Neutral Citation Number: [2014] EWCOP 25

Case No: 12488518 and 28 others

COURT OF PROTECTION
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 August 2014

Before :

Sir James Munby President Of The Court Of Protection

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Re X and others (Deprivation of Liberty)

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Mr Alexander Ruck Keene and Mr Benjamin Tankel for the Official Solicitor as advocate to the court
Ms Joanne Clement for the Secretary of State for Health and the Lord Chancellor and Secretary of State for Justice
Mr Stephen Cragg QC for the Law Society of England and Wales
Ms Alison Ball QC and Mr Andrew Bagchi for the Association of Directors of Adult Social Services
Mr Neil Allen for Cheshire West and Chester Council, Surrey County Council and Northumberland County Council
Mr Michael Dooley for Cornwall Council
Ms Bethan Harris for Worcestershire County Council
Mr Conrad Hallin for Sunderland City Council
Ms Natalia Perrett and Ms Emily Reed for Barnsley Metropolitan Borough Council
Mr Simon Burrows for Rochdale Metropolitan Borough Council
Mr Michael Mylonas QC for Surrey Downs Clinical Commissioning Group
Mr Jonathan Auburn for NHS Sheffield Clinical Commissioning Group
Mr John McKendrick for Nottinghamshire Healthcare NHS Trust
Mr Jonathan Butler for KW (a patient)
Ms Katie Scott for AS and GS (patients)
Mr Joseph O'Brien for PMLP (a patient)
Mr Ian Wise QC, Ms Martha Spurrier and Ms Alison Fiddy filed written submissions on behalf of Mind

Hearing dates: 5-6 June 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

This judgment was delivered in Open Court

Sir James Munby, President of the Court of Protection :

1. On 19 March 2014 the Supreme Court gave judgment in *Surrey County Council v P and others (Equality and Human Rights Commission and others intervening), Cheshire West and Chester Council v P and another (Same intervening)* [2014] UKSC 19, [2014] PTSR 460, [2014] COPLR 313. I am not here concerned to analyse the Supreme Court's decision, nor to explore its implications as a matter of substantive law. I am concerned solely with a narrower but more pressing issue: the practical and procedural implications for the Court of Protection of what all informed opinion agrees is the large increase in its case-load which will follow in consequence of the Supreme Court's decision.

2. Just how large that increase will turn out to be is not yet clear. In part it may depend upon the extent to which otherwise purely private care arrangements – for example, the care at home by the family of an elderly relative or spouse suffering from dementia – come within the ambit of Article 5 because of some involvement by the State, whether a local authority or the court. That raises potentially complex issues which, I emphasise, I am not here concerned with. I mention it only because on one possible outcome there could be a large number of such cases adding even further to the Court of Protection's case-load. Be that as it may, and even if that turns out not to be the case, it is clear that there is going to be a very significant increase in the number of cases in the Court of Protection relating to deprivation of liberty ("DoL").

3. In order to address this increase, I arranged for a number of DoL cases to be listed before me for initial directions on 8 May 2014. With the assistance of counsel appearing before me on that occasion, in particular Mr Alexander Ruck Keene who appeared for the Official Solicitor as advocate to the court, I was able to formulate the 25 questions, set out in the Annex to the order I made at the conclusion of that hearing, to be considered at a further hearing I fixed for 5 June 2014. For ease of reference those questions are set out in the Annex to this judgment.

4. At the hearing on 5 June 2014 I had the assistance of a large number of advocates, representing between them, in addition to the Official Solicitor as advocate to the court, the Secretary of State for Health and the Lord Chancellor and Secretary of State for Justice, the Law Society of England and Wales, the Association of Directors of Adult Social Services, Mind, eight local authorities, two NHS clinical commissioning groups, a NHS trust and four individuals. Their submissions were invaluable in illuminating the forensic landscape and pointing the way to the correct answers to the various questions. I am immensely grateful to all of them.

5. The immediate objective, in my judgment, is to devise, if this is feasible, a standardised, and so far as possible 'streamlined', process, compatible with all the requirements of Article 5, which will enable the Court of Protection to deal with all DoL cases in a timely but just and fair way. The process needs, if this is feasible, to distinguish between those DoL cases that can properly be dealt with on the papers, and without an oral hearing, and those that require an oral hearing.

6. In my judgment, that objective is feasible and can be achieved.

7. In contrast to the Family Court, which has a statutory rules committee, the Family Procedure Rules Committee, the Court of Protection has no statutory rules committee.

The rule making power for the Court of Protection is vested (see section 51 of the Mental Capacity Act 2005) in the President of the Court of Protection, with the agreement of the Lord Chancellor. An ad hoc, non-statutory, committee ("the Committee") has recently been set up to review the Court of Protection Rules 2007 ("the Rules") and associated practice directions and forms. At its first meeting on 14 July 2014, the Committee identified as a major issue for consideration the question of whether Rule 73(4), which provides that "Unless the court otherwise orders, P shall not be named as a respondent to any proceedings", requires amendment.

8. This is a preliminary judgment, setting out briefly my answers to those of the 25 questions which require an early decision if the objective I have identified is to be carried forward. It concentrates on the issues directly relevant to what I will call the 'streamlined' process. It sets out no more than the broad framework of what, in my judgment, is required to ensure that the 'streamlined' process is Article 5 compliant. Additional, detailed, work needs to be carried out as soon as possible by the Court of Protection in conjunction, where appropriate, with the Committee.

9. A further judgment will follow in due course, elaborating on my reasons for deciding as I have and dealing with the questions – in particular questions (6), (8) and (10) – not dealt with in this judgment.

(1) Can an official of the Court of Protection authorise a deprivation of liberty of an individual, or must such authorisation be judicial in order to comply with Article 5(1) ECHR?

10. Any authorisation of a DoL by the Court of Protection should be by a judge, not a court officer.

11. Article 5(1) does not itself require a judicial determination, but anyone lawfully deprived of their liberty in accordance with article 5(1) is entitled to a "speedy" decision "by a court" of the lawfulness of the detention. The decision must be judicial, so the "court" for this purpose must be a judge and not an official. There is therefore no purpose in creating a procedure (which in any event would require amendment to PD3A) involving initial decision in a DoL case by a court officer. Even if otherwise appropriate (which it is not) it would simply create additional, duplicated and unnecessary work for the Court of Protection.

(2) Can an initial application to the Court of Protection to authorise the deprivation of liberty of an individual be determined on the papers (with a right to direct an oral hearing and/or for any person or body involved to request an oral hearing or review) or does it require an oral hearing in order to comply with Article 5(1) ECHR?

12. Neither Article 5(1) nor Article 5(4) nor the Rules requires that the initial determination must involve an oral hearing. There are cases where, assuming a sufficiently robust process (see further below), the initial determination can properly be made on the papers, so long as there is an unimpeded right to request a speedy review (reconsideration in accordance with Rule 89) at an oral hearing.

(3) If an initial application can in principle be determined on the papers, how is the Court of Protection to identify which cases should be dealt with on the papers and which at an oral hearing?

13. I identify below in answer to questions (4) and (20) the material which will need to be put before the court in any 'steamlined' process in a DoL case. 'Triggers' indicating the need for an oral hearing and the inappropriateness of dealing with the application on the papers would be:

    i) Any contest, whether by P or by anyone else, to any of the matters referred to in paragraphs 35(ii)-(vii) below.

    ii) Any failure to comply with any of the requirements set out in paragraph 35(viii) below.

    iii) Any concerns arising out of information supplied in accordance with paragraphs 35(ix), (xiii) and (xiv) below.

    iv) Any objection by P.

    v) Any potential conflict with any decision of the kind referred to in paragraph 35(x) below.

    vi) If for any other reason the court thinks that an oral hearing is necessary or appropriate.

(4) What are the irreducible matters that must be addressed in evidence before the court before it can make an order satisfying the requirements of Article 5(1)(e) ECHR?

(5) What form should such evidence take (including medical evidence)?

14. Compliance with the three *Winterwerp* [*Winterwerp v Netherlands* (1979) 2 EHRR 387] requirements is essential to ensure compliance with Article 5: (i) medical evidence establishing unsoundness of mind, (ii) of a kind warranting the proposed measures and (iii) persisting at the time when the decision is taken.

15. Professional medical opinion is necessary to establish unsoundness of mind, but where the facts are clear this need not involve expert psychiatric opinion (there will be cases where a general practitioner's evidence will suffice).

16. The evidence should be succinct and focused. Statements and reports need not be lengthy. I see no reason why the totality of the material in a 'streamlined' application, that is, the application, the evidence and other supporting material, need exceed something of the order of 50 pages at most.

17. See further under question (20) below.

(7) Does P need to be joined to any application to the court seeking authorisation of a deprivation of liberty in order to meet the requirements of Article 5(1) ECHR or Article 6 or both?

(9) If so, should there be a requirement that P … must have a litigation friend (whether by reference to the requirements of Article 5 ECHR and/or by reference to the requirements of Article 6 ECHR)?

18. Neither the Rules (see Rule 73(4)) nor the Convention require P to be joined as a *party* to the proceedings, though Article 5(4) of course entitles P to "take proceedings".

19. What the Convention requires is that P be able to participate in the proceedings in such a way as to enable P to present their case "properly and satisfactorily": see *Airey v Ireland* (1979) 2 EHRR 305, para 24. More specifically, "it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty'.": *Winterwerp v Netherlands* (1979) 2 EHRR 387, para 60. P should always be given the opportunity to be joined if they wish and whether joined as a party or not must be given the support necessary to express views about the application and to participate in the proceedings to the extent that they wish. So long as that demanding standard is met, and in my judgment it can in principle be met without P being joined as a party, there is no need for P to be a party.

20. If P is a *party* to the proceedings, P must have a litigation friend. If P is participating other than as a *party*, there is no need for a litigation friend.

21. These are all matters which require urgent consideration by the Committee as part of its more general review of Rule 73(4).

(11) What frequency of review is required by Article 5(4) ECHR where a deprivation of liberty has been authorised by the Court of Protection?

22. Typically approximately annually, unless circumstances require a shorter period: see *Re GJ, NJ and BJ (Incapacitated Adults)* [2008] EWHC 1097 (Fam), [2008] 2 FLR 1295, *Re BJ (Incapacitated Adult)* [2009] EWHC 3310 (Fam), [2010] 1 FLR 1373.

(12) Must such review be judicial?

23. Yes.

(13) Can such review take place on the papers, or does it require an oral hearing?

24. An oral hearing is not required in every case; where appropriate, there can be a review on the papers: see *Re GJ, NJ and BJ (Incapacitated Adults)* [2008] EWHC 1097 (Fam), [2008] 2 FLR 1295, para 40, *Re BJ (Incapacitated Adult)* [2009] EWHC 3310 (Fam), [2010] 1 FLR 1373, paras 12, 24.

(14) Does the answer to the question above depend upon the nature of the initial authorisation procedure (ie whether it follows an oral or a paper-based authorisation procedure)?

25. No.

(16) If P or the detained resident requires a litigation friend, then: (a) Can a litigation friend who does not otherwise have the right to conduct litigation or provide advocacy services provide those services, in other words without instructing legal representatives, by virtue of

their acting as litigation friend and without being authorised by the court under the Legal Services Act 2007 to do either or both …?

26. A litigation friend does not have to act by a solicitor and can conduct the litigation on behalf of P: *Gregory v Turner* [2003] EWCA Civ 183, [2003] 1 WLR 1149, para 63. A litigation friend who does not otherwise have a right of audience requires the permission of the court to act as an advocate on behalf of P: *Gregory v Turner*, para 64.

27. These are issues which require urgent consideration by the Committee.

(17) What are the requirements necessary to ensure that any "streamlined" procedure for applications … complies with Article 5 and/or 6 of the ECHR?

28. See the answers to questions (3), (4) and (20).

(18) Which of the COPR 2007 would require amendment (and, if so, how) to enable a 'streamlined' Article 5 ECHR-compliant process?

29. Rules 50 and/or 51 require amendment to remove the requirement for permission to start proceedings in a DoL case.

30. Rule 89(3)(a) requires to be amended to remove the 21 day time limit in DoL cases.

31. Section 53 of the 2005 Act requires amendment to bring it into line with the recently amended section 46(2). In the meantime, to accommodate the fact that DoL cases under the 'streamlined' process may be heard by judges of the Court of Protection other than those referred to in section 53(2), and to reduce the number of appeals from such judges which would otherwise have to be to the Court of Appeal, Rule 89 requires to be amended to provide that any reconsideration in a DoL case of an order of such a judge shall be heard not by that judge but by a district judge or circuit judge, and Rule 172 requires to be amended to provide that where reconsideration is permissible in accordance with Rule 89 there shall be no appeal from the original order but only from the order made on reconsideration. A corresponding amendment will be required to Rule 84 to ensure that if an oral hearing is directed it will be before a district judge or circuit judge.

32. Consideration also needs to be given to amending or supplementing Rule 42(1) to provide for P to be notified in a DoL case *before* the issue of the application.

(19) Which of the Practice Directions would require amendment (and, if so, how) to enable a 'streamlined' Article 5 ECHR-compliant process'?

33. PD4A, PD6, PD7A, PD 8A and PD10AA need to be reviewed to see whether they may require amendment.

(20) Which of the current COP Forms would require amendment (and, if so, how) to enable a 'streamlined' Article 5 ECHR-compliant process'? How would urgent applications be identified?

34. New forms will require to be designed for the 'streamlined' process and their use made mandatory. If the process is to be 'front-loaded', as it must be, the application form should be designed so as to ensure that the applicant produces at the outset, together with the application form, the specified documents which the court *must* have in any DoL case. To ensure compliance with this requirement the application form could usefully adopt the format and techniques successfully used in the Court of Appeal, the Administrative Court and, most recently in the redesigned application forms used in children cases in the Family Court.

35. The application form should include questions directed to the following matters (to be answered either in the body of the application form or in attached documents):

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

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

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

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

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

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

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

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

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

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

    xi) P's eligibility for public funding.

    xii) The identification of anyone who might act as P's litigation friend.

xiii) Any reasons for particular urgency in determining the application (the recently introduced Family Court children application forms provide a useful precedent).

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

a) needing particular judicial scrutiny; or

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

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

36. The application form needs to be designed so that it indicates on the front page (following the model adopted in the redesigned application forms used in children cases in the Family Court) whether or not (Yes / No), for example, the application is urgent and whether or not there is reason to believe that either P or someone else challenges or is likely to challenge any of the matters set out in support of the application or to object to the order being sought.

37. Standard form orders require to be designed, for example, a standard form order authorising a deprivation of liberty (see paragraph 35(i) above) and a standard form order directing an oral hearing (see paragraphs 13 and 31 above).

(21) Would 'bulk' applications be lawful? If so, what documentation would be required in order to ensure appropriate assessment of the circumstances of each individual concerned'?

38. Separate applications must be made for each individual, even if there are a number of people in the same placement, because each case must be considered separately and on its own merits and, with the passage of time, people's circumstances may change (for example, P1 and P2 may no longer be in the same placement).

39. There is no reason why material which is generic to a number of individuals (for example, information relating to the matters referred to in paragraphs 35(iv) and (vi) above) should not be contained in a single 'generic' statement, a copy of which can be attached to each individual application form. Information specific to the individual will require to be dealt with separately.

Annex – the 25 questions set out in the order of 8 May 2014

Article 5(1) EHR

1 Can an official of the Court of Protection authorise a deprivation of liberty of an individual, or must such authorisation be judicial in order to comply with Article 5(1) ECHR?

2 Can an initial application to the Court of Protection to authorise the deprivation of liberty of an individual be determined on the papers (with a right to direct an oral hearing and/or for any person or body involved to request an oral hearing or review) or does it require an oral hearing in order to comply with Article 5(1) ECHR?

3 If an initial application can in principle be determined on the papers, how is the Court of Protection to identify which cases should be dealt with on the papers and which at an oral hearing?

4 What are the irreducible matters that must be addressed in evidence before the court before it can make an order satisfying the requirements of Article 5(1)(e) ECHR?

5 What form should such evidence take (including medical evidence)?

6 Can an urgent authorisation granted pending completion of assessments for an application for a standard authorisation under Part 5 Schedule A1 of the MCA be extended by the court following an application for an order made under section 2lA(5) of the MCA and would such an application require an oral hearing to comply with Article 5(1) ECHR?

7 Does P need to be joined to any application to the court seeking authorisation of a deprivation of liberty in order to meet the requirements of Article 5(1) ECHR or Article 6 or both?

8 Does the detained resident need to be joined to any application under section 21A of the MCA 2005, for the same reasons?

9 If so, should there be a requirement that P (or in an application under section 21A of the MCA 2005 the detained resident) must have a litigation friend (whether by reference to the requirements of Article 5 ECHR and/or by reference to the requirements of Article 6 ECHR)?

Article 5(4) EHR

10 If it is possible to extend an urgent authorisation by court order under section 21A of the MCA what is the maximum period of extension before the court must review the extended urgent authorisation to comply with Article 5(4) ECHR?

11 What frequency of review is required by Article 5(4) ECHR where a deprivation of liberty has been authorised by the Court of Protection?

12 Must such review be judicial?

13 Can such review take place on the papers, or does it require an oral hearing?

14 Does the answer to the question above depend upon the nature of the initial authorisation procedure (ie whether it follows an oral or a paper-based authorisation procedure)?

15 What obligations does Article 5(4) ECHR impose by way of the party status of P at the review stage? Does this differ depending on whether they have been a party at the initial application stage?

Implications — litigation friends

16 If P or the detained resident requires a litigation friend, then:

(a) Can a litigation friend who does not otherwise have the right to conduct litigation or provide advocacy services provide those services, in other words without instructing legal representatives, by virtue of their acting as litigation friend and without being authorised by the court under the Legal Services Act 2007 to do either or both?

(b) In all cases, how are the costs of instructing legal representatives to be met?

The COPR 2007, Practice Directions and Forms

17 What are the requirements necessary to ensure that any "streamlined" procedure for applications … complies with Article 5 and/or 6 of the ECHR?

18 Which of the COPR 2007 would require amendment (and, if so, how) to enable a 'streamlined' Article 5 ECHR-compliant process?

19 Which of the Practice Directions would require amendment (and, if so, how) to enable a 'streamlined' Article 5 ECHR-compliant process'?

20 Which of the current COP Forms would require amendment (and, if so, how) to enable a 'streamlined' Article 5 ECHR-compliant process'? How would urgent applications be identified?

21 Would 'bulk' applications be lawful? If so, what documentation would be required in order to ensure appropriate assessment of the circumstances of each individual concerned'?

22 Where should applications to authorise deprivation of liberty be issued and determined and, in particular, what is the role of the regional Court of Protection courts and Judges?

Other matters

23 Should any procedure developed to meet the principles set out above also encompass the position of those aged l6 and 17?

24 Should any procedure developed to meet the principles set out above also encompass the position of those subject to residence requirements under the Mental Health Act 1983 (eg guardianship or Community Treatment Order or those subject to conditional discharges pursuant to s.37/41 of the Mental Health Act 1983)?

25 To the extent that they have not already been addressed, are there any remaining obligations under Articles 6 and 8 ECHR that bear upon the mailers identified above?