MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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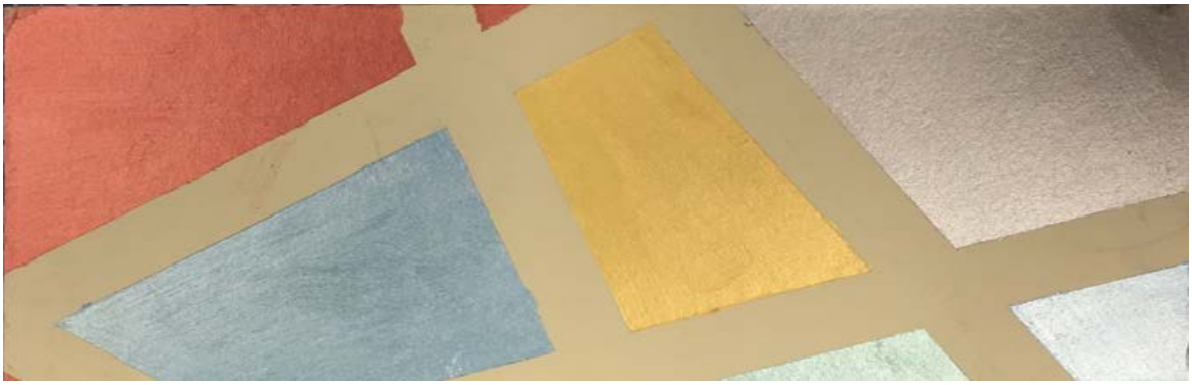

Welcome to the February 2023 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: is depriving a person of their phone depriving them of their liberty, a reminder that the court is the ultimate arbiter of best interests and an Ombudsman comes belatedly to the rescue;

(2) In the Property and Affairs Report: a reminder of the new process for applying for deputyship and how the Powers of Attorney Bill would amend the MCA 2005;

(3) In the Practice and Procedure Report: the Vice-President intervenes on s.49 reports and new contempt rules;

(4) In the Wider Context Report: Parliamentary consideration of the draft Mental Health Bill, a toolkit for supporting decision-making, and confidentiality and common sense;

(5) In the Scotland Report: the Supreme Court dismisses an appeal against assessment for services and an opposed application for guardianship.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also sign up to the Mental Capacity Report.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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Summary

Is depriving a person of their mobile phone depriving them of their liberty? That was the very 21st century question confronting MacDonald J in *Manchester City Council v CP & Ors* [2023] EWHC 133 (Fam). Whilst his analysis concerned the position of a 16 year old, his conclusions apply equally to adults.

It was common ground between the local authority and the Guardian that the significant restrictions to be placed upon the ability of the 16 year old in question, P, to use a mobile phone and other devices gave rise to a state imposed confinement to which she did not consent, and hence a deprivation of her liberty, which the High Court could authorise by exercise of its inherent jurisdiction. MacDonald J, however, whilst acknowledging that this had been the practice to date (including by himself), decided that it was necessary to consider the question in more detail, and reached the opposite conclusion.

Importantly, and identifying a point which is sometimes missed, MacDonald J made clear at paragraph 26 that the caselaw confirmed that "*in this context, and historically, the concept of liberty under Art 5(1) of the ECHR contemplates individual liberty in its classic sense, that is to say the physical liberty of the person*," and that the reference to "security" in Article 5 "*serves simply to emphasise that the requirement that a person's liberty may not be deprived in an arbitrary fashion*." He noted that rule 11(b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty also emphasised the concept of physical liberty,[1] defining deprivation of liberty as "*any form of detention or imprisonment or the placement of a person in another public or private setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other*

[1] In passing, he could equally have noted that the interpretation of deprivation of liberty for purposes of these Rules derived from the interpretation of the concept for purposes of Article 9 of the International Covenant on Civil and Political Rights. The Human Rights Committee's General Comment 35 on Article 9 makes clear in paragraph 3 that "[l]*iberty of person concerns freedom from confinement of the body, not a general freedom of action*."

public authority."

MacDonald J further identified at paragraph 37 that restrictions upon on access to, or the use of, telephones were most commonly considered by the ECtHR in the context of the Article 8 ECHR right to respect for private and family life, rather than under Art 5(1).

Applying these principles, MacDonald J recognised that:

> 45. […] *for P, in common with many other young people of her age, her mobile phone and other devices constitute a powerful analogue for freedom, particularly in circumstances where she is at present confined physically to her placement. Within this context, I accept that the possession and use of her mobile phone, tablet and laptop, and her concomitant access to social media, is likely to equate in P's mind to "liberty" broadly defined as the state or condition of being free.*

However, MacDonald J continued:

> *However, this court is concerned with the meaning of liberty under Art 5(1) of the ECHR. Whilst I recognise that the Convention is a living instrument, which must be interpreted in the light of present-day conditions (see Tyrer v United Kingdom (1978) 2 EHRR 1 at [31]), over an extended period of time the Commission and the ECtHR have repeatedly made clear that Art 5(1) is concerned with individual liberty in its classic sense of the physical liberty of the person, with its aim being to ensure that no one is dispossessed of their physical liberty in an arbitrary fashion. The Supreme Court proceeded on that formulation of the proper scope of Art 5(1) in Cheshire West.*

That meant, in turn, that:

> 46. […] *in my judgment the removal of, or the placing of restrictions on the use of, P's mobile phone, tablet and laptop and her use of social media do not by themselves amount to a restriction of her liberty for the purposes of Art 5(1). On the evidence currently before the court those restrictions do not act to deprive P of her physical liberty, but rather act to restrict her communication, so as to ensure her physical and emotional safety. The evidence set out earlier in this judgment demonstrates that the effect of those restrictions is to limit P's communications with peers who might encourage her to engage in bad behaviour, with strangers who may present a risk to her and with family and friends when she is in a heightened emotional state. Within this context, the restrictions on the use of P's devices for which the local authority seek authorisation do not, in my judgment, by themselves constitute an objective component of confinement of P in a particular restricted place for a not negligible length of time. In the circumstances, whilst they are steps at times taken without P's consent and are imputable to the State, those restrictions do not, by themselves, meet the first Storck criterion.*

The local authority argued that the restrictions upon her devices formed an integral element of the confinement to which P was subject (in circumstances where she was under other, more obvious restrictions such as supervision and physical restraint to protect from harm). Whilst MacDonald J accepted that they might, at time, be said to form part of a regime of continuous supervision and control, he reiterate that they did not act to restrict her *physical* liberty. Rather, their effect was:

> 65 […] *to prevent P broadcasting online indiscriminately, to prevent contact from those advising her how to frustrate*

> *steps the placement takes to stop her from harming herself and others and to prevent her sharing details online with those who may pose a risk to her and restricting contact with those against whom she has alleged abuse. There is no suggestion in the evidence currently before the court that those restrictions constitute a necessary element of the deprivation of P's physical liberty or of the manner of implementation of that deprivation of liberty. For example, the evidence before the court does not suggest that the restrictions on the use of P's mobile phone, tablet and laptop and use of social media are required to ensure the effectiveness of the current measures that do operate to prevent her from leaving the placement, or that without those restrictions the current measures that operate to prevent her from leaving the placement would be rendered ineffective. In these circumstances, in my judgment the restrictions in respect of P's phone, tablet and laptop and on the use of social media do not, even when considered in the context of the other elements of the other restrictions for which authorisation is sought, constitute an objective component of confinement of P in a particular restricted place for a not negligible length of time. Accordingly, it would in my judgment be wrong to authorise them under the auspices of a DOLS order[2] simply because they form part of the total regime to which P is currently subject in her placement.*

Some might be wondering by this stage why MacDonald J was quite so keen to make clear that the restrictions on P's devices did not give rise to a deprivation of her liberty. The answer he gave at paragraph 50 was an important one:

> *The difference between deprivation of and restriction upon liberty is one of degree or intensity and not one of nature or substance. But there is nonetheless a difference and that difference can have consequences. As I have noted above, restrictions of the type being imposed on P with respect to the use of her mobile phone, tablet and laptop, and concomitant limitations on her access to social media, are most naturally characterised as an interference with her Art 8 right to respect for private and family life. When considering them as such, before a court could endorse that interference it would have to be satisfied that that interference was necessary and proportionate, pursuant to Art 8(2). If however, those steps were instead to be considered and endorsed by the court by reference to Art 5(1), the exercise under Art 8(2) would be bypassed in respect of steps that constitute an interference in an Art 8(1) right. It is important that the court be careful not to allow its jurisdiction to make orders authorising the deprivation of a child's liberty by reference to Art 5(1) to spill over into authorising steps that do not constitute a deprivation of liberty for the purposes of Art 5(1), particularly where those steps might constitute breaches of different rights, which breaches fall to be evaluated under different criteria. It may well be that one of the reasons for ECtHR adopting the narrow interpretation of word 'liberty' under Art 5(1) in cases such as Engel v Netherlands, limiting it to the classic concept of physical liberty, was to reduce risk of the Art 5 exceptions resulting in a de facto interference with other rights, without proper reference to*

[2] As a plaintive and probably forlorn plea, it would be really helpful if practitioners and the courts could stop referring to inherent jurisdiction orders as "DoLS orders" as it perpetuates confusion with 'actual' DoLS, i.e. administrative authorisation under the Deprivation of Liberty Safeguards in relation to adults in care homes/hospitals.

> *the content of those other rights.* (emphasis added).

MacDonald J's conclusion meant that it was necessary to find an alternative route to authorise the restrictions (assuming that such restrictions were justified). This alternative route, he found, lay in the operation of parental responsibility (in P's case, by the local authority under its shared parental responsibility under s.33(3)(b) of the Children Act 1989, P being the subject of a final care order. MacDonald J found that, ordinarily, a local authority relying upon s.33(3)(b) Children Act 1989 to impose restrictions on the use of devices to protect a child from a risk of serious harm would not require the sanction of the court, he did accept at paragraph 60 that:

> *circumstances that contemplate the use of physical restraint or other force to remove a mobile phone or other device from a 16 year old adolescent, even in order to prevent significant harm, is a grave step that would require sanction by the court, rather than simply the exercise by the local authority of its power under s.33(3)(b) of the 1989 Act, not least because such actions would likely constitute an assault. I am further satisfied that, in an appropriate case and where an order under Part II of the Children Act 1989 would not be available where a child is subject to a final care order, it would be open to the court to grant the local authority permission to apply for an order under the inherent jurisdiction, separate to any order authorising deprivation of liberty, that declares lawful the steps required to effect by restraint or other reasonable force the removal from a child of his or her devices, provided it is demonstrated that their continued use is causing, or risks causing, significant harm and provided that the force or restraint used is the minimum degree of force or restraint required.*

MacDonald J emphasised that the threshold for making such an order – separate from the order authorising deprivation of liberty – would be a high one, requiring "*cogent evidence that the child is likely to suffer significant harm if an order under the inherent jurisdiction in that regard were not to be made*" (paragraph 71).

Comment

MacDonald J's decision is a very useful reminder of the limit of the concept of deprivation of liberty: in this context, liberty, importantly, is not another word for autonomy. As Lady Hale put it in *Secretary of State for the Home Department v JJ* [2007] UKHL 45 (at paragraph 57):

> *My Lords, what does it mean to be deprived of one's liberty? Not, we are all agreed, to be deprived of the freedom to live one's life as one pleases. It means to be deprived of one's physical liberty* […] *And what does this mean? It must mean being forced or obliged to be at a particular place where one does not choose to be:* […] *But even that is not always enough, because merely being required to live at a particular address or to keep within a particular geographical area does not, without more, amount to a deprivation of liberty. There must be a greater degree of control over one's physical liberty than that.*

In passing, it might be thought to be of interest that Lady Hale was clear in 2007 that deprivation of liberty included an element of overbearing of the person's will, but by 2014 considered in Cheshire West that a lack of MCA-capacity to consent to confinement was sufficient, even if the person appears to be content. If you want to follow that rabbit hole, you might find this paper of interest.

It is interesting, and reassuring, to note that MacDonald J reached the same conclusions as to the human rights allocation of restrictions

upon devices as was reached some years ago in the Court of Protection context by Mostyn J in *J Council v GU & Ors* [2012] EWCOP 3531. That the judgment did not refer to this case is likely down to the fact that (for better, or, we venture to suggest, worse) parallel furrows seem to be being ploughed by those concerned with deprivation of liberty in the context of children and adults.[3]

Be that as it may, MacDonald J's observations about the need to be clear about which rights are in play, and what considerations need then to be taken into account in identifying who can determine and on what basis whether or not the interference is lawful are trenchant. They are also equally relevant in DoLS land in relation to adults. They reinforce the fact that restrictions which are not specifically directed at restricting the physical liberty of the person are not restrictions which can be authorised under DoLS. Such restrictions, whether they be upon devices, or upon contact, either need to be justified by reference to the (thin) legal cover available here under s.5 MCA 2005, or – more likely – need to be put before the Court of Protection so that the court can determine whether (a) such restrictions are in the best interests of the person; and (b) whether they are necessary and proportionate so as to satisfy Article 8(2) ECHR.

Presuming a presumption of capacity

NHS Surrey Heartlands Integrated Care Board v JH [2023] EWCOP 2 (Hayden J)

Medical treatment – advance decisions

Summary

In this case, Hayden J was asked to consider whether an advance decision to refuse invasive tests or treatments (including life-sustaining treatments) was valid, not at a point when those tests or treatments were sought to be carried out, but in contemplation of the potential that they might be. As Hayden J identified at paragraph 9, the offence of s.2(1) Suicide Act 1961 (aiding, abetting, counselling or procuring another to take their own life):

> *is a challenging backdrop to the facts of cases like this one and, no doubt in part, the reason that the ICB seek their second declaration i.e., "that a person does not, therefore, incur liability for the consequences of withholding such tests or treatment from JH". It is important to emphasise, however, that there is no obligation on a patient, who has decision-making capacity, to accept life-saving treatment. Doctors are not obliged to provide treatment and, perhaps more importantly, are not entitled to do so in the face of a patient's resistance. This reflects a mature understanding of the importance of individual autonomy and respect for human dignity.*

JH, diagnosed with what would now be recognised as Autism Spectrum Disorder as a teenager, had had very extensive investigations into gastroenterological problems as a child, necessitating 'incessant' hospital involvement, leaving him profoundly anxious and unprepared to attend hospital, as well as deeply resistant to

[3] An issue identified by Sir James Munby in 2018, discussing in a speech for Legal Action Group the case of *D* at the point between his decision in the Court of Appeal and the decision of the Supreme Court, noting that *"these cases lie at the intersection of three different bodies of domestic law – mental health law, mental capacity law and family law – where judicial decision-making is spread over a variety of courts and tribunals which, by and large, are served by different sections of the legal professions too few of whom are familiar with all three bodies of law. The existence of these institutional and professional silos has bedevilled this area of the law at least since the earliest days of the Bournewood litigation. One day, someone will write a critical, analytical history of all this – and it will not, I fear, present an altogether reassuring picture."*

any form of invasive medical treatment. An encounter in 2017 concerning his diet at a meeting for which he did not feel had been fully briefed or prepared led him to want to prepare an advance decision setting out which tests and / or treatments he would be prepared to consent to. Hayden J described the advance decision, prepared on a template form from Compassion in Dying,[4] as "*manifestly carefully constructed* and […] *pellucidly clear*."

At the time (in 2017) a capacity assessment undertaken concluded that JH had capacity (although it is not entirely clear from the judgment as to whether this was an assessment in relation to making an ADRT, or in relation to some other decision(s)). Later, however, clincians "wavered" about the correctness of that assessment.

In light of the possible doubts about whether the ADRT had been created capacitously, and in light of the fact that JH was identified by his treating ICB as being at immediate and obvious risk to life because of his very restricted diet and very low BMI, an application was brought to confirm the status of the ADRT, and also for a confirmation that no liability would be incurred if tests / treatments were withheld from JH. JH had capacity to conduct the proceedings, and both attended (by telephone) and spoke to the judge; however, it is not entirely clear whether the case was proceeding on the basis that JH currently had capacity to make decisions about tests / treatment, or whether he lacked capacity. It appears from the discussion of JH's best interests that it was the latter. In any event, even if JH currently had capacity, it is understandable why the confirmation in relation to the ADRT was being sought: there must have been on the material before the court a real possibility that he would lose, at which point the ADRT would become very relevant indeed.

On the facts of the case, Hayden J had no hesitation in finding that JH had had capacity in 2017 to make the ADRT. Separately, he also made it clear that, even if he had not, he could not have contemplated a situation in which the clinically indicated investigations could have been forced upon him:

> *23.* […] *The strength of his feelings, the consistency with which they have been held, for so many years, and his obvious distress at the contemplation of such an intrusive investigative process would, in my judgement, be brutally corrosive of JH's autonomy. It would both compromise his dignity and cause him great personal trauma. It could not be reconciled with any concept of "best interests" in the manner required by the MCA. As Miss Sutton reminds me, JH told Dr W* [his GP] *that if the court determined that it was in his best interests to have further investigations, "he would not undergo them willingly and would have to be physically restrained". He also told Dr W that "undergoing investigations such as a colonoscopy would make him feel violated and it is not something he could tolerate". I emphasise that Dr W does not consider that any further investigations should be undertaken against JH's will due to the distress it would cause him. I agree.*

Comment

It is entirely understandable why this case was brought, and Hayden J was at pains to explain the importance of his essentially confirmatory role in relation to the ADRT. One point, however, is not addressed in the judgment (which may be down to the fact that the application was clearly

[4] See now Mydecisions.org.uk for an updated version of the template.

made and determined at some speed). Hayden J proceeded on the basis that he was bound by the presumption of capacity in terms of the determination of the position of 2017. However, Alex at least would respectfully suggest that this is not, in fact, obviously the case. Rather, Alex suggest that the position in relation to retrospective determinations of capacity is as set out in the draft updated Code of Practice to the MCA 2005:

> *4.104 Where a person's capacity to make a decision is being assessed retrospectively, the approach to be taken is different to assessing capacity 'in real time'. For example, it is clearly not now possible to seek to support the person to make the decision. It will be necessary to gather as much evidence as possible from surrounding documents and circumstances to establish whether or not the person had capacity at the time.*
>
> *4.105 Importantly, the presumption of capacity works differently where the person's capacity is being determined retrospectively. Where proper reasons are put forward to suggest the person did not have capacity, anyone who relies on the fact the person did have capacity will need to be able to show, on the balance of probabilities, that this was the case.[5] Who might need to show this depends on the circumstances. It might be the attorney where a power of attorney is questioned. It might also be the person themselves (or someone acting on their behalf) where an advance decision to refuse treatment is questioned.*

Albeit without detailed analysis, this was the approach taken by Peter Jackson J (as he then was) in *A Local Authority v E* [2012] EWHC 1639 (COP), which does not appear to have been referred to Hayden J.

What is set out above is not intended to cast doubt on the correctness of Hayden J's decision. However, it is important to note that – in a different case – the mechanical operation of the presumption could mean that medical practitioners would be required to abide by the advance decision notwithstanding the presence of a legitimate doubt as to the person's capacity. That would be a problematic outcome, not least in terms of the state's obligations to secure life under Article 2 ECHR. Rather, Alex would suggest, the proper approach would be to test whether proper reasons had been advanced to cast doubt upon the person's capacity to make the ADRT and, if they had, then to require whoever is relying on the person's capacity at the time to make the case.

Best interests: the court as final arbiter

Re AH (Re Best Interests) [2023] EWCOP 1 (HHJ Burrows)

Best interests – residence

Summary

Following on from his earlier judgment ([2022] EWCOP 45), HHJ Burrows returned to this matter to consider AH's best interests with respect to her residence and care.

AH was 46 years old and had a diagnosis of type 1 diabetes. HHJ Burrows summarised the risks that this condition posed to hear at paragraph 1: "*If her diabetes is properly managed, she is able to be fit and healthy. If it is not, she can rapidly become seriously unwell, and* could *die. In the past she has not been able to engage with those professionals who are responsible for her diabetes*

[5] I.e. in line with the position (at common law) in relation to testamentary capacity or lifetime gifts. See, e.g.,Gorjat v Gorjat [2010] EWHC 1537(Ch), and this discussion paper.

care. That led to her becoming seriously ill with ketoacidosis. She required hospital treatment. She was fortunate not to die." HHJ Burrows also noted the 'cycle' she had experienced while living in the community of "*non-engagement, illness, hospitalisation and then a dispute as to her destination upon discharge - if she does not die first*" (paragraph 23).

After concluding in its earlier judgment that AH lacked capacity to make decisions as to her residence and care, HHJ Burrows went on to consider AH's best interests in these domains. He did not hear from live witnesses, though did speak with AH herself. Her representatives (though her ALR) did not seek to challenge evidence from professionals.

HHJ Burrows was asked to approve a care plan which would deprive AH of her liberty at 'Placement 1,' a care home which would admit her for a period of assessment (and where she had been residing since March 2022 on an interim basis). However, in reality, AH's stay there would likely be of indeterminate length. The placement would take responsibility for overseeing her administration of insulin. She would not be free to leave the placement for visits to her flat without the permission of staff, and would be obliged to return to the placement. At the time of the judgment, AH was visiting her flat for one overnight stay per week, but this would likely come to an end in March 2023 when her housing benefit came to an end and she would be obliged to give up her flat.

HHJ Burrows heard from AH, who was clear that she did not want to go to Placement 1, and wished to go home. He noted that AH had lived an independent life in her flat for 17 years with support through the week, and medical oversight by the district nurses. HHJ Burrows also noted that AH was generally able to meet her social care needs, and could come and go as she saw fit. However, he also identified that AH disengaged (or inconsistently engaged) with her treatment, leading to potentially dire consequences for her.

HHJ Burrows surveyed relevant authorities, including those which considered the position of those who wished to spend their 'end time' in their homes, and courts affirming that such a course would be in their best interests (such as *P v M (Vulnerable Adult)* [2011] 2 FLR 1375). However, HHJ Burrows identified that, in distinction to such cases:

> *34. […] AH is relatively young. She will constantly be exposed to the risks of disengagement and the consequences that follow for decades. Her life could be shortened by many years. Her years could be blighted by ill health and hospital stays. She would not be happy in those circumstances. Or she could live in a place she does not want to be for decades in good health. She would not be happy in those circumstances, either.*

HHJ Burrows refused the uncontested application that AH should move to Placement 1, though found that the matter was finely balanced. It considered carefully that AH 'hated' Placement 1 and valued her independence. It noted that her flat remained available to her, and that a community care package could be organised for her. The court highlighted the potentially fatal risks to AH of disengaging with her care, and concluded that despite her stated intentions to engage, there was "*a reasonable prospect that AH will eventually cease to engage consistently, perhaps at all. At that point, it is inevitable that the Applicants may have to adopt a similar approach to the one they have adopted here by seeking the approval of the Court for the use of coercive powers that restrict AH's liberty or deprive her of it*" (paragraph 45). The court also noted the benefits of Placement 1 being in AH's

home area, which allowed her to continue her social contacts; if she had to move on an urgent basis in the future, there would be no guarantee she might remain local.

HHJ Burrows summarised his conclusions thus: conclusions:

> *63. I have balanced all the matters I have discussed above. This is a finely balanced case. I have concluded that it is not in her best interests to remain at Placement 1. Whilst the benefits are clear and obvious, and the risk of going home is real and very serious, I do not consider it to be necessary to require her to reside at Placement 1, where she does not wish to be when she could move back to her own home.*
>
> *64. In her own home she will receive social care and will be able to access the community with or without support. District Nurses will be able to provide AH with diabetes care. It is uncertain whether she will engage with them and whether she will be able to keep herself well. There is a risk she will not be able to do this. There is a real risk she will suffer a decline- gradual or sudden. There is a risk she will find herself back in hospital and then in care afterwards again. There is a risk she will die.*
>
> *65. However, in my judgment she has the right to her liberty and to remove it from her would be a devastating blow to her and would not properly recognise her right as a disabled person to be afforded respect and dignity for the way she wishes to live her life.*
>
> *66. I therefore make the declarations I indicated above. It is likely there will need to be a short period to enable the package of care at home to be restarted- I will defer the effect of this order until that is in place.*
>
> *67. I also add some comments on the professionals who provide AH with care, some of whom were instrumental in bringing these proceedings. Bringing this application was entirely right and justified. It was an expression of genuine and legitimate concerns over AH's health. Although the phrase "medical best interests" is often used, as any medical professional will immediately say, even medical best interests takes into account the wider issues that affect their patients. I have no doubt that the professionals in this case brought the application for AH as a person, not just as a difficult diabetes patient.*

Comment

The judgment is notable for its rejection of the apparently uncontested position of the parties that AH should move to Placement 1. The court gave heavy weight to AH's wishes and feelings, and found the effects of a move which likely would have done much to safeguard her health would be 'devastating' for her. While the case turned very much on its own facts and has limited value as precedent, it is of interest for its careful consideration of the harms which would be caused by overriding AH's autonomy.

Vaccination and mental capacity

We have updated our vaccination and mental capacity guide to take account of recent caselaw. It can be found here.

Deprivation of liberty - an Ombudsman to the (belated) rescue

In decision 21 018 408 of 15 November 2022, the Local Government and Social Care Ombudsman (LGSCO) found fault by the London Borough of Sutton due to considerable delays in authorising the deprivation of liberty of 'Mr Y. The complaint was brought by Mr Y's mother, 'Ms X'. Ms X stated that Mr Y, who lived in a care home, "*lived in a locked bare room, was inappropriately*

medicated and did not have any activities" (paragraph 1). Ms X also sought to effect a change of placement for Mr Y and the decision to grant the standard authorisation at the placement, but the LGSCO declined to investigate this, noting Ms X's right to bring these issues before the Court of Protection.

Mr Y was an adult with autism and learning disabilities; he was considered to lack capacity to make decisions about his care. His deprivation of liberty at a care home (in which he lived in a separate flat linked to the main building of the care home) had been authorised by way of a standard authorisation which expired on 3 January 2022. That authorisation had been for a period of six months, as a result of the assessor's recommending a review of the care arrangements in the home.

The care home sought a fresh authorisation on 13 January 2022; this was granted on 14 April 2022, and set to expire on 26 May 2022. This appears to have been largely due to a number of concerns raised in the best interests assessment, including that:

- Mr Y had not had a medication review since 2020;
- "Ms X objected to the placement in July 2021 and said staff did not have the expertise in dealing with Mr Y's complex needs. And she raised safeguarding concerns in 2022" (paragraph 26);
- Inconsistent statements were given regarding whether or not Mr Y was on continuous 1:1 support;
- Mr Y's room was bare (it was stated that this was for his safety); and
- Mr Y had been locked out of having access to the main building of the care home (though the manager removed the lock at the request of the BIA).

The BIA recommended a short authorisation, with a full review of Mr Y's placement to take place by the local authority learning disability team, to include Mr Y's family.

Ms X brought the complaint in relation to delays in authorising Mr Y's deprivation of liberty in February 2022. The Council stated that there had been "*human error in screening the* [DOLS] *paperwork which caused a delay in allocating the case to assessors to complete a renewal authorisation. It had changed screening processes to reduce the risk of recurrence.*" It further submitted that Mr Y had not experienced any distress in the DOLS assessment process, and had undertaken to review his placement and care.

The LGSCO found that "[t]*here was fault by the Council because between 3 January and 14 April 2022, there was no standard authorisation in place for Mr Y. This means there was no legal basis for his detention for almost three and a half months. The failure to follow the DOLS process and the lack of legal checks means there was no regard to Mr Y's Article 5 rights during that period*" (paragraph 31). The LGSCO found that both the local authority and care home were obliged to keep track of when the standard authorisation was to expire, and ensure its renewal. The Ombudsman further found that "[t]he failure to have in place an effective system to manage the expiry date was not in line with Paragraphs 24 or 123 of Schedule A1 to the Mental Capacity Act and was fault" (paragraph 31).

The LGSCO went on to find that the delay had caused injustice:

> *34. I note the professionals' view that Mr Y would likely not be adversely affected by being detained. While his mental health may not have been impacted, I*

consider there was a missed opportunity to see if Mr Y's care could be delivered in a less restrictive way. So there is avoidable uncertainty for Ms X about whether changes to the care plan might have taken place sooner had the renewal authorisation been completed at the correct time.

35. I note also the BIA recommended removal of the internal locks and that this was actioned immediately. The presence of an internal lock isolated Mr Y and prevented him from interacting with staff and residents in the home and was considered to be disproportionate. However, there is not enough evidence for me to conclude that removal of the lock/key-pad would have happened in January had the authorisation process been completed in time. This is because there is insufficient information about the level of risk at the time.

36. Although there is not enough evidence to conclude any distress to Mr Y, I consider Ms X to have suffered avoidable distress and time and trouble complaining about Mr Y's care.

The agreed actions were that:

- the Council was to apologise to Ms X and pay her £150 in recognition of her time and distress;
- *"Ensure a further standard authorisation is place if appropriate and provide me with a copy of relevant DOLS paperwork."*
- *Provide me with a copy of the review of screening processes in the DOLS team, highlighting the changes made to the previous process and explaining how the amendments reduce the risk of recurrence*" (paragraph 37)

Comment

This is far from the first time the LGSCO has found fault as a result of delays in considering standard authorisations (see, e.g., its findings in relation to severe and systemic delays in Staffordshire, including failing to consider many applications at all, and delays in assessments in Kent which separated an elderly couple). In this matter, the BIA appeared to find a number of concerns about the placement, and restrictions which appeared to be unnecessary (including Mr Y's exclusion from the main building), highlighting the need for a full review. The decision highlights the purpose of a standard authorisation as a safeguarding feature (in accordance with the DOLS name), and finds fault when this safeguard is not applied in a timely fashion. It is also notable for finding an obligation on local authorities to ensure effective monitoring of the expiration of deprivations of liberty in care home placements.

2022 – a year in (mostly) Court of Protection cases shedinar

For those wanting to remember what happened last year, Alex has recorded a shedinar covering key MCA cases from 2022, available here.

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in March. 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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