

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family and of any individuals referred to in this Judgment must be strictly preserved. All persons, including representatives of the media must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2015] EWCOP 1

Case No: 12399224

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF CP

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 7th January 2015

Before:

District Judge Mort

Between:

**ESSEX COUNTY COUNCIL
- and -**

Applicant

RF (1)

Respondents

PN (2)

JN (3)

CP (4)

(by his litigation friend, the Official Solicitor)

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Ms Alev Giz, instructed by Essex County Council Legal Services for the Applicant.

**Mr Andrew Bagchi instructed by Irwin Mitchell LLP on behalf of the Official
Solicitor for the 4th Respondent.**

**The 1st and 2nd Respondents appearing in person and the 3rd Respondent not
attending.**

JUDGMENT

Handed Down 7.1.15

1. I set out below the background to this case in order to put the issues into perspective.
2. CP (P) is 91 year old gentleman. He is a retired civil servant. He had served as a gunner with the RAF during the war. Prior to 2/5/13 P lived in his own home. He had lived there for around 50 years. He purchased the property for his parents and lived there with them and his sister until their deaths. He had lived alone with his cat Fluffy since the death of his sister in 1998. He is described as being a very generous man ready to help others financially if he believed they needed it, as well as making donations to various charities.
3. P has dementia. He has other health problems including difficulty in mobilising, delirium and kidney injury caused by dehydration. Unfortunately his health deteriorated during the course of these proceedings.
4. The jointly instructed independent psychiatrist in his report dated 7/8/14 concluded that P lacks capacity to litigate, and to make decisions regarding his care and residence. Whilst he felt that P's capacity may improve if the delirium subsided it would only be in relation to smaller day to day decisions and not in relation to the issue of residence.
5. P is a party to the proceedings and is represented by the Official Solicitor (OS).
6. Essex County Council (ECC) has responsibility for providing care to P and is the supervising body for the purposes of Schedule A1 to the MCA 2005.
7. P lived in a Care Home in Essex (CH) since 2/5/13. He was moved there from his home by ECC following a safeguarding alert.

8. These proceedings arose from a challenge to the lawfulness of P's placement at CH. The application was brought by RF. RF is a close friend of P.
9. P is a member of a Church which he attended every Sunday. Many of P's friends are members of the Church and they have continued to see him regularly. P's friends were of the unanimous view that it was in P's best interests for him to return home with a package of care in place.
10. P's niece JN and nephew PN are both parties to the current proceedings. They and another nephew DN agreed it was in P's best interests to remain at CH.
11. Unfortunately there has been discord between P's family and friends. RF believes that the manner of P's removal from his home and the information provided to P's family was the cause of the discord.

Circumstances of P's admission to, and residence in, the Care Home (CH)

(Some of these facts remain in dispute between the parties. The court has not heard evidence to resolve the disputed facts as they appear on the papers. The papers reveal the sequence of events set out below.)

12. On 1/5/13 a meeting took place at P's home. P's friends had alerted ECC to concerns regarding P's finances and his vulnerability to exploitation. There were also issues as to his self care. It was agreed that residential care for P would be investigated and that ECC would apply to be P's financial deputy.
13. A capacity assessment was carried out by SW1, a social worker with ECC and a colleague on 1/5/13 which concluded that P lacked capacity to make decisions about care, residence and finances. The assessment of P's ability to retain use and weigh information is unclear and there is no record of P's wishes and feelings.
14. SW1 received a telephone call from one of P's friends which raised concern such that SW1 requested P's urgent admission into residential care.

15. On 2/5/13 SW1 and one of her colleagues went to P's home. According to the Nurse Specialist's report they arrived at 8.30 am. The circumstances of P's removal are disputed but from reading the papers the following details emerge. P was wearing his dressing gown and was without trousers or pyjama bottoms. It is alleged that SW1 told P that he was to go with her to an hotel. When P declined it is alleged SW1 told him that she would call the police. P was persuaded to go with SW1 by his friend who was present. P was taken from his home and placed in CH a residential home for those living with dementia. P was 'very reluctant' to leave his home and was very distressed.
16. ECC had no authorisation to remove P from his home on 2/5/13 and place him in a locked dementia unit. ECC allege that P left his home voluntarily. An urgent authorisation was not put in place until 27/6/13 and a standard authorisation not until 4/7/13 some two months after P's removal from his home. It is by no means clear that P lacked capacity at the time. The authorisation included restrictions on P's attendance at Church and contact with friends. Those restrictions were lifted on 23/9/13.
17. It is of note that the capacity assessment undertaken by an ECC agency employee on 14/8/13 concluded that P did have capacity to make a decision regarding his accommodation.
18. A further capacity assessment was undertaken by ECC on 16/8/13. This was conducted by the case responsible social worker (SW2) who concluded that P did not have capacity to make decisions regarding his residence. This assessment directly contradicted the conclusion reached only two days before by the agency employee.
19. Further doubt as to the adequacy of the 16/8/13 assessment is raised by the assessment undertaken by the independent best interests assessor on 3/9/13. She

concluded that P had capacity to determine his residence and should be allowed home.

20. SW2 undertook further assessments on 26/11/13 and 17/6/14 concluding on both occasions that P lacked capacity in relation to residence.
21. The standard authorisation which had been put in place on 4/7/13 expired on 25/10/13. It was not renewed thereby rendering P's detention unlawful.
22. No further standard authorisation was put in place until 8/7/14, and then only at the suggestion of the OS. Even then the independent assessor was recommending that it was in P's best interests to be returned home.
23. Throughout the whole of the period of P's placement at CH he expressed a consistent wish to return to his home. Yet despite the assessments concluding that P did have capacity to make decisions regarding his residence, and the recommendations that it was in his best interests to return home, ECC did nothing to enable him to do so. The result is that P was detained against his wishes for a period of 17 months.

The positions of the parties at the final hearing on 1st October 2014

ECC (The applicant)

24. Prior to 1/10/14 ECC had maintained the position throughout these proceedings that it was in P's best interests to remain in residential care. However the day before the final hearing on 1.10.14 they notified the parties that they supported P's return home.

RF (First respondent and originally the applicant)

25. RF maintained that it was in P's best interests to return home permanently. She expressed her objection to the initial limitation on P's contact with friends, church attendance and his movements.

PN (P's nephew)

26. PN believed it was in P's best interests to remain in residential care.

JN (P's niece)

27. JN believed it was in P's best interests to remain in residential care as he cannot look after himself at home. She believed he would have settled there had it not been for his friends encouraging him to resist the move.

OS (Official Solicitor as P's litigation friend)

28. The OS was of the view that it was in P's best interests to return home as soon as possible with a full package of care in place that would meet his needs.

29. It was the further view of the OS that it is in P's best interests to have contact with family and familiar friends.

P

30. Whilst P has been represented by the OS the Mental Capacity Act 2005 requires P to be permitted and encouraged to participate in any act done for him and any decision affecting him. P had expressed a consistent wish to return home ever

since his placement at CH. He had maintained that wish during the periods when he was assessed as having capacity to make the decision.

Report of the independent Nurse Specialist, (TR)

31. On 13/8/14 I ordered the parties to jointly instruct an independent nurse specialist in palliative care (TR) to prepare a report in relation to P's best interests concerning the arrangements for his residence and care. That report was obtained and is dated 15/9/14.

32. TR was clear in her conclusions that:

- The manner of P's admission to CH and the discord between his family and friends had not had a positive impact upon P's circumstances
- P had consistently expressed a wish to return home and considerable weight should be placed upon that wish
- P had shown little understanding of his care needs and how they need to be addressed
- There were no insurmountable barriers to P's return home and the management of his needs once there
- The management of P's needs should be led by the professionals involved in his care
- It was in P's best interests to be allowed to return home with a 24 hour care package of care in place to address his needs
- A risk management plan should be drawn up in the event that P refused the care which he needs
- If P's health deteriorated as a result of the refusal of care then a move to a care setting should be actively pursued

The hearing on 1st October 2014

33. Pursuant to the findings of the independent psychiatrist in his report dated 7/8/14 it was accepted by all parties that P lacked capacity to litigate, and make decisions regarding his residence and care. I made interim declarations accordingly on 1/10/14.
34. The report of the independent nurse specialist dated 15/9/14 caused ECC to revise its position. On the eve of the final hearing ECC conceded that it was in P's best interests to return home permanently. They agreed to support P's return home and provide a 24 hour care package suitable to meet his needs.
35. I endorsed the plan for P's return home at the hearing on 1/10/14.

The position at the hearing on 5th November 2014

36. On the 5th November I was gratified to learn that P had returned home with his cat Fluffy. He is being looked after by carers and has accepted the care provided. RF reports that she has visited him and finds him to be happy and contented.
37. I note from the statement filed today by ECC's senior social worker that ECC have now put a comprehensive system of care in place for P. I am heartened by their new found commitment to ensuring that P is able to remain in his own home and acknowledge their efforts in that regard since the hearing on 1/10/14.

The remaining issues before me on the 5th November 2014

- Declarations as to P's capacity
- Costs
- Financial compensation for P

Final declarations as to P's capacity

38. On the 5th November I had before me the reports from Dr J dated 11/10/14 and 28/10/14. Dr J confirmed that although P has recovered from his episode of delirium he still lacked capacity in relation to residence and care. He concluded that P does however have capacity in relation to contact.
39. It was agreed that the court should make final declarations that P lacks capacity to make decisions in relation to his residence and care arrangements, but retains capacity to make decisions in relation to contact with others. I made declarations accordingly.

Costs

40. The issue of costs has been compromised on the basis that ECC will pay P's costs to be subject to detailed assessment if not agreed. I understand that those costs are likely to exceed £50,000 and it has been suggested they may exceed £64000.
41. I am invited to make a costs order accordingly, and shall do so.

Financial compensation for P

42. The parties have reached a compromise agreement in relation to P's prospective claim for damages for breach of his Article 5 right (right to liberty and security) and his Article 8 right (right to respect for private and family life).
43. P is a protected party and the compromise agreement must be approved by the court. A compromise agreement does not bind a protected party unless approved by a Judge. This safeguards the interests of the protected party. I am asked by the

parties to consider the compromise agreement and approve it. I am also invited to dispense with the need to issue separate proceedings to recover damages.

44. The Court of Protection Rules 2007 do not have provision for the approval of a settlement but nonetheless the court has power to do so following the decision of Charles J in YA(F) v A Local Authority (2010) EWHC 2770. The approval falls under Rule 21.10 of the Civil Procedure Rules 1998.

45. I must consider whether the compromise agreement provides sufficient recompense to P for the wrong done to him.

The terms of the compromise agreement

46. The terms I am asked to consider and if appropriate approve are as follows:

- A declaration that ECC unlawfully deprived P of his liberty between at least 2/5/13 and 4/7/13 and further between 15/8/13 and 7/7/14, amounting to a period of approximately 13 months.
- ECC to pay P £60,000 damages arising from P's unlawful detention
- ECC to waive any fees payable by P to the care home in which he was detained for the period of his detention. I am told these fees will be around £23,000 to £25,000.
- ECC to exclude P's damages award from means testing in relation to P being required to pay a contribution to his community care costs.
- The payment of all P's costs, to be assessed on the standard basis.

Considerations

47. P's advisers are ready to issue proceedings for damages in the County Court or High Court. The damages sought would be for breach of P's procedural and

Convention rights (Art 5 & 8) and would include aggravated damages for false imprisonment. The OS would intend to claim damages for the whole of the 17 month period of P's detention at the care home.

48. ECC has admitted breaches of P's Art 5& 8 rights for the whole of the period of P's detention save for a period of 4 months when the standard authorisation was in place. The compromise agreement takes into account the litigation risk that not all of the period claimed may be recovered at trial.

49. It is considered that the compromise agreement is the most efficient way to resolve the issue of compensation for P.

50. In view of P's advanced years and health it is in his best interests that an award is secured quickly so that he may derive enjoyment and benefit from it during his remaining years.

51. Any contested claim would require a lengthy hearing and may not be resolved for many months.

52. These considerations inform my decision as to whether the compromise agreement should be approved. It can only be approved if I am satisfied that it reflects the proper level of compensation for ECC's breach of P's Art 5 & 8 rights.

53. I pause here to remind myself of the circumstances which have led us to this position.

54. I have been greatly troubled by the manner of P's removal from his home on 2/5/13 and his placement in a locked dementia unit. There is no evidence that consideration was given to the less restrictive option of supporting him at home in accordance with his wish to remain there. Indeed, the independent best interests assessor comments in his report dated 7/7/14 'the least restrictive options were never tested' and further 'He (P) was never given the opportunity and support to remain in his own home this being the least restrictive option'.

55. It appears that one of the triggers for P's removal seems to have been concern about the risk to him from financial abuse. If that is correct I fail to understand why P's removal from his home of 50 years was considered to be a reasonable and proportionate solution to the problem or why his removal and detention was thought to be in his best interests. Action against the perpetrator(s) would have been preferable to the removal of the victim. The problem could have been addressed by the less restrictive and simple option of appointing a deputy to manage his property and affairs. However ECC would say that other factors influenced their decision to remove P from his home.
56. ECC does not dispute that P was locked in at CH and not free to leave; was under continuous supervision and control and that he consistently expressed a wish to leave and return home.
57. The arrangements at CH amounted to a deprivation of P's liberty.
58. Except for the authorisation granted on 4/7/13 (which expired on 25/10/13) no standard authorisation was put in place until 7/7/14. There was a procedural breach of P's Article 5 and 8 rights for 13 months of his 17 month detention. It is at least arguable that the whole of the 17 month period amounted to an unlawful deprivation of P's liberty.
59. ECC failed to authorise P's detention between October 2013 and July 2014 despite there being doubt as to his capacity and his consistent wish to return home.
60. ECC's failure is compounded by the findings of the capacity assessment on 14/8/13 which found that P did have capacity to decide to return home.
61. The capacity assessment dated 14/8/13 was countermanded only two days later by the social worker without any attempt being made to review the position, appoint an IMCA for P, and apply to the Court of Protection.
62. The independent assessment dated 3/9/13, concluding that P did have capacity to decide to return home and should be assisted to do so, was ignored by ECC.

63. ECC had an obligation to apply to the Court of Protection during P's detention. They failed to do so. These proceedings were triggered by a concern raised by RF during the course of ECC's application to become P's financial deputy. That concern prompted my order of 25/3/14 inviting RF to file a DOLS application form, which she did, thereby becoming the applicant in the proceedings. ECC were substituted as applicant on 9/7/14.
64. As the application was made under S21A the OS had to request ECC to put a standard authorisation in place as none had been granted at the time of the application.
65. As far as P was concerned ECC failed:
- To heed the presumption in favour of his capacity
 - To adopt the course of action which was less restrictive of P's rights and freedom of action.
 - To have regard the independent evidence of P's capacity by either ignoring it or immediately countermanding it
 - To take seriously or act upon his consistently expressed wish to return home
 - To appoint an IMCA for him
 - To refer the matter to the court
66. There is no doubt that P has been failed by ECC. The protection for the individual enshrined in the MCA and the Codes of Practice was ignored by ECC.
67. The conduct of ECC has been totally inadequate and their failings significant.
68. It is hard to imagine a more depressing and inexcusable state of affairs. A defenceless 91 year old gentleman in the final years of his life was removed from his home of 50 years and detained in a locked dementia unit against his wishes. Had it not been for the alarm raised by his friend RF he may have been condemned to remain there for the remainder of his days.

69. There can be no doubt that ECC's practice was substandard. They failed to recognise the weakness of their own case and the strength of the case against them. They appeared unprepared to countenance any view contrary to their own. They maintained their resolute opposition to P returning to his home until the last possible moment. In my judgment the conduct of ECC has been reprehensible. The very sad and disturbing consequences for P cannot be ignored.
70. The significant wrong done to P must be adequately compensated.

Conclusion

71. In considering the level of compensation to which P is entitled there is a distinction between cases involving procedural breaches and those involving substantive breaches.
72. Procedural breaches occur where the authority's failure to secure authorisation for the deprivation of liberty or provide a review of the detention would have made no difference to P's living or care arrangements.
73. Substantive breaches occur where P would not have been detained if the authority had acted lawfully. Such breaches have more serious consequences for P.
74. This case involves a substantive breach of P's rights. Had it not been for the unlawful actions of ECC, P would have continued to live at home with the type of support that has now been put in place.
75. P was 90 years of age when he was unlawfully removed from his home. The deprivation of his liberty during this late stage of his life only serves to compound its poignancy.
76. I have been referred to two cases involving damages for unlawful detention:
- London Borough of Hillingdon v Neary [2011] EWHC 3522 (COP)
- A period of 12 months detention resulted in an award of £35,000.

- The Local Authority and Mrs D [2013] EWCOP B34

No admissions of liability were made save for a 4 month period. Mrs D was offered £15000 plus her costs and Mr D £12,500 plus his costs. The judge approved the award although it was towards the lower end of the range if the award in the Neary case was taken as the bench mark.

77. Taking these cases into account the level of damages for the unlawful deprivation of an incapacitated person's liberty is between £3000 and £4000 per month.

78. In this case P was unlawfully deprived of his liberty for a minimum of 13 months (which ECC concedes) and arguably 17 months.

79. The award that I am asked to approve places the level of damages at between £3500 and £4600 per month.

80. I bear in mind that in addition P will receive the other elements of the compromise agreement set out in paragraph 46 of this judgment. Those other elements provide P with further significant compensation and mark the seriousness of the case.

81. I am satisfied that the compromise agreement provides P with a fair and reasonable award in so far as a monetary award can compensate him for the loss of his liberty in the circumstances I have described above.

82. I approve the compromise agreement as set out at para 46 of this judgment and shall make an order accordingly.