Mental Capacity Law Guidance Note

Judicial deprivation of liberty authorisations: Updated June 2015

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A: Introduction

1. In *Re X and others (Deprivation of Liberty)* [2014] EWCOP 25 (and *No 2* [2014] EWCOP 37), Sir James Munby, the President of the Court of Protection sought to devise a streamlined process to seek to enable the court to deal with DoL cases in a timely, just, fair and ECHR-compatible way. In June 2015, the Court of Appeal held that Sir James Munby P had not been entitled to proceed in the fashion that he did, and that his 'judgments' were in fact not authoritative statements of the law.

2. Although the Court of Appeal held that it did not have jurisdiction to consider the appeals brought against the 'decisions' of the President, the members of the Court of Appeal made clear that, at least as the Court of Protection is currently constituted, both fundamental principles of domestic law and the requirements of the ECHR demand that P be a party to proceedings for authorisation of deprivation of liberty. Strictly speaking, the conclusions of the Court of Appeal are 'obiter' (in other words not binding), but we anticipate that the *Re X* procedure set down here in Practice Direction: 10AA: Deprivation of Liberty applications (note, the material paragraphs for these purposes are 27 and onwards) is likely to be revised in short order to reflect these conclusions.

3. It may be that, when the new COPR Rule 3A comes into force on 1 July 2015, the Court will develop procedures that allow for the participation of P (for instance by the appointment of a representative) without making them a party. In order to square with the conclusions of the Court of Appeal, that participation will have to be automatic – i.e. not contingent upon P expressing a desire to participate.

4. It is important to note that none of those who sought to appeal the decisions of the President challenged his conclusions as to the evidential requirements that must be satisfied before a judge can authorise a deprivation of liberty. Nor did the Court of Appeal cast any doubt upon his conclusions that, for instance, there must be objective medical evidence that the individual is 'of unsound mind.' We would therefore suggest that it is clear that whatever procedure is enacted by the court (and in due course whatever replacement is proposed by the Law Commission) can properly proceed on the basis that the President properly identified the 'irreducible matters' that must be addressed in evidence to comply with Article 5(1)(e) ECHR.

5. Linked to this, we would strongly suggest that local authorities and CCGs who are responsible for care arrangements that give rise to deprivations of liberty outside hospitals and care homes do not delay in making applications until the Court of Protection has put in place a replacement for the *Re X* procedure. This decision does not alter the obligation on such bodies to seek authorisation from the Court where such is necessary, nor does it alter the nature of the evidence that must be put before the Court – what it alters is what the Court must then do in order to ensure compliance with Article 5(1)(e) ECHR.

6. We therefore suggest that the evidential requirements set out below continue to be relevant in applications for judicial authorisation of deprivation of liberty. We would further suggest that the applications continue to be made on the COP DOL10 form (in saveable PDF and also in unofficial Word version) because these forms provide a far more focused way of ensuring that the necessary evidence is gathered and put before the Court.

Evidential requirements

7. Each individual requires a separate application. But generic material could be in a single 'generic' statement, a copy of which can be attached to each application form. The application, evidence and other supporting material need not exceed 50 pages because the evidence should be succinct and focused and the statements and reports need not be lengthy.

8. The application needs to answer the following matters, either in the body of the form or in attached documents:

    i. A draft of the precise order sought, including in particular the duration of the authorisation sought and appropriate directions for automatic review and liberty to apply and/or seek a redetermination in accordance with Rule 89.

    ii. Proof that P is 16 years old or more and is not ineligible to be deprived of liberty under the 2005 Act.

    iii. The basis upon which it is said that P suffers from unsoundness of mind (together with the relevant medical evidence). See below for the nature of the medical evidence required.

iv. The nature of P's care arrangements (together with a copy of P's treatment plan) and why it is said that they do or may amount to a deprivation of liberty.

v. The basis upon which it is said that P lacks the capacity to consent to the care arrangements (together with the relevant medical evidence).

vi. The basis upon which it is said that the arrangements are or may be imputable to the state.

vii. The basis upon which it is said that the arrangements are necessary in P's best interests and why there is no less restrictive option (including details of any investigation into less restrictive options and confirmation that a best interests assessment, which should be attached, has been carried out).

viii. The steps that have been taken to notify P and all other relevant people in P's life (who should be identified) of the application and to canvass their wishes, feelings and views

ix. Any relevant wishes and feelings expressed by P and any views expressed by any relevant person.

x. Details of any relevant advance decision by P and any relevant decisions under a lasting power of attorney or by P's deputy (who should be identified).

xi. P's eligibility for public funding.

xii. The identification of anyone who might act as P's litigation friend, alternatively a person who could s act (or would if necessary be able to) as P's representative for purposes of securing P's participation in the proceedings under Rule 3A(2)(c) (which will take effect from 1 July 2015).

xiii. Any reasons for particular urgency in determining the application.

xiv. Any factors that ought to be brought specifically to the court's attention (the applicant being under a specific duty to make full and frank disclosure to the court of all facts and matters that might impact upon the court's decision), being factors:

a. needing particular judicial scrutiny; or

b. suggesting that the arrangements may not in fact be in P's best interests or be the least restrictive option; or

c. otherwise indicating that the order sought should not be made.

9. Professional medical opinion is necessary to establish unsoundness of mind but where the facts are

clear this need not involve expert psychiatric opinion (there will be cases where a general practitioner's evidence will suffice).

P a party

10. As above, at present, and to secure the necessary protections for P, they must be a party. This may change with effect from 1 July 2015 if judges consider that they can secure the proper level of participation by (for instance) making an order that a representative be appointed under Rule 3A(2)(c) without P being joined.

11. If P is a party then, until and unless a panel of accredited legal representatives is established, P must have a litigation friend. What is not entirely clear in light of the judgment of the Court of Appeal is whether, if they have a litigation friend, that litigation friend must act by a solicitor in order to conduct the proceedings and act as an advocate on behalf of P. The President had held that this was not necessary, but in light of the decision of the Court of Appeal, this cannot now be regarded as a binding decision. Even if it is held in due course that a litigation friend can act without a solicitor, we suggest that in any case of any complexity, any litigation friend should consider carefully whether they are content to act without legal representation (and, if they consider that they need such representation, should make clear that their consent to acting is contingent upon being given the necessary funds to do so). Guidance for litigation friends in the Court of Protection can be found here.

On the papers or oral hearing?

12. The Court of Appeal did not consider (and did not make any comment upon) the question of whether the initial determination can be made on the papers. We see no reason why it cannot be made on the papers where the applicant has identified a person who is able to act as litigation friend for P, and where that litigation friend has indicated their consent, on P's behalf, to the order being made on the papers.

13. We anticipate, though, that a likely consequence of the judgment is that there will – at least initially – be more cases in which an initial order is made on the papers (as of 1 July under Rule 3A) outlining how P is to participate, followed then by more oral hearings at which the question of whether the deprivation of liberty is to be authorised will be considered.

Frequency of review

14. The authorisation, even if initially made on the papers, can typically last for approximately one year unless circumstances require a shorter period. The review can, where appropriate, be done on the papers.

B: Questions (and some answers)

15. We pose here a number of questions that have arisen in relation to judicial authorisation of deprivation of liberty, together with some tentative answers: we emphasise, however, that specific advice must be sought in respect of particular applications.

Which evidence can be provided in generic form?

16. It seems to us that, where an application is under consideration for more than one individual, it would be unlikely if generic information could be provided going beyond information as to the nature of the arrangements giving rise to the deprivation of liberty and the fact of state imputability. It is difficult to imagine, for instance, that any generic information could be provided as to capacity or wishes and feelings.

What proof is required that P is over the age of 16?

17. We suggest that this will be of the same nature as that required to allow the SB to be satisfied that the (higher) age requirement under Schedule A1 is met. We would anticipate that stating P's date of birth would ordinarily suffice. If in doubt, of course check their birth certificate. If there is doubt and no papers – for example in the case of a paperless asylum seeker – a *Merton*-compliant age assessment may be required (see *B v London Borough of Merton* [2003] EWHC 1689 (Admin)).

What evidence is required as to the care arrangements?

18. We suggest that this evidence should not only address why it is said that the elements of the acid test are met (i.e. that the individual is under continuous supervision and control, and why it is said they are not free to leave) but also expressly set out any physical interventions that are allowed for in the care plan and (if different) that occur in practice. The importance of ensuring that the care plan is honest and complete in this regard was emphasised in *Re AJ (Deprivation of Liberty Safeguards)* [2015] EWCOP 5.

Can social work evidence suffice to establish P's unsoundness of mind?

19. We emphasise that every deprivation of liberty application requires (at least) a General Practitioner to confirm the relevant unsoundness of mind. We note that there therefore may well be a difference between 'standard' applications to the CoP where a COP3 setting out the basis upon which it is said that the person lacks capacity to take the relevant decision(s)s can be completed by (inter alia) a social worker, and a deprivation of liberty application.

What form of best interests assessment is required?

20. One of the key safeguards to administrative detention is the fact that the best interests assessor is independent. With judicial detention the judge occupies such independence. However, they are not as 'on the ground' and able to liaise with all the key consultees as a best interests assessor. We would suggest, therefore, best practice would be to have a best interests assessment carried out by a person other than the allocated social worker so as to ensure the maximum degree of independence. This would also minimise the need for calling upon independent expert evidence in the course of proceedings. If the application is being made by a CCG, then it will be necessary to commission such an assessment, and resourcing implications will no doubt arise.

Fees and funding

21. The prospect of separate applications, and presumably therefore separate fees (£400 application fee; £500 hearings fee), for each P will be a matter of some concern to public authorities. The availability of judicial detention on the papers in non-trigger cases may be of some reassurance to them but not to P. In terms of legal aid, at present judicial detention is means-tested, administrative detention is not. And no oral hearing means no entitlement to legal aid in any event. The cost and funding of court reviews may also require clarification in due course.

C: Useful resources

22. In addition to our own website (http://www.39essex.com/resources-and-training/mental-capacity-law/) and Alex's website (www.mclap.org.uk which has a dedicated page relating to *Cheshire West* resources), other useful materials relating to the *Cheshire* include can be found in Chapter 11 of Deprivation of Liberty: a Practical Guide, commissioned from the Law Society by the Department of Health, to which both Alex and Neil contributed.