

Section 21A applications and section 48 orders (DP v A local authority)

Private Client analysis: In this case, Mr Justice Hayden provides helpful practical guidance on the operation of section 48 of the Mental Capacity Act 2005 (MCA 2005), as well as confirming the scope of, and the court's role in, proceedings brought pursuant to MCA 2005, s 21A. He further emphasises the importance of section 21A application being determined speedily, in accordance with Article 5(4) of the European Convention on Human Rights (ECHR) (and accordingly suggests how practical weaknesses in capacity evidence could be addressed). Written by Stephanie David, barrister at 39 Essex Chambers.

DP v A local authority [\[2020\] EWCOP 45](#) (28 September 2020)

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What are the practical applications of this case?

The case confirmed that: first, section 21A applications do not permit the making of an interim declaration pursuant to [MCA 2005, s 48](#). Second, Article 5(4) ECHR requires that the lawfulness of a detention is speedily resolved by a court. Third, where the capacity evidence is insufficient, then it is open to a judge to put further questions to the original assessor, rather than unnecessarily instruct a further expert.

As to [MCA 2005, s 48](#), Hayden J provided some practical guidance in obiter. First, it must always be remembered that, under the aegis of a section 48 order, significant infringements on the civil liberty of an adult may be imposed. Second, the presumption of capacity applies when contemplating a section 48 order. Third, the words of [MCA 2005, s 48](#) require no gloss (it does not permit declarations). Fourth, when considering whether there is reason to believe that P lacks capacity, proper consideration and evaluation of all the available evidence will be necessary. Fifth, [MCA 2005, s 48](#) is a permissive provision in the context of an emergency jurisdiction, which can only result in an order being made where it is identifiably in P's best interests.

Finally, Hayden J observed that:

'At the core of Section 48 lies a balancing exercise in which the State's obligation to promote and support a autonomous adult decision taking must be weighed, on the particular facts of the individual case, against the State's equally important duty to protect some of society's most vulnerable individuals in circumstances of crisis.'

What was the background?

The facts are not significant to the legal issues before the court, save that the first instance judge observed that one of the deficiencies in the clinician's report on capacity was that they failed to explain the purpose of the visit. The judge had also determined that the evidence on capacity was not sufficient to confirm that the mental capacity requirement for a standard authorisation had been met, but rather than she could make an interim order pursuant to [MCA 2005, s 48](#). The judge at first

instance further directed that a relevant expert was identified to produce a capacity assessment pursuant to [MCA 2005, s 49](#).

In considering the local authority's capacity assessment, Hayden J observed that the real question for DP, which the capacity evidence failed to address, was 'whether he was able to evaluate any available options relating to his residence and care' not 'whether he was able to assess the potential risks to him if he were to leave the care home'.

What did the court decide?

After laying out the statutory scheme, Hayden J observed that the court's approach to a section 21A application is different to and distinct from its role in a standard welfare application:

'The Section 21A application is either to vary or to discharge a Deprivation of Liberty authorisation. In such applications, the task of the court is to evaluate the relevant qualifying requirements and to come to a view, on the available evidence, as to whether those requirements continue to be met [citing Charles J in *Re UF* [2013] EWCOP 4289] [...]

[The Court] is assessing the relevant qualifying requirements itself and reaching its own view on the evidence presented to it. It is almost inevitable that when doing that the Court will have to pay close attention to what will, on the evidence before it, best promote the best interests of the relevant person in the immediate, medium and long term and so carry out its own best interests assessment. [...]

So, as I read it, s.21A gives the Court of Protection the task of itself considering and making its own mind up on whether a standard authorisation should continue or should stop, or whether certain variations should be made to conditions relating to it. It therefore, has to consider amongst other things whether or not the relevant person has capacity and also best interests.'

Case details:

- Court: Court of Protection
- Judge: Hayden J
- Date of judgment: 28 September 2020

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