MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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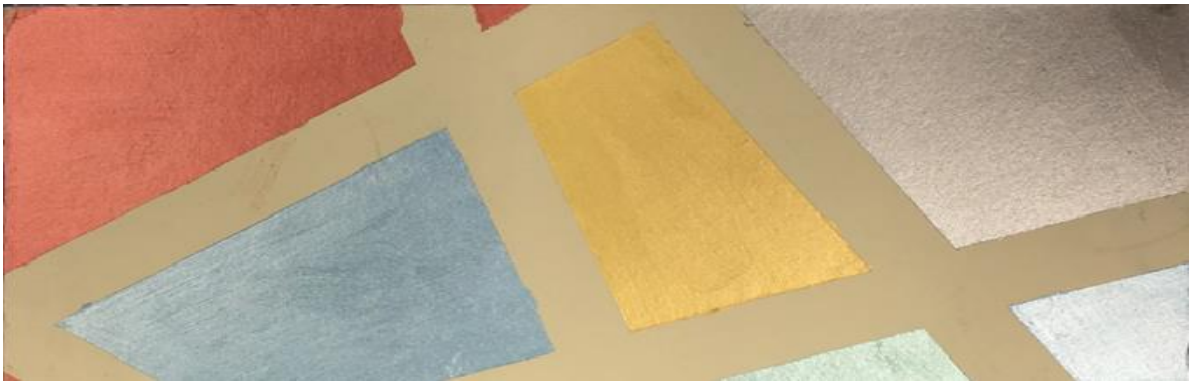

Welcome to the May 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Fact-finding in relation to coercive and controlling behaviour; habitual residence; and how recent should evidence be for the deprivation of liberty of a child?

(2) In the Property and Affairs Report: The Governments to the 'Moderninsing Lasting Powers of Attorney' consultation

(3) In the Practice and Procedure Report: Balancing privacy and open justice; costs of proceedings; and compliance with practice directions.

(4) In the Wider Context Report: Mental Health Act reform; COVID-19 in care homes; and MARSIPAN is replaced.

(5) In the Scotland Report: The World Congress; the Scott Review; and more on the PKM Litigation and Guardians' remuneration.

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

Consideration of coercive and controlling behaviour at a fact-finding hearing

MB v PB [2022] EWCOP 14 (15 March 2022) (Sir Jonathan Cohen)

Best interests - Contact

In *MB v PB (by her litigation friend, the Official Solicitor) & Oths* [2022] EWCOP 14, MB, the husband of P, applied to the Court of Protection to challenge the standard authorisation and the contact restrictions between him and his wife. Sir Jonathan Cohen was asked to make various findings of fact in relation to 44 separate allegations relating *inter alia* to: (i) patterns of coercive and controlling behaviour; (ii) the impact of MB's conduct upon caregiving staff at the hospital and care home; (iii) whether MB had interfered with the provision of care to P; (iv) the immediate impact of MB's contact with P on her; (v) the impact of MB's conduct upon P.

It was agreed by the parties that P lacked capacity to make decisions about her residence, care and contact with others.

P and MB married in 1981. They have four sons. P's sister and one of her sons (selected as the spokesperson) gave evidence in relation to the married life of P and MB – one characterised by P's unhappiness to the extent that before her youngest was born, she left with her three other children and was placed in a refuge. P was rarely allowed out by MB and she used to describe her discontent to her oldest children. P's access to her sister was also restricted. Their relationship had *"all the hallmarks of coercive and controlling behaviour"* (para 27).

In 2015, P suffered from a brain haemorrhage from which she made a complete recovery. In March 2018, she collapsed and had suffered from a sub-arachnoid haemorrhage. She was admitted to hospital and remained as an-patient in an acute unit between March and July 2018. During the hospital stay, it became apparent that MB thought he knew what was best for P and that he was completely unwilling to accept any sort of advice or comply with recognised procedures. The judge concluded that during P's hospital stay, MB would seek out junior or inexperienced staff to try and get them to do what he wanted done or to complain. There were also a number of safeguarding concerns in relation to MB's behaviour to P, which meant that many involved with P were anxious about her returning home.

P was then moved to a very specialist care home for individuals who have suffered from serious brain assaults. P was described as a very happy and cheerful person. MB would place relentless pressure on the care home staff, which culminated in notice being given due to him being overbearing. Evidence was given as to P's behaviour and presentation during and following contact.

MB accepted during closing submissions that he could not care for P. P's sister and children

strongly supported her continued placement at the care home. The issue for the court's consideration was therefore contact. The current contact between MB and P was solely virtual.

The judge found that there was a pattern of coercive and controlling behaviour both before and after P's admission into full-time care. MB had a controlling and overbearing attitude to care staff. MB sought to interfere with the care provided to P; and limit the contact she has with her sister and children. At times, P has found contact with MB upsetting and unwelcome but on other occasions, she has derived pleasure from it.

The judge emphasised the paramount importance of P being able to remain at her current care home, given there is no other placement in Wales that could meet her needs. He determined that loss or cessation of all contact between MB and P was not in her best interests. The care home agreed to a trial of face-to-face contact but not within the main building. The judge directed the parties to consider a trial period of contact whereby P's reaction could be assessed and with MB's ability to comply with a contract of expectations. He made it clear that he was not making a best interests judgment of contact at this stage but wanted its practicality to be explored.

Comment

The case was brought pursuant to section 21A of the Mental Capacity Act 2005 ("MCA 2005") by MB, even though the focus of the proceedings was on contact arrangements. The judge observed that the court has power pursuant to section 16 of the MCA 2005 to make decisions on behalf of P; and section 21A is the appropriate jurisdictional route, relying on Baker J's comments in *KK v CC* [2012] EWHC 2136, para 16. Whilst it is not unusual for courts to consider matters beyond a strict deprivation of liberty in the context of section 21A proceedings, it is a helpful reminder as to how the court justifies consideration of other related matters.

'Sufficiently recent' medical evidence for the deprivation of liberty of children

Miklic v Croatia 41023/19 (Judgment : Article 5 - Right to liberty and security : First Section) [2022] ECHR 311 (7 April 2022)

Article 5 ECHR

Summary

A child committed offences of intrusive behaviour and threats while lacking mental capacity. Relying on psychiatric and psychological expert opinions, the court placed him in a psychiatric hospital. His requests for fresh expert opinion were subsequently refused and his detention continued. He claimed that his Article 5(1)(e) rights were breached because of a failure to follow the procedure prescribed by domestic law.

The ECtHR reiterated that no deprivation of liberty conforms with Article 5(1)(e) without seeking the opinion of a medical expert and "*the objectivity of the medical expertise entails a requirement that it was sufficiently recent, the assessment of which depends on the specific circumstances of the case before it*" (para 63). Not only had the domestic procedure been breached by failing to obtain a fresh opinion but the evidence relied upon to warrant his continued confinement was 1-2 years old and "*the Court is not convinced that either of those expert opinions could be considered both objective and recent within the meaning of the Court's case-law on Article 5 § 1 (e)*" (para 74). Fresh medical expert opinion should have been sought because, *inter alia*, being of a very young age he had shown changes in his condition, a privately-

commissioned medical opinion implied his condition and evolved, and so more accurate information was needed (para 75).

So, contrary to Article 5(1)(e), the prolonging of his detention "*had on the whole been adopted in a procedure at odds with the relevant provisions of the domestic legislation and had not been based on objective and recent medical expert opinion*" (para 76).

Comment

We mention this case because of its potential relevance to the liberty protection safeguards. First, the case illustrates that care will need to be taken when obtaining medical evidence for young people, as there may not be a clear diagnosis or their condition may evolve. Second, there will be an issue regarding for how long the medical opinion can be relied upon, particularly when a 3-year renewal of the authorised arrangements is being contemplated. Whilst "*sufficiently recent*" depends on the "*specific circumstances*", as far as we are aware there is no ECtHR case where detention under Article 5(1)(e) has been authorised for three years based upon the predicted persistence of the mental disorder. That is not of course to say it would necessarily be contrary to Article 5(1)(e) to do so, but LPS certainly will test the court's jurisprudential boundaries.

Habitual residence

IM v Gateshead Council & Anor [2020] EWFC B85 (3 July 2020) (HHJ Moir)

International Jurisdiction of the Court of Protection – Other

Mental Capacity – Residence

Summary

This decision, handed down in July 2020, but only appearing on Bailii in 2022, concerned the question of whether the Court of Protection had jurisdiction to hear a challenge to a DoLS authorisation brought by a person placed by a Scottish local authority in a care home in Gateshead. From the relatively short judgment, it appears that all the parties before the court (i.e. the relevant English local authority supervisory body, the placing Scottish local authority, and IM himself by the Official Solicitor) took the view that it was necessary for the court to determine IM's habitual residence in order to have jurisdiction to determine his DoLS authorisation. On the facts of the case before her, and applying the case-law on habitual residence to them as at the point of the case coming before her HHJ Moir decided that she was not to be satisfied that the necessary degree of stability and permanence had been established to enable her to determine that IM's habitual residence has moved from Scotland to England and Wales.

Comment

As noted above, the judgment is in relatively short form, and it may have been that something has been lost in compression, but to the extent that HHJ Moir considered her jurisdiction to entertain a challenge under s.21A MCA 2005 was predicated upon IM's habitual residence in England & Wales, it is respectfully suggested that this could not be correct. The grant of a DoLS authorisation is not contingent upon a person being habitually resident in England & Wales; it is purely based upon a person's physical presence in the place for which authorisation is sought. The question of a person's ordinary residence (linked to, although not always co-terminous with, their habitual residence) comes in at the point of determining which supervisory body is responsible for the authorisation process – see paragraphs 180 and 181 of Schedule A1, making express provision for the situation where a person's ordinary residence cannot be determined.

The jurisdiction of the Court of Protection to consider a challenge against a DoLS authorisation arises expressly out of s.21A MCA, which provides the 'job spec' for the court determining such an application. There is, therefore, no reason to go to Schedule 3 and the provisions relating to habitual residence there because they are only relevant for identifying the jurisdiction of the court to exercise its functions under the MCA 'in so far as it cannot otherwise do so' (paragraph 7(1)).

Further, and to the extent relevant, an interpretation such as that applied by HHJ Moir is difficult to square with Article 5(4) ECHR, guaranteeing the right of challenge to detention. A person in IM's position would be subject to DoLS authorisation which was immune to challenge before the courts of England & Wales if they were not habitually resident there; nor would the Scottish courts be able to pronounce upon the validity or otherwise of the authorisation.

It is undoubtedly the case that habitual residence would be relevant for purposes of determining the court's wider jurisdiction under ss.15 and 16 MCA, and it may be that the compression in the judgment has led to the elision of the court's consideration of its jurisdiction under s.21A and ss.15/16. We would hope that in any future case involving these issues (and we are aware of a significant amount of cross-border 'traffic' in this context) there will be the opportunity to revisit this decision.

Seminar: Restraint and Positive Behaviour Support Plans for people with Learning Disabilities

Tor and Dr Theresa Joyce will be holding a seminar (chaired by Senior Judge Hilder) on their recent paper to assist legal professionals and judges in understanding and responding to PBS plans that include the use of physical restraint against people with learning disabilities. There will be an opportunity for questions and discussion. Questions can be sent in advance to marketing@39essex.com or during the seminar using Zoom's Q&A function. People can attend either remotely or in person, and can find full details (including how to register) 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.

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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.

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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.

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

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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.

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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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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 and Seminars

Physical restraint and PBS plans in the Court of Protection, 26 May 2022, 5:00-7:00PM

Victoria Butler-Cole QC and Dr Theresa Joyce will be holding a seminar (chaired by Senior Judge Hilder) on their recent paper to assist legal professionals and judges in understanding and responding to PBS plans that include the use of physical restraint against people with learning disabilities. There will be an opportunity for questions and discussion. Questions can be sent in advance to marketing@39essex.com or during the seminar using Zoom's Q&A function. People can attend either remotely or in person, and can find full details (including how to register) here.

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

17 June 2022	DoLS refresher for mental health assessors (half-day)
14 July 2022	BIA/DoLS legal update (full-day)
15 July 2022	Necessity and Proportionality Training (9:30-12:30)
15 July 2022	Necessity and Proportionality Training (13:30-16:30)
16 September 2022	BIA/DoLS legal update (full-day)

To book for an organisation or individual, further details are available here or you can email Neil.

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.

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.

Conferences (continued)

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.

Essex Autonomy Project Summer School 2022

Early Registration for the 2022 Autonomy Summer School (*Social Care and Human Rights*), to be held between 27 and 29 July 2022, closes on 20 April. To register, visit the Summer School page on the Autonomy Project website and follow the registration link.

Programme Update:

The programme for the Summer School is now beginning to come together. As well as three distinguished keynote speakers (Michael BACH, Peter BERESFORD and Victoria JOFFE), Wayne Martin and his team will be joined by a number of friends of the Autonomy Project who are directly involved in developing and delivering policy to advance human rights in care settings. These include (affiliations for identification purposes only):

> Arun CHOPRA, Medical Director, Mental Welfare Commission for Scotland

> Karen CHUMBLEY, Clinical Lead for End-of-Life Care, Suffolk and North-East Essex NHS Integrated Care System

> Caoimhe GLEESON, Programme Manager, National Office for Human Rights and Equality Policy, Health Service Executive, Republic of Ireland

> Patricia RICKARD-CLARKE, Chair of Safeguarding Ireland, Deputy Chair of Sage Advocacy

Planned Summer School Sessions Include:

> Speech and Language Therapy as a Human Rights Mechanism

> Complex Communication: Barriers, Facilitators and Ethical Considerations in Autism, Stroke and TBI

> Respect for Human Rights in End-of-Life Care Planning

> Enabling the Dignity of Risk in Everyday Practice

> Care, Consent and the Limits of Co-Production in Involuntary Settings

The 2022 Summer School will be held once again in person only, on the grounds of the Wivenhoe House Hotel and Conference Centre. The programme is designed to allow ample time for discussion and debate, and for the kind of interdisciplinary collaboration that has been the hallmark of past Autonomy Summer Schools. Questions should be addressed to: autonomy@essex.ac.uk.

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.

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