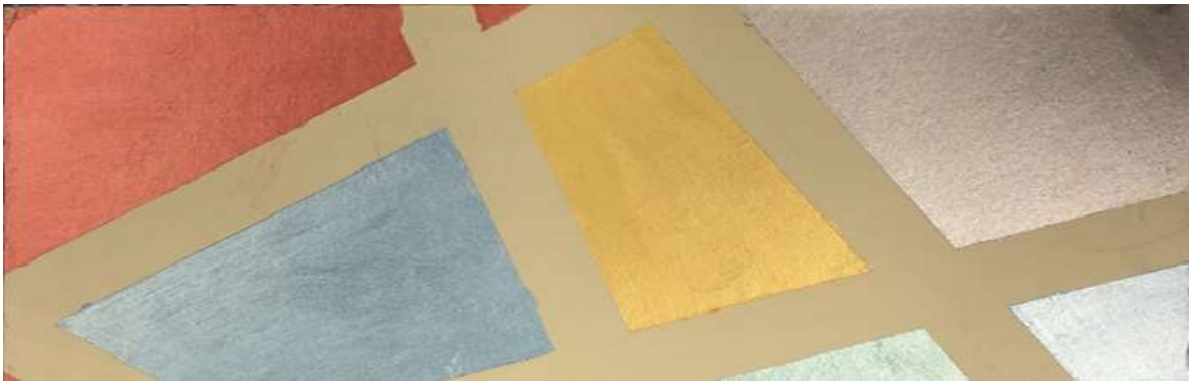
Essex CHAMBERS

MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

December 2021 | Issue 118



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.

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

Interim declarations

A working group [1] 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.

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

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.

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.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court and the European Court of Human Rights. He also writes extensively, has numerous academic affiliations, including as Visiting Professor at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributor to 'Assessment of Mental Capacity' (Law Society/BMA), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in ECHR/CRPD human rights, mental health and incapacity law and mainly practises in the Court of Protection and Upper Tribunal. Also a Senior Lecturer at Manchester University and Clinical Lead of its Legal Advice Centre, he teaches students in these fields, and trains health, social care and legal professionals. When time permits, Neil publishes in academic books and journals and created the website www.lpslaw.co.uk. To view full CV click here.

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Nicola appears regularly in the Court of Protection in health and welfare matters. She is frequently instructed by the Official Solicitor as well as by local authorities, CCGs and care homes. She is a contributor to the 5th edition of the *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (BMA/Law Society 2019). To view full CV click here.

Katie Scott: katie.scott@39essex.com

Katie advises and represents clients in all things health related, from personal injury and clinical negligence, to community care, mental health and healthcare regulation. The main focus of her practice however is in the Court of Protection where she has a particular interest in the health and welfare of incapacitated adults. She is also a qualified mediator, mediating legal and community disputes. To view full CV click here.

Rachel Sullivan: rachel.sullivan@39essex.com

Rachel has a broad public law and Court of Protection practice, with a particular interest in the fields of health and human rights law. She appears regularly in the Court of Protection and is instructed by the Official Solicitor, NHS bodies, local authorities and families. To view full CV click here.

Stephanie David: stephanie.david@39essex.com

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.

Arianna Kelly: arianna.kelly@39essex.com

Arianna has a specialist practice in mental capacity, community care, mental health law and inquests. Arianna acts in a range of Court of Protection matters including welfare, property and affairs, serious medical treatment and in matters relating to the inherent jurisdiction of the High Court. Arianna works extensively in the field of community care. To view a full CV, click here.

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Nyasha has a practice across public and private law, has appeared in the Court of Protection and has a particular interest in health and human rights issues. To view a full CV, click here.

Simon Edwards: simon.edwards@39essex.com

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.

Scotland editors

Adrian Ward: adw@tcyoung.co.uk

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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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Capacity Law and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click here.

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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