Mental Capacity Law Newsletter March 2015: Issue 54

Court of Protection: Health, Welfare and Deprivation of Liberty

Editors
Alex Ruck Keene
Victoria Butler-Cole
Neil Allen
Annabel Lee
Simon Edwards (P&A)

Scottish contributors
Adrian Ward
Jill Stavert

Introduction

Welcome to the March 2015 Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a case rivalling *Neary* in its importance, a case at the outer limit of the COP's powers and an update on *Re X*;

(2) In the Property and Affairs Newsletter: recent decisions of Senior Judge Lush, including a rare refusal of an application by the OPG for revocation of a power of attorney including an interesting assessment of the place of P's wishes and feelings;

(3) In the Practice and Procedure Newsletter: the significant case of *Bostridge* on nominal damages, extreme product champions, veracity experts and the place of morality;

(4) In the Capacity outside the COP Newsletter: two extremely important decisions of Charles J in relation to the MHT and patients who may lack capacity, an extremely significant Strasbourg decision on Article 5; anonymisation, the capacity to drive; and a new SCIE directory of MCA resources;

(5) In the Scotland Newsletter: an appreciation of Sheriff John Baird, an update on deprivation of liberty in the context of the SLC report, new guidance from the MWC about managing the finances of those lacking the material capacity; an update on incapacity matters addressed (or not) in proposals for court reform and the further Devolution Command paper, and an update on the Assisted Suicide Bill.

And remember, you can now find all our past issues, our case summaries, and much more on our dedicated sub-site here.

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For all our mental capacity resources, click here. Transcripts not available at time of writing are likely to be soon at www.mentalhealthlaw.co.uk.

Update on *Re X*

The Court of Appeal heard the appeal against the decisions in *Re X* on 17 and 18 February 2015. Judgment is reserved, and we will update you as soon as we have any news. In the interim, the procedure should continue to be used, but we would strongly suggest that the procedure should not be used in circumstances where P has no family members and an independent advocate has not been appointed to elicit their views and identify whether any of the 'triggers' are present.

Neary 2? Making Article 5(4) real

AJ (Deprivation of Liberty Safeguards) [2015] EWCOP 5 (Baker J)

Article 5 ECHR – Deprivation of Liberty – DOLS Authorisations

Summary

In an extremely important judgment, Baker J has given detailed guidance as to the heavy burden that is placed upon local authorities in making sure that individuals deprived of their liberty in care homes (and, by extension, hospitals) are afforded effective access to the Court of Protection so as to secure their rights under Article 5(4) ECHR. He has also confirmed again the importance of taking appropriate steps in advance where it is clear (or should be clear) that a person will be deprived of their liberty.

For those in a hurry, Baker J gave at the conclusion a series of wider lessons, which we reproduce here, although this is no substitute either for reading the balance of this note or – more importantly – the judgment itself.

"113. First, I emphasise that the scheme of the DOLS is that, in the vast majority of cases, it should be possible to plan in advance so that a standard authorisation can be obtained before the deprivation of liberty begins. It is only in exceptional cases, where the need for the deprivation of liberty is so urgent that it is in the best interests of the person for it to begin while the application is being considered, that a standard authorisation need not be sought before the deprivation begins.

114. Secondly, professionals need to be on their guard to look out for cases where vulnerable people are admitted to residential care ostensibly for respite when the underlying plan is for a permanent placement without proper consideration as to their Article 5 rights.

115. Thirdly, a RPR should only be selected or confirmed by a BIA where he or she satisfies not only the criteria in regulation 3 of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 but also the requirements of paragraph 140 of Schedule A1 of the MCA. This requires that the BIA not only checks that the facts set out in regulation 3 are satisfied but also carries out an analysis and reaches a judgment as to whether the prospective representative would, if appointed, (a) maintain contact with the relevant person; (b) represent the relevant person in matters relating to or connected with the Schedule and (c) support the relevant person in matters relating to or connected with the Schedule.

116. Fourthly, the local authority is under an obligation to satisfy itself that a person selected for appointment as RPR meets the criteria in regulation 3 and in paragraph 140 of Schedule A1. If the local authority concludes that the person selected for appointment does

not meet the criteria, it should refer the matter back to the BIA.

117. Fifthly, it is likely to be difficult for a close relative or friend who believes that it is in P's best interests to move into residential care, and has been actively involved in arranging such a move, into a placement that involves a deprivation of liberty, to fulfil the functions of RPR, which involve making a challenge to any authorisation of that deprivation. BIAs and local authorities should therefore scrutinise very carefully the selection and appointment of RPRs in circumstances which are likely to give rise to this potential conflict of interest.

118. Sixthly, an IMCA appointed under section 39 D must act with diligence and urgency to ensure that any challenge to an authorisation under schedule A 1 is brought before the court expeditiously. Failure to do so will lead to the evaporation of P's Article 5 rights.

119. Seventhly, the appointment of a RPR and IMCA does not absolve the local authority from responsibility for ensuring that P's Article 5 rights are respected. The local authority must monitor whether the RPR is representing and supporting P in accordance with the duty under paragraph 140 and, if not, consider terminating his appointment on the grounds that he is no longer eligible. The local authority must make sufficient resources available to assist an IMCA and keep in touch with the IMCA to ensure that all reasonable steps are being taken to pursue P's Article 5 rights.

120. Finally, in circumstances where a RPR and an IMCA have failed to take sufficient steps to challenge the authorisation, the local authority should consider bringing the matter before the court itself. This is likely, however, to be a last resort since in most cases P's Article 5 rights should be protected by the combined efforts of a properly selected and appointed RPR and an IMCA carrying out their duties with appropriate expedition."

Although the principles set down by Baker J are of general application, the particular factual context in which they arose is of some importance, not least because they represent a not uncommon state of affairs.

An elderly lady, AJ, had lived for a considerable period of time in an annexe of the home of her niece and her husband ('Mr and Mrs C'). She developed vascular dementia and became increasingly dependent on others, in particular Mrs C. She was, however, very reluctant to acknowledge her condition, and insistent that she could manage without any help. In April 2013, she signed LPAs in respect of health and welfare and property and financial affairs naming Mr and Mrs C as donees.

At around this time, AJ was referred to social services by a psychiatric nurse. When a local authority case co-ordinator visited on 22nd April 2013, Mrs C raised the possibility of respite care for AJ to prevent the breakdown of the care arrangements. In June 2013, Mrs C made it clear that she could not continue with her caring role in its current form as she and her husband had planned a fortnight's holiday. She said that she now felt that permanent residential care was required. The local authority social worker offered to find the nearest suitable home for respite while Mr. and Mrs. C were away, and duly identified a home, X House, for that purpose. It was clear that, in fact, it was hoped that if AJ settled she could remain in the care home on a permanent basis.

On 13 June, just before they went on holiday, Mr and Mrs C took AJ to X House. Upon arrival, she stated that she did not wish to be there and repeatedly asked to leave. No assessment under

Schedule A1 to the MCA 2005 had been carried out prior to her arrival but an urgent authorisation under the Schedule was granted by the manager at X House on 14 June. The urgent authorisation recorded inter alia that AJ had been placed at the home whilst her main carers, Mr and Mrs C, went on holiday for two weeks, "*with a view to* [AJ] *staying here on a permanent basis*." On the same day, a request was made to the local authority as the supervisory body for a standard authorisation, which was granted for a period of 21 days because of the uncertainty of the situation.

Mr C was appointed AJ's RPR, on the basis that AJ had a donee whose power under the LPA permitted them to select a family member, friend of carer to be their RPR, that the donee had selected Mr C to act in that capacity and that he was eligible to be appointed. It was clear at this stage that Mr C supported AJ continuing to be accommodated in a care home, even though it amounted to a deprivation of her liberty. A s.39D IMCA was also appointed, a Mr R.

At the start of July 2013, AJ was moved to Y House, and remained there thereafter, subject to repeated standard authorisations. Despite AJ's known opposition to living at Y House, no legal challenge was made to the standard authorisations for several months. As Baker J noted, "[t]*he reasons for this failure lie at the heart of this case*" (paragraph 18). A critical reason was the lack of effective communication between Mr C and Mr R.

When Mr R and Mr C finally spoke in November 2013 Mr R realised that Mr. C was not going to initiate proceedings and after further conversations with his manager he agreed to act as her litigation friend and instruct solicitors to make an application to the Court on her behalf. Proceedings were eventually issued in December 2013, challenging the standard authorisation made in July 2013. Mr R was replaced in March 2014 as AJ's litigation friend by the Official Solicitor. Although ultimately the substantive challenge under s.21A MCA 2005 was not actively pursued, in view of evidence as to a deterioration in AJ's condition and behaviour, and to the fact that there was no domiciliary care agency willing to offer to provide care, the Official Solicitor (1) raised concerns as to the extent to which the care plan accurately reflected the type and degree of physical interventions being used; and (2) pursued a claim for a declaration under s.7 HRA 1998 that AJ's rights under Article 5(1), 5(4) and 8 ECHR had been breached (but not a claim for damages). In order to determine the claim, Baker J conducted a hearing in May 2014 at which he heard oral evidence from Mr R, Mr C and the local authority's BIA, Ms G, and then subsequently sought (and received) extensive written submissions, inter alia, on the effect of the *Re X* judgment).

Restraint

As a preliminary issue, Baker J addressed the question of the use of restraint and its documentation. It became clear that the level of physical restraint being used by carers in Y House was greater than acknowledged in the care plan (and indeed, even in an amended care plan).

As Baker J noted:

> "*25. In supplemental submissions, Ms Butler-Cole on behalf of the Official Solicitor submitted that in any case in which physical restraint is used in the care of an incapacitated adult, any physical intervention, whether considered to amount to "restraint" or not, should be recorded in the care plan*

maintained by the service provider and monitored by the statutory body responsible for commissioning the person's care. Furthermore, precise details of all physical interventions should be ascertained and documented as part of the Deprivation of Liberty Safeguards process or indeed any best interest assessment from direct discussion with care staff implementing the interventions

26. I agree. In this case, whilst there may at one stage have been a discrepancy between the care plan and what was actually being provided, I am now satisfied that the local authority has addressed this issue in its amended plan. If, however, any further issue arises, or any party seeks any further declaration or order on this issue, the matter should be referred to me for further review."

Article 5(4)

Baker J provided a careful and comprehensive summary of the principles to be derived from the case-law relating to Article 5(4), which merits reproduction in full:

"35. In applying [the provisions of Schedule A1 to the MCA 2005], and assessing whether there was any infringement of Article 5(4) in this case, I have had regard to the case law, both European and domestic. The leading European cases are X v United Kingdom (1981) 4 EHRR 188; Winterwerp v The Netherlands (1979) 2 EHRR 387; Waite v UK [2002] ECHR 804; Shtukatarov v Russia (2008) 54 EHRR 962; Stanev v Bulgaria (2012) 55 EHRR 696, MH v UK [2013] ECHR 1008, and, most recently, Ivinovic v Croatia [2014] ECHR 964. From those authorities, the following principles can be summarised:

(1) "There is a positive obligation on the state to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The state is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge": Stanev v Bulgaria at paragraph 120.

(2) The procedure required by Article 5(4) must have a judicial character and be independent of the detaining authority: X v United Kingdom, supra, para 53, MH v UK, supra, para 77(c).

(3) Article 5(4) guarantees a remedy that must be accessible to the person concerned: MH v UK, supra, para 76.

(4) The state has an obligation to ensure that a mentally incapacitated adult is afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body: Ivinovic v Croatia, supra, para 45.

(5) Special procedural safeguards may be called for in order to protect the interests of persons who, on account of mental disabilities, are not fully capable of acting for themselves. Where a person lacks the capacity to instruct lawyers directly, the safeguards required may include empowering or even requiring some other person to act on that person's behalf: Winterwerp v The Netherlands, supra, para 60, MH v UK, supra, paras 77(e) and 92.

(6) Article 5(4) may not be complied with where access to a court is dependent on the exercise of discretion by a third party, rather than an automatic entitlement.

> *Where the third party supports the deprivation of liberty, reliance on the third party to initiate proceedings may not satisfy the requirements of Article 5(4): Shtukatarov v Russia, supra, para 124.*
>
> *(7) An initial period of detention may be authorised by an administrative authority as an emergency measure provided it is of short duration and the individual is able to bring judicial proceedings speedily to challenge the lawfulness of any such detention including, where appropriate, its lawful justification as an emergency measure: MH v UK, supra, para 77(a).*
>
> *(8) The likelihood of the judicial hearing leading to release from detention is irrelevant. Article 5(4) is first and foremost a guarantee of a fair procedure for reviewing the lawfulness of detention – an applicant is not required, as a precondition of enjoying that protection, to show that on the facts of his case he stands any particular chance of success in obtaining his release: Waite v UK, supra, para 59.*
>
> *36. In domestic law, the fundamental principle to be applied by the Court of Protection in cases of deprivation of liberty was summarised by Peter Jackson J in Neary v LB of Hillingdon [2011] EWHC 1377 (COP) at para 202:*
>
> > *'… there is an obligation on the State to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court.'*

Baker J noted the "guidance" given by the President in *Re* X as to the question of whether P needed to be joined as a party to proceedings for judicial authorisation for deprivation of liberty, and, in particular, paragraph 19, the conclusions of the President as to Article 5(4) as regards the requirements of "representation" if P is not to be a party to proceedings.

Initial authorisation

Baker J found that it was clear that Mr and Mrs C were clearly saying before they went on holiday that they could not continue to care for AJ and that a move to permanent residential care was required.

Therefore:

> *"47. As it was clear that AJ would not go willingly to X House, and that such a move would only be achieved by depriving her of her liberty, the local authority, prior to that move taking place, ought to have either carried out a DOLS assessment or made an application to the Court. During the first few days of her stay at X House, there was no authorisation in place, nor was there an RPR or an IMCA appointed to support her. The fact that the first two weeks of her stay at X House were nominally labelled as "respite" care cannot justify the local authority's failure either to instigate the DOLS process or apply to the court. The local authority plainly knew that Mr. and Mrs. C would not agree to AJ returning home at the end of their holiday and that, whatever may have been said about respite care, the move was intended to be permanent from the outset.*
>
> *48. In this case, the local authority had sufficient time to commence the process of authorisation. This case therefore fell within the 'vast majority of cases' in which, as Chapter 3 of the Code of Practice recognises, "it should be possible to plan in advance so that a standard authorisation can be obtained before the deprivation of liberty begins". Given the scheme of the Act is that urgent authorisations are expected to last for no*

> *more than seven days save in exceptional circumstances, the local authority ought to have been able to complete the process of assessment and grant of a standard authorisation before AJ arrived at X House on 13th June. In the alternative, given the fact that AJ's objections to being placed in residential care were clear and well-known, the local authority could have applied straight to the Court of Protection without going through the authorisation procedure under Schedule A1. As Keehan J observed in NHS Trusts 1 and 2 v FG [2014] EWCOP 30 at paragraph 101(iii), 'the mere fact that a deprivation of liberty could be authorised under Schedule A1 does not absolve [the authority] from making an application to the court where the facts would otherwise merit it.'"*

Importantly, this failure meant that there was no proper analysis of alternative options for AJ's care, nor was she afforded any opportunity to have her views considered, before the move to X House occurred. Baker J also found that it was irrelevant that the initial move took place, as an measure of interim support, not on the basis of s.21 National Assistance Act 1948, but rather under the statutory duties imposed by s.47(5) of the National Health Service and Community Care Act 1990. As he noted at paragraph 50: "[the consequence of the decision was that she, an incapacitated adult, was thereby deprived of her liberty. The local authority was therefore under an obligation to comply with Article 5 and it was unlawful under s.6 of the Human Rights Act 1998 for the authority to act in a way that was incompatible with AJ's rights under that Article."

Baker J therefore found at paragraph 51 that there had been:

> *"a clear breach of the principles identified in the European and domestic case law. As the European Court made clear in Stanev v Bulgaria, supra, the state is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge. In this case, the local authority was in breach of that obligation by failing either to instigate the standard authorisation procedure under Schedule A1 or alternatively apply direct to the Court of Protection in advance of AJ's admission to X House."*

The RPR

The core of the Official Solicitor's case on behalf of AJ was that the local authority ought not to have appointed Mr C to act as RPR at all, or at least not without ensuring that he would bring proceedings under s.21A in the light of AJ's known objections, or alternatively, having appointed him, replaced him when it became apparent that he was not going to facilitate a speedy review of her detention.

After a detailed analysis of the (inordinately) complicated statutory provisions, Baker J concluded that Mr C was not eligible to be AJ's RPR because:

1. A person is only eligible to be an RPR if they will, as part of supporting the relevant person, take appropriate steps to support the person to challenge any authorisation granted under Schedule A1 (paragraph 82). This construction of paragraphs 140(a) and (b) of Schedule A1 was supported, Baker J, noted by the Strasbourg case-law, in particular the case of *Shtukatarov v Russia*;

2. The evidence *"manifestly demonstrate[d] that Mr. C was unwilling or at least very reluctant to represent or support AJ in challenging the authorisation because he and his wife had*

concluded that they could no longer safely look after her at home and he believed that it was in her best interests to live in residential care" (paragraph 84). As Baker J noted, Mr C had immediately noted that he had a conflict of interest, and raised it with Ms G. Ms G's response had been to arrange for the appointment of an IMCA, but *"the appointment of an IMCA cannot overcome the ineligibility of the RPR*" (paragraph 84).

3. Further, at paragraph 86, Baker J accepted the Official Solicitor's submission that:

> *"the local authority ought not to have appointed Mr. C as RPR notwithstanding the fact that he was selected by the BIA. The European and domestic case law make it clear that there is a positive duty on public authorities under the Convention to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court, to ensure that a mentally incapacitated adult is afforded independent representation, enabling them to have their Convention complaints examined before a court or other independent body, and not to permit access to a court to be dependent on the exercise of discretion by a third party who supports the deprivation of liberty. As the President has made clear in of Re X and Others (Deprivation of Liberty) [2014], it is not always necessary for P to be joined as a party to any proceedings, but the state is under a clear duty to ensure that he or she is able to challenge a deprivation of liberty in a process that is judicial, accessible and independent of the detaining authority. To my mind, these obligations impose on the local authority as supervisory body a duty to scrutinise the prospective RPR selected under regulations 5 to 8 before making the appointment. I do not accept Mr. Dooley's submission that it was not open to the local authority as supervisory body to refuse to appoint Mr. C as RPR. The fact that, under regulation 11, a supervisory body may not (except where regulation 9 applies) appoint a RPR unless the person is recommended by a BIA under regulation 7 or 8 does not mean that it is obliged to appoint a person who is so recommended. Where a supervisory body has reason to believe that the person selected as RPR will not comply with the obligations under paragraph 140 of the Schedule, its duties under Article 5 compel it to refer the matter back to the BIA.*

4. Having (wrongly) appointed Mr C as RPR, the local authority as the supervisory body ought to have quickly realised (1) that AJ was extremely unhappy in residential care and wished to challenge the authorisations and (2) that Mr C was not taking any or any sufficient steps to represent or support her in pursuing that challenge. "*The local authority should therefore have taken steps to replace Mr C as RPR when it became apparent that he was not intending to issue proceedings promptly and that there was not going to be a speedy review of AJ's detention by a court, since s.21A proceedings must be brought very promptly to ensure compliance with Article 5(4)*" (paragraph 90).

IMCAs

Baker J was called to determine a number of questions in relation to the provisions relating to s.39D IMCAs. In summary form, he concluded that:

1. The functions of a section 39D IMCA are as set out in that section, as supplemented by Schedule A1, and concern matters relating

to the deprivation of liberty provisions under the Schedule. An IMCA appointed under section 39D does not have a broader, general role of representing or supporting P, and is not under a general duty to assist in determining what is in P's best interests but, rather, to perform the specific functions set out in section 39D(7), (8) and (9) [i.e. in very broad terms, supporting the RPR and the relevant person to understand matters relating to the authorisation and helping them exercise their rights to apply to court or for a Part 8 review] (see paragraph 108);

2. Where P has executed a LPA, the duty to appoint an IMCA under section 39D is not excluded under section 40(1)(b) unless the donee of the LPA is authorised to make decisions in relation to the matters in section 39D(7) and (8) (paragraph 112);

3. Standard health and welfare LPAs do not grant authority to the donee to make decisions relating to matters to which the duty to appoint an IMCA under section 39D(2) relates (paragraphs 115-6);

4. The fact of the grant of a standard health and welfare LPA will not therefore relieve a local authority of its duty to appoint a s.39D IMCA if any of the three cases in 39D(3),(4) or (5) arise [i.e. the relevant person or their RPR request one or the local authority consider the appointment of one is – in essence – necessary to ensure the person's rights are secured] (paragraph 116).

On the facts of the case, therefore, Baker J concluded that, in fact, a s.39D IMCA had to be appointed.

Very importantly, Baker J found that the fact of the appointment of the s.39D IMCA did not absolve the local authority of further responsibility:

> *"125. The principal errors committed by the local authority in this case were, as analysed above, the failure to initiate the authorization process prior to the 13th June 2013 and wrongly appointing Mr. C to act as RPR. In my judgment, however, the local authority's obligations did not stop there. The local authority thought that it would be meeting its obligations by appointing an IMCA and making resources available to assist the IMCA to act as litigation friend. As set out above, the appointment of an IMCA under section 39D was entirely appropriate and, although Mr. C was uncertain about how to take matters forward, I accept the local authority's case that resources were in fact available, for example to assist an IMCA acting as litigation friend. In most cases, that would in all probability have been sufficient. In this case, however, the local authority knew that Mr. C was unwilling or at least very reluctant to represent or support AJ in challenging the authorisation because he and his wife had concluded that they could no longer safely look after her at home and he believed that it was in her best interests to live in residential care. In those circumstances, I find that the appointment of Mr. R and the provision of resources to assist him in his role as IMCA did not absolve the local authority from its continuing obligation to ensure that AJ's rights under Article 5(4) were respected. The local authority knew at all times that AJ did not wish to be in X House or Y House. In those circumstances, I consider that the local authority, in addition to monitoring the actions of Mr. C as RPR and taking steps to replace him if appropriate, should have made enquiries as to why the IMCA was not taking steps to ensure that the right to apply to the court was being exercised."* (emphasis added)

Baker J emphasised that – as a last resort – the local authority should have considered bringing proceedings before the court itself. This was "[p]*lainly this is a last resort,* because *of the comprehensive and complex provisions for the selection and appointment of RPRs and the appointment of IMCAs are followed, and if RPRs and IMCAs appointed under these provisions carry out their responsibilities as they should, the rights of an incapacitated person to challenge a deprivation of liberty normally will be protected*" (paragraph 126).

However, the local authority "remained under a continuing and positive obligation to "ensure that AJ's Article 5(4) rights were respected. Thus, if it was not satisfied that the IMCA was taking the necessary steps to apply to the court, and if in all the circumstances it considered such a course to be appropriate, it should have brought court proceedings itself." (paragraph 126, emphasis added).

Conclusion

Baker J found that the case told a sorry tale of a series of failures by a number of people to ensure that the procedures designed to ensure that AJ's rights under Article 5 were respected, for which ultimate responsibility lay with the local authority. He therefore granted the declarations sought by the Official Solicitor.

Wider practice

As set out above, Baker J then pulled the threads together to give wider guidance for practitioners.

Comment

Whilst much of the judgment concerned extremely technical interpretation of the provisions of the MCA and the relevant secondary legislation (much of which strongly suggests that the whole regime is beyond repair as a statutory mechanism), it is, at heart, a vitally important assertion of the importance of public bodies taking appropriate steps:

1. To recognise when apparently beneficent steps will lead to a deprivation of liberty;

2. To be honest about what exactly those steps will be;

3. To pause before taking those steps to check whether, in fact, they are necessary or whether a less restrictive option can be pursued;

4. If they are necessary, to ensure – wherever possible – that the necessary authority is in place before they are taken;

5. To recognise the continuing and positive obligation imposed upon local authorities to ensure that those subject to standard authorisations are afforded an effective right to challenge their detention before the Court of Protection.

The case is also a clear recognition of the 'hard-edged' nature of rights under Articles 5(1) and 5(4). It is clear that Mr C thought that he was acting in AJ's best interests, and that, as a family member, he had a more complete and rounded picture of the circumstances than an RPR who had only met AJ on a limited number of occasions. However, through a truly Lemony Snicket series of events, her family members and the local authority ended up inadvertently conspiring to preclude her raising her fundamental objections to being "dumped" (as her friends perceived it) in a care home.

The final point relates to the preliminary point determined by Baker J in relation to the need for honesty in care plans as to exactly what level of restraint is being imposed upon an individual. This point is equally, if not more, important in relation to those in respect of whom *Re X* applications are being made – where, as matters currently stand, the court will only have the applicant's word for what is going on…

The outer limits of the MCA

The Mental Health Trust & Ors v DD and BC [2015] EWCOP 4 (Cobb J)

Best interests – capacity – medical treatment – deprivation of liberty – CRPD

Summary

This is the sixth judgment in nine months, five of which have been publicly reported, concerning DD – a 36-year old woman with Autistic Spectrum Disorder and mild to borderline learning disability – who has an extraordinary, tragic, and complex obstetric history. Permanent substitute carers, five of them in adoptive homes, are raising her six children, now aged between 6 months and 12 years. She has no continuing contact with any of them and has never demonstrated the desire or capacity to engage with the level of support which is likely to be required to assure a child's safety in her care. A summary of the background to the proceedings can be found here.

The earlier judgments concerned:

1. Ante-natal care and pre-birth scanning ([2014] EWCOP 8);

2. The manner and location of delivery of the baby (caesarean section in hospital) ([2014] EWCOP 11);

3. The administration of short-term contraception at delivery, and education about future contraception ([2014] EWCOP 13);

4. The administration of short-term contraception post-delivery ([2014] EWCOP 44);

5. The further administration of short-term contraception pending this hearing (December 2014).

We summarised and commented upon the two major decisions (2) and (3) here.

The present instalment called upon Cobb J to determine DD's capacity to litigate and to consider and make decisions concerning long-term contraception and/or therapeutic sterilisation, and, if lacking such capacity, to determine what was in her best interests. His Lordship held that she lacked the relevant capacity and that it was in her best interests to be sterilised. It should be stressed at the outset that this is an exceptional case on its facts requiring judicial relief in most extreme circumstances.

(1) Mental incapacity

Illustrating the importance of identifying the relevant information before determining capacity, Cobb J held:

> *"66. … [I]n deciding on contraception, type of contraception and/or sterilisation, DD would in my judgment be expected to have regard to the following 'relevant information' specific to her:*
>
> *i) the risk of a thrombo-embolic disease during any future pregnancy (as mentioned above, DD suffered a*

thrombotic embolism during her fourth pregnancy);

ii) *the risk of delivering a pre-term infant (her fourth child was born at 29 weeks and suffered breathing difficulties);*

iii) *the impact on DD's mental and emotional health of any further pregnancy (DD has suffered from a delusional disorder following her second and third pregnancies);*

iv) *the additional risks of a home birth for DD (which would always be likely to be her preferred mode of delivery);*

v) *the risk of placenta accreta; as mentioned above ([9](ii)), given that DD has undergone four caesarean sections, this would be particularly dangerous for DD, given the significant risk of extensive haemorrhaging at the point of removal; if bleeding cannot be stemmed DD faces the prospect of hysterectomy;*

vi) *that she faces considerable (and, with each pregnancy, increasing) risks to her life through the delivery of any child. Vaginal birth after caesarean carries considerable risks associated with rupture of the uterus; this is particularly acute given that the uterine wall is now seen to be 'tissue thin'; caesarean section carries risk of operative failure, adhesions or bowel or bladder injury, and the general risks associated with general anaesthetic."*

After a careful and comprehensive analysis of the evidence, it was decided that, by virtue of her Autistic Spectrum Disorder, "[t]*he evidence strongly indicates that DD is unable to retain much, if any, information relevant to this critical decision. However, I am wholly satisfied that she is unable to understand, and more specifically to weigh, the relevant information*" (para 79).

(2) Human rights

The proposed treatment plan involved authorising the applicants to enter her home, if necessary by force, and remove and convey her to hospital as a day patient for the sterilisation procedure under general anaesthetic, and to use reasonable and proportionate measures to provide the treatment, even if any deprivation of liberty resulted. DD's human rights considerations were inextricably bound up in the best interests determination.

Permission to intrude into the privacy and sanctity of her home and authorising compulsory treatment clearly interfered with Article 8. Moreover, insofar as the proposed sterilisation was concerned, Cobb J held that "private life" under Article 8 incorporated the right to respect for both the decisions to become and not to become a parent which applied to both DD and her partner, BC, who had a more significant learning disability. Interestingly, with respect to Article 12 (the right to marry and to found a family), his Lordship held:

> *"100. Although Article 12 reflects an absolute right, its limits remain poorly defined. Both counsel submit that Article 12 ECHR does not contain a free standing right to found a family in the absence of marriage; they submit that this is one 'conjunctive' right, not two 'disjunctive' rights. In my view the words "this right" in the Article strongly suggests that these two apparently separate rights, which are capable of operating independently of each other (i.e. "to marry" and "to found a family"), are in fact to be treated as linked, indeed effectively as one single right, and therefore is of no immediate application here.*

> *101. It seems to me, in any event, that even if "the right… to found a family" were to be viewed independently of the "right to marry" it would offer little more protection to the individual (DD) than the provisions of Article 8. I would further have had little trouble in concluding that the sterilisation procedure proposed is neither an arbitrary nor disproportionate interference with any Article 12 right to found a family (if it were indeed found to exist separate from marriage). As I have heard no detailed contrary argument beyond that reflected in this judgment, it is not appropriate, or necessary, for me to make further comment."* (emphasis added)

Further pregnancy, especially if concealed from the authorities, would be a significantly life-threatening event for DD. The risk of uterine rupture was not predicable and, were it to occur, would almost certainly be fatal to her and the infant if a vaginal birth were attempted unsupervised outside of a maternity unit. Not intervening therefore potentially engaged her right to life under Article 2:

> *"32. … It may well be that as the jurisprudence further develops beyond Rabone, DD's current situation would be considered to give rise to an operational duty. But my view, on these facts and at this time, is that the risk to DD's life is not so 'immediate' as to impose on the Applicants a positive operational duty to act under Article 2, separate from its statutory and common law obligations."*

Interesting reference was also made to the CRPD:

> *"102. I have been addressed briefly by counsel on the potential import of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), ratified by the UK in 2009 although not yet incorporated into English law. In my judgment, no discrete argument under the UNCRPD arises in this case. In any event, as an undomesticated international instrument, the Convention has no direct effect (see Lord Bingham in A v Secretary of State for the Home Department [2005] UKHL 71; [2006] 2 AC 221 at [27]) and I do not consider it necessary to address its potential relevance further."*

(3) Best interests

Four of DD's six children were born by caesarean section, and four children were born in the last five years. The realistic options with regard to best interests were limited to (a) the insertion of a 'coil' or (b) laporoscopic sterilisation. This was a rare case because the pregnancy stakes were high: DD could pay for pregnancy with her life. The professionals were unlikely to be made aware of the removal of a long-term coil, leaving her exposed to the risk of further pregnancy. Moreover, repeated administration of long-term contraceptive, by way of three-monthly injections or repeated coil insertion, would cause further intrusion into her private life which she found utterly objectionable.

Cobb J emphasised that "best interests" was not confined to best "medical" interests but instead embraced a wider notion. In a careful balancing exercise, to which we cannot here do justice, his Lordship considered the benefits and burdens of the coil and sterilisation options (paras 108-111). Those in favour of the latter considerably outweighed the former. There were also two factors of magnetic importance namely:

1. Future pregnancy poses such a high risk to DD's life that the option which most effectively reduces the prospects of this should be preferred; this is one of those exceptional cases where medical necessity justifies the considerable interference;

2. Sterilisation is the treatment which most closely coincides with DD's dominant wishes and feelings to be left alone to enjoy a 'normal' life free from intrusion by health and social services.

Her fertility was not found to be a magnetic factor: "*while this case is not about eugenics, it is clear that her fertility brings no realistic prospect of parenting a child. Rather than being a benefit, it is a burden to her, bringing with it the prospect of ongoing long-term intrusion by health and social services into her life*" (para 114). Her wishes and feelings (paras 115-122), and those of her partner (paras 123-128), were taken into account during the detailed best interests analysis.

With regard to less restrictive options, Cobb J held:

> *"97. Section 1(6) does not require me necessarily to choose the less restrictive option where a choice exists. I am obliged to have "regard" to the principle of less intervention, but can plainly opt for the intervention which is not the least restrictive if it is in the best interests of the individual involved: see C v A Local Authority [2011] EWHC 1539 (Admin) per Ryder J, at [61].*
>
> *98. It is accepted by counsel, unsurprisingly, that sterilisation is not the 'less restrictive' medical option in terms of irreversible (or largely irreversible) treatment to bring an effective end to child-bearing opportunities for DD; it is indeed the more, or most, restrictive. DD's "rights and freedoms" must be viewed in a wider context than just the medical procedure itself; her 'rights and freedoms' include the clear right to respect for her privacy. Sterilisation is in this context, in fact, much more likely to free her from further intrusion of her 'private life' from professionals, whereas the insertion of a coil (carrying with it a greater need for monitoring and in due course replacement/removal) would not. In this wider sense, sterilisation is in my judgment the less restrictive of the two principal options under consideration."*

In conclusion, it was held to be in DD's best interests to have the therapeutic sterilisation and that it was necessary to withhold the date of the procedure, due to the risks, from DD and BC. In terms of the practical arrangements:

> *"136. Thus it can be seen that each forced entry to the home has been (understandably) followed by escalating levels of distress experienced and displayed on the part of DD and BC. This is of real concern to me. I repeat what I said prior to the third such forced entry which I authorised in my 4 July 2014 judgment ([2014] EWCOP 11 [131]):*
>
> > *'Any physical restraint or deprivation of liberty is a significant interference with DD's rights under Articles 5 and Article 8 of the ECHR and, in my judgment, as such should only be carried out:*
> >
> > *a) by professionals who have received training in the relevant techniques and who have reviewed the individual plan for DD;*
> >
> > *b) as a last resort and where less restrictive alternatives, such as verbal de-escalation and distraction techniques, have failed and only when it is necessary to do so;*
> >
> > *c) in the least restrictive manner, proportionate to achieving the aim, for the shortest period possible;*
> >
> > *d) in accordance with any agreed Care Plans, Risk Assessments and Court Orders."*

Comment

This case illustrates perhaps the extremities of the powers available to the Court of Protection in the most extreme sets of circumstances. The judicial assessment of capacity, best interests, and human rights considerations is textbook (when gauged by reference solely to the MCA as it stands: see the last paragraph below). Whilst the outcome of the case is of course extreme – envisaging the forcible entry, removal, and sterilisation of a vulnerable adult – the reasoning is comprehensive with delivered the utmost careful consideration.

We would emphasise three interesting, though somewhat ancillary, aspects of the judgment. The first is the helpful summary of the source of respective duties on the public authorities involved in DD's welfare (see paras 22-28, with mention of the Care Act 2014). The second is the potential recognition of the Article 2 operational duty, developing *Rabone v Pennine Care Foundation Trust* [2012] UKSC 2. The law in England and Wales presently promotes ugly Samaritanism (see N. Allen, 'The right to life in a suicidal state' (2013) 36 *International Journal of Law and Psychiatry* 350–357). And the domestic courts have yet to formally recognise the duty to take reasonable precautions where public authorities know, or ought to know, of a real and immediate risk to the life of someone suicidal in the community. His Lordship's recognition of potentially further development of the duty is therefore welcome, albeit that the duty would not have been triggered on the facts.

Finally, it is worth stressing the somewhat short shrift given to the arguments regarding the potential import of the 'undomesticated' UNCRPD with its lack of direct effect. We note, first, that the ECtHR is increasingly citing the CRPD in its analysis of issues relating to capacity (for example, the case of *MS v Croatia*, discussed elsewhere this month), as did the Supreme Court in *Cheshire West*. Second, we would suggest that the CRPD would, in fact, have added a significant element in this case. Indeed, paying proper heed to the demand from the Committee on the Rights of Persons with Disabilities that decisions in relation to those said to lack capacity are to be taken on the basis of their will and preferences may have led to a very different outcome to that reached by Cobb J. Whether that outcome would – in fact – have served DD is a question that will no doubt be debated for some time as we continue to wrestle with the implications of the CRPD for domestic law.

RB v Brighton and Hove: update

Readers will no doubt remember the decision of the Court of Appeal in *RB v Brighton and Hove* [2014] EWCA Civ 561, relating to the lawfulness of deprivation of liberty in the context of risks posed by excessive drinking. Although the Supreme Court refused permission to appeal to RB, the Official Solicitor has applied on his behalf to the European Court of Human Rights,[1] a central plank of the appeal being the place that wishes and feelings (in particular those reflecting the desires of the individual expressed before any questions were posed as to their capacity) should play in the determination of best interests. We will keep you posted.

[1] Full disclosure, Alex and Nicola Kohn are instructed, pro bono, as junior Counsel for RB.

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Conferences at which editors/contributors are speaking

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available here.

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available here.

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see here.

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, 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 Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early 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 Newsletter in the future please contact marketing@39essex.com.

David Barnes
Chief Executive and Director of Clerking
david.barnes@39essex.com

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

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

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

London 39 Essex Street, London WC2R 3AT
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

Manchester 82 King Street, Manchester M2 4WQ
Tel: +44 (0)161 870 0333
Fax: +44 (0)20 7353 3978

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

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

Alex Ruck Keene
alex.ruckkeene@39essex.com

Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2015, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

Victoria Butler-Cole
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. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. 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 2009), 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 human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

Annabel Lee
annabel.lee@39essex.com

Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. 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.

Contributors: Scotland

Adrian Ward

adw@tcyoung.co.uk

Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

Jill Stavert

J.Stavert@napier.ac.uk

Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.