COURT OF PROTECTION UPDATE

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Introduction

1. This session is, essentially, "the Court of Protection for public lawyers". Its aim is to remind public lawyers of the existence of the Court of Protection, to explain some of the developments taking place there, and to show how its jurisprudence cross-fertilises to other areas.

2. This paper provides a brief overview of some of the topics to be discussed. It will be developed during the session itself.

DOL matters

3. The obvious area of interest surrounds the Deprivation of Liberty Safeguards (DOLS). Most will be familiar with this: in short, the DOLS were developed (Schedule A1 of the Mental Capacity Act 2005 and associated sections came into force on 1 April 2009) in order to plug the *Bournewood* gap concerning those who are detained but not pursuant to the Mental Health Act 1983. To be lawful, a DOL has to be authorised either by way of Sch A1 of the MCA 2005 (urgent or standard authorisation), or by a court (either under the inherent jurisdiction or under section 16 of the MCA). Failure to do that will render the DOL unlawful, and give rise to liability for damages (*G v E & others* [2010] EWHC 621 (Fam) is an example). A negligent (or potentially otherwise unlawful) Sch A1 authorisation will also confer no immunity: see *Hillingdon LBC v Neary* [2011] EWHC 1377 (COP) (considered further below): compliance with the scheme is therefore crucial. It is fair to say that a number of local authorities have taken time to learn this.

4. The introduction of the DOLS regime has resulted in a lot of jurisprudence concerned with what amounts to a deprivation of liberty. In particular, there has been considerable debate concerning the extent to which DOL cases outside the social welfare field are relevant (notably the control orders cases such as *SSHD v JJ* [2008] 1 AC 385 and the kettling case of *Austin* [2009] 1 AC 564) and the role of

"purpose" in determining whether there has been an objective deprivation. There was a suggestion that social welfare cases were so far away from the prison paradigm of DOL that a deprivation would only rarely arise in this context.

5. This suggestion has proved not well founded, but it is right that the context in which a person is said to be detained – and the relative normality of a social welfare setting, including home settings – have become highly relevant. There have been a series of recent cases concerning alleged detention in home settings (see eg. *Re A* [2010] EWHC 978 (Fam). The point also arose in *G v E & others* [2010] EWHC 621 but was not resolved). These have now concluded (for the moment[1]) with the key case of *P and Q v Surrey CC* [2011] EWCA Civ 190.

6. *P & Q* was concerned with two cases of detention in group homes. The court held that happiness is not relevant to whether a DOL exists (only to best interests). However whether P objects *is* relevant. The purpose of the detention is not relevant (cf. *Austin*) but the relative normality of a situation may be. Medication is always a pointer. Perhaps most significantly, the court was more concerned with this new concept of "relative normality" than with the extent to which the two individuals were controlled (a key factor in the preceding case law).

7. The court struggled a little with drawing the line between whether a DOL arises and whether it is justified (as being in best interests). Smith LJ also differed slightly as to whether or not a change of circumstances (this having been a rescue from an abusive situation) was relevant to the question whether there is, objectively, a DOL. However this too is not an easy line to draw. Although the DOL test is an objective one it will also take into account the particular capabilities and characteristics of the person concerned. There is therefore a subjective element beyond the simple question whether there has been consent (which here will virtually always be satisfied because there will be no capacity to give valid consent). See to similar effect the remarks of the Supreme Court in *SSHD v AP* [2010] UKSC 24 (a control orders case) and in particular Lord Dyson at [28].

[1] The OS is currently, subject to public funding, seeking leave to appeal to the Supreme Court.

8. *P and Q* was applied by Baker J in *Cheshire West v P* [2011] EWHC 1330 (Fam). He said that some care must be taken in reading across from other cases (they turn on their own facts and the differences may be subtle: [49]). For him, control, especially around aggressive behaviour, preventing other concerning behaviour, and the need (at times) for physical restraint, was key and combined to make this a DOL case. This was despite the degree of normality in the general arrangements.

9. The upshot is that there is a lot of new DOL law, but it is not always easy to apply. In lots of ways the decisions appear to be largely instinctive. There has been criticism, in some quarters, that this is leading to inconsistency in application of the DOL safeguards.

10. Turning to other points relevant to the DOLS. First, the issue of burden of proof. At [52] in *Chester West* Baker J held that there is no burden of proof in COP proceedings:

> The processes of the Court of Protection are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests. It may be that one party or another asserts a fact which, if in dispute, must be proved, to the requisite standards of the balance of probabilities, but the question of whether or not the circumstances as a whole amount to a deprivation of liberty is not one which falls to be determined by application of a burden or standard of proof.

11. The factual point is however important. See *LBB v JM, BK and CM* (unreported) 5 February 2010 (considered further below) where factual matters were being asserted, concerning allegations of sexual abuse, and Hedley J accepted that they had to be proved, by the authority, on the balance of probabilities.

12. Note also *BB v AM* [2010] EWHC 1916 (Fam) on interim DOL decisions. At [31]:

> "The courts simply do not have the time and resources to spend lengthy periods of time considering arguments at an interim stage as to whether or not detention amounts to a deprivation of liberty. The court has to make a quick and effective assessment at the interim stage on the best available evidence"

13. Another potentially interesting development concerns the need to review DOLs. This requirement flows from Article 5(4) of the ECHR (right to speedy

determination of the lawfulness of detention). That is generally satisfied by the DOLS regime itself (maximum authorisation period one year: see Sch A1 §42) or, with court-authorised DOLs, by arrangements complying with *GJ (Incapacitated Adults), Re* (2008) EWHC 1097 (Fam), (2008) 2 FLR 1295) and *BJ v Salford* [2009] EWHC 3310 (Fam).

14. An interesting aspect of *Hillingdon LBC v Neary* [2011] EWHC 1377 (COP) was that Peter Jackson J found a breach of Article 5(4) on grounds which included the failure to provide an Independent Mental Capacity Advocate (IMCA). This, it was held, prevented any review of the ongoing DOL being effective. At [202]:

> there is an obligation on the State to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court. The nature of the obligation will depend upon the circumstances, which may not readily be transferable from one context to another. In the present case, I have already found that the three matters together – no IMCA, no effective review, and no timely issue of proceedings – made it more likely than not that Steven would have returned home very much earlier than he did. Those omissions had consequences, and Hillingdon thereby defaulted on its obligations towards Steven. I accordingly find that they amounted to a breach of his rights under Article 5(4).

15. It seems to us that this is an interesting and potentially important finding about what *effectiveness* requires in Article 5(4) terms. This has proved difficult in different contexts. See eg. *James, Lee & Wells v SSJ* [2010] 1 AC 553: the prison case concerned in part with whether Article 5(4) requires the provision of offending behaviour courses (currently before Strasbourg).

16. The need for reviews, and the resources pressures associated with that requirement, was also a feature of the decision of Mostyn J in *YB v BCC* [2010] EWHC 3355 (COP). He held that a child aged 17 ½ was not deprived of her liberty when subject to a regime, during the week, of accommodation under s 20 Children Act 1989. Mostyn J held, in fairly firm terms, that this did not amount to a DOL.

17. While this decision might be understandable by reference to its facts, it is submitted there are some aspects to the legal analysis that are more difficult to understand. In particular, the court attached particular weight to the fact that, as a matter of law, the child could be removed by her parents at any time (see s 20(8)). It was argued that this legal facility amounted to little when, for a variety of reasons, it could not in

practice be effected. Mostyn J rejected that argument on the basis that a public body could not be effecting a DOL when it had no power to do it. This would seem to us to be obviously too broad unless seen in the very specific context of the case. However Mostyn J was clear that the "first and foremost" question is:

> "[w]hat is the legal basis for the confinement. If the legal basis is truly voluntary then it is very hard, indeed impossible, to see, that there has been an actual confinement." [32]

18. It will be seen whether this survives: the case is under appeal and is to be heard on 12 and 13 October 2011. As Strasbourg repeatedly makes clear, the Convention is about practical not theoretical rights.

19. Finally, in *GJ v Foundation Trust* [2009] EWHC 2972 (COP) the eligibility criterion for the DOLS was explained. In short the MCA 1983 takes priority. Thus, where an individual *could* be detained under the MHA, where the proposed MCA placement is a hospital, and where the individual objects to that placement, then the only route is the MCA.

Best interests: welfare

20. *Neary* is also relevant again here. It is probably the most high profile of the welfare cases decided this year, although experience suggests that the circumstances may not be so rare (see also *G v E*). Peter Jackson J found breaches of Articles 5 and 8 in the way Steven Neary was removed from his home life with his father. The judgment contains important statements of principle about both Convention rights throughout the judgment (Article 5(4) having already been touched upon). It is also significant in the emphasis given to Article 8 (including Article 8 procedural rights).

21. *Neary* is also significant in underlining the obligations on supervisory bodies to ensure that best interests assessments (assessments carried out in order to justify deprivations of liberty) are properly conducted. The judge held that active supervision of this process was required [175] and that included, in this case, ensuring that proper regard was given to the extant family life [182]. As already indicated, the failure to do this breached Convention rights. It also deprived the authority of the protection of Schedule A1.

22. *Neary* was relied on in *LB Waltham Forest v DKD & others* [2011] EWHC 2419 (Fam). However this decision marks a step in the opposite direction because it did not follow *Neary* or *Re S (Adult Patient) (Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam) and *Re MM* [2007] EWHC 2003 (Fam). The latter are both decisions of Munby J to the effect that there is a practical and evidential starting point in favour of existing family arrangements. A number of other cases as well as *Neary* adopted this principle (as being a proper reflection of the Article 8 right to a family life). However Theis J, preferring a decision of Roderic Wood J about philosophical shifts towards models of care where incapacitated adults are well supported by local authorities in the community (*DCC v LS* [2009] EWHC 123 (Fam)), held that extant family life is simply a factor to be weighed in the balance: one of the relevant circumstances for the purposes of s 4 MCA 2005. Permission to appeal is being sought.

23. Many COP cases turn on these type of problems, and there are underlying concerns about whether the MCA regime (and its application) is too paternalistic, and/or too risk averse. There is also a related debate concerning whether or not present approaches are consistent with Article 12 of the Convention on the Rights of Persons with Disabilities. This provides:

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

24. The debate is around the extent to which anyone is ever truly incapable, and whether sufficient emphasis is given to expressed preferences by incapacitated adults. A good way into these and related topics may be found in the excellent *The Small Places* blog at http://thesmallplaces.blogspot.com/.

Sexual relations

25. The *DCC v LS* [2009] EWHC 123 (Fam) litigation came back before Roderic Wood J as *DCC v LS* [2010] EWHC 1544 (Fam) and was then the subject of close analysis by Mostyn J in *DBC v AB* [2011] EWHC 101 (COP). The law relating to capacity to enter into sexual relations is a particularly specialist sub-set of COP work, and this is therefore not the place to engage in detailed analysis. Nevertheless, the issue is clearly fraught with (as Mostyn J held) legal, intellectual and moral difficulty. It is also very clearly going to be litigated further given that all the cases remain at first instance.

26. In this case Mostyn J attempted to reconcile an apparent difference of view between Munby J in the social welfare context and Baroness Hale in the criminal context about whether capacity to enter into sexual relations is purely act-specific, or also partner-specific. The judge resolved the issue (perhaps bravely), in favour of Munby J. Disagreeing with the expert evidence of Dr Hall in the case as to whether capacity included the need to understand that only adults over the age of 16 should engage in sexual intercourse, he concluded that capacity to consent to sex remains act-specific and requires an understanding and awareness only of the mechanics of the act, that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections, and that sex between a man and a woman may result in the woman becoming pregnant. There remains a number of unanswered questions, including where consent comes within that test, and whether the test for sexual relations which do not include intercourse would be different.

Best interests: treatment

27. The significant recent treatment case is *W v M* [2011] EWHC 2443 (Fam). This was an application from the family of a person in a minimally conscious state (MCS) (a level of consciousness just above persistent vegetative state) to withdraw artificial nutrition and hydration. It is thought to be the first case to come to court involving a diagnosis of MCS, with the court balancing M's rights under articles 2, 3 and 8 of the ECHR.

28. The transcript records the tragic circumstances the family were in. The court also pays tribute to those who acted for them on a pro bono basis (with some sharp words about why legal aid was unavailable). In large part the case is fact-specific. However it is of broader interest in that the court rejected a submission, made by the Official Solicitor, that because M was clinically stable then should then be *no* best interests balancing exercise (i.e. ANH could never then be withdrawn). Nevertheless, the sanctity of life principle first established in *Airedale NHS Trust v Bland* [1993] AC 789 weighed so heavily that, with limited evidence about what M's wishes would have been, some evidence of positive experiences, then even with clear wishes expressed by the family, evidence that M was often in pain and discomfort, and only remote prospects of recovery, the balance lay in favour of maintaining the treatment. The emphasis is very much therefore on advanced decisions being made in writing (s 24 of the MCA).

29. The court did however maintain a DNR order.

Procedural matters

30. A number of procedural developments are worth noting. In *A local authority v PB & P* [2011] EWHC 502 (COP) Charles J was faced with a case that was not ready and where issues arose in respect of (a) the facts that were in dispute; and (b) the jurisdiction of the COP as opposed to the Administrative Court (see further below). See his proposed draft direction for these cases on the future, and his underlining of the duties on parties to identify where issues of fact may have to be resolved.

31. This raises a broader issue about the need for fact-finding hearings in certain cases. As already noted, *LBB v JM, BK and CM* (2010) (unreported) 5 February was concerned with allegations of sexual abuse of a step-daughter. A fact-finding hearing was ordered (which then proceeded largely to determine best interests matters as well). Per Hedley J:

> The local authority took the view that since the intervention of the court would engage a potential breach of the Article 8 rights of the parties, that it may be incumbent upon them to establish on a factual basis why it was that the court's jurisdiction should be exercised. Broadly speaking, I would endorse that approach and recognise that where an Article 8.2 justification is required then the case should not be dealt with purely as a welfare case if there are significant factual issues between the parties which might bear on the outcome of the consideration under Article 8.2 as to whether state intervention was justified.
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> The Mental Capacity Act does not contain provisions equivalent to the threshold provisions under s.31.2 of the Children Act. Nor should any such provisions be imported in it as clearly Parliament intended that they should not be, but an intervention with parties' rights under Article 8 is a serious intervention by the state which requires to be justified under Article 8.2. If there is a contested factual basis it may often be right, as undoubtedly it was in this case, that that should investigated and determined by the court.

32. Another point of procedural interest concerns *Re A* [2010] EWHC 978 (Fam) (also noted above). Here Munby J considered the duties of local authorities faced with potential DOLs at home and the positive duties under articles 5 and 8 ECHR to make investigations. Reflecting in large part the earlier guidance given by Hedley J in *Re Z (Local Authority: Duty)* [2004] EWHC 2817 (Fam) he set out at [95] the obligations that then arise with regard to investigating, and ultimately putting matters before the court.

33. Questions of publicity and in particular the reporting of judgments have also been producing some debate in the COP. This is in large part as a result of the efforts of the *Independent* newspaper to subject to scrutiny what it sees as a secretive court. *Independent News and Media & others v A* [2010] EWCA Civ 343 is the key case on achieving the balance. For a number of reasons that case told a particularly compelling story, and so the court considered it a particularly good candidate for some publicity. However a more regular example of COP work was also publicised in *P v Independent Print Ltd* [2011] EWCA Civ 756.

34. Finally, to costs. *Manchester CC v G & E* [2011] EWCA Civ 939 was an appeal against Baker J's costs order in *G v E*. The general rule is of course no order. It was departed from in this case on the basis of the serious default by the local authority (including delay in bringing the matter to court). Indemnity costs were also ordered.

35. Another case where costs were ordered was *Cheshire West v P* (Baker J again). There the local authority had failed to disclose relevant records, had then destroyed records and compiled new ones, consequently lengthening proceedings. This behaviour also led to the local authority being named (the case has recently been heard on appeal, though not on the issue of costs).

The Court of Protection and judicial review

36. Finally, but arguably most importantly for public law practitioners, it is worth revisiting some of the principles about the relationship between the COP and judicial review. These principles are relatively straightforward, if not always easy to apply: if the issue (or dispute) is about what the protected party (P) wants or should want, then it is a COP matter. If the issue is, however, what should the local authority (or other public body) do, then it is a matter for judicial review.

37. A string of decisions establish this distinction, in particular *A v A Health Authority* [2002] Fam 213 and *Re S (Vulnerable Adult)* [2007] 2 FLR 109. The difficulty in application, as Munby J recognised in *A*, is that many disputes may concern *both* decisions of P that are susceptible to the COP jurisdiction, and decisions of public authorities that are only susceptible to judicial review. Examples of cases where drawing this distinction has proved difficult include *CF v SSHD* [2004] EWHC 111 (Fam) (a prison law case concerned with mother and baby units. Munby J declined to treat that as having a best interests pre-stage). By contrast, in *AH v Hertfordshire Partnership NHS Trust* [2011] EWHC 276 it was clear to all that the question of whether an individual ought to move on, in accordance with government policy in favour of care in the community, was a pure best interests question because the authority had made it clear it would keep open the facility if that was in the individual's bests interests.

38. In other cases, it may be that proceedings have to run in both jurisdictions. This happened in *R (C) v A Local Authority* [2011] EWHC 1539 (Admin). This was a highly complicated (and tragic) set of circumstances involving a severely autistic 18 year old who, amongst other things, was being confined in a padded room in a residential special school. Challenges ran in the Administrative Court with requests for best interests determinations alongside in the COP. Ryder J sat in both capacities. In the end, most of the judicial review matters were resolved by consent. However the case shows the potential for all relevant matters to be disposed of together, provided proper case management can be achieved.

39. There are, of course, many tactical considerations which arise in cases of this kind. In particular, if there is a COP element – because there is a dispute about best interests – then oral evidence is likely to be called with associated cross-examination. This obviously affords an opportunity to challenge decision-makers in a way that is almost always absent in Administrative Court proceedings. It may be thought that such an opportunity provides advantages when the court "switches hat" and considers the public law challenge. More broadly, it may be worth noting that this is yet another area (the others being human rights claims) where the Administrative Court is, albeit indirectly, having to accommodate oral evidence. One may wonder where that will take matters in the long run.