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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

AND IN THE COURT OF PROTECTION

IN THE MATTER OF THE SENIOR COURTS ACT 1981

AND IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand
London

Before MR JUSTICE COBB

IN THE MATTER OF

LONDON BOROUGH OF CROYDON

-v-

CD

MS Christine COOPER appeared on behalf of the Local Authority
The Respondent did not attend and was not represented
Ms Fenella MORRIS QC Leading Counsel, instructed by the Official Solicitor as Advocate to the Court.

JUDGMENT
14th AUGUST 2019
(AS APPROVED)

This judgment was delivered in PUBLIC. 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 CD and members of his family 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.
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MR JUSTICE COBB:

1. The application before the court this afternoon concerns a 65-year-old man, who I shall refer to as CD. Proceedings have been brought under the inherent jurisdiction of the High Court by the London Borough of Croydon ("the Local Authority") in relation to CD. The Local Authority represented today by Ms Christine Cooper seeks a range of declaratory relief. The only respondent to the application is CD himself, he is not present nor represented.

2. At a directions' hearing which was presided over by Mrs Justice Gwynneth Knowles on 29th July 2019, an order was made in which the court invited the Official Solicitor to act as advocate to the court in this difficult case. I am most grateful indeed to the Official Solicitor for having accepted this invitation and having instructed Ms Fenella Morris, Queens Counsel.

3. The background can be shortly stated. CD suffers from a range of medical problems; he has a psychiatric background characterised by depression and dysthymia, he suffers from epilepsy and complications arising from chronic alcohol abuse. He is diabetic and has a range of physical disabilities.

4. I can I think do no better than to summarise his state of health by drawing attention to the conclusion of the very comprehensive assessment filed by the Local Authority in support of its application. I won't read out the note in full, but it is appropriate that I should read out the introductory paragraphs into this judgment.

"CD is diabetic and also epileptic and has poor mobility, incontinent of urine and faeces and unable to maintain his home environment. CD's condition is further complicated by excess alcohol use and he is mostly inebriated at home. This has led to frequent incidents of falling in his flat, non-concordant with medication, severe self neglect, inability to manage his personal care, activities of daily living, his health and wellbeing. Recently his home environment deteriorated to a stage that a care agency commissioned via Croydon Council were unable to access the flat to support him with his care needs for fear of cross contamination and infection. Due to this lack of support occasioned by his poor and unhealthy home environment, CD frequently called the London Ambulance and Police… he attended the Accident and Emergency [department] of the Princess Royal Hospital in Bromley and Croydon University Hospital in Croydon regularly. CD lives alone and he has limited positive support network, he socialises with friends in the same block of flats who equally have alcohol misuse problems."

"CD is unable to safely complete most activities of daily living without help and support from his carer. Due to his restricted mobility he is unable to manage his living environment and his personal care or complete most activities of daily living. His flat has been 'blitz cleaned' on many occasions and support care package commissioned but this has failed on all occasions. All professionals working with CD are of the view that community care has failed and [the housing department] is not able to meet his needs."

5. I note from the history (which is as I say set out in the comprehensive report prepared for this hearing) that in 2017 CD was admitted to the Croydon University

Hospital and was detained under *section 2* of the *Mental Health Act 1983*. The note in the documents that I have before me of this admission reads as follows.

"CD could not at first tell us how he arrived into the hospital and later he said that he felt sad and he was losing everything. During assessment he demonstrated significant memory deficit and he lacked insight into his other issues, asked about the state of the flat which is very neglected CD stated that the only problem is the washing machine not working". He worried that various items are going missing from his flat such as keys, and that the TV was swapped for the worst quality. This distresses him and he cannot explain how this happens, he stated that the carers stopped coming and he doesn't know why. He later said that they had stolen things and that items of his had been thrown away.

"CD stated that he can look after himself, he stated that he does not want to go to hospital or see any psychiatrist because he was brainwashed in hospital. He did not accept that he has any current problems with toileting and dismissed that his flat was reported to be very uninhabitable. Asked about his non-engagement with the team CD stated that he lost his phone and couldn't contact his care coordinator."

"Discussion. In a discussion with Dr J and Dr S it was evidenced that CD is currently presenting with a disordered mental health which could be due to relapse in depression as well as it may indicate other organic problems. The robust support in the community in terms of his care team and SDS package failed as he disengaged. In the interview CD demonstrated lack of insight into his needs, self-neglect and he has no capacity to understand the risks he is living in, an extremely neglected flat and his self-neglect".

6. The proceedings before me today were brought on an escalating wave of concern by the Local Authority about the increasingly unhygienic state of the accommodation and indeed of CD himself. The concerns had arisen not only through observations of the local authority care workers themselves but also through third party agencies.

7. An illustration of that to which I have just referred is further contained in the Local Authority report as follows:

"His flat is soiled with human waste, putting him and anyone who accesses his flat at high risk of infectious diseases. He continues to drink alcohol and soil himself and as a result he cannot manage to control his bowels. His entire house from the hallway, lounge, bedroom and kitchen, including all his furniture, has faecal and urinal stains making it odorous and uninhabitable to live and preventing carers from going to his flat to provide personal care from which CD stands in need".

8. It appears from all that I have read that CD is disinclined to change his ways and is not willing to be moved to a safe environment where he can be supported with his personal care. At times it is apparent that he has been insightful of his condition and recognises the shortcomings of his personal and domestic care, however these flashes of insight have not been it appears sustained.

9. The situation is a very difficult one on the ground to manage. The Local Authority has tried repeatedly many strategies to achieve and maintain standards of appropriate hygiene in the home and for CD himself, but this has been a losing battle.

Recent care records show that CD has been inconsistent in his willingness to accept care with the management of his medication and with the cleaning of his home. Ms Cooper tells me that in fact there's been no access to the home now since around about 25th July and the call log certainly indicates that submission. One can only now imagine in what sort of state both CD and the accommodation must now be in.

10. The Local Authority here have an extremely difficult case to manage and have quite properly in my judgment brought the issue before the court.

11. In her helpful note to the court on behalf of the Official Solicitor Ms Morris QC has raised a number of points: first whether or not there has been sufficient assessment of CD's capacity, and whether or not indeed the *Mental Capacity Act 2005* could not or should not be deployed in these circumstances.

12. Ms Morris further raised question over the intrusiveness of the measures that were or are being proposed in respect of CD and asked whether *less* intrusive measures might indeed be taken. Ms Morris submitted that while it may be that CD appears capable of making individual decisions about his care some of the time when deciding to drink, or when he is drunk or otherwise disordered, he lacks capacity; in those circumstances it may be appropriate for the court ultimately to find that he does lack the relevant capacity to make decisions about his care when considered in the round and in that proposition she relied on the decision of *London Borough of Greenwich v CDM* [2019] EWCOP 32.

13. Ms Morris invited the court to consider what if any interim steps could be taken at this stage, and for me to bear very much in mind that any steps that are taken should only be those which are both necessary and proportionate.

14. I heard very able argument from both counsel during the course of the morning, and in direct response to a specific invitation from me they most helpfully spent a little time over a short adjournment considering the preparation of a specific interim care plan which was less aspirational and more practical than the proposed care plan put before the court in the Local Authority's filed evidence. I have now seen a 20-point plan which Ms Cooper commends to the court; Ms Morris accepts that that plan does indeed appear appropriately to meet the needs of the case.

15. With broad agreement about the care plan, there is left one important issue for me to adjudicate upon, and that is the jurisdictional basis on which I should consider and/or approve that plan. Ms Cooper invites me to use the powers vested in me under the inherent jurisdiction in respect of CD who (it is said) is a vulnerable adult and deserving of the court's protection under the inherent jurisdiction; she invites me to declare myself satisfied that it is in CD's best interest to receive the care which is set out in that plan to which I have referred.

16. Ms Morris suggests on the contrary that it would be a better course, and indeed a more appropriate jurisdictional course, for me to consider and indeed apply the provisions of *section 48* of the *Mental Capacity Act 2005* at this interim stage; that, argues Ms Morris, represents a more secure jurisdictional basis than that which is available to the court under the inherent jurisdiction.

17. I don't regard it as either necessary (or probably entirely desirable) to embark on a detailed review of the law in this area at this interim hearing, and in this *ex tempore* judgment. It is sufficient for me to record the following important points:

a. first the inherent jurisdiction may be deployed for the protection of vulnerable adults,
b. secondly in some cases a vulnerable adult may not be incapacitated within the meaning of the *2005 Mental Capacity Act* but may nevertheless be protected under the inherent jurisdiction;
c. third that in some of those cases capacitous individuals may be of unsound mind within the meaning of *article 5(i)(e)* of the *European Rights Convention*.
d. fourth, in exercising my powers under the inherent jurisdiction I am bound by the *European Convention* and the case law under the convention and must only impose orders that are necessary and proportionate and at all times have proper regard to the personal autonomy of the individual; and
e. fifth and finally, that in certain circumstances it may be appropriate for a court to take or maintain interim protective measures while carrying out all necessary investigations.

18. That helpful distillation of the law is a radical form of shorthand for what is a rich and developing body of case law which largely begins with the decision of Mr Justice Munby (as he then was) in *Re: SA* [2005] EWHC 2942, through his decision in *Re: PS* [2007] EWHC 623, taking in the decision of Mrs Justice Macur (as she then was) in a decision of *LBL* and *RYJ* [2010] EWHC 2665 to the case of *A Local Authority and others -v- DL* [2012] EWCA Civ 253 which is the for present purposes anyway the final and probably the most definitive authority on the issues before me.

19. Within the judgments of the court in that case Lord Justice McFarlane quoted extensively from the judgment of Mr Justice Munby in *Re: SA* (see *Re: DL* from [11] through to [23] inclusive).

20. Importantly Lord Justice McFarlane approved that which Mr Justice Munby had said in *Re: SA* about the definition of vulnerable adult. At [82] of *Re: SA* Mr Justice Munby had said this,

"In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who whether or not mentally incapacitated and whether or not suffering from any mental illness or mental disorder is or may be unable to take care of him or herself or unable to protect him or herself against significant harm or exploitation or who is deaf, blind or dumb or who is substantially handicapped by illness, injury or congenital deformity".

He added that he did not intend his judgment to be used interpreted as providing an exhaustive definition; his exposition was intended to be descriptive not definitive, indicative rather than prescriptive. The use of the inherent jurisdiction is not confined to those who are vulnerable adults however that expression is understood, nor is a vulnerable adult amenable as such to the jurisdiction.

"The significance in this context of the concept of a vulnerable adult is pragmatic and evidential, it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable

than an adult who is not vulnerable. So it is likely to be easier to persuade the court that there is a case calling for investigation where the adult is apparently vulnerable and where the adult is not on the face of it vulnerable, that is all."

21. I, for good reason, could not improve on that explanation or exposition of the law and I apply it to the facts of this case. On the facts as they present to me, it is in my judgment likely that CD is a man who *is* vulnerable within that definition and is therefore amenable to the jurisdiction, namely the inherent jurisdiction of the High Court.

22. I should nonetheless add one caveat; the "expanding empire of the law" as Lord Sumption referred to it recently, is in many respects still developing in this area, the area of the inherent jurisdiction. Some clear markers have been laid down which establish a boundary of the relevant territory; in one important respect I assess from the case law clear markers have indeed been laid and should be observed, and this is in relation to the use of the inherent jurisdiction for the purposes of depriving a person of their liberty.

23. This was an issue which was considered by Mr Justice Munby in *Re: PS* and (without reproducing the facts of that case in this judgment) I nonetheless draw attention to what he says at [16] and [23]. While at [16] he appears to give support for the unqualified proposition that the court has power under the inherent jurisdiction to direct that a child or an adult in question could be placed at and can remain at a specified institution such as for example a hospital/residential unit/care home or a secure unit that is in relation to children or incapacitated or vulnerable adults. It is equally clear that the court's powers extend to authorising that person's detention in such a place and the use of reasonable force if necessary to detain him and ensure that he remains there. That is, in my assessment, importantly qualified by what he goes onto say at [23] namely that (i) the detention must be authorised by the court on application made by the local authority and before the detention commences and (ii) subject to the exigencies of urgency or emergency the evidence must establish unsoundness of mind of a kind or degree warranting compulsory confinement, in other words there must be evidence establishing at least a prime facie case that the individual lacks capacity and that confinement of the nature proposed is appropriate.

24. And in his third subparagraph there he emphasised the need for review. Para [23] provides what seems to me to be an important qualification to this issue concerning deprivation of liberty under the inherent jurisdiction. As it happens, I am not (or probably not) asked to consider that on the facts of this case yet or today, but I simply alert the local authority and insofar as is appropriate the Official Solicitor of my provisional views on that subject.

25. Having considered Ms Cooper's case, I turn to the question of whether or not in as a matter of fact and law the *Mental Capacity Act 2005* could and in the circumstances should be deployed here. There is no recent or even potentially confidently reliable indicator of CD's capacity in the documents before me. The Official Solicitor invites me to *infer* from the evidence that there is reason to believe that CD does lack capacity in relation to decisions around his care and personal, the management of his personal health.

26. In considering that submission I have taken as I must the guiding principles of *section 1* of the *2005 Act* as my loadstar, and specifically noting that at *section 1(2)* a person must be assumed to have capacity unless it is established that he lacks capacity and a person is not to be treated as unable to make a decision merely because he makes an unwise decision. I have further had regard at *section 2* of the *Mental Capacity Act 2005* to the point that for the purposes of the *Act* a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain.

27. It doesn't matter whether the impairment or disturbance is permanent or temporary; by *section 2(2)*, and *section 2(3)* a lack of capacity cannot be established merely by reference to a person's age or appearance or a condition of his or an aspect of his behaviour which might lead others to make unjustified assumptions about his capacity; all these are important warnings in a case such as this. I have had further, of course, specific regard to the four-fold test in *section 3* of the *2005 Act*.

28. For present purposes I am being asked to consider exercising a power to make an interim order where, pending the determination of an application to it in relation to a person, I may make order or give directions in respect to any matter if "There is reason to believe that P" in this case CD, "lacks capacity in relation to the matter, the matter is one to which it's powers under the *Act*, this *2005 Act*, extend and it's in P's best interests to make the order or give the directions without delay".

29. I am able to state, on the evidence that I have received, that in a number of respects there is evidence of impairment of, or disturbance in the functioning of, the mind or brain of CD by reference to his psychiatric background of depression and/or dysthymia and/or his chronic alcohol abuse (or 'alcoholism' as it has been referred to today) which is of long standing or reasonably long standing.

30. It is apparent on my review of the material that CD's capacity to make decisions about his care has fluctuated. The evidence is that in 2017 for instance he showed a lack of understanding of the circumstances in which he was maintaining his personal care and/or an ability to use or weigh information relevant to maintaining healthy personal and domestic care.

31. The situation that now obtains is one in which CD has for the best part of three weeks refused access by the care services to his home; this *indicates* (whilst it doesn't affirmatively or comprehensively prove) that his mental functioning is or may well be deteriorating or has deteriorated.

32. On the basis of the information available to me today and drawing together the strands of the history and in particular those parts of his psychiatric history which are known, I feel able to conclude that there is reason to believe that at the moment, *per section 2*, he lacks capacity to make decisions about his personal care. There is no single evaluation of that, the *section 48* test is established by drawing together all the material of which I have been advised from the local authority and in particular the recent shutdown of CD's cooperation with care services.

33. Given the finding that there is reason to believe that he lacks *capacity* in relation to decisions concerning his care, I go onto consider whether it is in his *best interests* to make orders or give directions without delay. I take the view that it is in CD's best interests that I should give directions and/or make orders without delay which enable the Local Authority to gain access to his accommodation in order, first of all to provide appropriate care for CD himself and secondly to make his accommodation safe for human habitation. Were I not to do so there is in my judgment, from the evidence that I have seen and read, real cause to believe that his well being would be very significantly impaired indeed.

34. It follows from all that I have said that the order which I make today can be made under the *Mental Capacity Act 2005*; I propose to do so, as I am satisfied that it is more appropriate, where statute provides a route, that the statute is used.

35. Today's order should nonetheless reflect the fact that I find that CD is also a vulnerable adult within the meaning of the well-known *Re: SA* test, and that that route is or was an alternative available to the local authority on the particular facts of this case.

36. That is my judgment.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge