadline being 7th January 2022. More details can be found on the Congress website https://wcac2022.org/.

Jill Stavert

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Steph regularly appears in the Court of Protection in health and welfare matters. She has acted for individual family members, the Official Solicitor, Clinical Commissioning Groups and local authorities. She has a broad practice in public and private law, with a particular interest in health and human rights issues. She appeared in the Supreme Court in *PJ v Welsh Ministers* [2019] 2 WLR 82 as to whether the power to impose conditions on a CTO can include a deprivation of liberty. To view full CV click here.

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a recognised national and international expert in adult incapacity law. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His awards include an MBE for services to the mentally handicapped in Scotland; honorary membership of the Law Society of Scotland; national awards for legal journalism, legal charitable work and legal scholarship; and the lifetime achievement award at the 2014 Scottish Legal Awards.

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Conferences

Members of the Court of Protection team are regularly presenting at 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.

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 January. 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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