Essex CHAMBERS

# MENTAL CAPACITY REPORT: PRACTICE AND PROCEDURE

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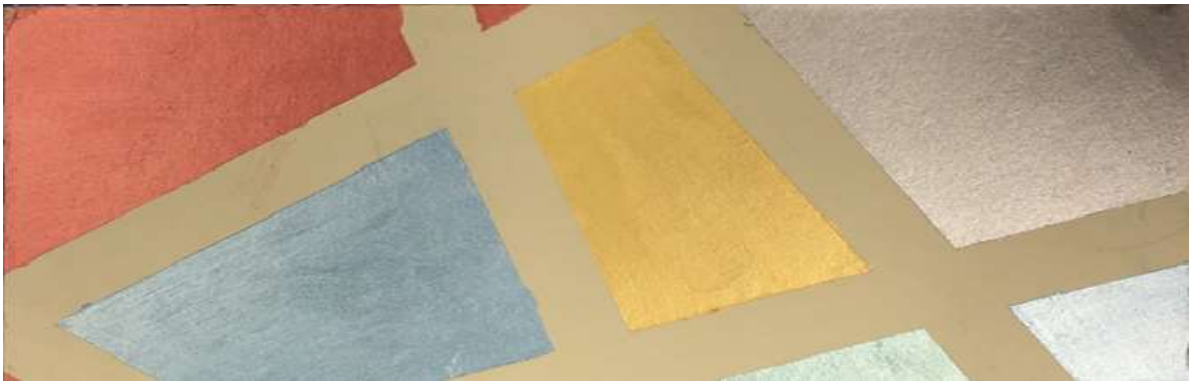

Welcome to the March 2020 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: a cautionary tale about re-using material for DoLS assessment and capacity complexities in the context of medical treatment;

(2) In the Property and Affairs Report: an important case on the limits of powers of professional deputies to act without recourse to the Court of Protection;

(3) In the Practice and Procedure Report: medical treatment – delay, neglect and judicial despair, developments relating to vulnerable parties and witnesses, and Forced Marriage Protection Orders under the spotlight;

(4) In the Wider Context Report: Mental Capacity Action Days, when not to presume upon a presumption, and a number of important reports from bodies such as the CQC;

(5) In the Scotland Report: the DEC:IDES trial.

We have also recently updated our capacity guide and our guide to the inherent jurisdiction. You can find them, along with our past issues, our case summaries, and more on our dedicated sub-site here.

If you want more information on the Convention on the Rights of Persons with Disabilities, which we frequently refer to in this Report, we suggest you go to the Small Places website run by Lucy Series of Cardiff University.

**Editors**
Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Simon Edwards (P&A)

**Scottish Contributors**
Adrian Ward
Jill Stavert

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



## Medical treatment: delay, neglect and judicial despair

*Cardiff & Vale University Health Board v P* [2020] EWCOP 8 (Hayden J)

*Best interests – medical treatment – Practice and procedure – other*

Hayden J has had to grapple with a further case in which delay in bringing a case to court has had serious consequences for the person.

The case concerned a young man aged 17, with a longstanding disability and described as severely autistic. He was unable to communicate either verbally or, for the most part, in any consistently effective way at all. He lived with his parents but he received some respite care, particularly at the weekend, at a specialist establishment for people with learning difficulties. In January 2019, he was given a CT scan under general anaesthetic in order that his dental state could be properly assessed. A plan had been made for him to walk into the clinical area and, if necessary, for restraint to be used. He walked part of the way with his father, who was a mental health nurse, but then refused to go into the clinical room. The Trust's Strategies and Intervention Team, which managed people facing similar challenges to him and who sometimes exhibit their distress in aggressive behaviour, briefly restrained him on a bed for approximately two minutes in order that venous access could be gained and anaesthetic agents safely administered. His father was able to calm the young man when he was restrained, and on waking he was relaxed and did not require any further restraint.

The examination that was undertaken revealed some tooth decay, but it also revealed that the young man had impacted wisdom teeth. The fact that they are impacted did not mean that they were necessarily painful. They may remain impacted for many years and cause no pain, but sometimes they do, and quite commonly this arises in late teens and early twenties.

However, from around October 2019, and with increasing frequency, the young man was observed by his parents violently to bang his head, sometimes banging his head against walls. As Hayden J observed "[t]*he parents, of course, have the opportunity to see their son more than anybody else. Whilst he may not be able to communicate directly, by a whole raft of cues, many of which they will not be aware of, they have become intuitive to his needs. They believed that his behaviour was in response to dental pain.*"

In November 2019, the young man was taken to the local A&E by his parents with an obvious bruise to his forehead. They believed that his

behaviour was so markedly changed that they feared he had some sort of concussion and may have fractured his skull. As Hayden J observed "[i]*t is, to my mind, self-evident that there was an urgent medical emergency that should have been investigated within hours or days, but in fact there has, as yet, been no CT scan at all."* Because there were potentially two pathologies to consider, a variety of disciplines became involved. In December, a multi-disciplinary meeting was convened. The parents were becoming increasingly concerned, however, and had the sense that they were not being listened to sufficiently.

It was clear on the evidence before the court that the young man lacked the capacity to consent to treatment or to understand the various issues involved.

In the circumstances, Hayden J observed that:

> *7. It might seem, from the above account, that some dental assessment was required quickly and now as long ago as November or early December 2019. Plainly, it was. But the application was only made by the Health Board on 20th February 2020. The proposed inspection and/or treatment is not to take place until early March. For anybody who has had toothache, even delay between now and then looks like an eternity. But this young man, it seems, has been suffering, and significantly so, for nearly five months. This is little short of an outrage. It is indefensible.*
>
> *8. What is most concerning is that the delay has occurred despite the fact that P is supported by parents who are vigilant to articulate his needs. F, I repeat, is a mental health nurse, and as such is particularly well-placed to act as an advocate on his son's behalf. P is also surrounded by professionals, who I do not for one moment doubt are committed to his treatment and care. Nonetheless, nothing has happened.*

Hayden J first had sight of the case on 20 February 2020, and reconvened the next day:

> *12. Ms Watson, counsel on behalf of the Health Board, today makes it absolutely clear that, since the case was heard yesterday afternoon, a great deal of work has been done and a great deal of thought given to the circumstances that P now finds himself in. She tells me candidly that when it became necessary to analyse the chronology of the proceedings, the full force of the delay and its impact on P became inescapably obvious to the Cardiff and Vale University Local Health Board. They have made, properly in my view, no attempt at all to evade their responsibility. They offer P and his parents a profound apology, the sincerity of which I have absolutely no cause to question. Today, the Clinical Director of the Dental Hospital has attended at court. He inevitably knew nothing of the case until yesterday. He, too, through counsel, makes no effort to defend the delay. It is indefensible.*
>
> *13. When Ms Watson drills down into the history of the case, in an attempt to understand why this has occurred, she comes to the very clear conclusion that it has arisen in consequence of "insufficient collaborative cooperation", to use her phrase, between the various disciplines required to identify P's best medical interests. In other words, a failure to share information and a failure to work together effectively. The failings here do*

> *not arise as a result of lack of resources. Neither are they the result of pressure or volume of responsibility on any individual. It is, sadly, yet again, a situation in which there has been a fundamental failure to communicate effectively by those responsible for P's care. This message has now been the conclusion of so many reviews, including serious case reviews, that it has become almost trite. There is no point identifying lessons to be learned if they are not, in fact, learned. Sharing information and effective communication is intrinsic to good medical practice. This is true generally but it requires heightened emphasis, if that is possible, in the context of the incapacitous, whose voice can easily and inadvertently go unheard.*

For reasons that are not developed in the judgment, it appeared that it was not practically possible to ensure inspection/treatment before March 2020. Amongst the consequences of this, Hayden J was careful to observe was that, as his parents told him, the deterioration in his behaviour responding to his pain:

> *16.* […] *has altered, as they put it, P's "profile". Their ambition for him is that, at 18 years of age, he might be able to obtain a place in a residential unit, which would provide some important opportunities for him. The relative containability of his behaviour throughout adolescence made that a reasonable prospect. But his parents are now very anxious that P's present behaviour might create an impression of a more challenging youngster than they believe him to be and cause such units greater anxiety when considering any application on his behalf.*

> *17. It is for that reason that I deliver this ex tempore judgment, a copy of which will be transcribed for P's parents, so that those who are considering options for P in the future will know that his recent behaviour appears likely to have been triggered by a neglectful failure to address a dental/medical problem. It should not be regarded as a facet of his overall condition. If what I have said here is weakened in consequence of any CT scans or investigations, then it can, of course, be revisited. But the above is the position, as it appears to his parents today and which I consider to be a realistic evaluation.*

## Comment

This is not the only case that Hayden J has had before him recently in which delay has caused adverse effects. We covered the *Mrs H* case last month, and its sequel [2020] EWCOP 6) reveals that the position was, as he feared, namely that the failure to make the application in a timely fashion meant that Mrs H's cancer was now inoperable.

In this case, and on the basis of paragraph 17 of Hayden J's judgment, and the very deliberate use of the term 'neglectful,' it would appear – in due course – that a claim could be brought on behalf of P to reflect the harm caused to him by the consequences of the delay. Paragraph 13 of his judgment both crystallises the problem and reflects what comes close to judicial despair as to how to ensure that such situations are not repeated.

Amidst all of this, it may come as a minor point, but it is perhaps rather striking that it appears that a year previously it had been considered entirely possible by those responsible for P's

case to have carried out a CT scan under general anaethestic (in circumstances including restraint) without the need to go to court.

## Vulnerable witnesses and parties

There have been a number of important cases and/or other developments recently of relevance, primarily by analogy, to the work of the Court of Protection. We summarise them here.

*Civil Justice Council*

The Civil Justice Council has, following a month long consultation in the autumn of 2019, published a series of recommendations for improvement of the current provision for vulnerable parties and witnesses accessing the civil justice system. The full report is lengthy and detailed (for instance the discussion about the meaning of vulnerability), but for present purposes we highlight the recommendations, which are:

1. Amending the overriding objective within the Civil Procedure Rules to reflect a need to ensure that 'all parties can fully participate in proceedings' and 'all witnesses can give their best evidence as well as providing a new practice direction specifically addressing vulnerability and provides guidance on the circumstances in which a court may consider an individual to be vulnerable and the steps which can be taken to give them assistance. This recommendation includes a proposal that CPR 44.3(5) on costs should be amended to include additional work/expense generated by the fact of vulnerability of parties/witnesses
2. Amending claim forms and directions questionnaires to include a question on whether proceedings involve a vulnerable party or witness.
3. HMCTS should consider capturing the data in relation to the vulnerability of court users, specifically considering the number of vulnerable parties or witnesses who appear before the civil courts and the steps taken to assist them.
4. Mandatory training on vulnerability for all civil judges covering:
    a. The assessment or detection of vulnerability;
    b. Case management when a party or witness is vulnerable;
    c. Conduct of hearings, including questioning of witnesses.
5. Regulators and training bodies should assess the adequacy of their current available training on vulnerability; the court should expect all advocates who undertake questioning of vulnerable witnesses to have had some relevant training or at least to be familiar with the Advocate's Gateway and toolkits (https://www.theadvocatesgateway.org/).
6. A court managing a civil case in which there has been a conviction in respect of assault or abuse should clarify the basis (if any) upon which any conviction is being challenged and as a result consider what issues properly remain for determination and what orders should be made in respect of the evidence to be adduced. Such

consideration should include (but not be limited to) consideration of the extent to which evidence within or transcripts of the criminal trial should form the evidence considered by the court and a requirement that the Defendant presents his/her evidence first.

7. Consideration should be given to the need to set ground rules for hearings involving vulnerable witnesses.

8. If a provision prohibiting cross-examination of a witness by a self-represented party who has been charged cautioned or convicted of a specified offence against them is enacted, a like provision should be extended to civil cases – with a discretion to order otherwise. Where there is a prohibition on cross-examination by a self-represented party, provision must be made through central funding for the appointment of a legal representative.

9. The Ministry of Justice and HMCTS should review the availability and use of intermediaries in the Civil Courts as a matter of urgency, recognizing that there is a clear need to recruit and train intermediaries for the civil and family courts.

10. Any mediator employed or recommended by HMCTS must have appropriate training.

11. Any reforms should consider who vulnerable court users will be affected.

12. Court facilities, infrastructure, staffing and equipment should be audited immediately;

13. HMCTS must provide easily accessible, adequately resourced and comprehensive assistance to court users to facilitate their full participation in the court process;

14. A national protocol should be brought into force requiring each court centre to:

    a. Set up a team of staff (or for single court buildings a nominated member of staff) who should receive training to work with court users with mental health and physical conditions, learning disabilities, limited mental capacity and other vulnerabilities.

    b. Consider how to ensure that vulnerable court users are offered support before arrival at court, during and after a hearing or attendance at court (including ensuring that there is a single point of contact and the supervision/overseeing of the provision of support).

    c. Introduce the provision of pre-trial visits for vulnerable court users and promote of their availability.

15. The MoJ should improve its financial support to the Litigant in Person Support Strategy.

16. HMCTS should review information for vulnerable and other court users and ensure there is easy access to comprehensive guidance on what to expect at court and what the court process entails.

17. HMCTS should ensure that all staff who handle civil cases are given adequate training with regard to identifying, communicating with and assisting vulnerable court users.

18. The Judicial College should consider the need for guidance/training/re-enforcement of training as to applications for and the making of/refusal to make compensation orders in cases of sexual assault/abuse. The Crown Prosecution Service should also consider its current practices and training in relation to seeking compensation orders.

Two decades after the Youth Justice and Criminal Evidence Act 1999 came into force, recognising the needs of vulnerable witnesses and providing statutory basis for entitlement to an intermediary, the provision of support and assistance required for participation of vulnerable witnesses in the civil justice system remains woefully underdeveloped. The recommendations of the Civil Justice Council will no doubt be welcomed by all practitioners who have struggled to access adequate resources to assist vulnerable clients.

*Intermediaries*

The Civil Justice Council report – understandably – highlights the potential role of intermediaries. There are circumstances when they would be of equal assistance before the Court of Protection, whether supporting a P who is competent to give evidence[1] or supporting another party giving evidence.

However, the need for intermediaries (who are a scarce resource) does need to be carefully thought through and their utility kept under review. In the personal injury case of *Morrow v Shrewsbury* [2020] EWHC 379 (QB), the Claimant claimed damages for personal injury arising out of an accident he suffered while spectating a rugby match. A rugby post next to which he had been standing collapsed and struck him on the head as a result of which he sustained facial and skull injuries. The Defendant admitted negligence; the Claimant claimed substantial damages for past and future lost earnings. Following a preliminary hearing before HHJ Bird, an intermediary was instructed to assist with the Claimant's evidence on the grounds that he suffered anxiety and depression, rendering him a vulnerable witness.

In her judgment following trial, Farbey J noted her concerns regarding the involvement of the intermediary, in particular her apparent lack of understanding of the precise nature of her duty (para 39). Although the intermediary was retained for the final hearing, following a ground rules hearing, the court imposed further restrictions on her involvement.

Farbey J ultimately noted:

> *46. The intermediary's contribution to the proceedings was negligible. On a couple of occasions, she asked whether the court could take a break during the evidence but I was unsure why she chose those moments to make such a request as opposed to other moments. She gave some minimal assistance to the claimant when he was looking for documents in the bundles but he was capable of finding the documents for himself.*
>
> *47. The claimant gave no indication that he could not follow questions or that he could not give the answers that he wanted to give. The intermediary did not raise any comprehension or*

[1] The role that they might play where P is either giving unsworn 'information' to the court, or in the context of supporting P to participate more broadly is more complex.

> *communication difficulties with the court.*
>
> *48 Mr Brown [counsel for the Defendant] conducted his cross-examination with conspicuous fairness. He took matters slowly and carefully so that the claimant could follow the questions. As I have mentioned, I permitted the claimant to take blank paper into the witness box as an aid to concentration. He did not appear to use the paper. He gave evidence forcefully and fluently.*
>
> *49. I have strong reservations about whether any of the ground rules were necessary. The intermediary served no useful role. Nothing that the intermediary did could not have been done by counsel and solicitors performing their well-defined roles founded on training, experience and professional ethics; or by the court in the exercise of its wide discretion to control proceedings and having the benefit of extensive expert evidence.*

In similar vein, in the criminal context, the Court of Appeal also recently noted in R v RT & Anor [2020] EWCA (Crim) 155 that:

> *36* […] *intermediaries are not to be appointed on a "just-in-case" basis or because the report by the intermediary, the psychologist or the psychiatrist has failed to provide the judge with a proper analysis of a vulnerable defendant's needs in the context of the particular circumstances of the trial to come. These are fact-sensitive decisions that call for not only an assessment of the relevant circumstances of the defendant, but also the circumstances of the particular trial. Put otherwise, any difficulty experienced by the defendant must be considered in the context of the actual proceedings which he or she faces.* […]
>
> *37.* […] *Criminal cases vary infinitely in factual complexity, legal and procedural difficulty, and length. Intermediaries should not be appointed as a matter of routine trial management, but instead because there are compelling reasons for taking this step, it being clear that all other adaptations to the trial process will not sufficiently meet the defendant's needs to ensure he or she can effectively participate in the trial.*

*Vulnerable witnesses and weight of evidence*

In *Re C (Female Genital Mutilation and Forced Marriage: Fact Finding)* [2019] EWHC 3449 (Fam), Gwynneth Knowles J made some important observations about the weight to be placed upon the evidence given by a vulnerable witness. Although given in the context of family proceedings (and hence by reference to the specific rules and Practice Direction) which cover the position in those proceedings, the central thrust of her observations are equally applicable in cases before the Court of Protection. We therefore set them out in full.

> *Assessing the Evidence of Vulnerable Witnesses*
>
> *15. It is important that I identify a matter which has been at the forefront of my mind in approaching my fact-finding task.*
>
> *16. As is apparent from paragraphs 38-43 of the judgment of King LJ in Re N (A Child) [2019] EWCA Civ 1997, it was only relatively recently that the Family Court*

*has made formal provision for vulnerable adult witnesses in family proceedings – Part 3A and PD3AA of the Family Procedure Rules 2010 entitled "Vulnerable Persons: Participation in Proceedings and Giving Evidence" came into force on 27 November 2017. The provisions of Part 3A were intended to maximise the ability of those deemed vulnerable to give their best evidence to the court and participate as fully as possible in proceedings. Though there is no definition of "vulnerability" in Part 3A, they are individuals, the quality of whose evidence is likely to be diminished by reason of their difficulties, as opposed to "protected parties", namely those who lack capacity to conduct the proceedings. The measures set out in Part 3A - such as the deployment of special measures, the use of intermediaries and so on – address the form of the evidence or, as Mr Bagchi QC put it, the procedural framework in which evidence is given. However, they do not address the substance of the evidence given by a vulnerable person. In this case, the mother has made very serious factual allegations which, if true, would have life changing consequences for those accused, but because of her disabilities (and despite a raft of special measures), it was suggested that she was unable to give either a coherent account of events or an account which had some of the hallmarks of credibility. What allowances, if any, can and should the court make for this? Can evidence from a vulnerable and emotionally labile witness, without independent evidential support, provide a firm basis upon which to ground serious findings such as marital rape, forced marriage and FGM? Despite my very considerable sympathy for witnesses with significant vulnerabilities such as the mother in this case, my clear view is that there is one standard of proof which applies without modification irrespective of the characteristics of witnesses, including vulnerable witnesses to whom Part 3A and PD3AA apply. I observe that many vulnerable witnesses are just as likely as anyone else either to tell the truth or to lie deliberately or misunderstand events. It would be unfair and discriminatory to discount a witness's evidence because of their inherent vulnerabilities (including mental and cognitive disabilities) and it would be equally wrong in principle not to apply a rigorous analysis to a witness's evidence merely because they suffer from mental, cognitive or emotional difficulties. To do otherwise would, in effect, attenuate the standard of proof when applied to witnesses of fact with such vulnerabilities.*

*17. That does not mean that the court is unsympathetic to a vulnerable witness such as the mother in this case. However, it remains the court's duty to take an entirely dispassionate approach to the process of determining whether, on the available, relevant and admissible evidence, the facts alleged by a vulnerable witness are established on the balance of probability. I have reminded myself of the wise words of Hughes LJ (as he then was) in Re B (Allegation of Sexual Abuse: Child's Evidence) [2006] EWCA Civ 773 at [43] when he observed that:*

> *"… the fact that one is in a family case sailing under the comfortable colours of child protection is not a reason to afford to unsatisfactory evidence a weight greater than it can properly bear. That is in nobody's interests, least of all the child's."*

> *The same forensic rigour is necessary in this case given the very serious nature of the allegations.*
>
> *18. Having said that, I offer the following observations, none of them particularly novel, which might assist in assessing the evidence of vulnerable witnesses, particularly those with learning disabilities. First, it is simplistic to conclude that the evidence of such a witness is inherently unreliable. Second, it is probably unfair to expect the same degree of verbal fluency and articulacy which one might expect in a witness without those problems. Third, it is important not to evaluate the evidence of such a witness on the basis of intuition which may or may not be unconsciously biased. Finally, it is important to take into account and make appropriate allowances for that witness's disability or vulnerability, assisted by any expert or other evidence available. I have taken all these matters into account in reaching my decision.*

*Reasonable adjustments and recording*

In *Heal v University of Oxford & Ors (Practice and Procedure)* [2019] UKEAT 0070_19_1607, the Employment Appeal Tribunal gave useful guidance both as to the scope of the duty to make reasonable adjustments, and also about the position where the reasonable adjustment requested is to record the proceedings.

> *a. Tribunals are under a duty to make reasonable adjustments to alleviate any substantial disadvantage related to disability in a party's ability to participate in proceedings.*
>
> *b. Where a disability is declared and adjustments to the Tribunal's procedures are requested in the ET1 form, there is no automatic entitlement for those adjustments to be made. Whether or not the adjustments are made will be a matter of case management for the Tribunal to determine having regard to all relevant factors (including, where applicable, any information provided by or requested from a party) and giving effect to the overriding objective.*
>
> *c. The Tribunal may consider whether to make a case management order setting out reasonable adjustments either on its own initiative or in response to an application made by a party.*
>
> *d. If an application is made for reasonable adjustments, the Tribunal may deal with such an application in writing, or order that it be dealt with at a preliminary or final hearing: see Rule 30 of the ET Rules.*
>
> *e. Where the adjustment sought is for permission for a party to record proceedings or parts thereof because of a disability-related inability to take contemporaneous notes or follow proceedings, the Tribunal may take account of the following matters, which are not exhaustive, in determining whether to grant permission:*
>
> > *i. The extent of the inability and any medical or other evidence in support;*
> >
> > *ii. Whether the disadvantage in question can be alleviated by other means, such as assistance from another person, the provision of additional time or additional breaks in proceedings;*

*iii. The extent to which the recording of proceedings will alleviate the disadvantage in question;*

*iv. The risk that the recording will be used for prohibited purposes, such as to publish recorded material, or extracts therefrom;*

*v. The views of the other party or parties involved, and, in particular, whether the knowledge that a recording is being made by one party would worry or distract witnesses;*

*vi. Whether there should be any specific directions or limitations as to the use to which any recorded material may be put;*

*vii. The means of recording and whether this is likely to cause unreasonable disruption or delay to proceedings.*

*f. Where an adjustment is made to permit the recording of proceedings, parties ought to be reminded of the express prohibition under s.9(1)(b) of the 1981 Act [2] on publishing such recording or playing it in the hearing of the public or any section of the public. This prohibition is likely to extend to any upload of the recording (or part thereof) on to any publicly accessible website or social media or any other information sharing platform.*

Choudhury J explored the question of recording further at paragraphs 34-7 should this be a situation which is troubling readers in relation to any specific case.

## Forced Marriage Protection Orders – the Court of Appeal rolls up its sleeves

*Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190 (Court of Appeal (Sir Andrew McFarlane P, Peter Jackson and Haddon-Cave LJJ))

*Other proceedings – family (public law)*

### Summary

This judgment is the first consideration by the Court of Appeal of Forced Marriage Protection Orders (FMPOs) made under s.63A Family Law Act 1996. The issues that arose were whether there was jurisdiction to make an FMPO where the person concerned had mental capacity to make relevant decisions and opposed the FMPO, and whether an indefinite Passport Order could be made in relation to an FMPO.

The case concerned a 35 year old woman, K, who had contacted police in 2015 saying that her family had threatened to murder her if she did not marry a relative. Similar concerns had also been raised by neighbours. The police applied for and were granted an FMPO at a without notice hearing. There followed a contested hearing a few months later, by which time K had withdrawn the allegations. The court decided that the FMPO should nevertheless continue, and ordered that K's passport should be held by the police until further order. Shortly after the hearing, K fled the family home alleging

[2] Section 9 of the Contempt of Court Act 1981, which would also apply in relation to proceedings before the Court of Protection.

assault, but again later withdrew the allegation. She was moved to a refuge. In 2017, K wanted to travel to Pakistan for the funeral of her mother, but her application for discharge of the FMPO and the Passport Order was refused, K not having engaged with professional advice about how to protect herself during foreign travel. K's application for permission to appeal was granted and sent to the Court of Appeal, which allowed the appeal only to the extent of imposing a 4 year time limit on the Passport Order, at which stage the court would need to review whether it should be continued.

The Court of Appeal noted that forced marriage was a '*fundamental abuse of human rights, a form of domestic abuse, and…a criminal offence*'. It was not confined to children or adults who lacked capacity, and 1 in 5 victims was male. It was not a one-off event: "*…the marriage forms the start of a potentially unending period in the victim's life where much of her daily experience will occur without their consent and against their will, or will otherwise be abusive. In particular, the consummation of the marriage, rather than being the positive experience, will be, by definition, a rape. Life for an unwilling participant in a forced marriage is likely to be characterised by serial rape, deprivation of liberty and physical abuse experienced over an extended period. It may also lead to forced pregnancy and childbearing. The fate of some victims of forced marriage is even worse and may include murder, other "honour" crime or suicide".* As such, a forced marriage was likely to include behaviour sufficient to breach Article 3 ECHR.

The Court of Appeal was clear that Parliament had not sought to limit the use of FMPOs to people without mental capacity. There was no mental capacity test in the legislation, nor any linkage to the MCA 2005 – instead, the legislation provided that the wishes and feelings of the adult concerned were just one factor among many that the court had to consider. This could give rise to an obvious conflict between Article 3 and Article 8, so '*the court must strive for an outcome which takes account of and achieves a reasonable accommodation between the competing rights… The required judicial analysis is not a true 'balancing' exercise in consequence of the imperative duty that arises from the absolute nature of Article 3 rights. Where the evidence establishes a reasonable possibility that conduct sufficient to breach Article 3 may occur, the court must at least do what is necessary to protect any potential victim from such a risk. The need to do so cannot be reduced below that necessary minimum even where the factors relating to the qualified rights protected by Article 8 are particularly weighty.*'

In practice, this meant the court assessing the level of risk, the quality of available protective factors and the nature and extent of the interference with Article 8 rights that would be entailed by making an FMPO. This would include an analysis of the proportionality of making an order, so that consideration would have to be given to whether a less intrusive measure might suffice, and to balancing the effect of the order on the person concerned against the objective and the likelihood of that objective being achieved.

The Court of Appeal set out a 'routemap' for decisions in future cases:

- Stage 1: Establish the underlying facts based upon admissible evidence and by applying the civil standard of proof. The

burden of proof will ordinarily be upon the applicant who asserts the facts that are said to justify the making of a FMPO.

- Stage 2: If the making of the order is contested at a hearing on notice, determine any relevant factual issues.
- Stage 3: Assess both the risks and the protective factors that relate to the particular circumstances of the individual who is said to be vulnerable to forced marriage. Consider drawing up a balance sheet. Decide whether there is a real and immediate risk that Article 3 is engaged.
- Stage 4: If the facts are sufficient to establish a risk that the subject will experience conduct sufficient to satisfy ECHR, Article 3, undertake the exercise of achieving an accommodation between the necessity of protecting the subject of the application from the risk of harm under Article 3 and the need to respect their family and private life under Article 8 and, within that, respect for their autonomy. This is not a strict "balancing" exercise as there is a necessity for the court to establish the minimum measures necessary to meet the Article 3 risk that has been established under Stage Three.

The Court of Appeal noted that the length, breadth and specific content of an FMPO would be case-specific, and that it was '*unlikely in all but the most serious and clear cases'* that an indefinite order would be appropriate.

On the question of indefinite Passport Orders, the Court of Appeal concluded that this power clearly existed, even where the person concerned had capacity and was objecting, and could even extend to making an order against the person themselves. In practice though, an open-ended Passport Order should only be imposed '*in the most exceptional of cases'* and generally speaking, a time limit should be included.

### Comment

The Court of Appeal's helpful routemap for judgments in this very difficult area is welcome. It is interesting to compare the FMPO legislation, which expressly permits the making of orders that interfere with the Article 5 and 8 rights of people who have capacity, with the situation in respect of 'vulnerable adults' who are subject to the High Court's inherent jurisdiction. In the latter case, the absence of any statutory framework means that Parliamentary consideration has not been given to the circumstances in which such interferences may be justified, and the level or nature of risk that would need to be present. In the continuing absence of any statutory framework, the guidance in respect of FMPOs may be of some assistance by analogy.

# Editors and Contributors

**Alex Ruck Keene: alex.ruckkeene@39essex.com**

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. He also writes extensively, has numerous academic affiliations, including as Wellcome Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

**Victoria Butler-Cole QC: vb@39essex.com**

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 contributing editor to Clayton and Tomlinson 'The Law of Human Rights', 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.

**Neil Allen: neil.allen@39essex.com**

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. To view full CV click here.

**Annabel Lee: annabel.lee@39essex.com**

Annabel has experience in a wide range of issues before the Court of Protection, including medical treatment, deprivation of liberty, residence, care contact, welfare, property and financial affairs, and has particular expertise in complex cross-border jurisdiction matters. She is a contributing editor to 'Court of Protection Practice' and an editor of the Court of Protection Law Reports. To view full CV click here.

**Nicola Kohn: nicola.kohn@39essex.com**

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.

# Editors and Contributors

**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.

**Katherine Barnes: Katherine.barnes@39essex.com**

Katherine has a broad public law and human rights practice, with a particular interest in the fields of community care and health law, including mental capacity law. She appears regularly in the Court of Protection and has acted for the Official Solicitor, individuals, local authorities and NHS bodies. Her CV is available here: To view 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.

**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.

**Jill Stavert: j.stavert@napier.ac.uk**

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

### Approaching complex capacity assessments

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

### 2020 World Congress in Argentina

Adrian will be speaking at the 6th World Congress to be held at Buenos Aires University, Argentina, from 29th September to 2nd October 2020, under the full title "Adult Support and Care" and the sub-title "From Adult Guardianship to Personal Autonomy." For more details, see here.

## Other conferences and events of interest

### Mental Diversity Law Conference

The call for papers is now open for the Third UK and Ireland Mental Diversity Law Conference, to be held at the University of Nottingham on 23 and 24 June. For more details, see here.

## Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in April. 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.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection: Health & Welfare
*Leading Set*

The Legal 500 UK
Court of Protection and Community Care
*Top Tier Set*

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

**LONDON**
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

**MANCHESTER**
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

**SINGAPORE**
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

**KUALA LUMPUR**
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085