Neutral Citation Number: [2020] EWCOP 45

Case No: 13102876

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/09/2020

Before :

THE HONOURABLE MR JUSTICE HAYDEN

- -

Between :

DP **(by his ALR, Keith Clarke)**	**Applicant**
- and -	
LONDON BOROUGH OF HILLINGDON	**Respondent**

- -
- -

Ms Victoria Butler-Cole QC, Mr Oliver Lewis (instructed by Burke Niazi solicitors) for the **Applicant**
Mr Lee Parkhill (instructed by The London Borough of Hillingdon) for the **Respondent**

Hearing dates: 29th 30th July 2020

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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 judgment was delivered following a remote hearing conducted on a video conferencing platform and was attended by members of the public and the press. 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 respondent and members of their 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.

Mr Justice Hayden :

1. This is an application for permission to appeal (with appeal to follow) orders made by Deputy District Judge Chahal QC (Hon), on 22nd May 2020. In her judgment DDJ Chahal concluded that there was sufficient evidence to make a declaration, pursuant to s.48 Mental Capacity Act 2005 ("MCA"), that the protected person (DP) *"lacks capacity to make decisions with regard to his care and residence."* DDJ Chahal also determined *"given the quality of evidence on DP's capacity, the court will also order a s.49 report for further evidence on capacity and best interest [sic] issues to be obtained by the parties after questions have been devised by the parties jointly to be put to the expert. The report shall be obtained from an appropriate medical expert, as soon as practicably possible, given the COVID-19 pandemic,"*

2. On the 25th June 2020, i.e. postdating the application for permission to appeal, DDJ Chahal sent the parties a directions order, dated 23rd June 2020, in which she made interim declarations pursuant to Section 48 of the MCA to the effect that DP lacked capacity both to conduct proceedings and to make a decision in relation to the question whether or not he should be accommodated in the care home for the purpose of being given the relevant care and treatment. The judge directed the parties to identify a relevant expert with a view to producing a s.49 MCA assessment evaluating DP's capacity.

3. Ms Butler-Cole QC, who did not appear below and Mr Oliver Lewis act on DP's behalf, via his Accredited Legal Representative (ALR) Mr Keith Clarke. They identify four grounds of appeal, contending:

   Ground 1: The judge wrongly failed to terminate the standard authorisation;

   Ground 2: the judge wrongly approached the question whether to make a declaration of incapacity as a best interests decision;

   Ground 3: and the judge's order is in breach of Article 5(4) ECHR;

   Ground 4: The judge's order is in breach of Article 8 ECHR.

4. DP, is 72 years of age and has a diagnosis of *"organic personality disorder and associated catatonic disorder, secondary to a stroke"* (cerebrovascular accident in 2000 and 2003). DP has been a resident of NN Care Home since 19th June 2004. He requires support with activities of daily living including personal care, hygiene, medication, mobility, nutrition and general safety. He has been prescribed antipsychotic medication, namely sulpiride which is administered at 300mg twice daily. He also receives a mood stabiliser, sodium valproate 250mg again, twice daily. It is reported by the Registered General Nurse (RGN) that at the care home, DP requires support of at least one staff member for his personal care and hygiene needs but requires 2 staff members when catatonic. Episodes of catatonia occur approximately once every 2 weeks and endure usually for one day, though occasionally for 3 days. DP is doubly incontinent and requires incontinence pads. He mobilises independently for short distances but uses a wheelchair for longer distances. He is able to feed himself, save when catatonic. When he is catatonic it is possible to continue feeding him, with support.

5. The London Borough of Hillingdon, the Local Authority, granted a standard authorisation on 17th September 2019 which is due to expire on 16th September 2020. This deprives DP of his liberty at NN Care Home. The standard authorisation is subject to one condition:

> *"The Managing Authority must continue to liaise with care management and exploring ways of supporting [DP] to access community and facilitate contact with his friend. Action plan should be updated with actions taken and outcome for future reference."*

6. Mental health and mental capacity assessments were carried out on 30th August 2019 by Dr Omolade Longe. The assessment concluded that DP lacks capacity to decide whether or not to be accommodated in the care home. Dr Longe assessed DP as being able both to understand and to retain information relevant to his care and accommodation but as being unable to use/weigh the information. Dr Longe also assessed DP as being unable to communicate his decision.

7. The parties identified the issues which fell to be determined by the Court, pursuant to s21A Mental Capacity Act 2005, as follows:

   i. *DP's mental capacity to make decisions about his residence and care;*

   ii. whether, if DP lacked capacity, the current arrangements for his care and accommodation remain in his best interests.

8. The only evidence as to capacity came from Dr Longe. DDJ Chahal analysed that evidence in some detail. She noted that Dr Longe had consulted with the RGN and the paid representative, Mrs Geeta Bance. The Deputy District Judge observed:

> *"45. Dr Longe has completed the Deprivation of Liberty Safeguards Form 4, Mental Capacity, Mental Health and Eligibility Assessments. This form bears the Department of Health Logo and the words "adass" ie adult and directors of social services. The form is widely used for these assessments by local authorities. Dr Longe stated on the form that he is a section 12 approved doctor and his address is given as C/O Mental Health First. There is no CV supplied and that is all that is known about Dr Longe. His experience and expertise are not provided. This is commonplace as the form does not seek this information. It would be instructive if it did.*
>
> *46. A s.12 approved doctor refers to the qualifications required of a doctor making a medical recommendation for detention under the Mental Health Act 1983 as amended. S.12 states:*
>
> *'Of the medical recommendations given for the purposes of any such application, one shall be given by a practitioner approved for the purposes of this section by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder…'*

9. It was noted that Dr Longe had taken some sensible measures to promote DP's capacity:

> *"I called to speak to staff of N[..]N Home in advance to ascertain the best possible time to interview [DP]. I ensured that [DP] was comfortable and as alert as possible. I also ensured he was not under the influence of sedative medication at the time of the interview (daytime hours on 29/08/19). [DP] was assessed in his room which was well lit and quiet. He does not have any significant visual or auditory impairment. [DP] speaks English and did not require an interpreter. I engaged [DP] using simple sentences to aid his understanding and encourage interaction."*

10. DDJ Chahal highlighted the fact that Dr Longe had not explained the purpose of his visit and my own observations as to the significance of such an omission in **The London Borough of Wandsworth v M & Ors (Rev 2) [2017] EWHC 2435 (Fam)**. She states:

> *"48. … This is where Dr Longe might be expected to say something about the purpose of his visit and any explanation he gave to DP about the reason for the assessment. This is not found on the form itself. The form could usefully be amended to add a question seeking this information. Elsewhere Dr Longe stated that he introduced himself "as a BIA acting on behalf of the London Borough of Hillingdon to review his care and support needs". This is clearly an inaccurate description of the purpose of his visit. Hayden J found a failure to properly explain the purpose of the assessment to be a critical one in the Wandsworth case (para 71) and said it could be fatal or at least gravely undermines the assessment. He was not dealing with interim applications or indeed assessments for a standard authorisation. Clearly, there is scope for training on both the need for and how such explanations could be given."*

11. DDJ Chahal set out Dr Longe's approach to the "functional test" i.e. ability to understand the information relevant to the decision; ability to retain the information; ability to use and weigh the information integral to the decision. The judgment records the following:

> *"51. Dr Longe addressed the next question on the form which is set out as follows: Stage Two: Functional test. This is divided into 3 sections a.b.c.* ***a. The Person is unable to understand the information relevant to the decision.*** *(Note: oddly the question is set out in the negative rather than as a question for reasons which do not make sense since Dr Longe found that DP was able to understand). Record how you have tested whether the person can understand the information, the questions used, how you presented the information and your findings. Dr Longe stated:*
>
> *"[DP] was provided information relevant to his care and accommodation needs. He was informed of his episodes of stroke*

and how this caused some degree of impairment including the inability to live independently. He was informed of his care needs including personal care, hygiene, medication, nutrition, mobility, and safety needs. He was provided information about how staff support him to meet his needs. He was informed of the potential risk to self-neglect, poor medication concordance and potential risk to physical health if he were to leave the nursing home."

*52. The form noted [DP]'s responses were as follows: [DP] provided a mix of responses to comments and questions asked. He was however generally able to provide appropriate responses. He stated that he did not know why he was in a care home but later said **'can't take care of myself…cause I had a stroke'** [bold as shown on the form]. He admitted he suffered strokes in the past and also admitted there are times when he is unable to do anything for himself (catatonic). He however said 'I don't know' when asked a number of questions. What do you need support with? – **'I want to go on holiday…why me?** What do staff members support you with? – **'They don't support me . They don't let me shave. I don't like some of the staff. They don't know how to treat me.'** I pointed out that he was shaved and asked who shaved for him. He did not respond. He randomly asked **'Where's my girlfriend Brenda?'.** Staff present did not know he has any girlfriend. Dr Longe concluded that DP was able to understand information relevant to his care and accommodation needs.*

*53. Dealing with the next question, this is set out as follows at **b. The person is unable to retain the information relevant to the decision.** (see my note at paragraph 55 above, which is also relevant here) Record how you tested whether the person could retain the information and your findings. Note that a person's ability to retain the information for only a short period does not prevent them from being able to make the decision. Here Dr Longe again stated that: "[DP] was provided information relevant to his care and accommodation needs. He was able to recall information provided regarding his stroke and difficulty living independently. He was able to appreciate the support provided although he did not seem satisfied that he was well supported with his needs. He seemed aware of his difficulties and asked 'why me?'. [DP] was generally able to retain the information long enough to use in conversation." Dr Longe concluded that DP is able to retain information relevant to his care and accommodation.*

*54. As to the third limb of the functional test, this is set out as follows: **c. The person is unable to use and weigh that information as part of the process of making the decision.** Here Dr Longe recorded that: [DP] struggled to identify some of his difficulties including the fact that he had a stroke and was unable to care for himself. He seemed to agree that he needs support when he is catatonic. He was however unable to discuss his care needs when*

> *asked. He stated that the carers don't support him and don't allow him to shave even though he had a clean shave. He was unable to discuss the potential risks if he were to leave the nursing home". Dr Longe added "This was likely to be due to poor attention and poor reasoning which are related to the organic personality disorder". Here Dr Longe found that DP is unable to weigh the information relevant to his care and accommodation.*
>
> *55. The next question is set out as follows:* ***d. The person is unable to communicate their decision (whether by talking, using sign language or any other means).*** *Record your findings about whether the person can communicate the decision. Here Dr Longe records : [DP] said 'Where can I go?' when asked if he was willing to remain in the nursing home'. Dr Longe concluded that DP was unable to communicate a capacitous decision. This does not quite make sense as DP was able to speak and communicate."*

12. It is important to note here that the real question facing DP was not whether he was able to assess the potential risks to him if he were to leave the care home but, whether he was able to evaluate any available options relating to his residence and care. Manifestly, this question is of an entirely different complexion. All agree it was not addressed.

13. Following the completion of the DoLS Form 4 a 'best interests' assessment was carried out by an experienced assessor, Ms Carol Mensa-Bonsu, on 6th September 2019. It is recorded, on the DoLS Form 3, that like Dr Longe, Ms Mensa-Bonsu took care to visit at a time when DP was likely to be most alert. She too listened to the views of others in particular to Ms GB, DP's paid relevant person's representative (RPR). Ms GB records that DP had a clear preference to move to West Drayton. For the reasons set out below she did not consider that to be in DP's best interests but she does, in my view, correctly identify what DP considers to be the real question:

> *"I have visited [DP] twice, 05.05.19 and 22.06.19, and in both visits [DP] has said he wants to move to West Drayton to be closer to his friend Bill. In my last visit, he was in a catatonic way but was still saying he wants to move. However, at the same time, [DP] stated that he is happy at [NN] Home. [DP] told me that if he moves to West Drayton, Bill will visit more frequently. There was a meeting to discuss this move on 11.06.2019. I was not invited to attend this as I believe there was some confusion at the care home/social worker on who the PPR is and Rachel Hagland from POhWER attended this. I spoke to Rukayat (Home Manager) about the outcome of the meeting and she advised me that [DP] wanted herself and Karen (Staff) to go with him to West Drayton and when Rukayat advised him that they are unable to go with him, [DP] stated, "if that is the case then I will stay here." [DP] also stated that he had been at the care home for many years, he felt settled and he was OK to just visit Bill on a regular basis.*
> *There is a preference from [DP] to move to West Drayton, however, I believe that it is in [DP] 's best interests to stay at NN Home. Bill has stated to staff, which is recorded, that he cannot guarantee he will be able to visit [DP], if [DP] moves to West Drayton. This is due to Bill's wife*

> *being unwell and he is her main carer. Moving [DP] to West Drayton will allow [DP] to have the vision that Bill will visit frequently. However, when this does not happen, [DP] may feel isolated as he is in a new placement/environment with unfamiliar faces. It may also have an impact on [DP] 's and Bill's friendship, [DP] may start to neglect Bill for not visiting, which will effect the the only friendship [DP] seems to have.*
> *Having regular visits to see Bill, if possible every 4-6 weeks, will allow [DP] to keep his friendship live and I believe this will reassure [DP] to stay at NN Home."*

14. Ms GB noted that DP has lived in the care home for sixteen years but recently i.e. since 2019, had been insistent on a move to West Drayton, to be closer to his friend Bill, who had been a regular visitor to DP until his wife became seriously ill and he no longer had time to make the journey. The extract above records that, at a meeting on the 11th June 2019 DP is reported to have said that if a move to West Drayton was not possible he would stay in the Care Home. This view is recorded, clearly, in the **RPR** visit report, dated 11th October 2019, 1st March 2020 and during the course of a video call on 20th March 2020.

15. The persistence of DP's wish to move to West Drayton led his RPR to contact and instruct a solicitor and an application was made on his behalf by his ALR, pursuant to Section 21A MCA. The application was issued on 23rd April 2020. The grounds accompanying the application raise the question of DP's capacity. The order of DDJ Chahal, made initially on reading the papers, contained the following recital:

> *"2. An application has been made by DP ("the Applicant") for an order under section 21A of the Mental Capacity Act 2005 to determine whether DP meets one or more of the qualifying requirements and to challenge the period, purpose and conditions attached to the said standard authorisation."*

16. The Deputy Judge purported to make a declaration in the following terms:

> *"IN THE INTERIM PURSUANT TO SECTION 48 OF THE MENTAL CAPACITY ACT 2005 AND PENDING FURTHER ORDER, IT IS DECLARED THAT*
>
> *The Court has reason to believe that DP may lack capacity to:*
> a. *conduct these proceedings;*
> b. *decide where he lives;*
> c. *decide how he is cared for."*

I shall return to this below.

17. At the hearing of the 6th May 2020 DDJ Chahal made the following observation in respect of Dr Longe's capacity assessment:

> *"59. I agree that in relation to the question using and weighing information as part of the decision making, (which is the only part of the assessment under challenge) Dr Longe's reasoning is not at times clear. DP does identify that he has had a stroke and is unable*

> *to care for himself and that he needs support when catatonic. These appear to be reasoned decisions. The fact that he was unable to discuss his care needs when asked, could be for a variety of reasons: he does not wish to, is bored, is embarrassed to do so, lacks insight into them, does not consider them significant etc. It is not clear what might be the explanation. The fact that DP says carers don't support him and don't allow him to shave even though he is clean shaven, could bear a variety of meanings. Also, when Dr Longe says DP was unable to discuss the potential risks of leaving the care home the context of the question is not clear. We don't know how Dr Longe raised this question, whether he suggested that there were risks and DP did not acknowledge them or whether he is saying DP did not spontaneously raise this issue. The latter would be an unreasonable expectation under the circumstances. The information recorded leaves open many questions and evidences poor connections and reasoning by Dr Longe."*

18. Manifestly, the Deputy Judge was troubled by the clear deficiencies of the assessment. She speculates whether the actual assessment may have been more thorough than that written up on the form:

> *"60. On the other hand, Dr Longe is a s.12 approved doctor and so is deemed to have specialist knowledge and what is written on the form may not give the best account of what an experienced practitioner saw in interview with DP. In his favour, Dr Longe is clear that he has to make a final decision on the balance of probabilities. He has not accurately explained the purpose of the assessment, but this is unlikely to have materially impacted on the assessment itself, though it is unhelpful and bad practice not to have properly explained to DP what he was doing."*

19. With respect to the Deputy Judge I do not feel as confident as she does, that a failure clearly to explain the purpose of the assessment to DP is *"unlikely to have materially impacted on the assessment itself."* Indeed, given that Dr Longe did not discuss or identify DP's wish to live in West Drayton, I am left with an uncomfortable feeling that Dr Longe may not fully have grasped the real question underlying the assessment. DDJ Chahal concluded that Dr Longe's opinion was *"certainly open to reservations."* However, she considered it: *"to pass"* the statutory test of giving the Court reason to believe that DP lacked capacity, at least for the purposes of an interim order. In coming to that conclusion, the Deputy Judge, identifies the following features of the evidence:

> *"54. As to the third limb of the functional test, this is set out as follows:* ***c. The person is unable to use and weigh that information as part of the process of making the decision.*** *Here Dr Longe recorded that: [DP] struggled to identify some of his difficulties including the fact that he had a stroke and was unable to care for himself. He seemed to agree that he needs support when he is catatonic. He was however unable to discuss his care needs when asked. He stated that the carers don't support him and don't allow him to shave even though he had a clean shave. He was unable to discuss the potential risks if he were to leave the nursing home". Dr*

> *Longe added "This was likely to be due to poor attention and poor reasoning which are related to the organic personality disorder". Here Dr Longe found that DP is unable to weigh the information relevant to his care and accommodation.*
>
> *55. The next question is set out as follows:* ***d. The person is unable to communicate their decision (whether by talking, using sign language or any other means).*** *Record your findings about whether the person can communicate the decision. Here Dr Longe records : [DP] said 'Where can I go?' when asked if he was willing to remain in the nursing home'. Dr Longe concluded that DP was unable to communicate a capacitous decision. This does not quite make sense as DP was able to speak and communicate."*

20. It must be noted that even here DDJ Chahal is of the view that Dr Longe's reasoning *"does not quite make sense."*

Statutory Framework

It is necessary here to set out the applicable statutory framework in which the assessment falls to be undertaken:

Standard authorisation

21. Only a supervisory body may grant a standard authorisation (para. 21, Sch A1 MCA). Before doing so, it "must secure that all of these assessments are carried out in relation to the relevant person – […] (c) a mental capacity assessment" (para. 33(2), Sch A1 MCA).

Mental capacity requirement

22. A mental capacity assessment is an assessment of whether the relevant person meets the mental capacity requirement. (para. 37, Sch A1 MCA).

The relevant person meets the mental capacity requirement if he lacks capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment. (para. 15, Sch A1 MCA).

Lacks capacity

23. A person must be assumed to have capacity unless it is established that he lacks capacity (s.1(2) MCA). 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. (s.2(1) MCA). For the purposes of section 2, a person is unable to make a decision for himself if he is 'unable':

> *(a) to understand the information relevant to the decision,*
>
> *(b) to retain that information,*
>
> *(c) to use or weigh that information as part of the process of making the decision, or*

(d) to communicate his decision (whether by talking, using sign language or any other means). (s.3(1) MCA)

24. The Mental Capacity Act 2005 Code of Practice (2007) sets out the standard of proof:

What proof of lack of capacity does the Act require?

4.10 Anybody who claims that an individual lacks capacity should be able to provide proof. They need to be able to show, on the balance of probabilities, that the individual lacks capacity to make a particular decision, at the time it needs to be made (section 2(4)). This means being able to show that it is more likely than not that the person lacks capacity to make the decision in question.

Challenging a standard authorisation

25. Where a standard authorisation has been given, the court may determine any question relating to any of the following matters (s.21A(2) MCA):

(a) whether the relevant person meets one or more of the qualifying requirements

(b) the period during which the standard authorisation is to be in force;

(c) the purpose for which the standard authorisation is given;

(d) the conditions subject to which the standard authorisation is given.

26. If the court determines any question under subsection (2), the court may make an order – (a) varying or terminating the standard authorisation, or (b) directing the supervisory body to vary or terminate the standard authorisation. (s.21A(3) MCA).

Report by an NHS body

27. The court may require a local authority, or an NHS body, to arrange for a report to be made - (a) by one of its officers or employees (s.49(3) MCA).

Capacity declarations

28. The court may make declarations as to –

(a) whether a person has or lacks capacity to make a decision specified in the declaration"

(b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person. (s.15(1) MCA)

29. The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if—

    (a) there is reason to believe that P lacks capacity in relation to the matter,

    (b) the matter is one to which its powers under this Act extend, and

    (c) it is in P's best interests to make the order, or give the directions, without delay. (s.48 MCA)

30. The Court of Protection Rules 2017 set out that "The court may grant the following interim **remedies** – (a) an interim injunction; (b) an interim declaration; or (c) any other interim order it considers appropriate." (COPR 2017 r.10.10(1)) (emphasis added).

31. It is important to state that the application before DDJ Chahal was made pursuant to Section 21A MCA 2005. This provides:

    21A Powers of court in relation to Schedule A1

    (1) This section applies if either of the following has been given under Schedule A1—

    (a) a standard authorisation;

    (b) an urgent authorisation.

    (2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—

    (a) whether the relevant person meets one or more of the qualifying requirements;

    (b) the period during which the standard authorisation is to be in force;

    (c) the purpose for which the standard authorisation is given;

    (d) the conditions subject to which the standard authorisation is given.

    (3) If the court determines any question under subsection (2), the court may make an order—

    (a) varying or terminating the standard authorisation, or

> **(b) directing the supervisory body to vary or terminate the standard authorisation.** (my emphasis)
>
> (4) Where an urgent authorisation has been given, the court may determine any question relating to any of the following matters—
>
> (a) whether the urgent authorisation should have been given;
>
> (b) the period during which the urgent authorisation is to be in force;
>
> (c) the purpose for which the urgent authorisation is given.
>
> (5) Where the court determines any question under subsection (4), the court may make an order—
>
> (a) varying or terminating the urgent authorisation, or
>
> (b) directing the managing authority of the relevant hospital or care home to vary or terminate the urgent authorisation.
>
> (6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person's liability for any act done in connection with the standard or urgent authorisation before its variation or termination.
>
> (7) An order under subsection (6) may, in particular, exclude a person from liability.]

32. For completeness, Schedule A1 provides:

> Authorisation to deprive residents of liberty etc
>
> Application of Part
>
> 1(1) This Part applies if the following conditions are met.
>
> (2) The first condition is that a person (“P”) is detained in a hospital or care home — for the purpose of being given care or treatment — in circumstances which amount to deprivation of the person's liberty.

> (3) The second condition is that a standard or urgent authorisation is in force.
>
> (4) The third condition is that the standard or urgent authorisation relates—
>
> (a) to P, and
>
> (b) to the hospital or care home in which P is detained.
> Authorisation to deprive P of liberty
>
> 2 The managing authority of the hospital or care home may deprive P of his liberty by detaining him as mentioned in paragraph 1(2).
> No liability for acts done for purpose of depriving P of liberty
>
> 3(1) This paragraph applies to any act which a person ("D") does for the purpose of detaining P as mentioned in paragraph 1(2).
>
> (2) D does not incur any liability in relation to the act that he would not have incurred if P—
>
> (a)had had capacity to consent in relation to D's doing the act, and
>
> (b)had consented to D's doing the act.
> No protection for negligent acts etc
>
> 4(1)Paragraphs 2 and 3 do not exclude a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing any thing.
>
> (2)Paragraphs 2 and 3 do not authorise a person to do anything otherwise than for the purpose of the standard or urgent authorisation that is in force.
>
> (3)In a case where a standard authorisation is in force, paragraphs 2 and 3 do not authorise a person to do anything which does not comply with the conditions (if any) included in the authorisation.

33. As can be seen above, Section 21A provides a route by which the Court may make an order which varies or terminates the standard authorisation. DDJ Chahal records the following in the prefacing paragraphs of her judgment:

> *"2. These proceedings concern an application under s.21A Mental Capacity Act 2005 which was issued on 21.4.2020. The court made an interim order on 23.4.2020 which, among other things, made interim declarations and listed the matter for a hearing on 6.5.2020. A Transparency Order was also made, so that P is known as DP to preserve anonymity."*

34. Both the Applicant and the Respondent recognise that the judge, despite having identified the fact that the Applicant sought an order that the standard authorisation be terminated, did not address that application at all in her judgment. Moreover, both parties to this application accept that the approach of the Court below was plainly wrong, the making of a s.48 declaration of incapacity having been conflated with a 'best interests' decision. I agree.

35. 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. Charles J addresses this in **Re UF [2013] EWCOP 4289**:

> *"9. Section 21A is plainly in the statute as part of the regime put in place to fill what is known as "the Bournewood gap". The case law thus far on how s.21A operates is fairly scant. My understanding is that there is a case which has very recently been heard by the Court of Appeal which might throw some light on this. For some time, it has seemed to me that attention has not yet been directed to the problems that might exist if a court considering the evidence that was before it, necessarily at a later time to the times upon which the relevant standard authorisations were given, reaches different conclusions to the relevant assessors and those responsible for granting the standard authorisation.*
>
> *10. Such points may well not be academic because issues could arise whether a deprivation of liberty was unlawful through periods of time during which DOLS authorisations based on conclusions that are different to those reached by the Court were in place. In that context, the relevant public authorities may face claims for damages. To my mind, there must be an argument that, in testing the legality from time to time of standard authorisations, an administrative law test is the appropriate one. However, equally, to my mind, and this is supported by the approach taken thus far in the Court of Protection, in the exercise of its powers under 21A the Court of Protection is not carrying out any sort of appeal or review jurisdiction. Rather, it 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. That is an inevitability in this case should it proceed. Also, as I have explained, if this case proceeds there is a high likelihood or an inevitability that if it is thought that the least restrictive way to best promote the best interests of UF is that she should be in a care home, so long as she protests at being there, she would be being deprived of her liberty and therefore that would need to be authorised.*
>
> *11. 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."

36. I should record that I have been told by Ms Butler-Cole QC that the case in the Court of Appeal referred to by Charles J (para 9 above) did not, ultimately, touch on this point. Accordingly, Re UF (supra) is the only reported case considering the approach to be taken. Ms Butler-Cole and Mr Oliver Lewis support Charles J's reasoning and further submit that the court should not treat Section 21A applications in the same way as a welfare application because Article 5(4) ECHR requires the court to determine the former as, in effect, a matter of urgency. Mr Parkhill, who appears on behalf of the Respondent, but who did not appear below, agrees.

37. Schedule A1 was drafted so as to meet the requirements of Article 5(4) ECHR:

Article 5

Right to liberty and security

> 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …the lawful detention of a person after conviction by a competent court;
>
> (e)the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

38. It follows that to comply with Article 5(1)(e), the detention must be lawful in domestic terms, including compliance with the procedure prescribed by law. *"In this respect the convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof"* see **Lashin v Russia [2013] ECHR 63**, para 109. The procedure prescribed by the MCA requires the Court to determine whether the Schedule A1 qualifying requirements, which

include the Mental Capacity requirement, continue to be met. This is the discrete scope and ambit of a Section 21A application.

39. Ms Butler-Cole argues that, as a matter of general practice, the court should not make any interim orders in a Section 21A application, she reasons that the criteria are either met or not, either a detention is lawful or it is not. Alternatively, she submits, an interim order, to gather further information, should only be made if there is a sufficiently clear evidential basis to do so. I strongly prefer the alternative submission which, in my judgement, strikes the balance between protecting P's autonomy and promoting his welfare.

40. All Counsel agree that an application made pursuant to Section 21A does not permit the making of an interim declaration pursuant to Section 48. Indeed, they submit that Section 48 itself does not permit the making of interim declarations, notwithstanding that this is almost universally the practice. As set out at para 29, above Section 48 provides for the making of an order or for the giving of directions. It does not provide for the making of a declaration. Thus, the Court's finding that there is reason to believe that P lacks capacity ought, strictly, not to be phrased in declaratory terms. Ms Butler-Cole also argues that, as the COPR 2017 describe an interim declaration as an "interim remedy", there can be no interim remedy in a Section 21A MCA application. As P is deprived, lawfully, of his liberty under a standard authorisation, the only remedy, it is argued, must be termination or variation of the standard authorisation.

41. As I have indicated above, I consider this approach to be too rigid. It is the duty of the court to determine whether the mental capacity requirement is met. If, as here, the judge was uncertain, then the obligation on the court was to investigate it further and to do so "speedily", to adopt the word used in Article 5(4). Of course, in Section 21A applications the court will always and of necessity have a capacity assessment before it. It was open to the Deputy District Judge, for example, to permit questions to be put to Dr Longe and/or, if necessary, to arrange for him to give evidence or revisit his assessment. I doubt that it was necessary to instruct a further expert on what is, when properly identified, an essentially uncomplicated issue i.e. does DP have capacity to decide to change care homes to be nearer to his friend Bill and, if not, whether it is in his best interests to do so.

42. Guidance as to the quality of evidence required was identified by the European Court of Human Rights in **Sýkora v The Czech Republic, 22 November 2012**, para 103:

> "*any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports*"

43. The criteria upon which this evaluative exercise is predicated, remain throughout, the principles set out in Section 1 MCA 2005. I repeat them here because though they are highly familiar to all practitioners, they are of such importance as to bear frequent repetition:

> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

44. It is important to identify that the submissions before DDJ Chahal were not framed with the precision and clarity of thought that I have had the benefit of in this appeal. I have lengthy, carefully crafted and well researched skeleton arguments on both sides, the benefit of a hyperlinked e bundle and Authorities bundle. I have heard skilled and focused submissions, on a video conferencing platform, for a day and a half, interspersed with appropriate breaks. I was also asked if DP could speak to me from his care home. As a courtesy and out of respect for his wish to be involved, I readily agreed. I did not take any evidence from him and was accompanied throughout by his Accredited Legal Representative. In stark contrast, DDJ Chahal had a one-hour telephone hearing and limited opportunity to absorb the position statements. Moreover, the elision of the Section 48 declaration with the Section 21A procedure was, I consider, one in which the Advocates became entangled. Though I have allowed this appeal I think it important to highlight and acknowledge DDJ Chahal's industry and effort in putting together a detailed and thoughtful judgment in circumstances which were challenging and so markedly different from my own. Importantly, it requires to be noted that the argument that the mental capacity requirement was not met had not been foreshadowed in the grounds filed with the application. It was however identified in the Position Statement and the draft order filed by the applicant.

45. Where a standard authorisation is in place, it remains in force until (i) its expiry date is reached; (ii) it is suspended, under sch. A1, part 6; (iii) the supervisory body terminates it; or (iv) the court terminates it, under s. 21A. For as long as the authorisation is in force, it provides the authority for the deprivation of P's liberty. When s. 21A proceedings are brought, the court's function is to '*determine*' questions as to whether the qualifying requirements are met and to consider varying or terminating the authorisation in light of its determination of the questions (see para 31 above).

46. As I have emphasised above, when the court determines any question relating to the authorisation, the extant authorisation remains in force, without the need for any positive decision by the court. The court does not become responsible for authorising

P's deprivation of liberty upon the issuing of a s. 21A application. The court's only function is to provide the review of the authorisation which is in force. In every case it is for the court to determine how it should resolve the issues raised in the application. Mr Parkhill submits that these are essentially case management decisions and, I agree. Mr Parkhill recognises and accepts Ms Butler-Cole's point that the guiding principle is the need for speedy determination of the lawfulness of detention mandated by Article5(4). This is a realistic concession recognising a significant body of European jurisprudence: **Van der Leer v. the Netherlands, Appl No. 12/1988/156/210, 21 February 1990; Oldham v the United Kingdom, Appl No. 36273/97, 26 September 2000; Van Glabeke v France, Appl No. 38287/02, 7 March 2006; MH v the United Kingdom [2013] ECHR 1008, 22 October 2013; Raudevs v Latvia, Appl No. 24086/03, 17 December 2013.**

47. Ultimately, the court must decide how and indeed when it is in a position to resolve the question and where it cannot do so immediately what the scope and ambit of the requisite evidence should be. Mr Parkhill highlights Rule 1.3 Court of Protection Rules which provides (inter alia) that the court's case management duties include:

> *(f) deciding promptly—*
> *(i) which issues need a full investigation and hearing and which do not; and*
> *(ii) the procedure to be followed in the case;*
> *(g) deciding the order in which issues are to be resolved;*

48. Ms Butler-Cole's absolutist or rigid approach, as I have described it (see para 41 above), fails fully to engage with the provisions of s. 21A, which provide that the court '*determine*' whether P '*meets'* the requirements. The power, under s. 21A(3), to terminate the authorisation only arises after the court has reached a determination under s. 21A(2).

49. Thus, for the reasons set out above, encapsulated in ground 2 of the Appeal , permission to appeal is granted and the appeal allowed.

50. It is important to note that this appeal had been listed before me to investigate whether it was possible to resolve a perceived difference of judicial opinion as to the nature and extent of the evidence required to support an order under Section 48 MCA. Given that both parties agree that the application of Section 48 did not, on a proper construction, arise at all in this case, a submission with which I have agreed, it follows that there is, strictly speaking, no need for me to investigate this issue further. However, given its importance to practitioners, on a day to day basis, I have concluded that it would be appropriate to look at it, even though my observations are now, inevitably, obiter.

51. The confusion arises from the use of language in three cases: In **Re F (Mental Capacity: Interim Jurisdiction) [2009] EWHC B30(Fam): [2010] 2 FLR 28**, per HHJ Marshall; **In London Borough of Wandsworth v M and Others [2017] EWHC 2435 (Fam)** per Hayden J; **DA v DJ [2017] EWHC 3904 (Fam)** per Parker J. For reasons that I have not been able to discover Parker J's judgment only surfaced in 2020.

52. In London Borough of Wandsworth v M (supra) I emphasised the importance of the presumption of capacity, within the Mental Capacity Act 2005, as a powerful protection for individual autonomy. Considering the application of this principle in the context of Section 48, I observed:

> *"There can be no doubt that the cogency and quality of evidence required to justify a declaration of incapacity, pursuant to **Section 15**, will be greater than that required to establish the interim test. However, it is important to emphasise that the presumption of capacity is omnipresent in the framework of this legislation and there must be reason to believe that it has been rebutted, even at the interim stage. I do not consider, as the authors of the 'Mental Capacity Assessment' did that a 'possibility', even a 'serious one' that P might lack capacity does justification to the rigour of the interim test. Neither do I consider 'an unclear situation' which might be thought to 'suggest a serious possibility that P lacks capacity' meets that which is contemplated either by **Section 48** itself or the underpinning philosophy of the Act. In exchanges with Counsel the test has been referred to as 'a low one' or 'a much lower threshold test at the interim stage'. Additionally, when I look, for example, at the words of the Judge in Re FM I am left with a real sense of unease, particularly as the facts in that case appear to have some similarity to those here. [para. 65]"*

53. Later in the judgment I made the following observations:

> *"Ultimately whilst I recognise that, for a variety of reasons, it will rarely be possible at the outset of proceedings to elicit evidence of the cogency and weight required by **Section 15**, I think it is important to emphasise that Section 48 is a different test with a different and interim objective rather than a lesser one. 'Reason to believe' that P lacks capacity must be predicated on solid and well-reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves. [para. 69]"*

54. I initially read HHJ Marshall's judgment in Re F (supra), as suggesting that the presumption of capacity only falls to be applied when grounding a formal declaration under Section 15 of the Act:

> *"35. The "presumption of capacity" reinforces the general approach of the Act, that "P's" basic right to have the power to make decisions for himself is to be respected and protected, and can therefore only be displaced by sufficient evidence establishing that he does <u>not</u> have capacity in the relevant respect. However, such a finding is what ultimately grounds a formal declaration under s 15 of the Act, and s 48 expressly confers powers on the court to take steps "pending" the determination of that question. It follows that the evidence required to found the court's interim jurisdiction under this section must be something less than that required to justify the ultimate declaration."*

55. On re-reading this passage I am inclined to think that I may have misinterpreted what HHJ Marshall was intending to say. In any event I am clear that the presumption of capacity applies at all stages in the operation of the MCA including when considering the applicable criteria when contemplating an order under Section 48.

56. It is convenient to set out the terms of the provision:

> ***"48 Interim orders and directions***
>
> *The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if—*
>
> *(a) there is reason to believe that P lacks capacity in relation to the matter,*
>
> *(b) the matter is one to which its powers under this Act extend, and*
>
> *(c) it is in P's best interests to make the order, or give the directions, without delay."*

57. I have some sympathy with Judge Marshall's characterisation of the interim test as *"something less than that required to justify the ultimate declaration."* In the Wandsworth case I was very keen to ensure that the test, at the interim stage, however one characterises it, did not become so reduced as to permit the making of an order on evidence which was weak or speculative. 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. It may take months or at least weeks to secure a full capacity assessment which may, in due course, conclude that capacity exists, may have existed all along or could have been achieved by measures designed to promote a pathway to capacity.

58. HHJ Marshall went on to say that "*What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P <u>may</u> lack capacity in the relevant regard (para 36)."* I agree entirely with this statement, though I would add that such evidence incorporates and certainly does not exclude, in its application, the presumption of capacity. Judge Marshall added a gloss to, what I consider to be this robust identification of the test, by commenting as follows:

> *"There are various phrases which might be used to describe this, such as "good reason to believe" or "serious cause for concern" or "a real possibility" that P lacks capacity, but the concept behind each of them is the same, and is really quite easily recognised."*

59. These phrases found favour with Parker J in DA v DJ (supra). Indeed, Parker J expressly deprecated my own reluctance to accept that the Section 48 test might be met on "a possibility" that P lacked capacity. As I read all three judgments I note that in each one, an attempt has been made to illuminate, expand or recast the clear words of the statute itself. It is, I think, better to predicate this exercise in the way that Parker J succinctly identified, by formulating the question "is there reason to believe that P lacks capacity?" This will be answered by conducting a broad survey of all the

available evidence, including hearsay evidence, which, inevitably, will have varying cogency and weight. It is intrinsic, as I see it, to each of the three judgments that there is a recognition that the Section 48 test requires proper consideration and evaluation of evidence. It is manifest that the section permits the court to make an interim order where professional evidence as to lack of capacity is not yet available. It should also be noted that the section is permissive, providing that the court "may" make an order, but not requiring it to do so. This provides the crucial safeguard in those cases where reasonable grounds for believing that P may lack capacity, on a given issue, can be identified but where the plans or proposed arrangements that are contemplated on the making of an order appear to the judge to be disproportionate or to represent an unjustifiable interference with P's autonomy. The court has to be satisfied that *"it is in P's best interests to make the order, or give the directions, without delay."* (see S48 (c)). The use of the word "delay" in this provision indicates that the section is designed for circumstances of perceived urgency or emergency. The Law Commission Report preceding the enactment and implementation of the Mental Capacity Act 2005 and the explanatory notes published by TSO (The Stationery Office), alongside the Act were referred to in DA v DJ. I note that the relevant extract from the Law Commission Report reads as follows and I further note that it is headed "Emergency Orders":

> *"10.21 As is the case under part VII of the Mental Health Act 1983, we consider that it would be useful for the Court of Protection to be able to make an order or give directions even if it cannot yet determine whether the person concerned actually lacks the capacity to take the decision in question. In exercising this emergency jurisdiction, the court would only be able to make the order or give the directions sought if it is of the opinion that the order or direction is in the best interests of the person concerned. We recommend that the Court of Protection should have power to make an order or give directions on a matter pending a decision on whether the person concerned is without capacity in relation to that matter (draft bill, clause 48)."*

60. Finally, as I have now observed in a number of cases, the Court of Protection is a uniquely fact specific jurisdiction. Therein lies the danger of attempting, however well-meaningly, to add an explanatory gloss to the words of the statute. In the Wandsworth case I was considering a perfunctory and very superficial assessment which, for the best of motives, was intended to deliver an undoubtedly kind and beneficial outcome for P. The purpose of the assessment had not been explained to P and the analysis was, as I described, "superficial and incomplete." I did not intend that the absence of an explanation to P of the purpose of the assessment or even the failure adequately to engage P's involvement in the assessment would automatically and, in every case, result in the assessment failing to meet the evidential test set by Section 48. I expressed myself thus:

> *"49. It seems to me that a prerequisite to evaluation of a person's capacity on any specific issue is at very least that they have explained to them the purpose and extent of the assessment itself. Here, that did not happen. In my view, it is probably fatal to any conclusion. In any event, it, at least, gravely undermines it. I have*

> *very much in mind* ***PC and Anor v City of York Council [2013] COPLR 409, [2013] EWCA Civ 478*** *where Peter Jackson J (as he then was) made the following observation:*
>
> > *'... there is a space between an unwise decision and one which an individual does not have the mental capacity to take and ... it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates.'"*

61. It is, I hope, clear that I was concentrating on the written assessment that had been undertaken by the individual concerned. I remain convinced that the failure to inform P as to what an assessment is actually addressing will probably be *"fatal to"* or, at least, *"gravely undermine" the* reliability of any conclusion. This is not the same as saying that the criteria in Section 48 will not be met. The judge will have to look at the wider canvas of the available evidence and consider those aspects of the report which might survive its failings. At the core of Section 48 lies a balancing exercise in which the State's obligation to promote and support 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.

62. I hope that these observations are of practical assistance to the profession and that they resolve the perceived conflict in the identified case law. Thus, in summary:

    i. The words of the Statute in Section 48 require no gloss;

    ii. The question for the Court remains throughout: is there reason to believe P lacks capacity?;

    iii. That question stimulates an evidential enquiry in which the entire canvas of the available evidence requires to be scrutinised;

    iv. Section 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;

    v. The presumption of capacity applies with equal force when considering an interim order pursuant to Section 48 as in a declaration pursuant to Section 15;

    vi. The exercise required by Section 48 is different from that set out in Section 15. The former requires a focus on whether the evidence establishes reasonable grounds to believe that P may lack capacity, the latter requires an evaluation as to whether P, in fact, lacks capacity;

    vii. The court does not become responsible for authorising P's Deprivation of Liberty upon issuing of a Section 21A application. The court's function is to review the authorisation which is in force;

    viii. The objective of Section 48 is neither restrictive, in the sense that it requires a high level of proof, nor facilitative, in the sense that it is to be regarded as a perfunctory gateway to a protective regime, and

ix. There is a balancing exercise in which the Court is required to confront the tension between supporting autonomous adult decision making and to avoid imperilling the safety and well-being of those persons whom the Act and the judges are charged with protecting.