Neutral Citation Number: [2019] EWCOP 51 No. 11895254

IN THE COURT OF PROTECTION

Before:

SIR MARK HEDLEY

B E T W E E N :

A LOCAL AUTHORITY Applicant

- and -

H
(by her litigation friend, the Official Solicitor)

Respondent

No 2

_____

MR A. FULLWOOD (instructed by Mr M. Hill of Weightmans Solicitors) appeared on behalf of the Applicant

MR B. McCORMACK (instructed by Ms Y. Mac of Hogans Solicitors)appeared on behalf of the Respondent.

_____

J U D G M E N T

SIR MARK HEDLEY:

1 In December 2011 in the Court of Protection sitting in Leeds, I considered the case of H.

2 I found that she lacked capacity to make any decisions in relation to her residence, care and support arrangements, contact, consent to sexual relations and contraception. It was abundantly obvious that, even in 2011, she had for the previous four years had an extremely difficult time to the point where intervention by Social Services had become imperative for her safety: see A Local Authority v H [2012] EWHC 49; [2012] 1 FCR 590.

3 The best interests order that was made following those declarations involved severe restrictions on H's liberty. They were authorised under the deprivation of liberty framework in the amended version of the Mental Capacity Act 2005 and they have been regularly reviewed by District Judge Coffey over the subsequent years, including of course a change of regime from authorisation under Schedule A1 to authorisation by the court because H's accommodation changed so that she was no longer in a care home.

4 Since 2011 H has made considerable progress. She lives now in her own flat inside a large house subdivided into flats, which indeed does have some Social Services oversight because one of the flats is given aside to care and support staff one of whom will sleep there at night. But that is where she lives and she is able, effectively, to organise her own life within that flat. She is able to work two days a week and she is able to go out from time to time, but the reality is that there are still significant restrictions on her liberty.

5 But that progress has led to two applications being made before the court: The first is to reconsider the capacity rulings, particularly in relation to sexual relations and contraception;

and, secondly, to review the best interests provisions in the light of any change that the court may make to the declarations.

6 These matters should be considered, in accordance with the current practice of the Court of Protection, by a Judge of the High Court and I have been specifically authorised by Mr Justice Hayden, Vice President of that court, to hear and determine this application.

7 I am extremely grateful to Mr Fullwood and Mr McCormack, counsel for the Local Authority and for the Official Solicitor respectively, for their detailed skeletons which I have had a chance to read and reflect on and for their oral submissions. I am grateful also for the provision of authorities which I also have had an opportunity to read. It will not, I hope, be considered disrespectful if I do not set out in this judgment the substance of what appears there, save to reassure them that I have it clearly in mind.

8 In 2011 when I originally heard this, the question of the capacity to consent to sexual relations was highly controversial and a number of Judges had attempted a formulation of the test to be used and I contributed to that fog by providing a test of my own. Happily since, the Court of Appeal has had an opportunity to review all those decisions and to offer clarity in this area.

9 In a case called in *Re M (An Adult)* [2015] Fam 61, the Court of Appeal considered with some care and in some detail the arguments that have been advanced. It is right to say that their conclusion is succinctly summarised in para.79 of the judgment, where they say:

> "On the basis that we have described, we hold that the approach taken in the first instance decisions [and then a number of Judges including me are named] in regarding a test of capacity to consent to sexual relations as being general and issue-

specific rather than personal or event-specific represents the correct approach within the terms of the 2005 Act."

10 It is of course a trite but important observation to that that, in the field of human relationships, sexual relationships are not as simple as that. They have far more than a physical component, they have an emotional and ethical component. But as the Court of Appeal observed in that case there is a limit to what the court can do. The court at para.77 of the judgment said this:

> "Going further, we accept the submission made to us to the effect that it would be totally unworkable for a local authority or the Court of Protection to conduct an assessment every time an individual over whom there was doubt about his or her capacity to consent to sexual relations showed signs of immediate interest in experiencing a sexual encounter with another person. On a pragmatic basis, if for no other reason, capacity to consent to future sexual relations can only be assessed on a general and non-specific basis."

That must now be treated as a settled statement of law.

11 I was also asked to consider a declaration in relation to contraception and the Court of Appeal specifically approved the approach taken by Mr Justice Bodey in *Re A* [2011] Fam 61 and I need say no more about it than that I have all those matters clearly in mind.

12 In those circumstances the parties obtained the evidence of Dr David Milnes, a consultant in the psychiatry of learning disability, who reported on 25 October 2018 and his report starts at C323 in the bundle of documents provided to me. I should observe that the work of Dr Milnes is in fact well-known to this court and it was with some comfort that I saw that it was

he who was providing the critical evidence in the case. From paras.124-138, he considers the progress made by H in her understanding of sexual relationships and he says at the end of that at para.138:

> "In summary, [H] has capacity to engage in sexual relationships as she was able to describe the mechanics of the act and the potential consequences including pregnancy and heterosexual sexual intercourse and the transmission of sexually transmitted diseases."

13 In paras.139-162, he considers the progress made by H in relation to the understanding of contraception and he concludes that, although his opinion was finely balanced and expressed with a degree of caution, he is also of the view that on the balance of probabilities it is his opinion that H has capacity to make decisions regarding contraception. It is important simply to observe that cautious though he might be, section 1(2) requires that the court applies a presumption of capacity and, therefore, in the absence of evidence which clearly establishes incapacity, the court must work on the basis that there is capacity.

14 Accordingly, the court should conclude as a result of that unchallenged evidence, and this conclusion is supported by the parties, that H now has capacity to consent to sexual relationships and also has capacity to deal with issues of contraception.

15 I should just say this: I am conscious that, in the area of contraception in which Dr Milnes expresses his caution, they do not in fact apply in practice to H at the present time because she is a willing participant in a regime of contraception delivered by injection.

16 Since that represents a departure from the original views expressed by the court, I think it is right that fresh declarations should be made under s.15 of the Mental Capacity Act.

Accordingly, I propose to declare that H lacks capacity to decide questions of residence, care and support arrangements and contact as well as, of course, capacity to conduct proceedings, but also to declare that she does have capacity to consent to sexual relations and to consent to matters relating to contraception.

17 That deals with the first part of the case, namely capacity. The court then turns to the question of best interests and it is very important to emphasise that the sole basis of the court having any jurisdiction to entertain arguments about best interests is the finding of incapacity. Accordingly, the court has no jurisdiction whatever to determine matters relating to consenting to sexual relations or contraception because H has capacity and she is entitled, as any citizen of this country is entitled, to make her own decisions for good or ill in relation to those matters.

18 H's best interests must be considered in this case because of the continuing declarations of incapacity in relation to care, residence and contact.

19 In approaching the question of best interests, s.4 of the Act requires the court to take a very broad approach and as a vivid illustration of the breadth of that approach the court need only consider, or anybody need only consider, the definition in s.4(11) of 'relevant circumstances' to see just how wide that definition is; it really includes absolutely anything that anybody wishes, as it were, to bring into the pot.

20 However, central to the question of best interests are the wishes and feelings of H herself. It had been made clear to me that she wished to attend court and I am delighted that she has done so. It was made clear to me that she would like to speak to the Judge and I am more than happy that she has done that as well.

21 It so happens that this case was listed in an inordinately large court room in which anything approaching conversation was simply completely impractical and, accordingly, we adjourned that part of the proceedings to my chambers and a conversation could take place there with the help of one of the care assistants, counsel and solicitor on behalf of the Official Solicitor.

22 In that conversation, H made clear a number of matters. First, she was keen of course that the Court of Protection and all its restrictions should in due course be withdrawn from her life and that, of course, is an entirely proper aspiration because that provides part of the incentive for seeing the improvements that have taken place over the last six or seven years are maintained into the future. But she immediately qualified that by saying "I want to take it slow" and she said a little bit later "I'm a slow person, I like to take things slow and see what happens". It was quite evident from the conversations we had that she very much appreciates the accommodation that she presently has and the support that surrounds it and the security that all that brings to her, and she would be unhappy and very concerned if those matters were not in place.

23 But what she is anxious to do is to have a much greater control over her own relationships. She wants to be able to develop relationships in a way that simply has not been possible because of the declarations that have been in place. She would clearly like to choose those with whom she has relationships or who become guests to her property. It is quite clear that she would like a range of people with whom she could develop relationships and those are all perfectly normal and reasonable aspirations which are denied to very few in our society and the court needs to bear that in mind as well.

24 The practical effect of that conversation is really this: that the court should not alter in any way the arrangements that are put in place to deal with questions of care and residence.

They are supported by everybody, including H, and they are well-developed in the helpful and thoughtful care plan of Ms S, the Local Authority social worker. They clearly are not only designed to, but have been entirely successful in meeting those needs for residence and care over the years.

25 What the court does need to focus on is the question of best interests in relation to contact. I think it is important to make a number of rather general observations when considering what on the face of it might appear a fairly narrow question. The first is this the court is being asked to grant to the Local Authority certain coercive powers. Whenever it is asked to do that, the court will always be conscious of an inherent conflict between its desire to promote the autonomy of the protected person - in other words to give H such freedom as reasonably she can have - and a need to protect the relevant person to ensure that the circumstances are such that H does not find herself in the position from which she had be rescued in 2011 or thereabouts.

26 But of course, all that is much easier said than done because granting certain coercive powers in respect of some incapacity may well involve those powers trespassing into areas in which the person does have capacity. This case will be a classic illustration of that. It is very difficult to devise powers in relation to those with whom H is to have contact that do not intrude on her ability to practice the freedom of consenting to sexual relations.

27 This is a matter with which the courts are not unfamiliar. Mr Justice Baker (as he then was) in the case of *A Local Authority v. P & H (an NHS Trust)* [2018] EWCOP 10, at para.66 of his judgment said this:

> "In submissions on these issues [which is the overlap between these matters], both the local authority and the Official Solicitor cite my earlier decision in *A Local Authority v TZ (No.2), supra*. That case concerned a young man who had the capacity to consent to such relations but lacked the capacity to make decisions about whether or not an individual with whom he may wish to have sexual relations was safe, or the capacity to make a decision as to the support he required when having contact with an individual with whom he may wish to have sexual relations. The challenge for the parties and the court in that case was to develop a best interests framework which permitted the young man sufficient autonomy of decision-making and respected his right to private life whilst balancing the need to protect him from harm."

That seems to be precisely the issue that the court faces in this case.

28 It is right that H should be given the maximum freedom that consenting to sexual relations is intended to bestow, but at the same time the court has an obligation to remember its protective role in relation to any person with whom she might have sexual relations, particularly given the history of this particular case as H in our conversation made it clear she fully understood.

29 The matter was also referred to by Mr Justice Hayden very recently in a Manchester case called *Manchester City Council v. LC &Anor* [2018] EWHC 2849 (fam), where Mr Justice Hayden at para.24 said this:

> "There has been a legal argument as to whether the Mental Capacity Act, by collateral declarations, is apt to limit the autonomy of individuals in spheres where they are capacitous. In simple terms, whether the measures put in place to protect LC

> in those areas where she lacks capacity may legitimately impinge on her autonomy in those areas where her capacity is established. It has been canvassed that if the court is to restrict LC either in part or, potentially, fully in such a sphere (i.e. where she has capacity), the court ought only to consider such measures under the parens patriae jurisdiction of the High Court. Happily, it is unnecessary for me to resolve that issue today…"

Although he did not have to resolve it, I do because that is precisely the issue which is confronted in this case.

30 The next general observation is that any such restrictions must be necessary and proportionate because they involve significant inroads into the Article 8 rights of H and, therefore, put her in a less favourable position than other people in the community would be in; and it does not matter how good the motive is for doing that, the fact is that that is what is being done and therefore those restrictions need to be no more than are strictly necessary and proportionate.

31 The next general observation is that in my view the court should confine its focus to those areas where compulsory powers are needed. Although of course the court must approve the whole of the care plan, it is not the function of a Judge to tell the social worker how to do their job nor is it usually remotely helpful if they try to do so. Accordingly, I have sought to limit my detailed consideration in this case to those areas where coercive powers are going to be necessary.

32 The next general observation is that in my view any coercive powers should always be framed within the limitations of the area where the party lacks capacity; that is particularly important in a case like this because the coercive powers must not make any mention of the

question of how sexual relations or anything else are exercised. They are simply not the court's business. The court's business is simply to deal with best interests arising out of the fact that H lacks capacity to decide with whom she should come into contact.

33 The last general observation to make is that the court is there, so far as reasonably possible, to respect the autonomy of any individual. I take the liberty of quoting from something I said in the case of *The NHS Trust v. P* simply because, in the principal case, the Court of Appeal expressly approved this comment and it is this:

> "The intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do it."

This, of course, is particularly true in the field of sexual relations. It is not the function of the court, it is not the function of the local authority to ensure that H lives a moral life. That is her business. It is only the function of the court and the local authority to regulate who it is she comes into contact with.

34 I think this is probably best illustrated by considering the position within the property in which H currently lives. The local authority have and will retain the power to maintain or monitor the list of welcomed visitors to H's flat. Whilst of course they cannot impose on H anyone she does not want, they do have a veto in relation to anyone that H might want. They may further provide for those times at which a visitor is to be in the flat and the times when that should end. But once that visitor lawfully enters the flat and the front door is shut, the local authority have no further responsibilities for what then takes place. Those are matters entirely for H and the person who is in the flat with her.

35 There is of course one obvious exception to that and that is that if H were to demonstrate signs of serious distress or to press her alarm then, of course, it would be not only permissible but required of the local authority probably to summon the police but certainly to use their own key to gain access. But they would not then be in a position to remonstrate about behaviour, they would only be in a position to require the person to leave as being no longer someone with whom H should – in her best interests - now associate.

36 I hope that little scenario makes it clear to those who have the very tricky job of making this work on the ground as to how it might work. I suppose what I am saying is that the local authority, and in particular the carers on site, do not have any responsibility for how H and her friends choose to behave once that front door has closed behind them.

37 Of course, the issue does not just apply in the flat though, obviously, that is the most likely place. There is the question of H meeting people in a public place or H wanting to go to someone else's home. Again, it is important to say that the local authority may decide whether that is a person with whom H should have contact and they may decide where it is appropriate for H to have contact with such a person. What they may not decide is how H then behaves once that contact is authorised. That is for her and it is for her to make her own decisions for good or ill as to how she then conducts herself.

38 Now none of this is intended by me to inhibit the proper role of carers and social workers to encourage, warn and advise; that they are entirely free to do in accordance with their consciences and their understanding of H's best interests. I am confining myself to the exercise of coercive powers in what I am saying.

39 Accordingly, it follows that I approve the care plans which have been advanced and have been developed in oral evidence by Ms S, the social worker. What I have sought to do is not

to inhibit those, but simply to specify the coercive elements which might properly appear in those grounds and to say they should appear as coercive. There is a great tendency in social work terms to hide coercion behind the façade of encouragement and, whilst that is no doubt very sensible in terms of talking to clients, in terms of the actual powers that the local authority have, coercive powers should be specified as such and identified as such and authorised as such.

40 That, I think, leaves four short matters to which I ought to refer: First, it will be necessary for me under the statute to authorise the deprivation of liberty because, even under the present arrangements, there are significant incursions on H's liberty which require to be recognised and authorised. I am conscious that that regime may change, but, as Parliament at the moment as shown no particular clarity for what it is going to change into, I shall leave it in accordance with the law as it presently is.

41 Secondly, it has been agreed on all sides - and I support this - that this matter should be reviewed a few months down the line to see how the new arrangements work. We will need to have a short discussion at the conclusion of this judgment as to when that should be and who it should be - shall it go back to the approved Court of Protection District Judge in Liverpool or what arrangements should be made? I am entirely open to what the parties have to say about that.

42 The third thing is this: I do not propose to spell out the care plan as it is unnecessary to do so. But they approved exactly as they operate at the moment, subject only to such nominal adjustments as may be required specifically to identify the coercive powers that have been granted by the court.

43 The last thing to be said is that if any part of this judgment is published then nothing may be said which might reasonably lead to the identification of H. She is entitled to her privacy and confidentiality and, whilst the powers of the court should be subject to public discretion and the use of those powers, the identity of the person in respect of whom they are directed should remain confidential.

44 That is the judgment I propose to give.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

** This transcript has been approved by the Judge (subject to Judge's approval) **