
GARDEN COURT
CHAMBERS

Court of Protection:
Recent Developments in Health & Welfare

Best Interests: Five Recent Cases

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29 June 2022

Introduction

- The issues before the Court of Protection are continually evolving.
- This talk highlights 5 cases since the Garden Court Court of Protection team's last update (June 2021) with a bonus ball of considering the practical guidance issued subsequently to one of those cases
- These cases illustrate how "best interests" decision- making raises a range of issues touching on the life of P, and how the courts analyse and ultimately determine P's best interests.
- The themes in these cases cover coercive control, forced marriage protection order, injunction, delay, level of restriction in view of alcohol consumption, religious and cultural needs

Best interests – coercive control, injunction re contact

- *Re BU* [2021] EWCOP 54, 24 September 2021, Roberts J
- BU, aged 70, had formed relationship with NC. BU's daughter brought application fearing harm to BU and alleged NC was a serial offender with a history of targeting the vulnerable for financial gain.
- NC moved in with BU rent free and BU made regular payments to him. BU sought to liquidate her entire portfolio of income bonds causing financial institution to contact the police. NC was arrested and bailed with conditions not to contact BU which he breached. BU was estranged from her family
- BU had been declared to lack capacity to make decisions as to her property and affairs; a deputy had been appointed and an injunction ordered preventing contact by NC
- Expert evidence given as to the extent to which BU had been subject to coercive control or undue influence by NC

Best interests – coercive control, injunction re contact

- BU saw NC as the source of her happiness and a future without him as bleak and empty [para 88]
- Held: BU lacked capacity to make decisions as to contact with NC
- Final order granted – no contact between NC and BU until further order
- Penal notice directed to NC
- BU had capacity to enter into marriage but she would not be giving valid consent becuase of coercion by NC
- 12 month injunction granted prohibiting NC from entering a civil partnership with BU (under the inherent jurisdiction)
- 12 month forced marriage protection order granted following the route map in *Re K (Secretary of State for Justice and another intervening)* [2020] EWCA Civ 190

Best interests – delay in making BI decision

- *North West London Commissioning Group v GU* [2021] EWCOP 59, 11 November 2021 – Hayden J
- GU, former pilot suffered cardio-respiratory arrest in 2014, aged 63. Eventually transferred from Thailand to the Royal Hospital for Neuro-disability (RHND)
- In 2018, GU's brother asked for a best interests decision re CANH (clinically assisted nutrition and hydration). Disagreement within the family led to the continuation of CANH but without a formal best interests decision taking place.
- The case eventually was brought before the court and on 21 June 2021 the Judge gave an extempore judgment that it was not in GU's best interests to continue CANH. Treatment was withdrawn and GU died a few days later. After GU's death, a further hearing was convened to give RHND the opportunity to assist the court in understand the 'inordinate and inexcusable delay' in determining GU's best interests [para 40]
- Where the decision is finely balanced or there is a lack of agreement, a court application should be made
- It is "pellucidly clear" that the obligation to review a patient's best interests falls on the individual with overall responsibility for the patient's care [para 98]

Best interests – restrictive setting and access to alcohol

- *MM (by his litigation friend, DF) v A City Council* [2021] EWCOP 62, 7 December 2021 – HHJ Burrows
- MM in mid 20's had mild learning disabilities and Dissocial Personality Disorder. He misused illicit substances and had criminal convictions and at risk of being exploited
- Resided in 24 hour supported accommodation with restrictions; 10pm curfew and no alcohol or drugs on the premises (which he resented). He would abscond and threaten staff. The LA considered moving him to a more restrictive placement
- MM's resentment at being controlled was captured in the interview with Dr O'Donovan, *'he repeatedly stated, I'm my own person, I can do what I want…I'd like to know who the Judge is, I'll smash his head in ….I'm not a person to be fucked around with…He went on to threaten to headbutt myself and at this point stormed out of the property, punching a cabinet on the wall'*

(consider that sort of encounter when come to AH……)

Best interests – restrictive setting and access to alcohol

- On S.21A MCA 2005 application, held: not in MM's best interests to move to a more restrictive placement
- Although remaining in his current setting meant he could go out and associate with exploitative people, use drugs and alcohol (he lacked capacity to make decisions to consume alcohol and illicit substances) and could be harmful, if greater restrictions were imposed, MM would be frustrated, resentful and angry and his life would hold little interest for him
- Restrictions on contact were also likely to lead to unhappiness (the expert had not been able to assess his capacity in this domain)
- Any restrictions beyond his current care plan would be counter-productive and not in his best interests
- The outcome demonstrates how weighing all the factors on the best interests balance sheet can result in a best interests decision that tolerates one type of risk/harm because it is the lesser risk/harm to P's overall wellbeing
- The judgment highlights the need to carefully identify wider risks to welfare when considering imposing restrictions on P

Best interests – religious and cultural needs

- *London Borough of X v MR (by his litigation friend, the Official Solicitor) PD and AB* [2022] EWCOP 1, DJ Eldergill
- S.21A application, MR aged 86, advanced dementia and short life expectancy
- One family member wanted MR moved to a Jewish care home; LA and OS opposed moving MR although OS thought finely balanced
- All professionals believed a move would not be in MR's best interests
- MR said he was happy in the nursing home. He had been committed member of his synagogue and Jewish community over many years and joined in Jewish hymns during a visit from a Rabbi and was pleased 'at an emotional and sensory level'
- Court held: issue was finely balanced
- MR would feel a comforting sense of familiarity and reassurance from seeing and hearing religious and cultural practices and traditions
- This was the decision he would make for himself if he still had capacity to decide 'his wishes, beliefs and values when he had capacity – who he was, how he chose to live his life what he valued – align with a move to a Jewish care home….I find that is it likely that, notwithstanding the risks, he would now wish to move to a Jewish care home if he still had capacity..' [para 101]

Best interests – religious and cultural needs

- Powerful factor in the decision was short life expectancy. The Judge observed he must 'not assume that keeping MR alive and maximising his life expectancy is the magnetic consideration in this case' [para 24]
- The risk involved needed to be considered in the context of the fact that MR may well die soon whichever decision was made [para 71]
- The fact that the type of risk to be taken is not unusual was relevant observing that a person with dementia is moved from one place to another where assessed benefits are considered to justify those assessed risks
- Finely balanced decision which very much depended on detailed appraisal of the facts of the cast and careful evaluation of what weight to attribute to each factor
- The importance of considering P's past and present wishes, feelings, beliefs and values in accordance with Lady Hale's judgment in Aintree [2012] UKSC 67 was emphasised

Best interests – withdrawal of life sustaining treatment

- *In re AH* [2021] EWCA Civ 1768 [2022] 1 WLR 2437 the Court of Appeal was concerned about the process by which Hayden J had reached his judgment
- P aged 56 contracted covid-19 sustaining multiple-organ failure and 'devastating neurological damage'
- The Trust sought an order that continuing to receive life-sustaining treatment was not in AH's best interests. The application was opposed by the family and OS
- After the hearing concluded, the Judge visited AH in hospital
- The Judge spoke to AH who appeared to be distressed and was crying. The Judge said 'I think it may be that you want some peace' and thought he was 'getting the message'
- AH's life expectancy was at most 12 months with no prospect of improvement
- The Judge decided that within a short period of time – allowing for P's daughter to arrive from overseas – ventilation should cease

Best interests – withdrawal of life sustaining treatment

- On appeal, the Court of Appeal held this was 'not an easy case' and *held*:

- The Judge had given careful consideration to the decision but the process leading to it was open to the interpretation that it was procedurally flawed
- It appeared the Judge may have thought he gained insight into AH's wishes by the visit. If so, arguably he was not equipped to gain such insight because of her complex medical condition and the parties would have needed to be informed and given the opportunity to make representations
- There should be a re-hearing. There was a pressing need for some further guidance on judicial visit. Some interim guidance was given including that the purpose of the visit should be determined before it takes place
- The case was remitted for hearing before Theis J [2021] EWCOP 64

Practical guidance - Judicial Visits to P following *In re AH*

- Judicial Visits to P [2022] EWCOP 5, 10 February 2022 – supplements Charles J's guidance
- The decision whether to visit P is to be taken by the judge
- The scope of the visit should be identified; it is not for formal evidence-gathering
- A visit may serve further to highlight aspects of the evidence that the Judge has already heard in a way which reinforces oral evidence given by either the experts or family members
- A visit may sometimes lead the Judge to make further enquiries of the parties, arising from any observations during the visit
- It will be rare for a member of P's family to be present and ought to be avoided
- A note must be taken of the visit and quickly made available to the Judge for their approval and circulated to all parties for their consideration
- Where the Judge considers the experience of visiting P may have had – or might be perceived to have had an influence on the 'best interests' decision, the Judge must communicate that to the parties and invite further submissions where appropriate

Thank you

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GARDEN COURT
CHAMBERS

COVID-19 vaccinations
Deprivation of Liberty

Ollie Persey

Garden Court Chambers

29 June 2022

Covid-19 vaccinations

SD v Royal Borough of Kensington and Chelsea [2021] EWCOP 14,

"i) The best interests assessment is not confined to evidence of the health benefits and risks of vaccination but involves a wide review encompassing all the relevant circumstances including those set out at s.4(6) and (7) of the MCA 2005;

ii) In relation to the benefits and risks to the health of P from vaccination, it is not the function of the Court of Protection to "arbitrate medical controversy or to provide a forum for ventilating speculative theories." The Court of Protection will "evaluate P's situation in the light of the authorised, peer-reviewed research and public health guidelines." It will not carry out an independent review of the merits of those guidelines.

iii) There may be exceptional cases where P's condition, history or other characteristics mean that vaccination would be medically contra-indicated in their case but in the great majority of cases it will be in the medical or health interests of P to be vaccinated in accordance with public health guidelines.

iv) Hence, disagreements amongst family members about P being vaccinated which are at their root disagreements about the rights and wrongs of a national vaccination programme are not suitable for determination by the court. It will be in P's best interests to avoid delay and for differences to be resolved without recourse to court proceedings."

New cases:

- NHS Liverpool CCG v X [2022] EWCOP 17
- North Yorkshire CCG v E [2022] EWCOP 15
- A CCG v FZ [2022] EWCOP 21

NHS Liverpool CCG v X [2022] EWCOP 17

- P a 50 year old woman with a diagnosis of severe epilepsy and mild learning difficulties
- P already had antibodies
- Drop in severity in number of cases and outcomes, in part due to vaccination programme
- Care plan should not include 'treat' to take vaccine

Key takeaway:

"Learning to live with the virus does not mean that we should now ignore it or neglect to make use of the protection afforded by available vaccines that have been shown to have a significantly beneficial effect in terms of inhibiting the spread of the virus, reducing the numbers catching the virus, or, in the case of those who still get infected or reinfected, reducing the risk of developing serious illness, admission to hospital or death."

North Yorkshire CCG v E [2022] EWCOP 15

- P a male in 60s who with moderate to severe learning disability
- *"it is not feasible for this court to make rulings about the reliability of the evidence on which national vaccination guidelines are based, or the validity of the analysis of that evidence which has led to those national guidelines being developed and adopted."*

"In certain cases the particular circumstances or history of an individual might establish that, exceptionally, the national guidance does not apply to them. Focusing on the particular case before me, the evidence from Dr J and evidence from the UK Health Security Agency relevant to E, is that:
i) E is more vulnerable to the effects of Covid-19 due to his age, sex, learning disability, and weight.
ii) Covid-19 vaccination by way of first and second doses and booster, would afford him good (but not absolute) protection against hospitalisation and death from Covid-19. His risk of suffering from debilitating symptoms or death from the virus would be markedly reduced were he to have the vaccines administered.
iii) E does not have any condition, nor is there anything in his history, that would render him more prone to suffer side-effects from Covid-19 vaccination than the general population.
iv) E's history of organic brain damage in infancy may or may not be related to the pertussis vaccination administered to him at that time, but even assuming that the vaccination caused brain damage, that is not a medical contraindication to having the Covid-19 vaccination."

A CCG v FZ [2022] EWCOP 21

- P in 40s of British Muslim and South Asian heritage, learning disability and asthma.
- Care plan for vaccinator to befriend P over multiple visits before a swift injection.

"63. I have found this case extremely challenging. The benefits of the vaccine are plain. However, the difficulty in administering it in a way that is likely to work is immense, and the damage a failed attempt could cause to the relationships within the family is hard to assess. I am quite sure, however, that the plan put forward by the CCG would be met with resistance and there would have to be a retreat by the vaccinator.
64.Having considered the matter at great length, ***I wonder what the proposed plan actually amounts to?*** *It seems to me what is proposed is to engage with FZ, if that is possible. That engagement would then lead to an appointment with the vaccinator which FZ would not know about. She would not even see the vaccinator until the moment immediately before the injection. At that point, I am not sure what is envisaged. I am satisfied that it is almost inevitable- certainly more likely than not- that FZ will resist. This will be verbal, and physical. I base that on the evidence of past interventions and the evidence of what happened when the entirely friendly and benign Official Solicitor's representative visited her just to speak.*
*65.****When making a choice in this case I have to look not only at the outcome of the treatment, but how it will be carried out****. I am satisfied that vaccination will have a good outcome for FZ. However, I am not satisfied that the option I am being asked to approve will achieve that outcome. I am satisfied that it will be met with resistance and will in all likelihood have to be aborted."*

Deprivation of liberty

- *Re T (A Child)* [2021] UKSC 35: the inherent jurisdiction in relation to children an "imperfect stopgap" to authorise deprivation of liberty where use of section 25 Children Act 1989 impossible.
- A argued that the court could not use its inherent jurisdiction in order to authorise the deprivation of a child's liberty in circumstances such as hers, on the basis that: (1) s.100(2)(d) Children Act 1989 prohibits it; it would cut across the statutory scheme in the Children Act 1989; and/or there be a breach of Article 5 ECHR. Furthermore, it was contrary to her best interests to make the order, given that she consented to the regime arranged for her.

Re: T continued

- Inherent jurisdiction is subject to limits. Section 100 of the Children Act 1989 prohibits the use of the inherent jurisdiction to confer, in particular, power to determine any question in connection with any aspect of parental responsibility for a child on a local authority. That, however, reflects the requirement of the CA 1989 that local authorities which need such a power must obtain a care order. It does not prevent recourse to the inherent jurisdiction in a case such as this, where the local authority already had parental responsibility by virtue of a care order.
- Does the inherent jurisdiction cut across section 25 of the Children Act 1989? No findings as to the precise regulatory status of T's placements. But it is in any event unthinkable that the High Court should have no means to keep children safe from extreme harm. If the local authority cannot apply for an order under section 25 because there is no secure accommodation available, the inherent jurisdiction can be used to fill that gap. Where there is absolutely no alternative and where the child, or someone else, is likely to come to grave harm if the court does not act, the inherent jurisdiction may be used to authorise a local authority to deprive a child of his or her liberty, notwithstanding that the placement will be in an unregistered children's home in relation to which a criminal offence would be being committed.
- The inherent jurisdiction in these circumstances fall foul of article 5 ECHR, given the safeguards which the courts have devised, in particular by mirroring the procedural protections applicable in a section 25 application

F (A Child) (Care Order : Deprivation of Liberty) [2021] EWHC 3527 (Fam

- 14.5 year old girl
- S20 CA 89 in 2019 following multiple suicide attempts.
- Detained under s136 MHA, care proceedings followed & LA applied to place F in a secure unit under s25CA 89. ASD diagnosis → children's home
- Mother opposed order authorising deprivation of liberty on basis that children's home was not depriving F of liberty.

F (A Child) (Care Order : Deprivation of Liberty) [2021] EWHC 3527 (Fam

"She questions whether the regime at A Children's Home and the restrictions currently placed upon Fiona amount to a deprivation of her liberty. The fact that restrictions may become necessary in the future would not be a reason to make such an order now (Hertfordshire CC v NK and AK [2020] EWHC 139). For example, Fiona currently has access to the grounds at A Children's Home using her fob, is allowed to be unsupervised for 15 minutes at a time and rarely has her belongings searched or faces restrictions on her use of her telephone. The last time she was subject to physical restraint was on 27 June 2021 (and this was the only time at A Children's Home). In any event, these restrictions are not, she says, proportionate or necessary given the progress Fiona has made in recent months."

F (A Child) (Care Order : Deprivation of Liberty) [2021] EWHC 3527 (Fam

"Fiona spoke for about 20 minutes to explain to me why it is not necessary for me to make an order depriving her of her liberty. She was articulate and persuasive which is why I asked her in our meeting whether she had considered becoming a lawyer. She reminded me that she had been subject to restrictions since the age of 12. Since then she has made huge changes and considerable progress. ***She has not attempted to take her own life for 18 months.*** *When she attempted to leave the placement in June 2021 it was to get some space not with the intention of killing herself. When she compares herself to other young people at A Children's Home she believes she is one of the lowest risks, yet she is subject to this order and many others there are not. The order is not necessary she says. She can be restrained without such an order. Many of the restrictions are not in fact used, such as entering the bathroom when she is there. She is a teenager and teenagers are impulsive, but overall she has not presented a risk for a long time now and these orders are meant to be used as a last resort. It is not necessary at the moment to make such an order. These are her human rights and she objects to the proposed deprivation. These orders should not be used to make other's lives easier. If the order was removed she would be able to make more progress and live a more normal life. Staff at A Children's Home do not necessarily appreciate that the order is permissive only and her life is more restricted because of the order. She is willing to stay at A Children's Home but wants to see the clear steps set out for her return home. There is a real risk that she will become institutionalised. She has made so much progress and recovery, but this has been through her decisions. She wants to live her life, to travel and to get a good job. Every young person struggles at times, but they do not need to be on a DOLS order. This may be seen as the easy option, but it does not mean it is the best option."*

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F (A Child) (Care Order : Deprivation of Liberty) [2021] EWHC 3527 (Fam

" The law on this issue is well known and summarised in the case of Salford CC v NV, AM and M [2019] EWHC 1510. Fiona has as much a right to her liberty as any other person. That right is protected by Article 5 of the European Convention on Human Rights and Article 37 of the United Nations Convention on the Rights of the Child. Any interference with Fiona's liberty must be in accordance with the rule of law, and only used as a measure of last resort and for the shortest possible time."

F (A Child) (Care Order : Deprivation of Liberty) [2021] EWHC 3527 (Fam

40. I do consider that the restrictions imposed upon Fiona ***amount to a deprivation of her liberty****.* ***She is not free to leave the perimeter of the property and her access to the outside areas has to be earned and can be withdrawn at any time. She is not free to be outside the placement unsupervised by an adult.*** *The proposed restrictions would enable staff to enter the bathroom when she is in there to make sure she is safe. It would enable them to be able to search her and remove her possessions if they were concerned about her safety. I appreciate these may not happen very often at the moment, but they are a necessary safeguard.* ***Fiona is monitored every 15 minutes and there is CCTV in the communal areas****. I do consider that these proposed measures, when viewed as a whole, would amount to a deprivation of her liberty. When I compare Fiona's situation to that of another child of her age, she is under a great deal more control and supervision than that other child would be.* ***At 14 the doors to that child's home would not be locked to prevent her leaving. She would be able to be outside the property unsupervised to go to school and to see her friends or go to the shops. She would be able to lock the bathroom door and to have privacy when she needs it. She would not be subject to monitoring every 15 minutes.***

*41. I have considered the argument that Fiona's situation is no different from the other residents at A Children's Home****. The difficulty with that is that I do not have much information about their individual circumstances.*** *There can be a number of reasons why the distinction has been made. On close analysis their situation may not amount to a deprivation of liberty. Alternatively, it may do so but for some reason no order may yet have been sought. To my mind what is important is to concentrate on Fiona's situation and not worry too much about the other residents at A Children's Home.*

F (A Child) (Care Order : Deprivation of Liberty) [2021] EWHC 3527 (Fam

42. The next question for me is whether I am satisfied that such a deprivation of liberty is in Fiona's best interests, whether it is proportionate and whether it is necessary to keep her safe. I have listened to, heard and reflected upon what Fiona and her mother have said, but I have no doubt that these restrictions are necessary and proportionate, for the time being. As I have said, I can see why her family and the professionals trying to help her have been very frightened by her behaviour. She has hurt herself in a significant way, most recently in the summer of 2021. ***She has also tried to take her own life. I know that was in the more distant past but no-one would want to take a risk of that happening again.*** *We all need to be sure that Fiona's behaviour has changed and changed for good. She needs to be patient with us and understand our worries. Her positive progress needs to continue for a little longer and to be stress tested. As Fiona herself told me all teenagers are impulsive. But not all teenagers hurt themselves or attempt to do so. I have considered and further amended the proposed regime of control and supervision to be annexed to the order. I have carefully reviewed these proposed deprivations and consider them to be proportionate and necessary given the history of this case.*

43. ***However, as I have already said during the hearing I would not agree an order authorising this for a further 12 months. This would be too long.*** *Everyone expects Fiona to be home by September 2022. If that has not happened the court will want to know why and to review, in any event, the ongoing necessity for a DOLS order. I will therefore make the order to last until 26 August 2022 in line with the revised position of the local authority and guardian. I have considered the alternative date in May as proposed by the mother, but I think that is a little too soon.* ***I would emphasise the restrictions authorised are permissive only and are not a requirement.*** *I know the local authority understands that but there should be further communication with A Children's Home to underline that point. It would not be right for Fiona to be subject to a greater degree of control of supervision than is strictly necessary to protect her from harm, simply because of the terms of the DOLS order that is in place.*

An NHS Trust v ST (Refusal of Deprivation of Liberty Order) [2022] EWHC 719 (Fam)

- *Deprivation of liberty of child in hospital*
- *ASD, learning disability and other highly complex needs.*
- *EHCP providing for 6:1 (!) support for child in classroom*
- *ST's dysregulation led to siblings locking themselves in their rooms.*
- *In 21st January 2022, following a previous attempt by the family to present ST to the hospital, Dr S advised that ST should not be admitted to hospital unless there was a medical need as "there is clear risk of harm to her and others if she is admitted and this is not an appropriate place of safety in a crisis".*
- *Morning of 16 February 2022 ST was admitted to a general paediatric ward as a place of safety. It is important to make clear that ST was admitted to the paediatric ward solely as a place of safety. There was, and is, no psychical or psychiatric need for medical treatment for ST, on a paediatric ward of otherwise.*

As I noted in Lancashire CC v G (Unavailability of Secure Accommodation) [2020] EWHC 2828 the following difficulty arises in respect of the best interests test in the context of cases of the type currently before the court:

"[61] In particular, the shortage of appropriate resources increases the risk that the decisions regarding the welfare of children will be driven primarily by expediency, with the welfare principle relegated to a poor second place. Within the context of secure accommodation, the local authority and the court must each consider whether the proposed placement would safeguard and promote the child's welfare (see Re B (Secure Accommodation Order) [2019] EWCA Civ 2025). When considering whether to grant an order authorising the deprivation of a child's liberty the court must treat the child's best interests as its paramount consideration. Where a local authority or a court is placed in a position of having to approve a placement because it is the only option available it is obvious that these cardinal principles will be at risk of being undermined. Yet this is the situation that local authorities and courts are forced to grapple with everyday up and down the country by the continuing shortage of appropriate resources and as highlighted repeatedly in the authorities that I have referred to above and more widely by the Children's Commissioner for England."

The question that inevitably flows from this analysis is what happens if the court concludes that it cannot authorise the deprivation of liberty as being in the child's best interests. As I observed in the similar case of Wigan BC v Y (Refusal to Authorise Deprivation of Liberty) [2021] EWHC 1982 (Fam) at [61] and [62]:
"[61] The foregoing conclusions of course lead inexorably to a stark question. ***What will now happen to Y? The answer is that local authority simply must find him an alternative placement.*** *Y is the subject of an interim care order and therefore a looked after child. Within this context, the local authority has a statutory duty to under Part III of the Children Act 1989 to provide accommodation for Y and to safeguard and promote his welfare whilst he is in its care. More widely, and again as made clear by Sir James Munby in in Re X (No 3) (A Child) [2017] EWHC 2036 at [36], Arts 2, 3 and 8 of the ECHR impose positive obligations on the State, in the form of both the local authority and the State itself. Art 2 contains a positive obligation on the State to take appropriate steps to safeguard the lives of those within its jurisdiction where the authorities know or ought to know of the existence of a real and immediate risk to life. Art 3 enshrines a positive obligation on the State to take steps to prevent treatment that is inhuman or degrading. Art 8 embodies a positive obligation on the State to adopt measures designed to secure respect for private and family life. Pursuant to s.6 of the Human Rights Act 1998, and within the foregoing context, it is unlawful for a public authority to act in a way which is incompatible with a Convention right.*

“Within this context, the court has discharged its duty, applying the principles the law requires of it, to give its considered answer on the two questions that fall for determination on the local authority application. That answer is that it is not in Y' best interests to authorise his continued deprivation of liberty on a paediatric ward. The court having discharged its duty, the obligation now falls on other arms of the State to take the steps required consequent upon the courts' decision, having regard to mandatory duties imposed on the State by statute and by the international treaties to which the State is a contracting party." In like manner, in Nottinghamshire County Council v LH and Ors [2021] EWHC 2584 (Fam), Poole J observed as follows having refused to authorise the deprivation of liberty of a child on a hospital ward that was not capable of meeting her needs: "Naturally, the court is acutely concerned for LT and what will happen to her now. It is deeply uncomfortable to refuse authorisation and to contemplate future uncertainties. However, LT is a looked after child and the local authority must find her an alternative placement – it has a statutory duty to provide accommodation for her and to safeguard and promote her welfare whilst in its care, under Part III of the Children Act 1989. The state has obligations under Arts 2, 3 and 8 of the European Convention on Human Rights (see Sir James Munby in Re X (No. 3) (A child) [2017] EWHC 2036 at [36]). I do not doubt that the local authority has striven to find alternative accommodation but that the national shortage of resources has led to the current position. Nevertheless, authorisation of the deprivation of LT's liberty in a psychiatric unit which is harmful to her and contrary to her best interests would only serve to protect the local authority from acting unlawfully, it would not protect this highly vulnerable child."

“I have decided that I cannot, in all good conscious, conclude that it is in ST's best interests to authorise the deprivation of her liberty constituted by the regime that is being applied to her on the hospital ward. I cannot, in good conscience, conclude that it is in the best interest of a 14 year old child with a diagnosis of Autistic Spectrum Disorder and moderate learning disability to be subject to a regime that includes regular physical restraint by multiple adults, the identity of whom changes from day to day under a rolling commercial contract. I cannot, in all good conscience, conclude that it is in ST's best interests for the distress and fear consequent upon her current regime to be played out in view of members of the public, doctors, nurses and others. I cannot, in good conscience, conclude that it is in ST's best interests to be subject to a regime whose only benefit is to provide her with a place to be, beyond which none of her considerable and complex needs are being met to any extent and which is, moreover, positively harmful to her.

New DOLS court

- From 4 July 2022, all new applications seeking these orders will be issued in the Royal Courts of Justice.
- Launched in response to increasing number of applications under inherent jurisdiction: Applications rose from 108 in 2017-18 to 579 in 2020-2
- The court will deal with applications seeking authorisation to deprive children of their liberty and will be based at the Royal Courts of Justice under the leadership of Mr Justice Moor.
- Children who are ineligible to be detained under the Mental Health Act 1983 and either do not meet the criteria for a secure accommodation order under Children Act 1989 or cannot be placed in a secure children's home because of lack of placement

Miklic v Croatia 41023/19 [2022] ECHR 311

- A child committed offences of intrusive behaviour and threats while lacking mental capacity in material domains. Relying on psychiatric and psychological expert opinions, the court placed him in a psychiatric hospital. His requests for fresh expert opinion were refused and his detention continued. He claimed that his Article 5(1)(e) rights were breached because of a failure to follow the procedure prescribed by domestic law. The ECtHR reiterated that no deprivation of liberty conforms with Article 5(1)(e) without seeking the opinion of a medical expert and "the objectivity of the medical expertise entails a requirement that it was sufficiently recent, the assessment of which depends on the specific circumstances of the case before it" (para 63). Not only had the domestic procedure been breached by failing to obtain a fresh opinion but the evidence relied upon to warrant his continued confinement was 1-2 years old and "the Court is not convinced that either of those expert opinions could be considered **both objective and recent within the meaning of the Court's case-law on Article 5 § 1 (e)"** (para. 74). Fresh medical expert opinion should have been sought because, inter alia, being of a very young age he had shown changes in his condition, a privately- commissioned medical opinion implied his condition and evolved, and so more accurate information was needed (para 75). So, contrary to Article 5(1)(e), the prolonging of his detention "had on the whole been adopted in a procedure at odds with the relevant provisions of the domestic legislation and had not been based on objective and recent medical expert opinion" (para. 76).

Thank you

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GARDEN COURT
CHAMBERS

Court of Protection - Health and Welfare Update

(1) Capacity under MCA 2005– highlights from the last 12 months' cases

(2) SS for Justice v A Local Authority - Sexual Offences Act 2003

Bethan Harris

29 June 2022

Cases on capacity under MCA 2005

UKSC

A Local Authority v JB (UKSC) – Ss 1- 3 MCA 2005 general principles; capacity to decide to engage in sexual relations

First instance decisions

Lancashire and South Cumbria NHS Foundation Trust v Q - test for litigation capacity; distinguishing between an unwise decision and an incapacitous one

S v Birmingham Women's and Children's NHS Trust – capacity to decide on a termination of pregnancy; distinguishing between inability to use and weigh and disagreement with the weight that P attaches to various factors

A Local Authority v ZK - when can capacity to decide on contact be person specific; P needs to understand it is his/her decision to make

UKSC - capacity to engage in sexual relations – relevant information

A Local Authority v JB (by his litigation friend, the Official Solicitor) [2021] UKSC 52, 24 November 2021

- The issue was whether the "*information relevant to the decision*" to engage in sexual relations (under s 3(1)(a) MCA 2005) includes the fact that the other person must be able to give consent and does in fact consent
- If a person lacks capacity under ss2-3 MCA 2005 to make the decision, he/she cannot consent to sexual relations and no other person can consent on their behalf: s 27(1) (b) MCA 2005
- **At first instance** the court had held that whether the other person can consent and did in fact consent was *not* part of the relevant information
- The **Court of Appeal** recast the decision as a decision to "*engage in sexual relations*" rather than a decision to "*consent to sexual relations*" and held that the relevant information includes the fact that any person with whom P engages in sexual activity must be able to consent and does in fact consent to it. "*A person who does not understand that sexual relations must only take place when, and only for as long as, the other person is consenting is unable to understand a fundamental part of the information relevant to the decision whether or not to engage in such relations*" (Baker LJ in the Court of Appeal, para 94)

A Local Authority v JB, UKSC (continued)

The UKSC upheld the decision of the CA. The judgment sets out points of principle [47-79]:

- **Burden of proof** on person asserting that a person does not have capacity; **balance of proof** is balance of probabilities [49]
- S 2(3) MCA 2005 is a "***statutory condition***" that all practicable steps are taken to enable a person to make a decision for himself of herself. If the person seeking to challenge capacity cannot show that the condition is satisfied, then the challenge will fail [50]
- S 1(4) MCA 2005 is the **principle of** "***autonomy***" (S1(4): a person is not to be treated as unable to make a decision merely because he makes an unwise decision) [51]
- As regards **timing of the assessment of capacity**: the test should be applied to the specific decision at the time it needs to be made. Ordinarily this will involve "*a general forward-looking assessment at the date of the hearing*". However if there is evidence of fluctuating capacity then that will be an appropriate qualification to the assessment [64]

A Local Authority v JB, UKSC (continued)

- S 2(1) is a single test, which falls to be interpreted by applying the more detailed description given around it in ss 2 and 3 [65]

- As regards whether capacity to decide to engage in future sexual relations should be assessed only on a general and non-specific basis, **"*the matter*" *can* be person-specific** (giving examples) [71]. The relevant information may depend on the personal characteristics of the person [72]

UKSC held on the central issue:

- The concepts involved were **not too abstract** to be included in the relevant information so long as "*must have capacity to*" was replaced with "*must be able to*" [95]

- "*The matter*" is the decision to engage in sexual relations. Information relevant to that decision includes **the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. They should be able to understand, use or weigh it as part of the decision-making process** [121]

Using and weighing in the context of diagnosis of emotionally unstable personality disorder - relationship between litigation capacity and subject-matter capacity

Lancashire and South Cumbria NHS Foundation Trust v Q (by her ALR) & Ors [2022] EWCOP 6, 24 February 2022, Hayden J

- Q had bulimia nervosa. She also had a diagnosis of Emotionally Unstable Personality Disorder (EUPD), recurrent depression and a background of severe trauma and PTSD symptoms. Declarations were sought as to her capacity to litigate, the validity of an Advance Decision to Refuse Treatment and capacity to decide to refuse treatment for hypokalaemia (a life-threatening condition resulting from Q's bulimia).

- Q gave evidence. Her GP and treating consultant psychiatrist gave evidence that Q had capacity to make decision on her physical health. A specialist psychiatrist in eating disorder psychiatry gave evidence that the EUPD caused "*a pervasively low self-esteem and hopelessness*" and fundamentally impaired Q's ability to weigh matters of life in the balance [43] but that the issue of her capacity was finely balanced [54].

Lancashire and South Cumbria NHS Foundation Trust v Q (continued)

- It was held that Q had capacity to conduct the litigation

It was held that the test for litigation capacity and subject-matter are not synonymous. An individual who lacks capacity to decide about medical treatment will frequently lack the capacity to litigate in a case where that is the subject matter but he would not put it as high as Mostyn J had in *An NHS v P [2021]* ("*virtually impossible to conceive of circumstances where someone lacks capacity to make a decision about medical treatment but yet has capacity to make decisions about the manifold steps or stances needed to be addressed in litigation about that very same subject matter*") [21-26]

- It was held that Q had capacity to make the decision to refuse treatment

"***To whatever extent A may have exhibited low self-esteem and worthlessness it is not evident to such a degree as occlude capacitous decision making on this issue***"; Q did not want to live under the medical regime she was under (was "*sick of it*"); her **decision was unwise** but was a decision for her to make [57-58]

Capacity to decide whether to have a termination – P had capacity even if aspects of her weighing were influenced by her diagnosed condition – criticism of hospital capacity assessment process

S v Birmingham Woman's and Children's NHS Trust (1) Birmingham and Solihull Mental Health Trust (2) [2022] EWCOP, HHJ Hilder sitting at Tier 3 as a Deputy High Court Judge, 7 March 2022

S was 38 weeks pregnant, had diagnosis of bi-polar affective disorder. Became pregnant with IVF. After stopping medication, became unwell, admitted under MHA 193 section. S said she wanted a termination but was not 100 % certain. The treating team decided she lacked capacity and it was not in her best interests to have a termination. S brought the case to court herself. The perinatal consultant psychiatrist considered S's wishes a symptom of her mental illness [25].

Held: S had capacity to make the decision-

"*I am satisfied that S has amply enough 'pieces of the jigsaw to see the whole picture'. Even if aspects of her weighing are influenced by symptoms of her diagnosed condition, I am not satisfied that S is unable to use or weigh the information relevant to making a decision about termination of her pregnancy. Rather….she is demonstrating the application of her own values to the decision in question" [58]*

S v Birmingham Woman's and Children's NHS Trust (continued)

Points of interest in the judgment

- Highlights the "helpful summary" of the law on **ability to use and weigh** information in the decision-making process in ***LB Tower Hamlets v PB [2020] EWCOP 34*** para 12 – 14

- Refers to ***Re SB [2013] EWHC 1417 (COP)*** – ("*even if SB had paranoid or delusional views, she gave many other reasons for desiring a termination*")

- Whether an abortion would in fact be performed would depend on whether 2 doctors were satisfied that criteria under the Abortion Act were met

- Criticisms of the hospital's processes: S had not been made aware her capacity was being assessed by them; clinicians' lack of awareness of need to identify relevant information; S's voice not heard in the best interests meeting

- The matter should have been brought to court by one of the health bodies and more promptly, applying the **Vice-President's Guidance, 17 January 2020 on serious medical treatment** (should not have fallen to S herself to do so)

- A **face-to-face hearing** would have been better than a remote hearing (but was not possible due to urgency)

Capacity to decide on contact – in general/in respect of specific people – P must understand it is his decision to make

A Local Authority v ZK (by his litigation friend, the Official Solicitor) and SB [2021] EWCOP 61, *12 November 2021, HHJ Burrows*

- The issues included whether ZK (who has a diagnosis of Landau-Kleffner Syndrome) had capacity to make decisions on contact with others

- Expert opinion stated he could weigh up simple matters relating to family members based on past experience of them but would be less able to do this with people in general, concluding that ZK had capacity to make decision about contact with members of his family but not with others. ZK lacked ability to assess risk.

- The judge held ZK was unable to understand relevant information regarding potential risk *per se* and that applied across the board. This was not a case like *A Local Authority in Yorkshire v SF [2020] 15 EWCOP*, Cobb J where the court distinguished between contact with P's husband and contact with others, in which there was "*a very firm evidential basis for distinguishing between decision making capacity with her husband and other people bon the basis of the evidence and circumstances in that case*" [26]

A Local Authority v ZK

- In any event ZK did not experience himself as having agency and his decisions were a response to what he perceived others to want. He was only just learning that he had a decision to make.

Secretary of State for Justice v A Local Authority (1) C (by his litigation friend) (2) & Ors [2021] EWCA Civ 1527; [2021] 3 WLR 1425, 22 October 2021

- Care-plan facilitating engagement of a sex worker – breach of Sexual Offences Act 2003

S 39 Sexual Offences Act 2003 provides

A person (A) commits an offence if - (a) he intentionally causes or incites another person (B) to engage in an activity, (b) the activity is sexual (c) B has a mental disorder (d) A knows or could reasonably be expected to know that B has a mental disorder, and (e) A is involved in B's care in a way that falls within section 42.

Secretary of State for Justice v A Local Authority (continued)

Facts:

- C had Klinefelter Syndrome resulting developmental delays and social communication difficulties
- C informed his Care Act advocate he wished to have sex and wished to know whether he could have contact with a sex worker
- C had capacity to decide to engage in sexual relations and to decide to have contact with a sex worker
- The local authority applied for a declaration as to whether implementing a care plan facilitating C's contact with a sex worker would involve the care workers being in breach of s 39 SOA 2003. The care workers would book the sex worker (with the aid of a charitable trust that provided assistance in this sphere for people with disabilities) and make the arrangement for the visit and to pay the sex worker [paras 3 and 8].
- At first instance, the court held there would not be a breach of SOA 2003.

Secretary of State for Justice v A Local Authority (continued)

On appeal, the Court of Appeal held:

- "*Causes or incites*" carry their ordinary meaning
- It is a question of whether the acts in question create the circumstances in which something might happen or do they cause it in a legal sense
- A care worker implementing this care plan would clearly be at risk of committing a criminal offence
- S 39 SOA 2003 did not entail a breach of C's Art 8 or 14 ECHR rights
- S 15 MCA 2005 declarations should only be used to declare that an act that could be a breach of criminal law is lawful in exceptional circumstance and for cogent reasons. It was doubted that the court should have entertained the application.

Secretary of State for Justice v A Local Authority (continued)

Comment:

- The respondent's case faced considerable hurdles
- The care plan was hypothetical. There would have been a need for a risk assessment and disclosure to the sex worker as C had been assessed in the past as posing a risk of sexual and physical violence to others [7], [23]
- It was noted that s 53A of the 2003 Act creates a strict liability offence under which care workers would in any event have been at risk of liability [33-34]
- It was held that the legislation was to protect vulnerable people and "bright lines" necessary for certainty [44]
- Examples given in the judgment of circumstances falling on the other side of the bright line, [49], [75] (including care workers arrange contact between a mentally disordered person and spouse/partner, aware that sexual activity may take place; a young person wishes to meet people of their own age and make friends and one of the consequences may be that the incapacitated adult engages in sexual relations)

Court of Protection Health and Welfare Update June 2022 – a few final points

- Practice and Procedure - 2 recent cases; draft updated Code of Practice
- Inherent jurisdiction of the High Court for the protection of vulnerable adults (*not the COP*) – 2 recent cases

Practice and Procedure

Court of Protection proceedings to determine discharge arrangements when P is detained under MHA 1983 -

PH (by his litigation friend, LH) v A CCG & A City Council [2022] EWCOP 12, HHJ Burrows, 14 March 2022 – re-affirms that s 16 MCA 2005 proceedings can be brought whilst P is detained under MHA 1983 to make decisions in relation to arrangements for P on his discharge. However in this instance discharge was not imminent and the court would be "some form of observer with a view to becoming actively involved in the future". The court decided as a matter of case management that the proceedings should not continue.

Power of the Court of Protection to grant injunctions to give effect to its orders - re-affirmed

A NHS Foundation Trust v (1)G and (2) LF & Ors [2022] EWCOP 25, Hayden J, 23 June 2022 – the Trust sought injunctions surrounding the care plan for G; a narrow interpretation of the power to grant injunctions was rejected: "*I am satisfied that Section 16 and Section 17 of MCA conjunctively provide an entirely cogent framework for the granting of injunctive relief to give effect to the Court's orders or directions in such cases where it finds it necessary and expedient to do so*" [9]

To come – updated Code of Practice to MCA 2005

- Will include guidance on the new Liberty Protection Safeguards scheme
- Consultation on the draft updated Code closes on 14 July 2022
- Status of the Code:

S 42 MCA 2005 sets out the list of persons who are duty bound to have regard to the Code and courts/tribunals must have regard to the Code where relevant.

Inherent jurisdiction of the High Court for the protection of vulnerable adults - 2 recent cases demonstrating the boundaries of the jurisdiction

PH (by his litigation friend, the Official Solicitor) v Betsi Cadwaladr University Health Board [2022] EWCOP 16, 31 March 2022, Hayden J

PH, aged 41, had physical injuries resulting in a tracheostomy and requiring PEG feeding. He also had a brain injury. His behaviour could be challenging. He had been incorrectly diagnosed with emotionally unstable personality disorder. COP proceedings considered his transfer from hospital to a discharge destination in North Wales. Shortly after he refused to take nutrition but continued to receive Magnesium and Potassium supplements. Both the Health Board and OS argued the inherent jurisdiction for the protection of vulnerable adults could be engaged to allow for the provision of supplements to PH if he requests them (which meant he would gain further time). It was agreed that PH had capacity under MCA 2005.

Held: "*The limited scope of the inherent jurisdiction is circumscribed by particular, albeit non-exhaustive, criteria which relate to vulnerable adults whose capacity for decision-taking is overborne in some way (see Re SA [2005] EWHC 2942 (Fam); Southend-On-Sea Borough Council v Meyers [2019] EWHC 399 (Fam) (20 February 2019). Nobody had suggested this is the case here*" [20] There was no further role for the court.

PH (by his litigation friend, the Official Solicitor) v Betsi Cadwaladr University Health Board (continued)

Comment

- The jurisdiction has in the past been referred to as a "*lawless void*" because of the apparent lack of parameters
- In this judgment the court was clear that the IJVA is a jurisdiction with parameters

London Borough of Islington v EF [2022] EWHC 803 (Fam), Mr A Verdan QC (sitting as a deputy High Court Judge), *18 March 2022*

The local authority applied under the IJVA for orders to prevent EF (aged 18) for a period of time from travelling to Brazil, following which there should be a review. EF wanted to travel to Brazil to be with a man she loved and wanted to be with. The man was wanted in the UK for possession of child pornography. EF had a diagnosis of schizo-affective disorder. EF had capacity under MCA 2005 to make the decisions. The court initially made interim orders without notice to EF and then applied to extend the orders.

Held: EF was not deprived or disabled from being able to make decisions but was making unwise decisions [90]. The jurisdiction should not be used to make orders against the subject of proceedings or if there was such jurisdiction it should be used only in truly exceptional circumstances [98]. The judgment ends with a "plea to EF" to think further and listen on advice, stating the court's view was that she was making a very unwise decision to move to Brazil.

London Borough of Islington v EF (continued)

Comment

- An expert was instructed who made a very careful assessment of whether the deficits in her understanding brought her within MCA 2005
- The judgment contains **a helpful exposition of the key cases in this area** including reference to Sir James Munby's lecture "*Whither the Inherent Jurisdiction*" [36-49]
- The fact that orders were sought **against the subject herself** was inevitably problematic; as highlighted in the judge's review of previous cases, the case-law only went as far as supporting the use of such orders on an interim basis [45]

Thank you

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