



Welcome to the March 2017 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: the limits of wishes and feelings and a different take on Article 5;
- (2) In the Property and Affairs Report: changes to EPA/LPA registration fees;
- (3) In the Practice and Procedure Report: a further amendment to the CoP Rules, a major on the participation of P, a guest article on ground rules in cross-examination and HRA damages, costs and the LAA;
- (4) In the Wider Context Report: tools to address coercive control, the MCA and immigration detention, and the second issue of the International Journal of Mental Health and Capacity Law;
- (5) In the Scotland Newsletter: an important Sheriff Appeal Court decision about care charges and the divestment of assets

And remember, you can find all our past issues, our case summaries, and much more on our dedicated sub-site [here](#). 'One-pagers' of the cases in these Newsletters of most relevance to social work professionals will also shortly appear on the SCIE website.

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The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Coercive control tools 2

Dementia matching website..... 2

The MCA and immigration detention..... 2

Article 12 CRPD – further assistance 5

International Journal of Mental Health and Capacity Law – second issue 5

Shameless plug: Mental Health Ethics, Ethics and Law MSc at King’s College London 5

Coercive control tools

A dedicated website has been created for social workers and other health and social care practitioners to develop their knowledge and skills in working with situations of coercive control. The Serious Crime Act 2015 created a new offence of controlling or coercive behaviour in intimate or familial relationships. These situations are likely to be difficult and will need to be handled with the utmost sensitivity. Commissioned by the Chief Social Worker’s Office at the Department of Health, and produced by Research in Practice for Adults and Women’s Aid, helpful resources that are available on the website include:

- Background reading and information;
- A set of five case studies with learning activities; and
- Tools for support effective, reflective practice.

These tools are extremely practical and helpful. They do not (and cannot), however, plug what is ever more obviously a gap in the legal framework – namely tools to address coercion and coercive

control exercised between individuals who are not in intimate or familial relationships.

Dementia matching website

The Alzheimer’s Society has launched a new online matching service called Side by Side which is designed to connect volunteers to someone with dementia over shared hobbies and interests. We think that this is a brilliant idea. There are nearly 2,000 individuals with dementia waiting to be paired up and Side by Side have urgently called for more volunteers. If you are interested, read more about it in the Guardian [here](#): or on the Side by Side [website](#).

The MCA and immigration detention

R (ASK) v Secretary of State for the Home Department [2017] EWHC 196 (Admin) (Queen’s Bench Division (Administrative Court) (Green J) (Court of Appeal)

Article 5 – Deprivation of Liberty

Summary

This claim for unlawful detention concerned ASK, a 29 year old national of Pakistan. ASK came to the UK on a student visa. He started to exhibit signs of aggression and commenced

drinking substantial amounts. ASK's brother sought medical help for him and ASK was detained in hospital under s.2 Mental Health Act 1983. During his time in hospital, his leave to remain expired and he became an over-stayer.

ASK was discharged from hospital into the community. His behaviour began to deteriorate and he commenced heavy drinking and cannabis consumption. His intransigence led to the police being called and, on the basis that ASK was an unlawful over-stayer, he was detained at an Immigration Removal Centre pending removal from the UK.

ASK's condition fluctuated during his time in immigration detention and there was disagreement between clinicians as to whether he was fit to be detained, fit to fly or whether he should be transferred to hospital. One psychiatrist concluded that ASK had a severe mental illness requiring admission to a psychiatric hospital. The Secretary of State confirmed that no steps would be taken to remove ASK pending his transfer to hospital. ASK was subsequently admitted to a psychiatric unit.

ASK argued that he had been unlawfully detained in an immigration removal centre for an unreasonably long time before being transferred to hospital. His claim failed as the court was satisfied on the evidence that the Secretary of State had taken appropriate steps at all times including to transfer ASK to hospital once he received the psychiatrist's opinion.

Comment

The issues in this case were wide-ranging and a great deal of the judgment is devoted to analysing the relevant legislative framework, the

attribution of legal responsibility for ASK's detention and the evidence. Some consideration was given to the MCA 2005 and at least part of ASK's claim rested on the contention that "ASK lacked mental capacity throughout and failure to accord to him legal or the appropriate representation materially delayed his transfer to hospital". However, Green J noted that that "*the scope for the operation of the MCA 2005 [in this context] is limited since many of the pivotal decisions did not require ASK's consent, not the least because it was not argued that ASK has any sensible or meaningful immigration grounds upon which to object to removal. He did not need lawyers to contest removal on normal, non-medical, grounds. However this does not mean that ASK's capacity was irrelevant since important decisions relating to ASK still needed to be taken including in particular as to transfer to hospital upon which his views were relevant.*"

In an annex setting out competing arguments as to the relevance of (inter alia) the MCA 2005 in this context, Green J recorded the SSHD's position as to her duties under the Act, thus:

24. The Secretary of State argues that pursuant to section 1 MCA 2005 she is obliged to treat all detainees as having mental capacity to make decisions. However she contends that there are no decisions by the Secretary of State in issue in this case that are "consensual", i.e. decisions requiring agreement by an individual. Removal and deportation decisions are not consensual. They take place even if the detainee objects strenuously. Where a foreign national subject to removal actioned indicates that they wish to make a voluntary return the Secretary of State may seek confirmation of their mental capacity to

make that decision, as happened in the present case. But there is no legal requirement for consensual removal or deportation to be given.

25. She contends that it is the duty of responsible clinicians to ensure that detainees suffering from mental health issues receive appropriate treatment and assistance and as part of those duties the clinicians must ensure that there is mental capacity to make decisions concerning medical treatment and to ensure that the duties under the MCA 2005 are adhered to. But the Defendant has no statutory power under the Act or otherwise, and no practical ability, to assess the mental capacity of a detainee to make any type of decision or become involved in the detainee's decision making in medical, financial or legal matters.

The Claimant agreed in part with this analysis, but "in important respects disagrees with it..."

25. [...] The Claimant accepts that the Defendant is correct that decisions by the Secretary of State to remove or deport an individual are non-consensual and do not require the consent of the individual concerned and it is also correct that there is a statutory presumption of capacity in section 1 MCA 2005. However the Claimant disagrees that, upon this basis, there is no duty upon the Defendant to assess, or request the assessment of, the mental capacity of a detainee or to take steps to assist an incapacitated detainee to participate in the process and in decision making. It is argued that the Defendant has recognised that there are situations in which a detainee's mental capacity will effect decisions taken about them whilst in detention. For example

DSO03/2013 requires capacity to be assessed where a detainee is refusing food and/or fluid. DSO01/2016 (medical information sharing) expressly recognises the best interests duty in respect of an incapacitated detainee when decisions are taken requiring consent to information sharing. The Claimant also joins issue with the Defendant when she says that she has no power or practical ability to assess mental capacity. It is said that no specific statutory power is required since the MCA 2005 requires anyone working with an incapacitated person to assess capacity where there is a cause for concern. The Defendant's case workers are, it is said, able to recognise situations and information causing concern that a detainee lacks capacity and to request a capacity assessment from an appropriate clinician or health care professional. It is said the Defendant has not introduced procedural guidance to caseworkers on when and how the capacity of a detainee should be assessed at all. In the present case it is said that the duty to assess mental capacity was triggered by the Claimant's symptomatic behaviour which raised concerns from the outset that the Claimant could not understand communications from officers and by the consistent concerns raised by clinicians including the two section 48 psychiatrists as well as Dr Goldwin and Dr Dossett. The decision relating to immigration status and removal from the UK to Pakistan were decisions requiring the Claimant's participation. At various times he agreed to voluntary removal and at other times he suggested a claim for asylum.

Because of the way in which the case unfolded, it was not necessary for Green J to determine

which of these rival contentions were correct; they are, at least, set out clearly for determination in a further case.

Article 12 CRPD – further assistance

Mental Health Europe has [published](#) a useful position paper on Article 12 CRPD entitled: "*Autonomy, choice and the importance of supported-decision making for persons with psychosocial disabilities*," as well as an excellent [animation](#) on the meaning of the Article.

International Journal of Mental Health and Capacity Law – second issue

The second issue of this new online, open access journal is now [available](#).¹ The articles include: *Disability, Deprivation of Liberty and Human Rights Norms: Reconciling European and International Approaches* (Eilionóir Flynn); *DoLS or Quality Care?* (Gordon Ashton OBE); *Capacity Assessment and Information Provision for Voluntary Psychiatric Patients: a service evaluation in a UK NHS Trust* (Benjamin Perry, Swaran Singh, David White); and *Deprivation of Liberty: the position in Scotland* (Laura Dunlop)

Shameless plug: Mental Health Ethics, Ethics and Law MSc at King's College London

Alex is very pleased to say that he will be teaching from September on the King's MSc in Mental Health, Ethics and Law, for which applications are now open. This MSc is delivered by two internationally recognised centres of excellence and provides an integrated, strongly interdisciplinary, education in mental health,

ethics and law. It equips graduates to become leaders in healthcare, mental health law or policy. Students will have the unique opportunity to study alongside others from a wide range of academic and professional disciplines at the heart of London's legal and psychiatric world. For further information, see [here](#).

¹ Full disclosure: Alex was on the editorial team for this issue.

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Alex is recommended as a 'star junior' in Chambers & Partners for his Court of Protection work. He has been in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively, has numerous academic affiliations, including as Wellcome Trust Research Fellow at King's College London, and created the website www.mentalcapacitylawandpolicy.org.uk. He is on secondment to the Law Commission working on the replacement for DOLS. To view full CV click [here](#).



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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click [here](#).



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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click [here](#).



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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click [here](#).



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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. To view full CV click [here](#).

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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click [here](#).



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Adrian is a Scottish solicitor, a consultant at T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law,*" he is author of *Adult Incapacity, Adults with Incapacity Legislation* and several other books on the subject. To view full CV click [here](#).



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Jill Stavert is Professor of Law, Director of the Centre for Mental Health and Incapacity Law, Rights and Policy and Director of Research, The Business School, Edinburgh Napier University. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2015 updated guidance on Deprivation of Liberty). To view full CV click [here](#).

Conferences

Conferences at which editors/contributors are speaking

Seminar on Childbirth and the Court of Protection

39 Essex Chambers is hosting a seminar in conjunction with the charity Birthrights about caesarean-section cases in the Court of Protection. The seminar aims to take a critical look at these cases, with a distinguished multi-disciplinary panel. The seminar is at 5pm-7pm on 8 March 2017, and places can be reserved by emailing beth.williams@39essex.com.

Hugh James Brain Injury conference

Alex will be speaking at this conference aimed at healthcare professionals working with individuals with brain injuries and their families on 14 March 2017. For more details, and to book, see [here](#).

Scottish Paralegal Association Conference

Adrian will be speaking on adults with incapacity this conference in Glasgow on 20 April 2017. For more details, and to book, see [here](#).

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next Newsletter will be out in early April. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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