Neutral Citation Number: [2019] EWCOP 5

Case No: COP 13260480

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2019

Before :

THE HONOURABLE MR JUSTICE HAYDEN

- -

Between :

CB	**Appellant**
(by her litigation friend, the Official Solicitor)	
- and -	
(1) Medway Council	**Respondents**
(2) CM	

- -
- -

Mr Oliver Lewis (instructed by **Bison Solicitors**) for the Appellant
Ms Sian Smith (instructed by **Medway Council**) for the 1st Respondent
CM (acting in person) 2nd Respondent

Hearing date: 4 March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE HAYDEN

This case was heard in open court. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the appellant 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.

Mr Justice Hayden:

1. This is an appeal on behalf of CB brought by her litigation friend, the Official Solicitor, against a Judgment by HHJ Backhouse, sitting as a Judge of the Court of Protection in Maidstone County Court on 8 November 2018. On 20 December 2018 I granted permission to appeal and today have heard full argument on the appeal.

2. It is contended that the Judge was wrong to deal with the matter in the way she did which, it is submitted, amounted to a summary dismissal of the application before her. In the event that the Court agrees with that submission it is further submitted that there was a failure to comply with the 'overriding objective' (Rule 1.1 (2) of the Court of Protection Rules (COPR); breach of Articles 5 and 6 of the ECHR and breach of the common law duty to act with fairness.

Background

3. CB is a lady of 91 years of age. She has been living in a care home for the last eighteen months, having been transferred from her home in Surrey where she had lived for sixty-five years. Until five years ago she lived there with her husband until he died. In early 2017 CB was admitted to hospital following a fall and persistent urinary tract infections. She was in hospital for eleven weeks. On discharge CB went to live in a care home in Epsom. She did not like the care home at all and so her nephew, CM, arranged for some practical alterations to be made to her home to enable her to move back in. She was able to do so by April 2017. CM holds Lasting Powers of Attorney (LPA) in respect of CB's health and welfare as well as her property and affairs.

4. CM lived with his aunt for a month at her home but found it very difficult to cope. She had a recurrence of urinary tract infection and became disorientated. She had a package of care in place that initially provide for care visits, but this was changed to "live in" care. Accordingly, somebody was with her twenty-four hours per day. It appears to be common ground between the parties that CB would wander, sometimes in the middle of the night. The police had to be called on several occasions and neighbours were disturbed. By the 19 September 2017 the situation had reached a crisis point and CB was transferred to her present home.

5. A report prepared on 22 October 2018, made pursuant to S49 of the Mental Capacity Act 2005, concluded that CB's presentation is in keeping with "a diagnosis of dementia, unspecified type and of severe degree". The author of the report, Dr Ajiteru, a consultant in old age psychiatry also considered that CB did not have the capacity: to conduct proceedings; to make decisions about where to live; to make decisions about the care she receives; to make decisions about her property and finances or to make or rescind a lasting Power of Attorney. Dr Ajiteru was unable to say whether CB would have had capacity to make or rescind a Power of Attorney in May 2017, when it was authorised in favour of her nephew.

6. The proceedings in Maidstone County Court were primarily concerned with where it is in CB's interest to live and receive care.

7. CM tells me in a document, submitted in the course of this appeal, that his aunt started life in very modest circumstances. She met her future husband in Athens and came to

England with *"hardly a penny or Drachma to their name"*. It is not necessary for me to set out here the nature of CB's assets, save to say that her savings appear to amount to a sum in the region of £2.5 million.

8. The first hearing took place on 22 June 2018 before HHJ Backhouse. The Official Solicitor had been appointed as litigation friend and was represented by counsel. The OS's position in relation to CB's best interests was that further disclosure was required. The Judge made an order for the Sec 49 MCA report (see para 5 above) and for third party disclosure. The substantive directions required the Local Authority to file and serve evidence, by 2 August 2018, addressing: any physical adjustments to the property required; details of care package which would enable CB to return to her home; the costs involved.

9. Mr Lewis, who appears on behalf of CB by her litigation friend, the Official Solicitor, has emphasised that in his report Dr Ajiteru had gone beyond the terms of his instruction, which were limited to questions of capacity and had evaluated CB's best interests (i.e. where she should live and how she should be cared for). Mr Lewis submits that Dr Ajiteru did not have sufficient information to evaluate where CB's best interest lie. Whilst I find that there is some force in that submission I consider it important to reflect Dr Ajiteru's general conclusions here:

> *CB has significant risk associated with her dementia including self-neglect, malnutrition, dehydration, non- compliance with treatment, wandering, falls. She requires prompts, supervision, support and assistance to mitigate these risks;*
>
> *CB requires 24-hour care;*

10. Dr Ajiteru expressed the following opinions based on his *"knowledge, skills and experience"*. He considered that it would be difficult for one or two carers to provide the level of care CB requires. He considered a "*team of carers"* is required *"to reduce the risk of carer burden stress and burn out".* This, he thought, *"is **probably** best met within an appropriate care home setting"* (my emphasis). In coming to his view Dr Ajiteru emphasised the costs and funding of such care, the levels of expertise available for medication management, regulation of CB's behaviour e.g. confusion and wandering at night time. Whilst he recognised that 24-hour care in her own home may provide her with the opportunity to be in a space which has treasured memories **this**, he considered, been tried in the past and failed.

11. The advantage of care in a 24-hour setting, for Dr Ajiteru, is that it offers a range of skilled staff and provides CB with the opportunities for socialisation. Moreover, Dr Ajiteru observed that each move for individuals with dementia can have a significant impact of their mobility and mortality. This, he considered, had to be factored in when considering whether yet another move would be in CB's best interests.

12. At a round table meeting, which took place on 5 November 2018, CB's solicitor considered that although the Local Authority had filed and served a 'Needs Assessment', they had not undertaken a complete best interest evaluation, in a way that was consistent with the order of 22 June 2018. The Local Authority's solicitor accepted the criticism and yielded to it. The significant financial assets that CB possesses were thought to be sufficient to permit further exploration of the funding of

what, on any view, is an extensive and very expensive care package. A draft Consent Order, which contained the recital "Upon the Court confirming," provided for a hearing, listed on 8 November 2018, to be vacated. The order contained the following additional provisions:

i) A request to the GP to provide information as to whether oramorph, a pain killer to assist with CB's breathing difficulties, could be administered to CB at home;

ii) The Local Authority to provide written evidence setting out:

a) a best interests balancing exercise of the available options for CB's long-term care, including:

- A return to CB's home (including consideration of physical adjustments to the property, details of care package e.g. live in carers and cost;
- Remaining at the present nursing home;
- An alternative care home providing 24-hour support (in Surrey) and
- An assessment of less restricted less residential options, bearing in mind the duty to promote independent living skills.

iii) The Local Authority to set out its conclusions as to where CB should reside and from whom she should receive care.

13. The above represents my summary of the essential features of the draft order agreed by the parties at that time, which did not include CM. It does not replicate it verbatim. In any event when it was emailed to the Judge she replied in these terms:

> *"I am not prepared to adjourn tomorrow's hearing. I would like the opportunity to hear from CM. I am not persuaded that a GP is the right person to provide the information required and consider that the way forward needs to be considered at the hearing".*

14. I consider that the Judge was entirely right to refuse to vacate the hearing. It should be borne in mind that CB, by this stage, had already been in the care home since September 2017 (i.e. fourteen months). Prior to that she had spent eleven weeks in hospital and two months in her own home. The Judge had expert evidence pointing out, that which I do not consider to be controversial, namely that disruption is extremely distressing to individuals in CB's situation. I cannot see how the timescales taken to address these issues can possibly be reconciled with CB's own timescales. It is axiomatic that at 91 years of age CB does not have time on her side.

15. Moreover, I feel constrained to say, that which I have already stated in several cases, delay is invariably inimical to P's welfare. Timetabling and case management must focus on a sensible and proportionate evaluation of P's interests and not become

driven by the exigencies of the litigation. Whilst the Mental Capacity Act does not have incorporated in to it the imperative to avoid delay in the way that the Children Act 1989 does, the principle is nonetheless embraced by the Court of Protection Rules, which require the application of the "overriding objective". In any event the avoidance of delay is a facet of CB's Article 6 and Article 8 rights.

16. At the hearing on 8 November 2018, Judge Backhouse heard from Ms Daly on behalf of CB and a Ms Jepson on behalf of the Local Authority. CM appeared in person, as he does today. The Judge heard short representations from counsel. She also heard from CM who, inevitably as an unrepresented person, gave evidence rather than confining himself to submissions. It is clear that the Judge placed a good deal of weight on what CM had to say. In particular she accepted CM's account of the deficiencies in the arrangements for 24-hour care.

17. The Judge displayed her alarm on hearing from CM that for an entire month, a young woman on a university vacation had provided 24-hour per day care, apparently without any break. CM told the Judge that the young woman *"even worked her lunch hours"* and *"if they worked their breaks they get double time for that"*. CM said it was *"a total disaster"* and just *"pure luck that my aunty did not have a bad accident"*.

18. Though the Judge was plainly aware that CB had significant funds (CM told her she had approximately '*£2.5 million savings, plus the house'*) she agreed with CM that a complex nursing regime with people who can administer medication would *"probably cost four times"* the provision in the care home. The Judge also observed *"money is not infinite and we do not know when she is going to… how long she is going to last, bluntly"*. Before commencing her ex tempore judgment, the Judge prefaced her remarks with this observation*: "I am almost talking myself in to just dismissing this application"*. This was the first any of the advocates or indeed CM discovered that this was in the Judge's mind. The Judge did not invite any submissions on the point but launched immediately in to the Judgment. It is plain that during the course of her Judgment the Judge did indeed "talk [herself] into" the desirability of dismissing the application.

19. The Judge predicated her reasoning on the following analysis which requires to be set out:

> *"18. Having considered the issue carefully, I am going to dismiss this application at this stage. The Official Solicitor is saying that as part of a belt and braces exercise, the court ought to see if it is possible for CB to go home as she would like to and in that sense, it would be in her best interests. It might be a less restrictive environment, although she would still have to be subject to restrictions on her liberty to prevent her wandering.*
> *19. However, this is not the usual case which the court often sees where a return home with a live-in care package has not previously been tried and needs to be explored. In this case, such a privately funded package has been tried. If she returns home, there is a real risk the she will again not be properly cared for and will become aggressive or agitated, which carers will find very difficult to manage.*
> *20. Although he was not asked to comment on the issue of best interests,*

> *Dr Ajiteru in his Section 49 report has provided helpful evidence contrasting care at home and care in a care home. He says this: 'One must take into consideration 24-hour care in CB's own private residence compared with 24-hour care in a care setting. The challenges of 24-hour care at home include issues around funding of such care, levels of expertise that will be available for CB for complex issues such as medication management and management of her behaviours such as confusion and wandering at night time. On the one hand, 24-hour care in her own home may provide her with the opportunity to be in her own home/space, which contains her treasured memories'. I would put in there, of course, that is important. 'However, experience', and this is CM's experience 'has shown that this has been tried in the past and has failed for various reasons, resulting in a significant degree of risk to both CB and risk of carer stress and burnout. The advantage of care in a 24-hour setting is that there is a range of skilled staff with the right expertise to mitigate risk of carer stress and burnout. In addition, care in a 24-hour placement also provides CB with the opportunities for socialisation'.*
> *21. He also deals with the stress that people with dementia experience in moving placement, and he says, 'Based on her presentation, considering risks and benefits, considering her levels of insight, and considering the challenges of caring for her at home, she requires 24-hour nursing specialist care in a care home appropriate to meet her needs'.*

20. The Judge expressed her conclusions thus:

> *22. All the evidence is that the care home is appropriate to meet her needs, and, indeed, CM says it is a very caring environment for her.* ***Therefore, while I hear what the official solicitor says, I do not think that it is proportionate to make this Local Authority spend the time and cost of going through a balancing exercise which will tell me what I already know in terms of the difficulties, risks and cost of a package of care at home. In my judgment, the evidence is already there to show that the risks of returning home outweigh the benefits to CB of such a return. It is in CB's best interests to remain where she is, properly looked after and safe.*** (my emphasis)
> *23. Therefore, for those reasons, I consider that the deprivation of liberty is justified, and I will dismiss this application."*

21. It is important to record here that when the Judge states that *"CM gave information"* he was not called to give evidence and was, accordingly, not cross-examined. It is also clear that the Judge placed some emphasis on the welfare conclusions of Dr Ajiteru, which also had not been put to the assay by questioning and appear, additionally, to have been outwith the remit of his instructions.

22. As is clear from those passages of the Judgment that I have highlighted above the Judge concluded that she had sufficient evidence before her to dismiss the application summarily. Mr Lewis addresses this in these terms:

> *"The judge made the following assertions: "I very much doubt this [a package of live-in care] will work, I am very sceptical", "the practicalities are likely to be extremely difficult to organise" and "the chances of getting a team of experienced nursing carers consistently available are not good". All of these statements are conjecture. There was no evidence before the court about the feasibility, practicality or changes of getting the right nurses. No party had contacted care agencies to obtain an assessment as to whether and how a live-in package would work, and how much it would cost. Those steps should happen as part of the local authority's best interest's assessment as envisaged in the draft consent order that had been filed with the court on 7 November 2018 prior to the hearing on 8 November.*
>
> *By failing to allow the parties to gather further evidence about the feasibility of a return home, the judge failed in her duty of "ensuring that P's interests and position are properly considered" – per r.1.1(3)(b) COPR.*

23. It is necessary, at this point, to consider the applicable legal framework.

The Court of Protection Rules (COPR) identify the 'overriding objective' as "enabling the court to deal with a case justly and at proportionate cost"

(r. 1.1(1) COPR). The nature of the obligation is that the court "will seek to give effect" to the overriding objective when it exercises any power under the COPR or interprets any rule of practice direction (r. 1.1.(2) COPR).

Dealing with a case justly and at proportionate cost includes - **per r.1.1(2)**:

a. Ensuring that it is dealt with expeditiously and fairly;
b. Ensuring that P's interests and position are properly considered;
c. Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
d. Ensuring the parties are on an equal footing;
e. Saving expense;
f. Allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases; and
g. Enforcing compliance with rules, practice directions and orders.

24. The Court's jurisdiction to give summary Judgment on an application is also addressed in the COPR.

Exercise of powers on the court's own initiative

> 3.4. (1) Except where these Rules or another enactment make different provision, the court may exercise its powers on its own initiative.
> (2) The court may make an order on its own initiative without hearing the parties or giving them the opportunity to make representations.
> (3) Where the court proposes to make an order on its own initiative it may give the parties and any other person it thinks fit an opportunity to make

representations and, where it does so, must specify the time by which, and the manner in which, the representations must be made.
(4) Where the court proposes (a) to make an order on its own initiative; and (b) to hold a hearing to decide whether to make the order, it must give the parties and may give any person it thinks likely to be affected by the order at least 3 days' notice of the hearing

25. Mr Lewis concedes that a Judge sitting in the Court of Protection has power to dismiss an application on the Court's own initiative. This is, he recognises, not only provided for expressly by the COPR but is reinforced by the case law. In particular, my attention has been drawn to **KD and LD v Havering London Borough Council [2010] 1FLR 1393.** There, HHJ Horowitz QC was considering similar provisions in the 2007 COPR, whilst hearing an appeal from a District Judge. Judge Horowitz made the following pertinent observation:

> *"27... It is a statute [MCA 2005] whose provisions are set out in refreshingly clear understandable English, aptly so in a jurisdiction in which persons with disabilities and their often stressed carers so often find themselves caught up in potentially complex and distressing proceedings.* ***It is not, it seems to me, the intended policy of the Act that every case should proceed to an extended hearing with the assistance of instructed experts or examination of experts."*** (my emphasis).

26. However, Judge Horowitz, an extremely experienced Judge, recognised that the exercise of a summary power in proceedings such as these, which can have seismic impact on the liberty and autonomy of the individual, will always require great caution. As I have indicated above, the real potential for harm caused by delay demonstrates that the existence of this summary jurisdiction may sometimes provide a very powerful protection for P (in that it will facilitate the avoidance of delay). Mr Lewis accepted that this summary power exists even where the court is evaluating the proportionality of a deprivation of liberty, engaging, as it always will, Article 5 rights. I asked him whether he could imagine a factual scenario which engaged P's Article 5 rights but which would nonetheless permit of a summary resolution. He could not think of any, neither can I. Nonetheless, I agree with him. I am satisfied that the power exists even though it may be largely theoretical. Judge Horowitz put it in this way:

> *"28. But such summary power is, in my judgment, to be exercised appropriately and with a modicum of restraint. The power to make an order of the court's own initiative without hearing the parties or giving them an opportunity to make representations does not extend as was done here to engagement in that procedure at the outset of a hearing in which the parties were in attendance all the more so in expectation of procedural and no other steps. It is plainly a power to be exercised as an alternative to a hearing and in the proper case such as an emergency or where there is little or no apparent contest anticipated to the exercise of the court's powers. It is not likely to be an appropriate power to be exercised where the outcome is a deprivation of liberty in circumstances where there is a serious issue or potential issue whether*

> *that is appropriate and so where Arts 5 and 6 are potentially both engaged."*

27. Finally, Judge Horowitz records:

> *"29. Ms Butler-Cole submits that a summary determination of best interests must be made by reference to evidence and on considering the relevant circumstances as provided by s 4(2) of the Act and, of course, the checklist provided by the remainder of the section. There is, she says, nothing to indicate that this exercise was fully performed. I agree. I would suggest that serves to emphasise that the summary determination route is appropriate for a plain case and not where real questions are likely to be raised as to the appropriate mode of management and disposal."*

28. By parity of analysis, my attention has also been drawn to **Re: SW (Care Proceedings: Case Management Hearing) [2015) 2FLR 136.** Though he was dealing with Children Act proceedings, the following observations by Sir James Munby (P) are apposite here:

> *"29. Every care Judge will be conscious that, whilst it is in a child's best interest for their future to be determined without delay, it is equally in their best interest that the management of the case which determines their future should be fair and Article 6 European Convention compliant. The danger lies when, as unfortunately happened here, vigorous and robust case management tipped over in to an unfair summary disposal of a case".*

29. When properly analysed it seems to me that this paragraph from Sir James Munby's Judgment entirely captures the essence of Mr Lewis's complaint in this case i.e. a process which began as vigorous and robust case management tipped over, he contends, in to a summary disposal that is essentially unfair.

30. As I indicated above, it is submitted by the Official Solicitor that in dismissing a case, where no party has requested it, in circumstances where an individual's rights under Article 5 are engaged, there is a breach of both Article 5 and 6. It strikes me that this generalised submission cannot easily be reconciled, if at all, with Mr Lewis's early concession that the power to deal with the application summarily exists in law. Nor can this be accommodated comfortably with his later argument that Judge Backhouse erred in "an inappropriate and wrongful exercise of discretion". Whilst Article 5 undoubtedly falls to be considered here, these submissions, if Mr Lewis will forgive me for saying so, are too elaborate.

31. The simple issue is whether the Judge had sufficient information before her to discount, at this stage, any real possibility of CB returning to her home, supported by the extensive and expensive care package that is being mooted. The language of the Judgment itself, to my mind, answers this question in phrases such as *"I very much doubt…. I am very sceptical…. The practicalities are…. likely to be extremely difficult…."* I share the Judge's scepticism and I also very much doubt that even with an extensive package of support a return home will be in CB's best interest. I note too that Dr Ajiteru expressed himself in cautious terms (see para 10 above). However,

scepticism and *"doubt"* is not sufficient to discount a proper enquiry in to such a fundamental issue of individual liberty.

32. The powerful counter veiling factors have been identified by CM at this hearing, in a document that he produced. I permitted him to file and serve it. I also permitted the Local Authority to file an updating statement from Patrick Osakwe, who is the social worker employed by them. From these two documents emerge several key facts: CB presently requires monitoring every fifteen minutes during the day and every thirty minutes at night; she is unable to identify when she needs her inhaler; she is very unsteady on her feet and prone to fall. CM regards a return home as *"a lottery"*. By this he means a risk that is not worth taking, in circumstances where his aunt is well cared for and well looked after in a care home which he regards highly and where there are staff who have been working there, as he points out, for at least ten years. His simple but cogent argument is: why take the risk? He reminds me that he lives nearby and takes his aunt to all her hospital appointments and for occasional drives out to lunch, when she feels up to it. He notes that she never expresses any resistance on a return to the home, though I gather from all concerned that she rather enjoys the role of the curmudgeon. To all this I add Dr Ajiteru's incontestable point that there are serious risks inherent in any upheaval.

33. It is easy to see why the Judge took the course she did and I have a good deal of sympathy with her. She will have recognised, as do I, that the effluxion of time has had its own impact on the viability of the options in this case. However, what is involved here is nothing less than CB's liberty. Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and proper enquiry. I cannot envisage any circumstances where it would be right to determine such issues on the basis of speculation and general experience in other cases.

34. To determine whether someone has been 'deprived of his liberty' de facto, within the meaning of Article 5, the starting point must **always** be a consideration of their **specific situation** see: **De Tomasso v Italy [GC] 43395/09, ECHR 2017).** The approach is illuminated in **Guzzardi v Italy 7367/76 Chamber Judgment [1980] ECHR 5 (06 November 1980)** and requires to be stated:

> *"92. The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2) which has not been ratified by Italy. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, par. 58-59)."*

35. In **P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor [2014] UKSC**, Lady Hale made the following, now frequently cited

observations which encapsulate the nature of the rights guaranteed by Article 5 of the European Convention.

> *"45. In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.*
>
> *46. Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focussed right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."*

36. In all the circumstances therefore, I allow the appeal. In doing so I urge the parties to reinvigorate their endeavours to ensure that further exploration of the issues keeps the concepts of proportionality and the undesirability of delay in unwavering focus. Finally, I should record that the Local Authority's position on this appeal has been one of neutrality.