Mental Capacity Law Guidance Note

Judicial deprivation of liberty authorisations

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A: Introduction

1. In *Re X and others (Deprivation of Liberty)* [2014] EWCOP 25, the President of the Court of Protection has devised a streamlined process to seek to enable the court to deal with DoL cases in a timely, just, fair and ECHR-compatible way. In this first of two judgments, Sir James Munby P sets out the broad framework; the second will elaborate on the reasons and address three remaining matters of the 25 identified by the court.

2. We do not in this Note provide editorial comment upon the decision, although it is clear that full implementation of Sir James Munby P's judgment will require new application forms to be generated, the Court of Protection Rules to be amended and the MCA 2005 itself to be revised. It is also clear that the judgment will have a significant impact upon questions relating to public funding (if, for instance, the authorisation procedure can take place upon the papers, then as the relevant regulations currently stand and if P is a party, they would have no entitlement to legal aid).

3. Rather, we outline here how an application for judicial authorisation to deprive liberty ought now to be made in light of Sir James Munby P's first judgment. We suggest that this guidance applies immediately – i.e. there is no need to wait until new application forms are developed before making applications.

4. It is important to note at the outset, though, that the President's judgment did not address questions of how and when the acid test set down by the Supreme Court in *Cheshire West* applies – it did not, for instance, address any specific points relating to supported living. These matters will undoubtedly be the subject of further judicial consideration in due course.

Evidential requirements

5. Each individual requires a separate application. But generic material could be in a single 'generic' statement, a copy of which can be attached to each application form. The application, evidence and other supporting material need not exceed 50 pages because the evidence should be succinct and focused and the statements and reports need not be lengthy.

6. The application needs to answer the following matters, either in the body of the form or in attached documents:

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

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

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

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

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

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

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

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

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

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

   xi. P's eligibility for public funding.

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

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

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

a. needing particular judicial scrutiny; or

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

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

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

On the papers or oral hearing?

8. The initial determination can be made on the papers, with an unimpeded right to request a speedy review at an oral hearing. However, the following triggers indicate the need for there to be an oral hearing in the first instance:

1. Any contest, whether by P or by anyone else, to any of the matters (ii)-(vii).
2. Any failure to comply with any of the requirements set out in (viii).
3. Any concerns arising out of information supplied in accordance with (ix), (xiii) and (xiv).
4. Any objection by P.
5. Any potential conflict with any decision of the kind referred to in (x).
6. If for any other reason the court thinks that an oral hearing is necessary or appropriate.

P a party?

9. 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, there is no need for P to be a party.

10. If P is a party, they must have a litigation friend who does not have to act by a solicitor and can conduct the litigation on behalf of P. Where they have no right of audience, the litigation friend will require the permission of the court to act as an advocate on behalf of P.

Frequency of review

11. The authorisation, even if initially made on the papers, can typically last for approximately one year unless circumstances require a shorter period. The review can, where appropriate, be done on the papers.

B: Questions (and some answers)

12. The judgment raises a number of questions (some of which may be answered by the President himself in due course). We pose here a number which occur to us immediately, together with some tentative answers: we emphasise, however, that specific advice must be sought in respect of particular applications.

Which evidence can be provided in generic form?

13. It seems to us that, where an application is under consideration for more than one individual, it would be unlikely if generic information could be provided going beyond information as to the nature of the arrangements giving rise to the deprivation of liberty and the fact of state imputability. It is difficult to imagine, for instance, that any generic information could be provided as to capacity or wishes and feelings.

What proof is required that P is over the age of 16?

14. Of particular relevance to transition services, unlike administrative detention under Schedule A1 judicial detention can be authorised from the age of 16. We would anticipate that stating P's date of birth would ordinarily suffice. If in doubt, of course check their birth certificate. If there is doubt and no papers – for example in the case of a paperless asylum seeker – a Merton-compliant age assessment may be required (see *B v London Borough of Merton* [2003] EWHC 1689 (Admin)).

What evidence is required as to the care arrangements?

15. We suggest that this evidence should not only address why it is said that the elements of the acid test are met (i.e. that the individual is under continuous supervision and control, and why it is said they are not free to leave) but also expressly set out any physical interventions that are allowed for in the care plan and (if different) that occur in practice.

Can social work evidence suffice to establish P's unsoundness of mind?

16. There is a degree of ambiguity in the judgment as to whether every deprivation of liberty application requires (at least) a General Practitioner to confirm the relevant unsoundness of mind, or whether such evidence can be established by a clinician but confirmed by another such as a social worker. This ambiguity will hopefully be clarified in due course either in the second judgment or following further

work by the Rules Committee. At present, however, we would suggest erring on the side of caution and – in particular in any case where there could be any doubt – obtaining medical evidence from a clinician. We note that there therefore may well be a difference between 'standard' applications to the CoP where a COP3 setting out the basis upon which it is said that the person lacks capacity to take the relevant decision(s)s can be completed by (inter alia) a social worker, and a deprivation of liberty application.

What form of best interests assessment is required?

17. The ruling does not state in terms who is to carry out the best interests assessment, leaving open the option that it could (for instance) be carried out by the individual's allocated social worker (if the application is made by a local authority). One of the key safeguards to administrative detention is the fact that the best interests assessor is independent. With judicial detention the judge occupies such independence. However, they are not as 'on the ground' and able to liaise with all the key consultees as a best interests assessor. We would suggest, therefore, that although not a legal requirement, best practice – particularly in 'trigger' cases – would be to have a best interests assessment carried out by a person other than the allocated social worker so as to ensure the maximum degree of independence. This would also minimise the need for calling upon independent expert evidence in the course of proceedings. If the application is being made by a CCG, then it will be necessary to commission such an assessment, and resourcing implications will no doubt arise.

What happens where P cannot express a view about being joined as a party?

18. The judgment suggests that in such a case, P does not need to be joined as a party, but this does not alleviate the obligation upon the public body bringing the application to take (and we suggest document taking) appropriate steps to ensure that P has been put in a position not just to express their wishes and feelings generally but specifically about whether they wish to be a party.

Fees and funding

19. The prospect of separate applications, and presumably therefore separate fees (£400 application fee; £500 hearings fee), for each P will be a matter of some concern to public authorities. The availability of judicial detention on the papers in non-trigger cases may be of some reassurance to them but not to P. In terms of legal aid, at present judicial detention is means-tested, administrative detention is not. And no oral hearing means no entitlement to legal aid in any event. The cost and funding of court reviews may also require clarification in due course.

C: Next steps

20. As noted at the outset, there will be a second judgment forthcoming in due course which will, in addition to giving reasons, answer a number of specific jurisdictional questions as to the Court's powers to extend urgent authorisations.

21. As the President made clear in his judgment, there is much work to be done by the ad hoc Rules Committee convened to review the Court of Protection Rules; we will disseminate news of the Committee's work as soon as we are able.

D: Useful resources

In addition to our own website (www.copcasesonline.com) and Alex's website (www.mclap.org.uk - which has a dedicated page relating to *Cheshire West* resources), other useful materials relating to the *Cheshire West* decision include:

1. Official guidance

- Department of Health Guidance on the obligations of local authorities following the decision in *Cheshire West* (28 March 2014)
- Department of Health Guidance on reducing the use of restrictive practices inter alia in health care settings issued by Department of Health (April 2014)
- CQC briefing for providers in health and social care settings (updated late April 2014)
- Adass Advice Note: Guidance for Local Authorities in the light of the Supreme Court decisions on deprivation of liberty (April 2014)

2. Commentary: guidance notes

- Deprivation of liberty after *Cheshire West*: this guidance note, written with my fellow Newsletter editors, sets out the key questions for social workers and medical practitioners to ask following the judgment of the Supreme Court in *Cheshire West* (March 2014).

3. Commentary: webinars

- P, P and Q: The key to the gilded cage - a video featuring Jenni Richards QC, Fenella Morris QC, Nicola Greaney and Ben Tankel, all of Thirty Nine Essex Street (March 2014)

4. Commentary:

- The *Cheshire West* Mental Capacity Law Newsletter special issue (March 2014)
- Deprivation of liberty in the hospital setting: a paper that by Alex and Catherine Dobson, which considers the law relating to deprivation of liberty in the hospital setting, including discussions of what constitutes a deprivation of liberty after *Cheshire West*, what it takes to have capacity to consent to such a deprivation of liberty, and whether the MCA 2005 or the MHA 1983 will apply (April 2014)