MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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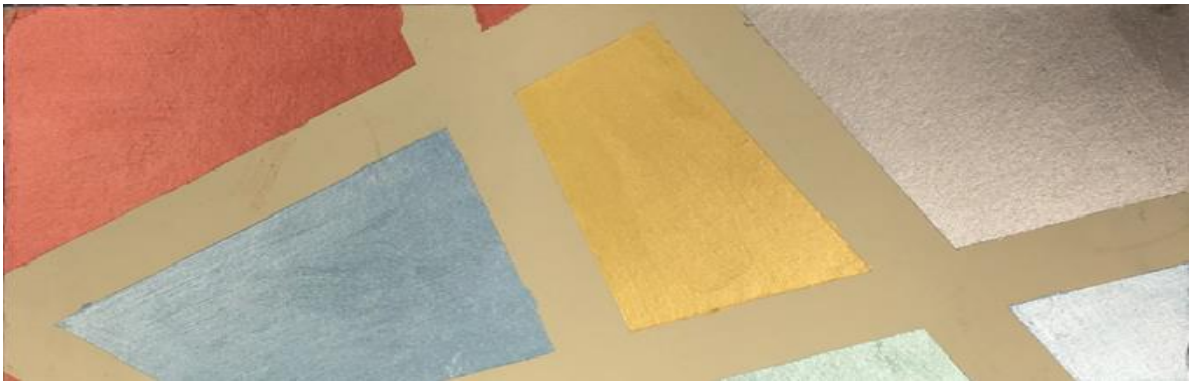

Welcome to the February 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Capacity to refuse treatment while on a CTO and deprivations of liberty for children;

(2) In the Property and Affairs Report: testamentary capacity;

(3) In the Practice and Procedure Report: naming P, public or private hearings, judicial visits and litigation capacity;

(4) In the Wider Context Report: voting rights and disability, sufficiency of care and Article 8, and Article 2 inquests;

(5) In the Scotland Report: Guardians' remuneration and the Scottish Mental Health Law;

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.

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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

Unofficial guide to the Mental Capacity Act and Deprivation of Liberty Codes of Practice

There are two Codes of Practice to the Mental Capacity Act 2005, one for the main body of the Act, and one for the Deprivation of Liberty Safeguards. They are statutory Codes: they have been approved by Parliament, and the MCA 2005 requires certain people to have regard to them. Those people include anyone acting in a professional capacity. Neither Code of Practice has ever been updated since they were published, the main Code in 2007, and the DoLS Code in 2009. They are both out of date in significant ways. As part of the coming into force of the Mental Capacity (Amendment) Act 2019, we had anticipated that there would be a new Code published which would (in one place) update the main MCA Code and give guidance as to the operation of the Liberty Protection Safeguards. However, the LPS have been delayed and, whilst we anticipate that there will be a consultation on the draft Code in 2022, it appears likely that professionals will be stuck operating two out of date Codes for some time.

Whilst professionals have to have regard to the Codes, they can – and should – depart from them where they have been superseded by case-law which makes clear what the Act itself, the source of the law. Alex, Tor and Neil have prepared an **entirely unofficial** guide to those parts of the two Codes which are most obviously out of date.

Capacity to refuse treatment while on a CTO

Re Q [2022] EWCOP 6 (Hayden J)

Mental capacity - medical treatment

Medical treatment – advance decisions

Mental Health Act 1893 – Interface with MCA

Summary

Q was a 50 year old woman with longstanding bulimia nervosa, and diagnoses of various mental health disorders including EUPD and recurrent depression, arising from childhood sexual abuse and trauma. She had been detained under the MHA 1983 at the start of 2021 and discharged from hospital 8 months later under a Community Treatment Order (CTO). One of the conditions of the CTO was that she attend hospital for treatment for extremely low potassium levels, which were caused by her eating disorder. The CTO also required Q to 'engage constructively with all health professionals in the management of the consequences of the eating disorder' and gave examples of the sort of treatment that might be required including weekly blood tests, oral medication, and if that was not sufficient, admission to hospital for further treatment.

The applicant trust, who were providing this treatment, sought declarations in the Court of Protection as to her capacity to make decisions about the treatment and as to whether Q had capacity when she created an Advance Decision to Refuse Treatment (ADRT) for low potassium levels, even if that meant her life would be at risk. The ADRT had been signed prior to the CTO being put in place.

The court held that Q had capacity to make relevant medical treatment decisions and that her ADRT was valid. Q accepted that she was only alive because of the requirements of the CTO, and that she complied with them under duress. There was no question that Q was able to understand and retain the relevant information – the question was whether she could use or weigh the information. The independently instructed psychiatrist, Dr Glover, was of the view that she could not, because of her *"pervasively low self-esteem and hopelessness"*. Q's treating doctors were less persuaded that her sense of worthlessness was as pervasive as Dr Glover had found.

When interviewed, Q rejected the proposition that three short visits to A&E in the space of 5 months to keep her alive was a relatively small price to pay for her continued existence, and the things in life which gave her pleasure.

The court also held that Q had capacity to conduct the proceedings, and that there was no inconsistency in the possibility that Q might have litigation capacity but lack subject matter capacity. Hayden J cast doubt on the view expressed by Mostyn J in *An NHS Trust v P* [2021] EWCOP 27 (echoing sentiments first expressed by Munby J in *Sheffield City Council v E* [2005] Fam 326) that it would be virtually impossible to have capacity to conduct proceedings about a matter in respect of which a person lacked capacity.

Comment

It is unfortunate that this judgment does not explain the legal frameworks of the MCA and MHA and their application in the context of advance decisions to refuse treatment.

As a community patient, should Q at any stage lose capacity to make relevant treatment choices, the ADRT would have effect even though it arguably refuses treatment for a mental disorder. Paragraph 24.54 of the MHA Code of Practice states that *"treatment cannot be given to CTO patients who have not been recalled to hospital (part 4A patients) contrary to a valid and applicable advance decision."* Q could nevertheless be recalled to hospital to receive life-saving treatment under the MHA powers.

As a detained patient, she would not be able to refuse treatment for her mental disorder through an ADRT, and there is caselaw which suggests that treatment of the sort Q required is properly viewed as treatment for her mental disorder, even though it is treatment for a physical manifestation of the disorder (see for example *Nottinghamshire Healthcare NHS Trust v RC* [2014] EWCOP 1317). The validity of the ADRT would be strictly irrelevant if Q was recalled to hospital.

Given that Q presently has the relevant decision-making capacity, the ADRT is irrelevant in any event. The CTO conditions cannot be forced upon her against her wishes while she remains a community patient, in any event.

The purpose of the Trust's application may have been to seek a declaration that it was lawful not to impose treatment on Q, notwithstanding that it could in principle be provided under the Mental Health Act. The overall conclusions of the judgment would not be determinative of future decisions by Q's responsible clinician, but would likely be relevant in considering the use of discretionary powers under the MHA. The court's judgment that Q had capacity and her ADRT was valid would likely also inform future decisions by clarifying that there is no option to force treatment on her outside of an MHA detention.

Deprivations of liberty for children

Re AB (A Child: human rights) [2021] EWFC B100 (Mr Dexter Dias QC, sitting as a High Court Judge)

Article 5 ECHR – Children and Young Persons

Inherent Jurisdiction

Summary

AB was 13 and a special guardianship order was made in favour of his paternal grandmother as his parents were unable to care for him. He was diagnosed with autism, oppositional defiant disorder and attachment issues, and further problems developed leading to an interim care order by which he was placed in foster care. Those carers were similarly unable to care for him due to his complex needs and emotional dysregulation, so he was placed in a privately run care home. He was unlawfully deprived of liberty for 4 months because no application was made by the local authority despite repeated request by the Children's Guardian:

> *4. I have emphasised in proceedings that this historic illegality is a matter of the gravest concern to the court. This court exercises its inherent jurisdiction not as a mere technicality, but as a constituent part of the rule of law. To have a person confined without lawful authority, and particularly a child, and particularly an exceedingly vulnerable child, is a matter of the utmost seriousness. It is a fundamental interference with the child's rights under the European Convention on Human Rights and the UN Convention on the Rights of the Child.*

Following the delay, an application to authorise AB's deprivation of liberty was made but issues arose regarding the placement. He had been physically restrained 17 times whilst there and a scathing report was produced by two Ofsted inspectors. AB was in a neglected, chaotic and unsafe environment, whose living conditions shocked even senior managers of the company that operated the home. Its registration was immediately suspended, action was taken against staff, and the children were moved out.

In relation to the new placement, the local authority applied for the following restrictions to be authorised for AB under the inherent jurisdiction of the High Court:

1. Inability to have access to gaming technology except for devices and games that are agreed by staff, and except during times agreed by the staff for AB to engage in gaming.
2. Not being allowed in a peer's room without being supervised for the safety of both AB and his peers.
3. Inability to leave the placement on his own due to his age and his limited understanding of safety and his local area.
4. AB to receive 1:1 support where he is supervised by a member of staff for 8 hours a day.

Looking at the three elements of a deprivation of liberty, the judge held that these restrictions far exceeded what would be imposed on a non-disabled 13-year-old and therefore amounted to confinement. He was not satisfied that AB validly consented to it, with serious concerns as to whether he was *Gillick* competent to a meaningful level. With the State being responsible, the circumstances therefore amounted to a deprivation of liberty. As to whether to authorise it in AB's best interests, after the turmoil of the previous placement, the judge found that the current one met his welfare needs and authorised the arrangements to protect AB from significant harm. The local authority no longer sought authorisation to restrain, there having been no incidents at the new placement.

Comment

The judgment, which only recently appeared on Bailii, contains a helpful and comprehensive

summary of the relevant jurisprudence, and the various regulations and inspection provisions relating to children. The liberty deprivation was authorised under Article 5(1)(d) ("educational supervision") on a best interests basis (para 80), double checked by a necessity and proportionality test (para 93). The judge emphasised the positive obligations on not just the local authority but also on the Children's Guardian to take proactive steps, such as to restore the matter to court, to prevent avoidable safeguard lapses if others failed to do so (paras 177-179). There is also a set of conclusions in an Appendix to the judgment which may helpfully provide a roadmap of issues for parties and judges in similar cases:

> *Stage 1. AB's Art. 5, Art. 8 and Art. 3 ECHR rights and Art. 3 and 37 UNCRC rights are engaged.*
>
> *Stage 2. The necessary conditions for a s.25 Children Act 1989 order are not satisfied, therefore the appropriate legal pathway to seek authorisation of the deprivation of AB's liberty is the inherent jurisdiction of the court.*
>
> *Stage 3. The two conditions for invoking the inherent jurisdiction are satisfied:*
>
> *Condition 1: the circumstances of AB's placement at Ford Cottage constitute a deprivation of liberty: he is unable to consent to his confinement; he is subject to continuous supervision and control; he is not free to leave. Further, the circumstances meet the Storck test:*
>
> *(a) The confinement is for a not negligible period of time;*
>
> *(b) AB cannot and does not validly consent to the confinement, nor is there anyone who shares parental responsibility for him who can;*
>
> *(c) The confinement is attributable to the responsibility of the State.*
>
> *Condition 2: the deprivation is in AB's best interests considering his welfare holistically, in light of his complex presenting needs and how the arrangements can support and promote his welfare and development.*
>
> *Leave: The statutory leave conditions under s.100(4) Children Act 1989 are satisfied and the court grants the local authority leave because:*
>
> *(a) No other order would succeed in keeping AB safe;*
>
> *(b) There is reasonable cause to believe that without exercising the court's inherent jurisdiction, AB is likely to suffer significant harm.*
>
> *Proportionality: The deprivation sought is necessary and proportionate:*
>
> *(a) Protecting AB from significant harm is a sufficiently important and legitimate aim to justify significant curtailment of his Art. 5 ECHR rights;*
>
> *(b) The measures sought by the local authority are rationally connected to and further the protection of his safety and promotion of his welfare;*
>
> *(c) Less intrusive measures would unacceptably compromise his personal security and welfare, rendering the measures necessary;*
>
> *(d) The balance between liberty and welfare has been struck in a proportionate way: the benefit of safeguarding AB's welfare*

outweighs the intrusion into his protected rights.

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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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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.

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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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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.

Centre for Health, Law, and Society Symposium: Redrawing the Boundaries of Mental Health and Capacity Law The University of Bristol Law School is holding an online conference on Wednesday, 9 March from 2:00-5:00PM. The online event will be split into three sessions, and include Dr Camillia Kong as keynote speaker, and a response from Dr Lucy Series. The link to the event is here and registration is via eventbrite: https://www.bristol.ac.uk/law/events/2022/chls-symposium-2022.html

UK Mental Health Act reform: Can it deliver racial justice and ensure the rights and wellbeing of people with mental health problems? A free conference is being held online on 9 March, co-hosted by Race on the Agenda and Mind, the tile being: For more details, and to register, see here.

7th World Congress on Adult Capacity, Edinburgh International Conference Centre [EICC], 7-9 June 2022 The world is coming to Edinburgh – for this live, in-person, event. A must for everyone throughout the British Isles with an interest in mental capacity/incapacity and related topics, from a wide range of angles; with live contributions from leading experts from 29 countries across five continents, including many UK leaders in the field. For details as they develop, go to www.wcac2022.org. Of particular interest is likely to be the section on "Programme": including scrolling down from "Programme" to click on "Plenary Sessions" to see all of those who so far have committed to speak at those sessions. To avoid disappointment, register now at "Registration". An early bird price is available until 11th April 2022.

The Judging Values and Participation in Mental Capacity Law Conference The *Judging Values in Participation and Mental Capacity Law* Project conference will be held at the British Academy (10-11 Carlton House Terrace, London SW1Y 5AH), on Monday 20th June 2022 between 9.00am-5.30pm. It will feature panel speakers including Former President of the Supreme Court Baroness Brenda Hale of Richmond, Former High Court Judge Sir Mark Hedley, Former Senior Judge of the Court of Protection Denzil Lush, Former District Judge of the Court of Protection Margaret Glentworth, Victoria Butler-Cole QC (39 Essex Chambers), and Alex Ruck Keene (39 Essex Chambers, King's College London). The conference fee is £25 (including lunch and a reception). If you would like to attend please register on our events page here by 1 June 2022. If you have any queries please contact the Project Lead, Dr Camillia Kong: camillia.kong@bbk.ac.uk.

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.

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