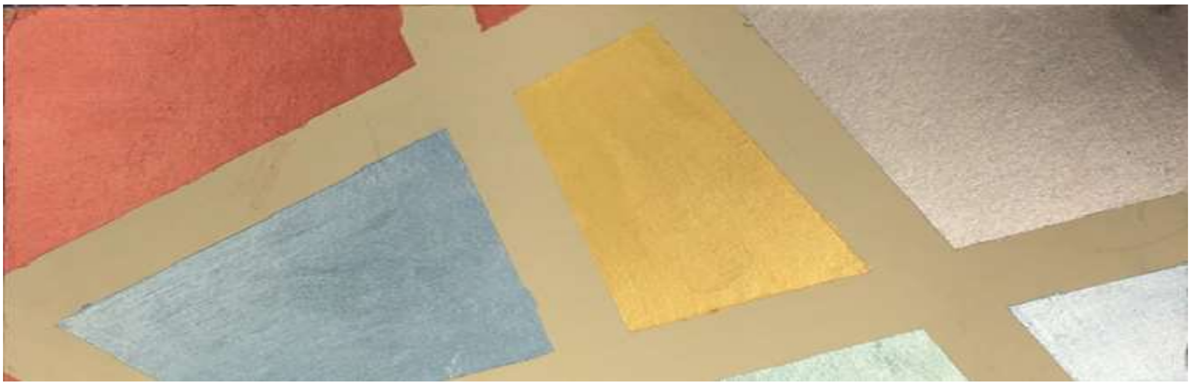
39 Essex CHAMBERS

MENTAL CAPACITY REPORT: THE WIDER CONTEXT

May 2020 | Issue 104



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

(1) In the Health, Welfare and Deprivation of Liberty Report: the Court of Protection, COVID-19 and the rule of law; best interests and dying at home; and capacity and silos (again);

(2) In the Property and Affairs Report: further guidance from the OPG in relation to COVID-19 and an unusual case about intestacy, minority and the Court of Protection;

(3) In the Practice and Procedure Report: the Court of Protection adapting to COVID-19; remote hearings more generally; and injunctions and persons and unknown;

(4) In the Wider Context Report: National Mental Capacity Forum news, and when can mental incapacity count as a 'status?';

(5) In the Scotland Report: further updates relating to the evolution of law and practice in response to COVID-19. We also note that 9 May 2020 was the 20th anniversary of the Adults with Incapacity (Scotland) Act 2000 receiving Royal Assent.

You can find our past issues, our case summaries, and more on our dedicated sub-site here. Chambers has also created a dedicated COVID-19 page with resources, seminars, and more, 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

National Mental Capacity Forum news

The National Mental Capacity Forum will be holding the last of three rapid-response online meetings on Wednesday 3 June, 16:30-17:30. The event will focus on the challenges of ensuring both protection for public health and respect for human rights during the COVID-19 pandemic.

The meeting, in the form of a Zoom Webinar, will be chaired by Baroness Ilora Finlay, with hosting provided by the Autonomy Project at the University of Essex. Alex will be contributing, as he has done to the previous two.

Advance registration is required as spaces are limited. Please click here on the following link to register your interest.

Please click here to access the recordings of the two earlier webinar events (1 and 28 April 2020).

Under the auspices of the Forum, Alex also chaired a (recorded) conversation with Lorraine Currie and Chelle Farnan on remote assessments, which can be found here.

COVID-19, testing and mental capacity

Members of the Report team have produced a guidance note on testing for COVID-19 and mental capacity, available here.

Updated NHSE legal guidance on mental health, learning disability and autism

NHS England has issued updated (19 May) guidance on the impact of the coronavirus (COVID-19) pandemic on the use of the MHA 1983 and supporting systems to safeguard the legal rights of people receiving mental health, learning disability and autism services, including specialised commissioned services. The guidance includes a section (developed with and approved by DHSC) on using the MHA Code of Practice.

When does mental incapacity constitute a ‘status’?

MOC (by MG) v SSWP (DLA) [2020] UKUT 0134 (AAC) Upper Tribunal (Administrative Appeals Chambers) (Upper Tribunal Judge Ward)

Other proceedings – Tribunal

Summary

Can impaired decision-making capacity constitute a 'status' for purposes of purposes of the law relating to discrimination? That was the question posed before the Upper Tribunal in *MOC (by MG) v SSWP* [2020] UKUT 0134 (AAC) in the context of Disability Living Allowance ('DLA'). The claimant had learning disabilities. He had Down's Syndrome. He was also deaf and blind. He also had a number of significant physical disabilities. His sister was his appointee for benefit purposes, and also his welfare deputy.

The claimant had been in receipt of DLA at the highest rate of each component since 6 December 1993. He was admitted to hospital in 2016, and remained in NHS hospitals for somewhat over a year. When he reported the hospital admissions to the DWP, the DWP took a decision that his DLA was not payable after the 28th day of his inpatient admission, pursuant to the operation of the relevant provisions of the Social Security (Disability Living Allowance) Regulations 1991/2890. The equivalent regulations had been disapplied in relation to those children following the decision of the Supreme Court in *Mathieson v SSWP* [2015] UKSC 47 that they breached the rights of such children under Article 14 and Article 1 and Article 1 of Protocol 1 to the ECHR and fell to be disapplied applying s.3 HRA 1998. The claimant sought by his sister to contend that the same logic applied to adults.

The Secretary of State conceded that in light of *Mathieson* the claimant had the status of a severely disabled adult in need of lengthy inpatient hospital treatment. It was submitted that there were two other statuses to which he might properly lay claim, namely:

(a) an incapacitous severely disabled adult in need of lengthy in-patient hospital treatment; and/or

(b) a severely disabled adult who lacks capacity to make decisions about care and medical treatment in need of lengthy in-patient treatment.

The Secretary of State resisted both alternative forms of status "essentially on the ground that because issues of capacity are issue-specific and because capacity may come and go, they lack a sufficient quality of durability to constitute a status and that a court should be slow to find a status based on lack of capacity because of the administrative difficulties to which it would give rise."

Upper Tribunal Judge Ward accepted that:

> *7. […] there is no easy proxy for determining whether or not a person is lacking in capacity, whether for decisions about care and medical treatment or otherwise. In the present case, a Deputy has been appointed, with functions which make the question relatively straightforward to answer. Others may have given a lasting power of attorney in respect of personal welfare decisions, in which case the Office of the Public Guardian should have been informed if it is suspected that a person is losing capacity. In yet further cases, no such formal arrangements will have been put in place and whether a person has capacity for a particular decision or not will have to be assessed on the spot in accordance with the provisions of the Mental Capacity Act. Whilst it may be the case that assessments of the capacity of a person who is in hospital but who does not have a Deputy nor has given a power*

> *of attorney for personal welfare may have to be carried out and should be recorded, not only would it be a considerable burden on the DWP to obtain that record and on NHS staff to provide it, but more fundamentally, if lack of capacity is the trigger for finding that there has been a breach of a claimant's human rights, a breach which is not present when the person does have capacity, there is a risk of people moving in and out of being the subject of a breach of the ECHR on a virtually daily basis.*

Whilst Upper Tribunal Judge Ward considered that the Secretary of State was right to accept that a fair degree of 'refining down' of the group considered to have a status was permissible:

> *10. Nonetheless, while mindful of that approach, I prefer Ms Richardson's submissions* [on behalf of the Secretary of State] *on the unsuitability of capacity as a key element in identifying a "status". I derive no assistance from Ms Bartlam's reliance on the decision of the European Court of Human Rights in Siddarbras v Lithuania (Case 55480/00). While it illustrates that a status may be acquired based on past events (past membership of the KGB), it does not help with whether a status can be defined by reference to anything as potentially evanescent as a loss of capacity (as in some cases it will be, even if in others it is anything but)*

Nonetheless, because the claimant had been conceded to have one status in any event UTJ Ward went on to consider the question of whether, if there was any differential treatment, it was justified. He found that it was, essentially on the basis that in both principle and practice, in-patient admission to hospital meant that all relevant needs of a disabled person to be met. In this, he noted that he did not consider it made a material difference that a person was acting as Deputy:

> 22. […] *Whilst anyone acting as Deputy, or indeed under a welfare lasting power of attorney, would need to have an understanding of the patient's needs and wishes, I agree with Ms Richardson it does not follow that it has to be acquired from a hands-on caring role. The reports submitted to the Court of Protection by the appointee are not in evidence and there is no evidence permitting me to conclude that acting as Deputy carried with it responsibilities to provide care to the extent claimed. The responsibilities of the Deputy are cast in terms of taking decisions, rather than the direct provision of care.*
>
> *23. There is some limited evidence suggesting that in this particular case, the appointee was required to become involved in certain respects. In a statement appended to her appeal form to the FtT the appointee explains that:*
>
> > *"Deputy/ carers required all times of day/night to be included with Multi Disciplinary Team in all decisions affecting [the claimant]. Medical staff require attendance of Deputy/carers to advise/allow them to carry out all procedures. To attend NUMEROUS meetings to discuss treatment, sign official forms and Medical/Social Services re care or treatment or transfer of [the claimant]." (emphasis in original).*
>
> *It is clear that those requirements were principally those which flowed from the function of the Deputy to take decisions*

> *on the claimant's behalf, which would be far more limited than a requirement to assist in the actual provision of care. Her oral evidence to the FtT as recorded in the FtT's Record of Proceedings in my judgment showed her involvement in consenting to procedures which the claimant had to undergo, plus the sort of involvement based on personal knowledge of the patient which up to a point the relatives of any person in hospital would have, but which will be particularly important in the case of a patient with learning disabilities.*

Having reached this conclusion, UTJ Ward at paragraph 32 noted that:

> *32. Returning to the question of a comparator, the position is different from that of a severely disabled child in need of lengthy inpatient hospital treatment, because of what is shown by the evidence about differing patterns of care for adults and children. That is unaffected by Ms Bartlam's efforts to persuade me, by considering the respective legal frameworks applicable to children and vulnerable adults, that they are in a similar position, which I do not find of assistance in the present context. Nor am I persuaded by her argument based on the particular position of 16 and 17 year olds with regard to the giving of consent. The position is different from a severely disabled person who is not in receipt of lengthy hospital inpatient treatment because the person who is not in hospital is not receiving publicly funded care via the NHS, while the person in hospital is. As regards the complaint of Thlimmenos discrimination by failing to treat the claimant differently from a capacitous severely disabled adult in need of lengthy in-patient treatment, this would depend on showing that the consequences of the claimant's lack of capacity were such that their situations were relevantly different. However, that has failed on the evidence.*

UTJ Ward noted that both parties had accepted that it was appropriate for him to have regard to the UN Convention on the Rights of Persons with Disabilities, but found that specific consideration had been given to the needs of "incapacitous severely disabled individuals," in particular in the form of the DWP's Equality Impact Assessment on retention of the hospitalisation rule, which noted that:

> *29.2.3 We have considered whether severely mentally impaired claimants who are unable to act for themselves and need help from support workers should be exempt from the policy. However, in addition to the double funding issue, this would be extremely difficult to administer and would introduce different treatment by disability type.*
>
> *29.2.4 More broadly it is arguably unfair to discriminate on specific mental health grounds and the ability to effectively identify and award such cases would be complex. In conclusion, we have no evidence to suggest that the NHS is not able to provide the right types of services for patients and no grounds therefore to continue to award care and mobility components.*

UTJ Ward therefore found that the Secretary of State was entitled to rely upon the relevant regulations to deny the claimant DLA after the 28th day of his inpatient admission.

Comment

Whilst one can admire the ingenuity of the argument advanced on behalf of the claimant, it was, in reality a claim – at least in relation to the claim based upon a status of incapacity – that was both doomed to fail on the facts and should have been doomed to fail in principle. Although not stated in terms by UTJ Ward, the very point of the concept of mental capacity as applied in England & Wales is that it is meant to be functional and decision-specific, and to be decisively different to a status based approach. One could ask as to the extent to which this always applies in practice (does, for instance, a diagnosis of severe and enduring anorexia lead almost inevitably to a conclusion that the person lacks capacity to make decisions about their nutrition?) but had the Upper Tribunal acceded to the claimant's argument, it could only have done so on the basis that (a) there was something 'stable' in the concept of mental incapacity; and (b) it was, therefore legitimate to find that lacking mental capacity was a status in and of itself. This would have been a distinctly retrograde step. Indeed, as UTJ Ward (and, in fairness, the Secretary of State recognised), the real issue was not so much who might be making decisions for the claimant but how the claimant's needs were to be met. The former might be a question for the MCA; as Lady Hale made clear in *N v ACCG* [2017] UKSC 22, the latter is not logically related to the MCA at all.

RESEARCH CORNER

We highlight here recent research articles of interest to practitioners. If you want your article highlighted in a future edition, do please let us know – the only criterion is that it must be open access, both because many readers will not have access to material hidden behind paywalls, and on principle.

This month, we highlight the article which Alex has contributed to on 'Isolation of patients in psychiatric hospitals in the context of the COVID-19 pandemic: An ethical, legal, and practical challenge' now available (in pre-print) in the International Journal of Law and Psychiatry's Special Issue: "Mental health, mental capacity, ethics and the law in the context of Covid-19 (coronavirus)." The article examines the impact of the Coronavirus Act on health and social care outside hospital; public health restrictions; the MCA under strain; the Court of Protection; medical decision-making, the MCA and scarce resource; and mental health law.

It is also available in pre-print via ResearchGate here.

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

At present, most externally conferences are being postponed, cancelled, or moved online. 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 June. 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