Neutral Citation Number: [2022] EWCOP 31

Case No: 13956061

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2022

Before :

MR JUSTICE MOSTYN

- -

Re: EM

- -
- -

David Lawson (instructed by Mills & Reeve) on behalf of Coventry and Warwickshire Integrated Care Board and Coventry and Warwickshire Partnership Foundation Trust

Hearing date: 7 July 2022

- -

APPROVED JUDGMENT

Mr Justice Mostyn:

1. This case concerns a 74-year-old man ("EM") who was unfortunately diagnosed with malignant melanoma in October 2021 and brain metastases in April 2022. By an application dated 1 July 2022, NHS Coventry and Warwickshire Integrated Care Board ("the ICB") applied for an order to remove EM from his home to an acute hospital setting (University Hospital Coventry and Warwickshire) because of serious concerns about the safety of his environment and his refusal of care. Those concerns were initially raised by Coventry and Warwickshire Partnership NHS Trust ("the Trust"), which has also participated in this application.

2. At an urgent out of hours hearing on 1 July 2022 before Keehan J, it was declared on an interim basis that there was reason to believe that EM lacks capacity to conduct these proceedings and make decisions about his medical treatment, care and residence. It was also ordered on an interim basis that it was in EM's best interests: (i) to be taken from his house to University Hospital, Coventry and Warwickshire; (ii) for force to be used to gain access to his house if necessary; (iii) to stay at the hospital until further order of this court and to be prevented from leaving or self-discharging from hospital should he seek to do so; and (iv) to receive care there according to the clinical judgment of staff. EM was not represented, nor did he participate by any other means, at that hearing.

3. A return date was listed for 7 July 2022. At that hearing, I was asked to make an order declaring that it was in EM's best interests to be further moved, this time to a nursing home, on the basis that EM was fit for discharge and a nursing home would be preferable to remaining in a ward in an acute hospital. While I granted that order, I required some convincing to do so in circumstances where I was being asked to order a second move for EM in the space of a week, again without any representation of EM. There was no "participation" by EM in these highly intrusive proceedings. No direction to that end had been made under r1.2(2) of the Court of Protection Rules 2017 ("COPR"). There was the following written evidence about his wishes and feelings viz:

   i) a statement from the Palliative Care Registrar dated 1 July 2022 about EM's home circumstances, his wish to stay at home and his reluctance to accept care;

   ii) a letter from the Palliative Care Consultant dated 6 July 2022 relating to EM's presentation in hospital and his capacity and wish to return home; and

   iii) an urgent authorisation by a clinical sister dated 4 July 2022 recording that EM wanted to leave the hospital and thought he could look after himself.

   Frankly, this very limited material does not amount to meaningful "participation" in any true sense of the word. In my respectful opinion, this material did not "properly secure" P's interests and position under r. 1.2(2)(e) (which authorises no direction to be made where P's interests and position can properly be secured without one).

4. During the hearing, I indicated to Mr Lawson that I was minded to give a short judgment on the minimum degree of participation that must be afforded to an individual such as EM on an application which asks the court to authorise his deprivation of liberty. Obviously, such an application is extremely serious and directly engages Article 5 of the European Convention on Human Rights ("ECHR"). I also observed, as regards the

transparency order made by Keehan J, that there may be an issue to be grappled with as to whether such an order is technically sound.

5. This is my judgment.

Participation of EM

The principles

6. A core principle of the Mental Capacity Act 2005 ("MCA 2005") is that a decision made on behalf of an individual who lacks the mental capacity to make that decision (known for the purposes of the MCA 2005 and the COPR as "P" [1]) must be taken in his[2] best interests (s. 1(5) MCA 2005). In conducting that best interests analysis, s. 4 MCA 2005 places on a statutory footing the imperative necessity of ensuring that the voice of P is carefully listened to. To that end, the person conducting the best interests analysis must take the following steps:

> "(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
>
> …
>
> (6) He must consider, so far as reasonably ascertainable –
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so."

7. When an application is brought before the Court of Protection, the court becomes the relevant decision-maker for P and conducts the ultimate best interests analysis on those matters within the four corners of that application. Consistently with s. 4(4), the court must therefore promote the participation of P "as fully as possible in any act done for him and any decision affecting him". It must also be provided with information, insofar as reasonably ascertainable, about those matters identified in Section 4(6).

[1] Rule 2.1 of the COPR defines "P" as follows: "(a) any person (other than a protected party) who lacks or, so far as consistent with the context, is alleged to lack capacity to make a decision or decisions in relation to any matter that is the subject of an application to the court; and (b) a relevant person as defined by paragraph 7 of Schedule A1 to the Act".

[2] In this case P is male. Throughout this judgment where the use of a pronoun is unavoidable I have therefore used the singular pronouns "he/him/himself" rather than laboriously using "he or she" or artificially using the plural pronoun "their" as a singular. Had P in this case been female I would have used female singular pronouns throughout, notwithstanding the exclusive use of the male pronoun in the statute.

8. Rule 1.2 COPR (headed "Participation of P") provides the primary procedural mechanism by which the participation imperative in s. 4(4) MCA 2005 is implemented, stating that:

> "(1) The court must in each case, on its own initiative or on the application of any person, consider whether it should make one or more of the directions in paragraph (2), having regard to –
>
> (a) the nature and extent of the information before the court;
>
> (b) the issues raised in the case;
>
> (c) whether a matter is contentious; and
>
> (d) whether P has been notified in accordance with the provisions of Part 7 and what, if anything, P has said or done in response to such notification.
>
> (2) The directions are that –
>
> (a) P should be joined as a party;
>
> (b) P's participation should be secured by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct;
>
> (c) P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act and to discharge such other functions as the court may direct;
>
> (d) P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur;
>
> (e) P's interests and position can properly be secured without any direction under sub-paragraphs (a) to (d) being made or by the making of an alternative direction meeting the overriding objective.
>
> (3) Any appointment or directions made pursuant to paragraph (2)(b) to (e) may be made for such period or periods as the court thinks fit.
>
> (4) Unless P has capacity to conduct the proceedings, an order joining P as a party shall only take effect –
>
> (a) on the appointment of a litigation friend on P's behalf; or

> (b) if the court so directs, on or after the appointment of an accredited legal representative.
>
> (5) If the court has directed that P should be joined as a party but such joinder does not occur because no litigation friend or accredited legal representative is appointed, the court shall record in a judgment or order –
>
> (a) the fact that no such appointment was made; and
>
> (b) the reasons given for that appointment not being made.
>
> (6) A practice direction may make additional or supplementary provision in respect of any of the matters set out in this rule. …"

9. Rule 1.2 is supplemented by PD 1A on "Participation of P", which begins by reciting "the importance of ensuring that P takes an appropriate part in the proceedings and the court is properly informed about P…" (para 1) before noting as relevant that:

> "2. To this end, rule 1.2 makes provision to –
>
> (a) ensure that in every case the question of what is required to ensure that P's "voice" is properly before the court is addressed; and
>
> (b) provide flexibility allowing for a range of different methods to achieve this,
>
> With the purpose of ensuring that the court is in a position to make a properly informed decision at all relevant stages of a case.
>
> …
>
> 7. If the court concludes that P lacks capacity to conduct the proceedings and the circumstances require that P should be joined as a party, the order joining P as a party shall only take effect on the appointment of a litigation friend or, if the court so directs, on or after the appointment of an accredited legal representative. This enables steps to be taken and orders to be made before P becomes a party. During that period P's participation can be secured and the court can seek relevant information in any of the ways set out in rule 1.2(2)(b) to (e).
>
> …
>
> 9. An accredited legal representative is defined in rule 2.1. When such representatives exist one can be appointed whether or not P is joined as a party and this may be of assistance if urgent orders are needed, particularly if they are likely to have an impact on the final orders (e.g. an urgent order relating to residence)."

10. In considering how P's participation is to be facilitated in any given case, the court will therefore consider whether to join P as a party and to appoint a litigation friend to act for him or, alternatively, to appoint a "Rule 1.2 representative". This in turn requires consideration of Part 17 COPR.

11. For litigation friends, the rules in Part 17 draw a distinction between 'P' and a 'protected party'.[3] For example, a litigation friend can be appointed without a court order for a protected party, but by virtue of r.17.3 the appointment of a litigation friend for P must be by court order in accordance with r.17.4. This provides that:

> "(1) The court may make an order appointing –
>
> (a) the Official Solicitor; or
>
> (b) some other person,
>
> to act as litigation friend for a protected party, a child or P.
>
> (2) The court may make an order under paragraph (1) –
>
> (a) either on its own initiative or on the application of any person; but
>
> (b) only with the consent of the person to be appointed.
>
> (3) An application for an order under paragraph (1) must be supported by evidence.
>
> (4) The court may not appoint a litigation friend under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 17.1(1).[4]
>
> (5) The court may at any stage of the proceedings give directions as to the appointment of a litigation friend.
>
> (Rule 1.2 requires the court to consider how P should participate in the proceedings, which may be by way of being made a party and the appointment of a litigation friend under this Part.)"

12. As regards the appointment of Rule 1.2 representatives, r. 17.9 provides that:

[3] Rule 2.1 COPR defines a "protected party" as "a party or an intended party (other than P or a child) who lacks capacity to conduct the proceedings". There may, for example, be cases in which it is proposed that a family member of P is joined as a party to proceedings but she lacks capacity to conduct those proceedings. In that case, the family member will be properly termed a "protected party".

[4] Rule 17.1 COPR, in turn, provides that: "(1) A person may act as a litigation friend on behalf of a person mentioned in paragraph (2) if that person – (a) can fairly and competently conduct proceedings on behalf of that person; and (b) has no interests adverse to those of that person. (2) The persons for whom a litigation friend may act are – (a) P; (b) a child; and (c) a protected party.

> "a person may act as an accredited legal representative, for P, if that person can fairly and competently discharge his or her functions on behalf of P".

As with a litigation friend for P, the appointment must be: (1) by court order; (2) either on application or on the court's own initiative; but (3) only with the consent of the person to be appointed (r. 17.10).

The case law

13. There is a body of case law emphasising the importance of giving careful consideration to, and making appropriate directions for, the participation of P where an application is made to deprive him of his liberty. A significant proportion of that case law arises in the context of the fall-out from *Cheshire West and Chester Council v P and Another* [2014] UKSC 19 and the influx of applications to the Court of Protection which followed. While such case law pre-dates the COPR entering into force, it remains directly relevant when considering what is required to avoid a breach of the Article 5 ECHR rights of P where a decision is taken authorising a deprivation of his liberty.

14. In *Re X* [2014] EWCOP 25, when seeking to formulate principles for a streamlined procedure for the authorisation of deprivations of liberty, the then President of the Court of Protection, Sir James Munby, inter alia opined that:

> "18. Neither the Rules (see Rule 7(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." (original emphases)

15. A further judgment was subsequently handed down by the President, namely *Re X (No2)* [2014] EWCOP 37, in which he supplemented his analysis in *Re X* on the

participation of P, though remaining of the view that it was not *necessary* for P to always be joined as a party to proceedings.

16. On appeal, the Court of Appeal ([2015] EWCA Civ 599) concluded that it had no jurisdiction to entertain the appeal, as the President did not have jurisdiction to determine the issues in question at first instance. Two members of the court did, however, issue extensive obiter dicta that the President erred in determining that P did not need to be joined as a party to proceedings where he was to be deprived of his liberty by the order being sought in those proceedings. Black LJ concluded that Article 5 ECHR required the following:

> "104. … I stress that I am only concerned, at present, with whether P must be a party to the deprivation of liberty proceedings. Given the tools presently available in our domestic procedural law, I see no alternative to that being so in every case.
>
> 105. If he is joined, P will necessarily have a litigation friend who must have no interests adverse to his and who will look after his interests in relation to the litigation. He will be served with documents and, where necessary, will be able effectively to question the premise upon which the proceedings are brought and, if matters cannot be resolved without a contested hearing, to challenge the case put before the court, including by obtaining his own expert evidence where required. What is more, the court will have done what is reasonably practicable to permit and encourage him to participate as fully as possible in any decision affecting him, fulfilling section 4 of the MCA 2005. …
>
> 108. … For the reasons I have explained, had I been in a position to determine the issue in these proceedings, I would have held that in order that deprivations of liberty are reliably subjected to thorough scrutiny, and effective procedural safeguards are provided against arbitrary detention in practice, it is presently necessary for P to be a party in the relevant proceedings."

17. Moore-Bick LJ stated:

> "171. The decision in *Winterwerp v The Netherlands* (1979) 2 EHRR 387 makes it clear that a person who lacks capacity must have access to a court and an effective opportunity to be heard, either in person or by means of representation. The fullest right to participation in proceedings is that which is enjoyed by the parties, but the streamlined procedure envisaged by the President contemplates that there will be cases in which a person lacking capacity will not be made a party because someone considers that it is unnecessary for that step to be taken. I agree with Black L.J. for the reasons she gives that a procedure under which such a person need not be made a party in order to ensure that the proceedings are properly to constituted (even though he may be joined as a party at his request) is not consistent with fundamental principles of domestic law and does not provide the

> degree of protection required by the Convention and the Strasbourg jurisprudence."

18. In *The Health Service Executive of Ireland v CNWL* [2015] EWOP 48, Baker J considered the question of whether, following the decision of the Court of Appeal in *Re X* and the entry into force of Rule 3A of the Court of Protection Rules on 1 July 2015, "an adult who is the subject of an application under Schedule 3 to the Mental Capacity Act 2005 to recognise and enforce an order of a foreign court that deprives the adult of his or her liberty [should] be joined as a party to the application": [1]). Baker J noted that the Court of Appeal's remarks "were (at best) obiter dicta or (possibly) merely dicta", but "…I consider that I must treat the dicta as the strongest possible indication of how the Court of Appeal would rule on the question before it, in the event that the issue returns to that Court as part of a legitimate appellate process": [14]. Baker J, importantly, stated:

> "31. In *Re X*, the judges of the Court of Appeal were considering proceedings for orders authorising the deprivation of liberty by the Court of Protective exercising its original jurisdiction under the MCA 2005. They were not asked to consider applications for the recognition and enforcement of foreign orders under Schedule 3. **Their clear statements of principle, however, serve as a strong reminder of the importance to be attached to ensuring that P's voice is heard on any application where deprivation of liberty is in issue." (emphasis added)**

19. Baker J opined that "very urgent cases" might require a slightly different approach to representation for P, albeit only on an interim basis. He stated:

> "34. … In very urgent cases, the court may conclude that an interim order should be made without any representation by or on behalf of the adult, but direct that the question of representation should be reviewed at a later hearing. Such a course seems to me to be consistent with the analysis of Black LJ at paragraph 104 of *Re X*. In every case, however, when carrying out that analysis, the court must be alive to the danger identified by Black LJ, at paragraph 100 in *Re X* that the process may depend "entirely on the reliability and completeness of the information transmitted to the court by those charged with the task" who may "be the very person/organisation seeking authorisation for P to be deprived of his liberty"."

20. Further important judgments on how P's participation was practically to be secured followed, including the decisions of Charles J in *Re NRA* [2015] EWCOP 59, *Re JM and Others* [2016] EWCOP 15 and *Re KT and Others* [2018] EWCOP 1, although these focus on the practical mechanisms for securing participation at that time.

21. Throughout these judgments, rules and practice directions runs a golden thread pronouncing that the parties and the court must ensure that the participation of P is given careful consideration and promoted as far as possible. While the exigencies of a given situation may dictate the making of interim orders in the absence of representation for P, this power is to be exercised with especial caution. The court must review the

"completeness" of the information transmitted to it with "a healthy scepticism", since such information will be provided by those seeking authorisation for P's deprivation of liberty, and therefore comes with the risk of confirmatory bias.

22. The arrival in 2017 of r. 1.2 of the COPR does not water down the force of this case law. The existence of a power to appoint an informal representative (r.1.2(2)(c)), or to allow P to address the court (r.1.2(2)(d)), or to do nothing because P's interests and position are 'properly secured' (r.1.2(2)(e)), does not signify in the slightest that such measures would be appropriate where a court is considering the extremely serious step of depriving P of his liberty. Such powers may be, and probably will be, appropriate where a lesser measure (such as how money is to be spent) is the subject matter of the application. But there is nothing in that rule, or in the practice direction, that suggests that anything short of party status (or appointment of an accredited legal representative) can be considered in a deprivation of liberty application. The case law establishes the standards where Article 5 is in play and nothing in the rules attenuates those standards.

The present case

23. The rules and authorities cited above emphasise the importance of P's voice being heard on any application which seeks to deprive him of his liberty. Yet on two separate occasions within the space of a week, the court was asked to make significant decisions concerning the health and welfare of EM without him being represented and with virtually no participation by him.

24. On the first occasion, the order made by Keehan J on 1 July 2022 authorising EM's first move (from home to hospital) contained an interim declaration[5] that there was "reason to believe that [EM] lacks capacity to conduct these proceedings…". It also recited that the "the Official Solicitor ha[d] been contacted but [is] unable to provide representation for this application at this time". The order did not:

    i) Provide any detail about the approach made to the Official Solicitor, including why that approach was unsuccessful (e.g. because security for her costs could not be provided or that she had not been formally invited to act as litigation friend);

    ii) Beyond the unsuccessful approach to the Official Solicitor, identify whether EM's participation was further considered by the court and the parties before the order was made (e.g. by approaching an Accredited Legal Representative and seeking his consent to be put forward to the court for appointment, or by identifying EM's wishes and feelings in respect of the proposed move); or

    iii) Identify how EM's participation would be addressed moving forward, such as by formally inviting the Official Solicitor to act as litigation friend for EM or making some other direction consistent with the duty in r. 1.2 COPR.

25. The (telephone) hearing before Mr Justice Keehan was attended by EM's Palliative Care Registrar. She provided a witness statement dated 1 July 2022 and gave some oral evidence. I am informed, though this is not apparent from the face of the resulting order,

[5] This should arguably have been an interim recital following *London Borough of Hillingdon v DP [*2020] EWCOP 45 and *University Hospitals of Derby and Burton NHS Foundation Trust and Another v MN* [2021] EWCOP 4, although it is fair to say that the issue has not been fully argued to date in the case law. .

that the hearing was also attended by a nurse and by his general practitioner, and that two of EM's children attended and spoke about his wishes and feelings. Having read the witness statement of the Palliative Care Registrar I can understand why the order was made. It set out the significant risks to EM were he to remain in his own home even for a short period of time. I consider, however, that while EM's voice was heard in the sense that his wishes and feelings were conveyed to the court he was, as I have stated above, not facilitated to participate meaningfully in the process in the manner envisaged by r1.2 COPR. Moreover, how that deficiency might be remedied for future hearings was not addressed. Of course, I make no criticism of my colleague who was dealing with an emergency out-of-hours application over the telephone. I accept that the applicant did explain that the exigencies of the situation meant that the application had to be made ex parte and that EM's representation could not be facilitated. But the resulting order did not explain how that would be secured for the next hearing.

26. On the second occasion, a week later, I was asked to authorise a further move for EM. Again, there was no representation for EM. Mr Lawson's position statement stated that:

> "The Official Solicitor has previously been put on notice but has not yet accepted the case. It might be that a family member could be litigation friend or that an ALR or advocate service could be found."

27. At the hearing, it was confirmed by Mr Lawson that family members had been asked if they would be willing and able to take on the role of litigation friend. They were not. The position statement also confirmed that attempts had been made to secure an advocacy service for EM for this hearing but were unsuccessful. The averment that the Official Solicitor "has not yet accepted the case" was perhaps not perfectly expressed as she had never been formally invited to act as litigation friend by the court.

28. The Official Solicitor's well-known Practice Note on "appointment as litigation friend in personal welfare proceedings in the Court of Protection (including serious medical treatment cases) and appointment as advocate to the court" dated 3 February 2021[6], sets out her acceptance criteria including the need to be formally invited to act as litigation friend in each case.

29. Despite the continued absence of representation for EM, I was persuaded that it was appropriate to make the order. I was satisfied that this was a "very urgent case" where it would be appropriate to make a further interim order notwithstanding the lack of representation for him, whilst making directions to secure his participation moving forward. I note that there was had been an attempt to ascertain EM's wishes and feelings for the hearing. A witness statement by the Director of Nursing and Clinical Transformation at the ICB stated that:

> "EM has been reviewed by a Consultant Geriatrician Dr L at UHCW on 6 July 2022 who has prepared a report relating to his care which is at Exhibit JS 2. In addition to his report Dr L has informed me that he did make an effort to discuss the situation

[6] Accessible at: https://www.gov.uk/government/publications/appointment-of-the-official-solicitor-in-welfare-proceedings-practice-note. There is a parallel note for Property and Affairs applications, which can also be found at: https://www.gov.uk/government/publications/appointment-of-the-official-solicitor-in-property-and-affairs-proceedings-practice-note.

> regarding the Court and provide explanation to EM but it was not possible as he was not able to retain the information neither was he willing to engage constructively. Dr L said that he does not feel that EM is able to understand the process and his involvement in it will cause only frustration. Even with support Dr L does not think EM will not (sic) be able to follow the process.
>
> The ICB has tried to establish if an advocate can be available for EM either at UHCW or commissioned by the ICB. The ICB have not been able to source advocacy support before the hearing tomorrow, however, the ICB has sourced independent advocacy to be put in place following admission to the community placement as set out below."

I have to say that this does not satisfy the imperative necessity of seeking to secure, to whatever degree is feasible having regard to the exigencies of the situation and the level of his incapacity, EM's participation in the proceedings.

30. Section 4 MCA 2005, the Rules and Practice Directions, and the case law all reflect the critical importance of ensuring that P's participation in proceedings is properly considered and promoted in any application before the Court of Protection. Moreover, the case law mandates that this will, in cases concerning an individual's deprivation of liberty such as the present, almost invariably require P's joinder and the appointment of a litigation friend. I agree with the statement of Baker J in *CNWL* that it may be acceptable in "very urgent cases" to make interim orders before representation for P can be secured, although this will require the court when exercising such a power to consider the circumstances of the case very carefully indeed. Such scrutiny will include considering whether the decision can be deferred until representation can be secured, or whether P's participation can be secured in any other way on an interim basis. The court must also ensure it makes appropriate directions to secure P's participation moving forward.

Final observations

31. The fundamental rule is this:

> **(1) Subject to the exception in (2), where an application is made which seeks the deprivation of P's liberty, P must be joined as a party to the proceedings and a litigation friend (or an accredited legal representative) must be appointed to act for P.**
>
> **(2) The exception referred to in (1) is where an interim order is very urgently needed and there is just not enough time to secure P's representation before the hearing. But at the hearing P's representation at future hearings must be enabled.**

An unjustified failure by the court to secure such representation when making a non-urgent deprivation of liberty order will very likely render the order unlawful.

32. In the field of public law applications under Part IV of the Children Act 1989, a guardian for the subject children is invariably appointed by the court under s. 41 of that Act to represent them and to safeguard their interests. Sometimes it will not have been possible for the appointment to have taken effect by the time an emergency application is heard. But the representation of the child is always at the forefront of the minds of all participants and the court. In my opinion it would be as well if a similar mentality was present in proceedings in the Court of Protection involving the deprivation of liberty for P.

Two further matters

33. I wish also briefly to address two further matters which have arisen in this case namely (i) the anonymisation of orders; and (ii) the technical correctness of the standard form Transparency Order.

Anonymisation of orders

34. Almost a decade ago, in the case of *J Council v GU and Others* [2012] EWCOP 3531, I deprecated the practice of anonymising documents (other than reported judgments) in the following terms:

> "22. … All of the Court documents in this case, including Orders, have the names of the parties anonymised by the use of initials. In the memorable words of Lord Rodger of Earlsferry in *re Guardian News and Media Ltd* [2010] 2 AC 697 at para 1 the case has become an "alphabet soup". There is absolutely no reason for this, although for some mysterious reason, which I cannot work out, it has become standard practice. Not only is it very confusing to any reader but it dehumanises the participants. I cannot locate in the Court of Protection Rules a rule equivalent to FPR 2010 rule 29.10 which prohibits the inspection or copying of any document on the court file by a stranger to the proceedings. However by Court of Protection Rules 90 - 91 the general rule is that proceedings shall be heard in private. This means that the court file is, absent an order of the court, similarly closed to strangers. Proceedings in the Family Division and other family courts are equivalently designated as private business but all court documents bear the parties' actual names. So should court documents in proceedings in the Court of Protection. Of course, a judgment such as this, which is going to be published, will be anonymised, just as is the (usual) case with Family Division judgments. In *Independent News and Media Ltd and others v A (by his litigation friend, the Official Solicitor)* [2010] EWCA Civ 343, [2010] 1 WLR 2262, [2010] 2 FCR 187, [2010] 2 FLR 1290, Lord Judge CJ at para 11 extolled the merit of "a suitably anonymised publication of the court's judgment" in Court of Protection proceedings. But it would be a false inference to conclude that that judgment tacitly said that all court documents should be anonymised also. I therefore require that in the agreed final order here the parties have their identities restored to them."

35. Similar sentiments were expressed by Munby LJ in *HM (An Adult)* [2010] EWHC 1579 (Fam), where he referred to his appearance as counsel before Sir Stephen Brown P in *Re G (Adult Patient: Publicity)* [1995] 2 FLR 528 and recounted:

> "21. … It was suggested to the President that the effect of paragraph 1 of the order was that the court's process and orders should themselves be headed '*In re G*' rather than with the actual name of the patient. The President rejected that suggestion, accepting my submission that "It is one thing to say the list outside the court should have some suitable anonymous initial" but that it is "a nonsense for the court's process to be headed with anything other than the proper title to the action". The President expressed the distinction as being between "the listing" and the "process" or the "actual summons", making it clear that paragraph 1 was confined to the former and did not include the latter."

36. No-one has paid any attention to these remonstrations and the practice of anonymisation of orders has continued unabated. So, in this case I was presented with a draft order within which P was anonymised throughout. While this was not quite the 'Alphabet Soup' which has remained on the menu in many cases (where the court is faced with multiple anonymised persons, public bodies and sometimes even the clinicians) I was reminded of my earlier judgment in *GU.*

37. I requested that the perfected order should remove the anonymisation in order to restore EM's identity. I then amended the draft order to make clear on its face that there was a transparency order in force prohibiting the identities of the anonymised parties from being published or otherwise disclosed, and reminding readers that a breach of the transparency order would be a contempt of court.

38. Since my judgment in *GU*, the COPR have entered into force. The new rules do not cause me to change my view, and I remain mystified from where this practice of anonymising orders derives.

39. It is a terrible practice. I have struggled to imagine the impact on a person, particularly someone who is close to the line between capacity and incapacity, of reading a formal order which rules his life profoundly, in which his identity is stripped away and he is simply reduced to initials. It would surely be utterly demoralising, and perceived as patronising and insulting. I cannot identify any justification for this practice and I reiterate my comments in *GU* that it should not continue. For the avoidance of doubt, my comments do not extend to public judgments, such as this. P will certainly be anonymised in this judgment.

Transparency orders

40. By the time this application came before me, a transparency order in broadly standard terms had been made by Keehan J also on 1 July 2022. I have reviewed the issue of transparency in judgments in the Family Court (most recently see *Gallagher v Gallagher (No 1: Reporting Restrictions)* [2022] EWFC 52). In that judgment I made it clear that I was not intending to give any further judgments on the issue of

transparency in financial remedy proceedings, and I am not doing so here (even by analogy).

41. However, when considering the transparency order made in this case on 1 July 2022 I was concerned to note that it may be technically unsound for two separate reasons namely (i) the order was made in the absence of a *Re S*-type balancing exercise, weighing the Article 8 ECHR rights of EM with the Article 10 ECHR rights of the public at large, exercised via the press; and (ii) notice of the intention to seek the order had not been given to the press pursuant to s12(2) HRA 1998.

42. I now set out my concerns, very briefly, as follows:

i) Rule 4.1(1) of the COPR provides that the "general rule is that a hearing is to be held in private". The rest of Rule 4.1 says nothing about what can be reported about such a hearing. It prevents a journalist attending the hearing, but its terms do not prevent any party talking to a journalist or that journalist subsequently writing a report.

ii) Section 12 of the Administration of Justice Act 1960 imposes a blanket ban on reporting proceedings brought under the Mental Capacity Act 2005, but r.4.2 COPR and Practice Direction 4A allow, for the purpose of the law of contempt, certain disclosures to be made.

iii) Rule 4.3(1) and (2) COPR supplies the court's power to order that a hearing be held in public and, consequentially to that order, to impose reporting restrictions.

iv) Rule 4.3(3) provides that:

> "A practice direction may provide for circumstances in which the court will ordinarily make an order under paragraph (1), **and for the terms of the order under paragraph (2) which the court will ordinarily make in such circumstances.**" **(emphasis added)**

v) Practice Direction 4C has been made under r4.3(3), and provides that:

> "2.1 The court **will ordinarily (and so without any application being made)** -
>
> (a) make an order under rule 4.3(1)(a) that any attended hearing shall be in public; and
>
> (b) in the same order, impose restrictions under rule 4.3(2) in relation to the publication of information about the proceedings.
>
> 2.3 An order pursuant to paragraph 2.1 **will ordinarily be in the terms of the standard order approved by the President of the Court of Protection** and published on the judicial website at www.judiciary.gov.uk/publication-court/court-of-protection/. **(emphasis added)**

vi) The emphasised passages in r. 4.3(3) and PD4C, paras 2.1 and 2.3, provide for a standard order to be made almost automatically: i.e. without any enquiry whether such an order is appropriate on the facts of a given case. That such an enquiry is necessary flows from the fact that the transparency order is undoubtedly a form of reporting restrictions order.

vii) Reporting restriction orders can only be made following a court conducting the 'ultimate balancing exercise' between Article 8 and Article 10 ECHR rights as described by Lord Steyn in *Re S (a child)* [2004] UKHL 47; [2005] 1 AC 593 as follows:

> "The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed **in the individual case is necessary**. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test." **(emphasis added)**

viii) There is no sidenote in the standard order template saying that a *Re S* balancing exercise must be undertaken, such as to prompt the judge to turn his or her mind to that exercise. Nor was there any statement in the specific order of Keehan J dated 1 July 2022 that this exercise had been actually undertaken.

ix) Save where there are compelling reasons why the press should not be notified, a reporting restriction order can only be made after all practical steps have been taken to give the press notice of the intention to seek such an order. But there is no provision to this end in r.4 COPR or PD4C. Such notification is required pursuant to s12 HRA 1998, which provides that:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied:
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified."

x) There is no rubric or sidenote in the standard order template saying that the press must be notified prior to the order being made, nor is there any statement that this occurred in the order of Keehan J dated 1 July 2022.

43. Plainly, on 1 July 2022 the media were not notified that a reporting restriction order was being considered. It is equally clear that a *Re S* balancing exercise undertaken was not undertaken. Had these steps been taken the order would have said so on its face. It is, however, a standard practice, condoned by r.4 COPR and PD4C, not to take these steps. That being so, I respectfully suggest that the correctness (I hesitate to use the word lawfulness) of this standard practice is reviewed by the Rule Committee with input from all relevant stakeholders.

44. One possible way of resolving the problem might be to leave the proceedings to be heard "in private" but to make a standard order at the beginning of the case which relaxes the strictures of section 12 of the 1960 Act by permitting the press and legal bloggers to attend the hearings and allowing them (and the parties) to report the proceedings provided that they do not identify P directly or indirectly (see *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam) where an equivalent order was made). In my opinion such a permissive order would not be a reporting restriction order, and therefore would not trigger the requirement to undertake a *Re S* balancing exercise in every case. Nor would such an order spark the requirement to notify the media of the intention to seek the order under s. 12(2) of the HRA 1998.

45. I recognise, however, that in *Webster* at [77] Munby J thought that such a permissive order did trigger a requirement to undertake a balancing exercise. Further, at [121] he considered that an order which permitted the press to attend the hearing would mean that the proceedings were not "in private". If that were so then it would follow that the permissive order would certainly be characterised as a reporting restriction order, which would bring into play s. 12(2).

46. I leave it to others to determine if those views are correct.

Postscript

47. The hearing before me took place on 7 July 2022. On 14 July 2022, after the writing of this judgment had been largely completed, I was informed that EM had sadly died the previous day. I passed on my condolences to his children then, and I repeat them in this judgment.

48. The proceedings technically abated on the death of EM, and following his death there is no direct benefit to his children in any further steps which could be taken.

49. I have considered in such circumstances whether I should hand down this judgment. I have decided that I should do so, as I consider that my observations on the three specific matters of participation, anonymity and the correctness of the standard transparency order should see the light of day.
