Neutral Citation Number: [2021] EWCOP 10

Case No: 13588956

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF UR

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2021

Before :

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

- -

Between :

UR **(by her litigation friend,** **the Official Solicitor)**	**Applicant**
- and - **DERBY CITY COUNCIL**	**1st Respondent**
- and -	
NHS DERBY AND DERBYSHIRE CLINICAL COMMISSIONING GROUP	**2nd Respondent**

- -
- -

Miss Emma Sutton (instructed by MJC Law) for the **Applicant**
Miss Zoë Whittington (instructed by Derby City Council) for the **1st Respondent**
Miss Samantha Paxman **(**instructed by Browne Jacobson LLP**) for** the **2nd Respondent**

Hearing dates: 28th January 2021

- -

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 applicant and members of his 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. I am concerned in this application with UR, who is 68 years of age. Miss Sutton appears on behalf of UR by her litigation friend, the Official Solicitor, Miss Whittington on behalf of Derby City Council, the first respondent, and Miss Paxman on behalf of NHS Derby and Derbyshire Clinical Commissioning Group, the second respondent.

2. UR was born in Poland in February 1952. She has had a rich and interesting life, but that has been lived, for some time now, in the shadow of a persistent delusional disorder and what is described as a comorbid depression. One aspect of UR's general psychological presentation is a somatoform pain disorder which means that sometimes UR believes she has serious pain in her limbs for which there is no actual pathology. Sometimes, in consequence of this condition, she refuses to eat and drink. There have been periods where she has declined to make any effort to walk, believing her legs require amputation. It is often necessary, to maintain her general health, for nutrition, hydration and medication to be provided by way of a PEG tube. It was this issue that first led to the case coming before me.

3. Over the course of the last 9 months UR has been receiving care in a nursing home in Derby. Her placement there is jointly commissioned by the Local Authority and the CCG. UR is currently eligible to receive after care services pursuant to section 117 of the Mental Health Act 1983 ('MHA 1983') in consequence of her earlier treatment under section 3 of that Act.

4. On 1st April 2020, Derbyshire Healthcare NHS Foundation Trust applied for personal welfare orders, pursuant to the Mental Capacity Act 2005 ('MCA 2005'). The application concerned where UR should live and was extended to include arrangements for her care and treatment. This, as I have foreshadowed, included serious questions relating to the administration of medication, nutrition and hydration via the PEG tube.

5. It was possible to proceed by way of final declarations being made by the court, on 23rd July 2020, in relation to the medical issues. It is unnecessary to burden this judgment with those declarations. The case came before me again, however, in relation to questions concerning where UR should live and, specifically as to whether UR should remain in her care home or return to live with and be cared for by her family in Poland. The application proceeded as a challenge to the standard authorisation granted by the Local Authority pursuant to section 21A of the MCA 2005 as regards the best interests qualifying requirement, and specifically, whether that qualifying requirement was met.

6. As I understand it, UR has, for most of the past 9 months, been consistently expressing a wish to return to Poland and to her family. The unwavering consistency of those wishes are striking and unambiguous. At a hearing in November 2020, the real issue identified by the Court and the parties became whether it was possible and in UR's best interests to achieve that which she plainly wanted. UR has a family who are important to her. Perhaps most important is her sister, G. She is just a few years younger than UR. G and UR's niece, E, have both repeatedly and enthusiastically offered to care for UR. They live in Silesia in South West Poland and they have accommodation which would be suitable for her. UR has the financial wherewithal to fund her own package of care, should that be required.

7. The parties have prepared a careful and detailed chronology. It requires, in order to give context to this application, to be set out here:

(1) **February 1952**	UR's date of birth (68 years old)
(2) **August 1955**	UR's sister (G) date of birth (65 years old)
(3) **1972**	UR moves to the UK from Poland (age 20)
(4) **1974**	UR met D
(5) **1977**	UR marries D in Poland
(6) **April 1987**	UR's niece (E) date of birth (33 years old)
(7) **2002**	UR's mother dies, UR missed the funeral in Poland by an hour. She remained in Poland for some time to care for her elderly father but then returned to England. When she returned to work, she was involved in an accident and experienced physical pain afterwards
(8) **8 October 2002**	**Mental health problems begin**. UR referred to Derbyshire Royal Infirmary due to a paracetamol overdose (age 50). Her appetite reduced and she had lost a stone
(9) **12 December 2002 - 9 April 2020**	During this period (a little over 17 years), UR was admitted intermittently to hospital 3 times (informally) and 8 times (under the MHA 1983) for severe depression with psychotic symptoms and somatic symptoms (including choking and having pins and needles all over her body). Home treatment in the community was provided when UR was not in hospital
(10) **2005**	UR spent 3 months living with her sister in Poland
(11) **November 2009**	UR suffered a fall and fractured her femur. She had surgery and a metal plate was fitted to the bone. This procedure aggravated her somatic symptoms of pain in her leg
(12) **6 May 2010**	UR diagnosed with Bipolar Disorder
(13) **26 July 2011**	UR diagnosed with Recurrent Depressive

		Disorder
(14)	**November 2011**	UR diagnosed with Somatoform Pain Disorder
(15)	**18 January 2012**	UR spent 30 hours in a residential home which was regarded as 'respite' for her husband. There were reported difficulties in the marriage (safeguarding issues raised due to UR's husband being unable to meet UR's needs)
(16)	**27 December 2013**	During a period of inpatient treatment (under section 3 MHA 1983) UR's relationship with her husband breaks down and the family home is sold (with the consent of UR who was found to have capacity to make decisions regarding her property and affairs at this time)
(17)	**2014-2015**	Safeguarding concerns raised regarding UR's marriage (emotional and financial exploitation)
(18)	**July 2015 - 12 October 2018**	UR placed in a residential home under a CTO
(19)	**28 October 2018**	During a period of inpatient treatment (under section 3 MHA 1983), the medical records refer to *'[UR's] niece and sister (who live in Poland). They have explained that they are happy to have her home in Poland and to take care of her'*
(20)	**30 October 2018**	Position of the family (regarding UR returning to Poland to live with them) was communicated to UR who *'was in agreement with this'*
(21)	**17 November 2018**	NG tube fitted due to concerns regarding UR's weight (34.5-37.5 kg). Fitted under section 63 MHA 1983
(22)	**5 September 2019**	PEG fitted due to ongoing concerns regarding UR's weight. Fitted under section 63 MHA 1983
(23)	**6 November 2019**	UR visits the nursing home. The medical records state that *'[UR] agreed to attend and came with us in the taxi. [UR] expressed on many occasions that she did not like the home, or anything about it. [UR] appeared very uncomfortable when she was there and asked us how we would feel having to live there'*. When she returned to hospital UR *'continue[d] to repeat that she cannot go to [the nursing home]'* . The social worker's records indicate that UR was giving varying views about moving to

the nursing home from thinking that it was 'nice' to not liking it

(24) **7 November 2019** — UR stated that the nursing home *'was a horrid place. she suggested she was in too much pain to engage with staff at the home and the other patients were sitting in chairs shouting'*

(25) **14 November 2019** — UR stated that she *'wished she was back in Poland'*

(26) **16 November 2019** — UR stated that *'she doesn't want to move to 'the horrible nursing home'*

(27) **18 November 2019** — Section 17 leave at the nursing home *'[UR] was very upset and adamant that she didn't want to go there'*

(28) **19 November 2019** — UR reported that she *'hated' the placement'* and that '*she wanted to go back to Poland to be with her sister. She said that she feels very isolated here'*

(29) **24 November 2019** — Note of visit to the nursing home: *'[UR] said that she hates it there and doesn't want to spend the rest of her life there. Said that the staff are "horrible" and cause her "pain and distress". Said that the staff aren't giving her medication in her peg in her best interest "they're holding me down and hurting me'* and '*Nurses are just concerned giving anything via peg as it's distressing [UR]'*

(30) **26 November 2019** — Note of visit to the nursing home: *'She kept repeating that she was not happy there and did not want to be there, she would rather be with her sister in Poland or the previous home, she lived in for 2 years'*

(31) **27 November 2019** — CTO begins at the nursing home. Note of visit to the nursing home: *'she did not like it at the home and she had never been out the bedroom since she had been bought here'* and *'She reported she would like to go to Poland and her family would take care of her, they wouldn't dump her anywhere, if she ever went back to Poland she would never come back'*

(32) **28 November 2019** — UR *'reported "feeling heartbroken" as she didn't want to be at [the nursing home], she wanted to be with her sister in Poland and was unaware of any reason why she couldn't be'*

(33)	**27 February 2020 -**	UR removed from the nursing home and was detained for treatment (section 3 MHA 1983) (recall of CTO) after concerns were raised that she had been refusing medication for her mental health (via the PEG tube) and the nursing home did not feel able to provide food via the PEG due with restraint
(34)	**11 March 2020**	Best interests meeting regarding use of PEG in the community. The minutes state that '*her diagnosis is one of persistent delusional disorder, recurrent depressive disorder, dissociative disorder and post-traumatic stress disorder'*
(35)	**25 March 2020**	COP3 capacity assessment of Dr Paul McCormick (consultant in old age psychiatry) who assessed UR on 28.02.20. Concluded that UR lacks capacity to conduct proceedings, make decisions about her residence and her treatment (including receipt of medication and nutrition and hydration) as she is unable to use or weigh the relevant information
(36)	**28 March 2020**	Within the medical records it highlights that *'[UR] talking about living in Poland and that her sister wanted her to move in with her'*
(37)	**29 March 2020**	Care plan: if UR does not accept prescribed medications, they will be administered using the PEG as a last resort. Staff may hold UR's hands using open palms (not for long periods) to ensure compliance
(38)	**1 April 2020**	Within the medical records, UR is reported to be *'happy'* and *'agreeing'* to return to the nursing home
(39)	**1 April 2020**	Court application: personal welfare order sought (serious medical treatment) that it is in UR's best interests to be administrated nutrition, hydration and medication, against her wishes, via her PEG tube, and subject to proportionate restraint, if necessary
(40)	**2 April 2020**	Ex-parte order (Keehan J) (1) authorising UR's move to the nursing home / to receive medication via her PEG tube pending a return hearing in 8 weeks. Liberty to return the matter back sooner, if required
(41)	**7 April 2020**	Ex-parte order (Keehan J) ordering that it is in UR's best interests to reside at the nursing home and receive a package of care and for her deprivation of liberty therein to be authorised until 2 weeks following the date of the next hearing

(42)	**9 April 2020**	UR discharged from hospital to the nursing home (initially as section 17 leave)
(43)	**23 July 2020**	Final Order (SMT) Hayden J
(44)	**21 October 2020**	UR informed her solicitor *'of course I would like to go to Poland. I would go and live with my sister'*
(45)	**3 November 2020**	Interim hearing, Hayden J. Detailed case management leading to a final hearing
(46)	**25 November 2020**	Section 49 report of Dr Prakash (addressing mental health concerns of moving to Poland)
(47)	**27 November 2020**	Report of Mr Kurek (Polish legal expert)
(48)	**9 December 2020**	GP report (addressing physical health concerns of moving to Poland)
(49)	**7 January 2021**	Viability assessment of Jagoda Szewczyk (Pilaszek) (independent social worker)
(50)	**9 January 2021**	Report of Mr Kurek (Polish legal expert) regarding UR's benefit entitlement, her health and social care rights, whether she remains a Polish citizen and any issues which impact upon her position as a consequence of the UK leaving the European Union
(51)	**13 January 2021**	UR informed the best interest assessor that **'***she was happy living at [the nursing home] for the 'time-being', she is looking forward to moving to Poland'* and that she was *'leaving her room more often'*. The best interest assessor notes that *'all those consulted report that [UR] clearly wants to move to Poland'*
(52)	**18 January 2021**	The 3rd witness statement of Christine Ford (social worker)
(53)	**15-19 January 2021**	Email correspondence with UR's husband. UR's husband considered that it was in UR's best interests to move to Poland
(54)	**19 January 2021**	Report of Mr Kurek (Polish legal expert)
(55)	**22 January 2021**	Witness statement of Lauren Crow (UR's solicitor) addressing UR's wishes and feelings

8. UR comes from a devout Roman Catholic family. She was born in a large village called Ziezowice and has a manifestly strong sense of her identity as Polish. She studied Economics and achieved a diploma and worked in a bank. She came to the UK in 1972 age 20, working as it happened in a nursing home and also as an au pair. There, and in the years that followed, she became a fluent English speaker, but she remains equally fluent in Polish and enjoys speaking in her own language.

9. Mrs UR (as she was to become) travelled back and forth to Poland until 1974 when she met her husband, and they married in 1977. The papers identify that UR settled in Derby because she had a relative there. I note that her relative was an uncle who became a Roman Catholic priest. That adds to the picture of a family whose faith is important to them. Although she and her husband have lived separately, they have not divorced, I suspect (though I cannot know) that that may be for religious reasons. It was between December 2002 – April 2020 that UR was admitted intermittently to hospital, something in the region of 11 times, exhibiting signs of severe depression and psychotic or somatic symptomology. Her presentation was alarming and frightening to those who observed it and also, I should add, to her.

10. The legal framework is relatively easy to state and has not been contentious. Counsel have been able to pare it down into one agreed document. Although it is familiar territory to practitioners, it is helpful to set it out here. My summary of the scope and ambit of the applicable law set out below, draws heavily on the agreed document, which I consider to be an accurate and thorough analysis. That said, the application of the law to the circumstances of this case, requires a degree of subtlety.

Section 21A applications

11. The powers of the court, in relation to schedule A1 are set out in section 21A(2) MCA. These convey jurisdiction on the court, for the purposes of Article 5(4) ECHR, to review the authorisation of a person's detention and provide that:

> *'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'*

12. Thereafter, section 21A(3) MCA provides that:

> *'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'*

13. The 'best interests' requirement are set out in paragraph 16 of schedule A1 MCA:

> *'(1)The relevant person meets the best interests requirement if all of the following conditions are met.*
> *(2)The first condition is that the relevant person is, or is to be, a detained resident.*
> *(3)The second condition is that it is in the best interests of the relevant person for him to be a detained resident.*
> *(4)The third condition is that, in order to prevent harm to the relevant person, it is necessary for him to be a detained resident.*
> *(5)The fourth condition is that it is a proportionate response to—*
> *(a)the likelihood of the relevant person suffering harm, and*
> *(b)the seriousness of that harm, for him to be a detained resident'*

14. As foreshadowed above, schedule A1 MCA was plainly drafted with the intention of incorporating 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.

15. As I observed in **DP v London Borough of Hillingdon [2020] EWCOP 4** *'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 …… .This is the discrete scope and ambit of a Section 21A application'*.

16. 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 intended to either vary or 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 (**DP v London Borough of Hillingdon [2020] EWCOP 4** (supra) at para 35). Charles J also addressed this in *Re* **UF [2013] EWCOP 4289.**

17. That said, once an application is made under section 21A, the court's power is not constrained to determining the question of whether P meets one or more of the qualifying requirements. The court also has power to make declarations pursuant to section 15 as to whether P lacks capacity to make '*any'* decision. Once such a declaration is made, the court has power pursuant to section 16 to make decisions on P's behalf concerning his personal welfare or property and affairs (**CC v KK [2012] EWHC 2136 (COP)**, Baker J, as he then was, at para 16, **PH v A Local Authority [2011] EWHC (Fam)**, Baker J at para 15).

18. Sections 15 to 17 of the MCA grant the Court of Protection power to make decisions concerning personal welfare and to make declarations and orders in respect of a person who lacks capacity. Section 15 deals with declarations, including declarations as to the lawfulness or otherwise of any act which has been or is to be done. Section 16 enables the court, by making an order, to make personal welfare decisions for a person without capacity, and, by section 17(1)(a), the court's power in this regard extends to deciding where P lives.

19. Section 16(3) MCA makes it clear that the court's powers under section 16 are to be read in conjunction with the wider provisions of the MCA and, in particular, to section 1 and to section 4. What governs the court's decision about any matter concerning personal welfare is therefore the protected persons best interests.

20. Section 4 MCA provides that:

> *'(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of -*
>
> *(a) the person's age or appearance, or*
>
> *(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
>
> *(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
>
> *(3) He must consider -*
>
> *(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
>
> *(b) if it appears likely that he will, when that is likely to be.*
>
> *(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*
>
> *(6) He must consider, so far as is reasonably ascertainable –*
>
> *(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of -

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in sub-section (6). ...'

21. The application of the best interests criteria is most comprehensively illustrated in the decision of the Supreme Court in **Aintree University Hospitals NHS Foundation Trust v James and others [2013] UKSC 67**. At para 39 of her Judgment, Baroness Hale observed:

> *'The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological ……. they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be'*

22. At para 45, Baroness Hale added:

> *'The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. .... But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being'*

23. Additionally, in **Wye Valley NHS Trust v Mr B [2015] EWCOP 60**, Peter Jackson J, as he then was, stated:

> *'10. Where a patient lacks capacity it is accordingly of great importance to give proper weight to his wishes and feelings and to his beliefs and values …… . once incapacity is*

> *established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given in others, very significant weight will be due*
>
> *11. This is not an academic issue, but a necessary protection for the rights of people with disabilities. As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an "off-switch" for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.*
>
> *12 .... It is, I think, important to ensure that people with a disability are not – by the very fact of their disability – deprived of the range of reasonable outcomes that are available to others .....*

24. In **ITW v Z, M & Various Charities [2009] EWHC 2525 (Fam)** Munby J, as he then was, set out a number of, non exhaustive factors which might illuminate P's wishes and feelings (at para 35):

    a. The degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings;
    b. The strength and consistency of the views being expressed by P;
    c. The possible impact on P of knowledge that their wishes and feelings are not being given effect to;
    d. The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
    e. The extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in their best interests.

25. The case law has emphasised the danger of an overly paternalistic approach, see **PH v A Local Authority, Z Ltd and R [2011] EWHC 1704 (Fam)** and **CC v KK [2012] EWHC 2136** (COP). In cases concerning vulnerable adults, there is an ever-present risk that professionals may feel drawn towards an outcome that is more protective of the adult. The point was articulated most strikingly in the well-known judgment of Munby J, as he then was, in Re **MM (An Adult) [2007] EWHC 2003 (Fam)**. It bears repetition not least because it captures the point so powerfully:

> *'A great judge once said, 'all life is an experiment', adding that 'every year if not every day we have to wager our*

> *salvation upon some prophecy based upon imperfect knowledge' (see Holmes J in Abrams v United States (1919) 250 US 616 at 630). The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be brought at too high a price in happiness and emotional welfare.*
>
> *The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?'*

26. This 'protectionist culture' has been consistently deprecated by the judges of the Court of Protection. In *Re* **GC [2008] EWHC 3402 (Fam)**, Hedley J was considering the discharge of an elderly man from hospital to the home where he had lived for many years:

> *'GC is a man in the 83rd year of his life and my concern is to ask myself: how will he most comfortably and happily spend the last years that are available to him? ..... Next it seems to me that for the elderly there is often an importance in place which is not generally recognised by others; not only the physical place but also the relational structure that is associated with a place ...'*

27. The above passage has particular resonance for the application made in this case. In **Westminster City Council v Manuela Sykes [2014] EWHC B9 (COP)** District Judge Eldergill made the following thoughtful and insightful observations:

> *'several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress',* and that *'although there is a significant risk that a home care package at home will 'fail', there is also a significant risk that institutional care will 'fail' in this sense (that it, produces an outcome that is less than ideal and does not resolve all significant existing concerns)'*

20. Article 8 ECHR is also a relevant factor:

> Article 8
> Right to respect for private and family life
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

28. In **K v LBX and Others [2012] EWCA Civ 79**, the Court of Appeal confirmed that there is no presumption in favour of family life when undertaking a best interests analysis. The exercise requires consideration of the factors set out at section 4. In the course of that evaluation a judge will always be required to factor in an assessment of whether the proposed course is necessary and appropriate and in particular whether it properly justifies the interference with the Article 8 rights of P. Thus, no artificial starting point should be imported into the exercise. Thorpe LJ observed, at para 35:

> *'the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate'.*

29. Davies LJ noted, at para 63:

> *'there will undoubtedly be many cases in this context where Article 8 considerations will be a very important factor. Where (as here) Article 8 is engaged and where (as here) there will be a potential interference with the right to family life which has to be respected then the interference has to be justified: that is fundamental. … Where (as here) the family life is long standing, is existing and is of high quality, due weight needs to be given to that in assessing whether the proposed interference with the family life is justified and proportionate and in reaching the overall conclusion on best interests'.*

The approach of Thorpe and Davies LJ in **LBX (supra)** has been widely applied see e.g: **A North East Local Authority v AC and BC [2018] EWCOP 34,** at para 157; in **An NHS Foundation Trust v AB and CD [2019] EWCOP 45**, para 28.

COVID-19 issues

30. The plan for UR requires me to consider the constraints placed on civil liberties arising in consequence of the pandemic public health crisis. The most recent regulations which have, of necessity, been updated and changed on a very regular basis are: Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020/1374. Paragraph 2(2)(f)(iv) of schedule 3A(1) provides: *'Exceptions: leaving home'* Exception 1 seeks to define the circumstances surrounding "*leaving home necessary for certain purposes".* It outlines that it is to be deemed "reasonably necessary for the person concerned ("P") to leave or be outside the place where P is living ("P's home") if that relates to 'moving home' on the basis that it is *'in connection with the purchase, sale, letting or rental of a residential property'".*

31. In view of the detail of this care plan, it is also necessary to consider Exception 2, which addresses leaving home for the purposes of work, voluntary services, education and training etc. Paragraph 5(c), 'Exception 2 states that it is to be regarded as 'reasonably necessary for P to leave or be outside P's home ….. to provide care or assistance, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the **Safeguarding Vulnerable Groups Act 2006**, to a vulnerable person or to a person who has a disability'

32. Paragraph 7(3B) of Schedule 4 to the **Safeguarding Vulnerable Groups Act 2006** provides that '*Relevant personal care'* means -

> *(a)physical assistance, given to a person who is in need of it by reason of age, illness or disability, in connection with—*
> *(i) eating or drinking (including the administration of parenteral nutrition),*
> *(ii) toileting (including in relation to the process of menstruation),*
> *(iii) washing or bathing,*
> *(iv) dressing,*
> *(v) oral care, or*
> *(vi) the care of skin, hair or nails,*
>
> *(b)the prompting, together with supervision, of a person who is in need of it by reason of age, illness or disability in relation to the performance of any of the activities listed in paragraph (a) where the person is unable to make a decision in relation to performing such an activity without such prompting and supervision, or*
> *(c)any form of training, instruction, advice or guidance which—*
> *(i) relates to the performance of any of the activities listed in paragraph (a),*
> *(ii) is given to a person who is in need of it by reason of age, illness or disability, and does not fall within paragraph (b).*

33. Additionally, under '*Exception 2: work, voluntary services, education and training etc')* paragraph 5(e) provides exemption for circumstances where it is reasonably necessary for P to leave or be outside P's home *'to fulfil a legal obligation …..'.*

34. I have been told that if UR has taken a Covid-19 test, 48 hours before arrival in Poland, and it is negative, she will be admitted to the country. The evolving circumstances, throughout the world, raise the spectre of her having to isolate. I have been told by Miss

Sutton that this is less likely to be required if UR has received the vaccination. I heard evidence from the key social worker, Mrs Ford, who told me that UR has (no doubt as a facet of her psychological problems), a fear of needles and injections. Sometimes she has been resistant to her antipsychotic depot medication and it is thought to be because she is afraid of the injection. Equally, there have been other occasions where it has been possible to persuade UR to comply.

35. It is said that, at the moment, and on this issue (perhaps a little surprisingly) that UR has the capacity to make this decision for herself. She has chosen not to receive the vaccination. That is her right. As I observed, during the course of exchanges with counsel, she has survived in a care home throughout the course of the pandemic. Her health, her age and the circumstances in which she lives and, indeed, the country in which she lives has placed her at a very high risk at contracting the virus. Happily, she has not succumbed. It would be very sad if, in pursuance of this plan, she was exposed to and contracted the virus and in circumstances where she has been offered the vaccine. I am told by Miss Whittington that the social worker and the care home manager will undertake a sensitive piece of work with UR to help her better to understand how the vaccine could make her life so much safer and more secure. Whilst the work should concentrate on the very considerable benefits the vaccine offers, it should also scrutinise, with very great care, whether UR is truly capacitous on this issue.

Cross-border considerations

36. The starting point for consideration of the court's jurisdiction in cross-border matters is schedule 3 MCA. Section 63 MCA provides as follows:

> *'Schedule 3 –*
> *a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2020 (Cm. 5881) (insofar as this act does not otherwise do so), and*
> *b) makes related provision as to the private international law of England and Wales'*

37. **The 2000 Hague Convention** ('the Convention') came into force on 1 January 2009 (following its ratification by three states). It has now been signed by 18 states including the United Kingdom and Ireland. Though the United Kingdom has ratified the Convention, it has declared that the ratification applies to Scotland alone and thus the Convention is not yet in force in England and Wales. Ireland has not ratified the Convention.

38. Certain provisions within schedule 3 MCA make direct reference to aspects of the Convention (such as cross-border placements) and are accordingly not in force. The greater part of schedule 3 however, is in force and these provisions are clearly based upon the Convention, utilising the language of the Convention e.g. '*habitual residence*'. Schedule 3 paragraph (4) expressly provides that '*an expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention*'.

39. The effect of those provisions of schedule 3 presently in force is (a): to clarify the scope of the Court of Protection's substantive jurisdiction; to provide for the court to exercise

this jurisdiction in circumstances where the person in question is not habitually resident in England and Wales; and (b) provide for the recognition and enforcement in England and Wales for orders of foreign courts concerning individuals who lack capacity.

40. Paragraph 7(1) of schedule 3 MCA identifies persons in respect of whom the *'full, original jurisdiction of the Court of Protection is exercisable'* which includes the ability of the court to make declarations and orders under sections 15 and 16 MCA (Re: Various applications concerning foreign representative powers **[2019] EWCOP 52**, Senior Judge Hilder at para 20.2). Paragraph 7(1) requires to be set out:

> ***Scope of jurisdiction***
> 7 (1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to –
> (a) an adult habitually resident in England and Wales,
> (b) an adult's property in England and Wales,
> (c) an adult present in England and Wales or who has property there, if the matter is urgent, or
> (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

Habitual residence

41. '*Habitual residence*' is not defined in the MCA or, in fact, in the Convention. In **An English Local Authority v SW and Others [2014] EWCOP 43**, Moylan J, as he then was, held that the meaning to be given to habitual residence in the context of the Convention and the MCA should be the same as in other family law instruments such as the 1996 Hague Child Protection Convention and Council Regulation EC 2201/2003 (Brussels IIA) though he also acknowledged that different factors will be relevant and will bear differential weight (para 64-65). It is not necessary, for the purposes of this judgment, to examine this further.

42. Perhaps surprisingly the term 'habitual residence' has generated a considerable degree of litigation and case law. It is convenient to distil the key principles that have emerged:

> (1) Habitual residence is a question of fact and is not a legal concept such as domicile (*A v A (Children: Habitual Residence)* [2014] AC 1 at para 54);
>
> (2) The test adopted by the ECJ is the '*place which reflects some degree of integration by the child in a social and family environment*'. The child's physical presence should not be temporary or intermittent (*Proceedings brought by A (Case C-523/07)* [2010] Fam 42 at para 38);
>
> (3) Consideration needs to be given to conditions and reasons for the child's stay in the state in question (*Mercredi v Chaffe (Case C-497/10PPU)* [2012] Fam 22 at para 48);

(4) The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce (*A v A* (supra) at para 54);

(5) Both objective and subjective factors need to be considered. Rather than consider a person's wishes or intentions, it is better to think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there - their state of mind (*Re LC (Children)* [2014] AC 1038 at para 60);

(6) It is the stability of the residence that is important, not whether it is of a permanent character (*Re R (Children)* [2016] AC 76 at para 16);

(7) Habitual residence is to be assessed by reference to all the circumstances as they exist at the time of assessment (*FT v MM* [2019] EWHC 935 (Fam) at para 13).

43. The clearest and most authoritative analysis is Re **LC (Children)** (supra). There, Baroness Hale stressed the need to look at the circumstances which led to the move in question:

> *'The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then and later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another'.*

44. In **An English Local Authority v SW** (supra), Moylan J made the following additional and very useful points:

(1) The overarching test for habitual residence should be the same whether one is considering adults or children, although different factors may or will have differing degrees of relevance [para 66];

(2) The expression '*degree of integration*' is an overarching summary or question rather than the sole, or even necessarily the primary factor in the determination of habitual residence. The court's focus should not be narrowed to this issue alone as a question of fact [para 68 and para 72];

(3) Integration, as an issue of fact, can be an emotive and loaded word. It is not difficult to think of examples of an adult who is not integrated at all in a family environment and only tenuously integrated in a social environment but who is undoubtedly habitually resident in the country where they are living. Integration as an issue of fact can also raise difficulties when a court is determining the habitual residence of a person who lacks capacity [para 70];

(4) The court *'should not lose sight of the wood for the trees'* [para 71].

45. It follows that when the court makes a personal welfare order to the effect that it is in P's best interests to move outside the jurisdiction of England and Wales, the Court of Protection will only retain jurisdiction if P remains habitually resident in England and Wales. As the case law identifies, evaluating habitual residence will always be by reference to the facts as they exist as at the time of assessment by the court.

46. Following the hearing in November 2020, and with counsel's assistance, I indicated a number of areas that needed to be considered before I could identify whether a move was possible and in UR's best interests. Those areas included psychiatric assessment, physical assessment, as clear an understanding of the framework of the comparative law as possible (in Poland) and a range of information concerning the financial arrangements. Those concerns were scrupulously pursued by the Local Authority and by the Official Solicitor.

47. Dr Prakash, who is a consultant in old age psychiatry within Derbyshire Healthcare NHS Foundation Trust, has provided a clear and helpful report outlining the challenges and likely impact upon UR of a move to Poland. In summary, he considers that it is unlikely to have an adverse impact on her mental health. UR's GP, Dr Khalil, has also provided a short report in which he has concluded that there is no contraindication, from a physical health perspective, arising from a move to Poland. I have also been particularly impressed with the input of Mr Tomasz Kurek, the Polish lawyer, who has with enviable clarity, set out how the transition to Poland can be made and the appropriate applications that would have to be pursued and considered.

48. In addition to the above, I have been provided with an independent social work report, dated 6 January 2021, the author of which has risen impressively to the challenges of remote working and has been able to incorporate 'remote visits' to UR's sister and niece in Poland. This has included two separate assessment sessions totalling something in the region of 3 hours. What emerges from that assessment is a family who claim UR as theirs, who wish to be afforded the opportunity to care for her, who have been made fully aware of the challenges her care can involve, and who understand the practical

matters that they have to pursue in order to care for her. What is striking about the assessment is the family's unflinching, unhesitating commitment to her. In determining where her best interests lie, I have given very significant weight to that obvious love and commitment.

49. The Official Solicitor, I have no doubt with Miss Sutton's assistance, has undertaken what is called a 'balance sheet analysis' of the competing factors. As I discussed with Miss Sutton, whilst there is some utility in this approach it can be misleading. Manifestly, some factors will attract greater weight than others, as I have illustrated above. In those circumstances a balance sheet approach can be misleading. It risks, as Sir Andrew MacFarlane (P) has described it, becoming "a map without contours". In fact, in the wider context of her Position Statement, the detailed and careful analysis of the competing issues is far more sophisticated than the term 'balance sheet' would suggest. Indeed without, I hope, being too pedantic, I have renamed the document: 'Analysis of the Competing Issues'.

50. Miss Sutton has identified the key factors underpinning the decision and has navigated her way through the relevant provisions of the Mental Capacity Act. Because I consider these written submissions to be a model of their kind, I set them out in full. On behalf of the Official Solicitor, Miss Sutton submits that the benefits to UR in moving to Poland are as follows:

> (1) UR's past and present wishes and feelings (section 4(6)(a) MCA)**:** UR has been clear and consistent in her wish to return to Poland (see chronology). Most recently, UR's solicitor attended upon her (by telephone) on 22 January 2021. During their conversation, UR confirmed that she would like to return to Poland as soon as possible and would accept professional support. She is happy to travel by plane (accompanied by nursing staff) and understands that this may not be immediate due to travel restrictions. Significant weight should be given to UR's wishes.
>
> (2) UR's beliefs and values (section 4(6)(b) MCA): UR cared for her father following her mother's death and remained with him in Poland when he was unable to care for himself. Such family values (caring for each other) are important and returning to Poland to live with her immediate family/ have contact with extended family (in circumstances where she no longer has *any* family in the UK) is significant. Returning to Poland would also allow UR to speak her first language and eat Polish food – which she has stated she misses. Additionally, both UR and her sister are Catholic and it is likely that she would be able to more fully engage in her religious beliefs if she were to return to live with her family.

(3) Consultation with those engaged in caring for UR or interested in her welfare (section 4(7)(b) MCA). The following persons agree that a move to Poland would be in UR's best interests:

(i) UR's sister and niece: they are clear in their want to care for her and the ISW sets out a number of strengths regarding this arrangement. UR's sister is retired and plans to look after UR full time with support from her daughter who works. Both appear willing and able to take advice/ undergo further training (regarding meeting UR's needs) where necessary.

(ii) UR's cousin (U): she lives in San Diego and the social worker spoke with her by telephone. The cousin visited UR last year (when she was in hospital) and described the family support available in Poland which included another cousin (A) who is a retired teacher and who lives in walking distance from the family home in Poland and who would also be willing to support UR.

(iii) The Local Authority: the social worker (Christine Ford) confirms within her third witness statement that *'in my view, Poland offers UR the potential to gain a quality of life which she has not experienced for a long time, in a least restrictive environment of her choosing'*.

(iv) The CCG: Marie Warrington has confirmed that it would be in UR's best interests to move to Poland as it is her expressed wish to return to live with her family.

(v) The Trust: from a mental health perspective, the risks of anxiety and agitation (regarding travel) can be mitigated (Dr Prakash, 25 November 2020).

(vi) The GP: from a physical health perspective, there is no reason that UR cannot travel (Dr Khalil, 9 December 2020).

(vii) UR's husband: UR's relationship with her husband is complex, however they continue to have telephone contact (most recently on 22 November 2020, 30 November 2020, 10 December 2020, 30 December 2020, and 12 January 2021). On 15 January 2021. UR's husband confirmed (by email) to UR's solicitors that *'[UR's] sister is aware of [UR's] condition having visited her in the UK. And also, in 2005, [UR] spent 3 months living with her sister in Poland. That was 3 years after [UR] had several admissions to the*

psychiatric units. During those 3 months in 2005, [UR's] mental health improved enormously. Up to about 85% normal…. possibly more. That was just being with her sister, her sisters daughter and some cousins who live close by (because they are blood relatives). This had an immensely positive effect on [UR]. There's no doubt that [UR] benefitted from being with her closest relatives. [UR] has said that she wants to go there. I think it's a great idea and I support that. I hope that [UR] is able to achieve that goal as soon as it's possible to do so'.

Thereafter, on 18 January 2021, UR's husband confirmed that UR *'has often talked about going to live with her sister in Poland, and has clearly discussed it on many occasions with her sister. This is the only alternative plan that she aspires to. She does not want to spend the rest of her life in a care home. Moving to Poland would be a way forward for her, for the reasons that I mentioned in my last email …..'*

(4) <u>All the relevant circumstances</u> (section 4(2))

(i) The strength of UR's relationship with her sister is illustrated by her want for her sister to be her sole beneficiary when she dies.

(ii) The mental health assessment of Dr Jan (section 12 doctor) dated 10 January 2021 highlights that in her opinion *'the deprivation/ restrictions/ supervisions do appear to have a negative impact on [UR's] mental health due to her delusional belief system and lack of insight'*.

(iii) The nursing home is a restrictive, institutionalised setting, which offers UR little privacy. Her quality of life is likely to improve if she returns to Poland to live with her family.

(iv) UR resides with older residents suffering from dementia which limits her ability to socialise, develop friendships, and engage in group activities.

(v) A detailed transition plan has been prepared to mitigate the risks of travel and care upon arrival in Poland. This includes sedation (PRN Lorazepam) being administered if

required. UR is practising wearing a face mask in preparation for the journey and it is proposed that she flies from East Midlands Airport (the flight being 2-2 ½ hours) with 2 trained nurses. The nurses will support UR to her sister's house and will remain for 3 days to support the family in understanding UR's needs (such as using the PEG feed). The cost of staff members supporting UR to Poland will be met by the Local Authority and CCG, and the carers will be the nurse manager and another qualified member of staff who knows UR well.

(vi) For the immediate future, UR would (if necessary) be able to self-fund a package of care in Poland; either via her UK state pension or her savings – including if UR had 3 hours of professional care each day (21 hours a week) and a 2 hour 'sitting service' each day (14 hours a week).

(vii) The legal expert has confirmed that *'it appears that the UK government does not intend to change the rights for the UK pensions acquired before December 31, 2020. In accordance with [this] information, a person who is entitled to the UK State Pension can still claim this pension if moves abroad to live in the EU, EEA (European Economic Area) or Switzerland. Since Poland is the EU country, [UR] will be able to claim her UK State Pension after she moves to Poland'*.

(viii) The Polish Embassy have confirmed that the Upper Silesia region (where UR's family live) is the most urbanised and populated region in Poland which offers one of the densest networks of hospitals and health centres. It was also confirmed that there are various forms of local support available for families taking care of people with mental disorders including community (home) treatment teams.

(ix) Although UR would need to be assessed by the Social Insurance Institution, it is likely (based on her medical needs) that she will be eligible for a Polish disability pension based

on a 'full inability' to work in the sum of 1,100 Polish Ztoty per month *(£224.13*). A corollary of such entitlement is that free health care would then be available for her.

(x) UR now has a valid British passport and can (on a practical basis) travel.

51. Miss Sutton submits that the countervailing burdens presented by UR moving to Poland are as follows:

(1) The travel arrangements are extensive in circumstances where UR has not travelled to Poland (or any significant distance) for around 15 years (since 2005);

(2) UR will not be entitled to section 117 MHA 1983 aftercare provision, and her disability benefit/ entitlement to healthcare provision in Poland will not be determined until her arrival and subsequent assessment by relevant services. It is likely (for the immediate future) that UR will need to pay for her own care;

(3) Based on income, it is unlikely that UR will be entitled to social care as the family income exceeds 528 Polish Ztoty per month;

(4) UR's family have not cared for her before and there is a risk that they be unable to meet her physical and mental health needs;

(5) It is unclear if UR's prescribed supplements are available in Poland;

(6) It is unclear how a hospital bed with a suitable mattress will be purchased for UR in readiness for her arrival.

52. Looking at UR's wishes and feelings, and recognising that the two are quite separate concepts, considering her beliefs and values and listening to what is important to her, all help to weave together a clearer understanding of where her best interests lie. Miss Sutton emphasises that UR plainly has a strong sense of her Polish identity. She has a very heightened sense of 'family' but she no longer has any family in the UK. She has maintained her fluency in Polish. UR's strong Roman Catholic faith has a Polish facet to it. She has described how she enjoys the food from her home region. She plainly seeks the company of her family.

53. I have described UR's psychological and psychiatric history, and though I am aware that she requires (at least periodically) an antipsychotic depot injection, she is plainly a woman who retains a capacity to enjoy life and an appetite to do so. In the care home where she presently lives, she does not find much sustenance for those appetites. She considers, and this may well be correct, that most of the people with whom she shares the home suffer so profoundly from dementia that she feels unable to engage socially with them. The consequence of that is that she has retreated into a very confined world, driven by necessity rather than by design. That is not an environment that promotes her

own sense of autonomy, nor is one which can effectively promote capacitous decision making. In making those observations I intend no criticism of the Local Authority or the CCG, both of whom have, I emphasise, gone to the most impressive lengths in this case to put a package of care together that enables UR to travel to Poland. None of the above should be taken as a criticism of the care home either. On the contrary, it is manifest that UR has received consistent and good quality care.

54. There were a number of issues that required to be addressed if the transition to Poland were to be possible. I say at once and for the avoidance of any ambiguity, I am satisfied that it is possible and in UR's best interests to move to live in Poland. I am extremely pleased that the professionals in this case, have been able to put a plan together which enables UR to fulfil her wish to return to where she regards as home. The remaining issues which need to be addressed include: an application to the Voivode (local governor); an application for an identity card; registration with health services. There is also a sensible, practical plan to update UR's banking arrangements. The plans record the need to obtain a wheelchair for her journey; travel insurance; air fare etc. There have also been discussions with the family to provide a hospital style bed with suitable mattress. Careful and well thought through plans have been put in place to provide for UR's medication and supplements. I identify these small but important practical measures to illustrate the extent of thought and care that has been given to UR's plan.

55. One further issue that has arisen, as foreshadowed above, has been whether UR could leave this country to travel to Poland under the present regulations (Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020/1374). I have carefully considered schedule 3A(1) of the January 2021 Regulations. I have come to the clear and, I believe, uncontroversial conclusion that this move from the care home to her family in Poland, is not only incorporated within the identified 'exceptions' specified in paragraph 2(2)(f)(iv) of the Regulations (see paras 30,31 and 33 above), but reflects both the spirt and objectives of the Regulations as a whole and in particular paragraph (5)(c) and (e), paragraph (7) and/or paragraph 13 of schedule 3A(1). It also requires to be emphasised that the exemptions set out in paragraph 2 of schedule 3A(1) are not intended to be exhaustive, nor could they be. Additionally, and for the avoidance of doubt, I consider that UR's carers have a 'reasonable excuse' to accompany her and are therefore validly 'exempt' from the regulations. In assisting UR to move to Poland her carers are operating 'in a work capacity' and are providing physical assistance to her as contemplated by paragraph 5(c). The care home manager and a nurse have indicated that they are prepared to travel with UR and to accompany her all the way home. They are also content to self-isolate or perhaps quarantine, if required, on their return. Their selfless and dedicated professionalism is profoundly impressive.

56. Although there are a number of outstanding practical matters, as I have highlighted above, I have very little hesitation in reaching the conclusion that, whilst the plan is not free from risk, it offers distinct and obvious advantages to UR. It broadens UR's social horizons, it returns her to her family, it relocates her to her homeland. Perhaps most importantly, as it is consistent with her clear and frequently expressed wishes, it guards her autonomy in the proactive way the MCA prescribes. It is not possible here, or in life generally to eradicate all risk. Perhaps a life without risk is not even desirable. Exercising personal autonomy frequently requires making choices. I am quite sure that UR would be safe and well cared for in her care home. I am equally sure that she would

not be happy. It strikes me that were she fully capacitous to take this decision herself UR would recognise the inevitable discomforts and challenges of what may very well be her last journey but would unhesitatingly choose to return to Poland. I am pleased that all the professionals in this case, working collaboratively and creatively together, have been able to construct a plan for UR's return which I am able to approve as being in her best interests.

57. I have delivered a judgment in this case which is lengthier and more detailed than I had originally contemplated. I have done so because I consider the preparation and presentation of this case, by all the disciplines involved, is a beacon of good practice. It should be regarded as a paradigm for professionals who find themselves considering similar situations in the future. It is invidious to single out any particular aspect of the case as particularly deserving of comment, but I do consider that the case management measures taken here are likely to be of wider and more general assistance in cases, in the Court of Protection, involving permanent relocation from the jurisdiction of England and Wales. Counsel submit, and I agree, that the following, non exhaustive, checklist is likely to provide useful guidance:

i. Liaison with the relevant Embassy/ Consulate (in the first instance) to ascertain what guidance and assistance can be provided;
ii. Evidence as to physical health to travel (GP);
iii. Evidence as to mental health to travel (psychiatrist);
iv. Legal opinion regarding citizenship, benefit entitlement, health and social care provision in the relevant country, and such other issues relevant to the case;
v. Consideration of any applications that need to be made as a consequence of any legal opinion provided;
vi. Independent social work evidence regarding the viability of the proposed package of care in the relevant country if such evidence cannot be provided by the parties to the proceedings or a direction under section 49 MCA;
vii. Confirmation of travel costings from the commissioners of the care package, both in relation to P and any carers that may need to travel with them (who will pay?);
viii. Confirmation that the necessary medication/ care will be available during travel from the UK/ for the immediate future in the new country
ix. Transition plan/ care plan, to include a contingency plan and how the matter should return to court in the event of an emergency in implementing the proposed plan;
x. Best interest evidence from the relevant commissioners;
xi. Wishes and feelings evidence;
xii. Residual orders to allow the plan to be implemented, including single issue financial orders regarding opening/closing of UK bank accounts, the purchasing of essential items to travel (if necessary);
xiii. Covid-19 considerations prior to travel (if applicable)

58. For all the above reasons, I am able to make the following order, which I incorporate within the judgment, because I consider it to be a useful template for future cases:

IT IS DECLARED PURSUANT TO SECTION 15 OF THE MENTAL CAPACITY ACT 2005 THAT:

1. It is lawful, as being in UR's best interests, to be transported from AL Nursing Home to East Midlands Airport in accordance with the transition plan attached to this order and to thereafter reside with her sister and niece within the Polish property. For the avoidance of doubt, UR:

(1)Has a reasonable excuse to leave AL Nursing Home as she falls (directly or implicitly) within the exemptions contained in paragraph 2(2)(f)(iv), paragraph (5)(c) and (e), paragraph (7) and/or paragraph 13 of schedule 3A(1) of the Regulations, or
(2)Otherwise has reasonable excuse to leave the UK in accordance with the finding of this court that it is in her best interests to do so; recognising that the exemptions set out in paragraph 2 of schedule 3A(1) of the Regulations are not exhaustive by application of paragraph 1(2)(a) of schedule 3A(1) of the Regulations.

IT IS ORDERED PURSUANT TO SECTION 16(1)(a) AND SECTION 16(2)(a) AND BEING A RELEVANT DECISION UNDER SECTION 4A(3) AND (4) OF THE MENTAL CAPACITY ACT 2005 AND THEREBY PERMITTING UR's DEPRIVATION OF LIBERTY, AND IF AND TO THE EXTENT THAT SHE IS SO DEPRIVED:

2. It is lawful and in UR's best interests to be transported from AL Nursing Home to East Midlands Airport in accordance with the transition plan attached to this order and to thereafter reside with her sister and niece within the Polish property. To the extent that the restrictions in place during the transportation constitute a deprivation of her liberty, such deprivation is authorised by the court.

3. In the event that it is necessary, the Local Authority and CCG, by their employees or agents, may use reasonable and proportionate measures to transport UR from AL Nursing Home to East Midlands Airport which must be done in a way which is the least restrictive and consistent with UR's best interests and implemented in a way calculated to cause UR the least distress, and only such force as is necessary is used and that any safety restraint techniques are used only by persons having appropriate training. For the avoidance of doubt, the level of restraint relates to chemical sedation and not physical restraint.

THE COURT HAS DETERMINED PURSUANT TO SECTION 21A(2)(a) AND SECTION 21A(3)(b) OF THE

MENTAL CAPACITY ACT 2005 THAT:

4. The best interests qualifying requirement is not met. In particular:

(1)It is not in UR's best interests to continue to reside at AL Nursing Home and to receive a package of care therein in accordance with her assessed needs;
(2)In order to prevent harm to UR, it is not necessary for her to reside at AL Nursing Home;
(3)UR's continued residence at AL Nursing Home is not a proportionate response to the likelihood of her suffering serious harm if she were not a detained resident.

5. Upon UR leaving the jurisdiction of England and Wales, the Local Authority, in its capacity as the supervisory body, is directed to terminate the standard authorisation.

AND IT IS ORDERED THAT:

6. Permission is granted to the parties to jointly instruct Mr Tomasz Kurek of Kurek & Partners Law Office, Warsaw, Poland, to prepare the power of attorney and to thereafter make the necessary application to the Voivode to confirm UR's Polish citizenship. The court approves 1-2 hours of work at a cost of between £100-200 plus 23% VAT for the preparation of the power of attorney and 10-15 hours of work at a cost of £1,000-1,500 plus 23% VAT for the application to be made to the Voivode. Such cost shall be apportioned equally between the parties and is a necessary expense upon UR's public funding certificate.

7. The Local Authority and CCG shall, forthwith, take the necessary steps to ensure that the transition plan [E/96-90] and, upon completion, an updated care plan (prior to her discharge from AL Nursing Home) are translated into Polish, and for copies to be thereafter provided to UR's sister and niece. The transition plan will be provided to UR's sister and niece within 4 weeks of the date of this order, and the updated care plan within 2 weeks of it being completed. Any costs in relation to such translation are to be borne equally by the Local Authority and CCG.

8. Upon UR leaving the jurisdiction of England and Wales, these proceedings shall conclude.

9. The solicitor for the Local Authority has permission to disclose a copy of this order to AL Nursing Home.
10. The Local Authority shall ensure that a copy of this order is provided to its DoLS team.

11. *The CCG shall ensure that a copy of UR's medical records (hospital and GP) are provided to any health and social care provider in Poland (which is/ will be providing health and social care to UR in Poland) upon being notified of the names/ addresses of any providers.*

12. *Liberty to any party to apply at 48 hours' notice to the court and the other parties to vary or set aside any of the terms of this order on a general basis. Additionally, if UR indicates a wish to return to the UK during the 3-day window staff are with her in Poland and lacks capacity to make the decision to return to England, an urgent hearing will be required which will need to consider (inter alia) whether UR remains habitually resident in England and Wales. Any application so made shall be reserved to Mr Justice Hayden.*

13. *This order takes effect when made, whether or not it bears the seal of the court.*

14. *No order as to costs, save for a detailed assessment of the costs of UR who is a legally aided party.*