IMPORTANT NOTICE

These proceedings were conducted in private, pursuant to an order made on 2nd November 2020. This judgment may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number: [2021] EWCOP 34

Case No: 1363030

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF YC

B E T W E E N

YC
(through her Accredited Legal Representative, Michael Barrett)

Appellant

and

(1) THE CITY OF WESTMINSTER
(2) SC

Respondents

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 27th May 2021

Before :

Her Honour Judge Hilder

Hearing: 1st February 2021
with subsequent written submissions

Ms. Asma Nizami (instructed by Burke Niazi Solicitors) for the Appellant
Mr. Michael Paget (instructed by The City of Westminster Council) for the Respondent

In the exceptional circumstances of covid-19 pandemic, the hearing was conducted in private pursuant to an order made on 2nd November 2020. The judgment was handed down to the parties by e-mail on 27 May 2021. It consists of 22 pages, and has been signed and dated by the judge.

References in the form [**XX**] refer to pages of the bundle for the hearing on 2nd November 2020. References in the form [**AppXX**] refer to pages in the bundle for the appeal hearing on 1st February 2021.

A. The Issue

1. This appeal raises an important question about how supervisory bodies should evidence their scrutiny of requests for authorisation of deprivation of liberty.

2. Schedule A1 of the Mental Capacity Act 2005 ("the Act") sets out a regime ("the DOLS regime") for authorisation of deprivation of liberty in the care arrangements of residents of hospitals and care homes. Section 21A of the Act sets out powers of the Court in respect of such authorisations.

3. A standard authorisation in respect of YC's living arrangements at FC Care Home was purportedly granted by The City of Westminster on 16th June 2020. YC's representatives contend that the authorisation was invalid because of errors in one section of Form 5, which is the written authorisation. Their argument was dismissed by Deputy District Judge Kaufman at a remote hearing held on 2nd November 2020. YC's representatives now appeal that decision.

B. Matters Considered

4. I have considered the bundle and other documents prepared for the hearing on 2nd November 2020, including:

On behalf of YC:

Statements by Michael Barrett dated 6th August 2020 [**G1**], 21st September 2020 [**G67**] & 14th October 2020 [**G75**]

Position statements by Ms. Nizami dated 10th August 2020 [**A1**] & 30th October 2020 [**AppA43**] and a skeleton argument dated 27th October 2020 [**A18**]

On behalf of The City of Westminster:

Statement by Andrew Seymour, dated 10th August 2020 [**G23**]

Statement by Angela Tanner, dated 9th September 2020 [**G27**]

Position statement [**AppA49**] and skeleton argument [**AppA41**] by Mr. Paget

5. I have also considered a transcript of the hearing on November 2nd which has been approved by the judge, skeleton arguments on behalf of each party for the appeal hearing (dated 28th and 18th January 2021 respectively) and further written submissions after the hearing (dated 8th and 12th February 2021 respectively.)

C. The Facts and Background

6. YC is now 89 years old. She has dementia and various physical health issues, and presently lives at FC Care Home.

7. Up to the appeal hearing, there had apparently been little attention paid to clarifying the details of YC's family life. One son, S, is a party to these proceedings but he has referred to having two brothers [**G32**] and a sister with 5 adult offspring [**transcript page 2**]. YC herself says she has thirteen children [**F5**]. It has now been clarified that in fact YC has five children and eight grandchildren. No family members appeared at the hearing on 2nd November or at the appeal hearing.

8. Since 1993 YC had been living in a flat rented from the Local Authority. Latterly, she had carers visiting several times a day. On a number of occasions the carers found YC on the floor when they arrived. Between July 2019 and February 2020, YC had ten admissions to hospital, varying in length from one to eleven days. The hospital records [**G32**] refer to "behavioural issues – will put herself on the floor when she knows carers are coming to get back into hospital. Admits she is lonely and doesn't like living on her own." On 12th March 2020, in the early days of the covid-19 pandemic, YC was discharged from hospital to her current residential placement.

9. On 16th June 2020 a Standard Authorisation for deprivation of YC's liberty at FC Care Home was apparently granted, with a single condition, namely that the Managing Authority "consider whether it is possible and safe to take [YC] out for some fresh air and reduce restrictions on her. She is currently confined to her room." [**F22**]

10. YC has expressed a largely consistent wish to return to her home. Accordingly, with the assistance of her RPR, a COPDLA application dated 31st July 2020 [**D1**] was made to challenge the standard authorisation. There is no mention in the application papers of any concerns with the validity of the standard authorisation but it would appear from section 10.2 of form COPDLA that no copy of the standard authorisation was available to YC's representatives at the time of preparing the application.

11. On 3rd August 2020 an order [**D19**] was made in standard terms, appointing Michael Barrett of Burke Niazi Solicitors as Accredited Legal Representative for YC, joining the City of Westminster as Respondent, providing for S and any other children to be notified, and listing the matter for a hearing, to be conducted remotely, on 13th August 2020.

12. An amended version of the standard authorisation was filed and served on 5th August 2020 [**G14**].

13. The first hearing was vacated by consent on the day it was due to take place. A position statement filed in advance on behalf of YC [**A1**] includes a section headed "Validity of

Standard Authorisation", setting out the ALR's view that the standard authorisation "was never valid for wont (*sic*) of scrutiny". The order [**D14**] includes two recitals of note:

- one identifies the errors in the original Form 5, sets out the chronology of its correction, and itemises the ALR's concerns about the validity of the standard authorisation as a result; and
- another notes the statement of Andrew Seymour explaining the basis of the error and the local authority's position that the standard authorisation is valid.

A direction was given for the City of Westminster to respond to these concerns, and the matter was relisted on 2nd November when the court would "make a decision about" the validity issues.

D. The Validity Issues

14. The qualifying requirements for an authorisation under the DOLS regime are standardly evidenced in forms devised jointly by the Department of Health and the Association of Directors of Adult Social Services. In YC's case, Form 3 [**F1**] addresses the age requirement, the no refusals requirement and the best interests requirement; and Form 4 [**F14**] addresses the mental capacity requirement, the mental health requirement and the eligibility requirement.

15. It is common ground between the parties that both Form 3 and Form 4 are fully and accurately completed in respect of YC (although the best interest conclusion is in issue.)

16. Pursuant to paragraph 54 of Schedule A1 of the Act, a standard authorisation must be in writing. Pursuant to paragraph 55, it must state specified matters – the name of the relevant person, the name of the relevant hospital or care home, the period during which the authorisation is to be in force, the purpose for which the authorisation is given, any conditions subject to which the authorisation is given, and the reason why each qualifying requirement is met. The standard form for meeting these requirements is Form 5.

17. It is common ground between the parties that Form 5 [**F21**] fully and accurately states all the required matters in respect of YC.

18. The ALR's concerns about the standard authorisation relate to the single section of Form 5 headed "Evidence of Supervisory Body Scrutiny." The preamble to this section states that "[t]he authoriser should indicate why they concur with the conclusions of the assessors reports and demonstrate overall scrutiny of the process." The Form 5 is signed by Andy Seymour, who is therefore the "authoriser" for the purposes of this section. Over almost two pages of narrative in this section, nineteen out of twenty-five references to the subject of the authorisation (as identified in the Schedule to this judgment) refer to "Ms. Hull". Six references to the subject of the authorisation, interspersed with the references to Ms Hull, correctly name YC.

19. The concern of YC's ALR is that the repeated references to Ms Hull indicate a lack of adequate scrutiny and call into question the validity of the decision made by the supervisory body. Moreover, he contends that a supervisory body cannot amend a defective Form 5 after a period of seven weeks has passed.

20. The City of Westminster considers that the standard authorisation was validly granted on 16th June 2020, and the amended version merely corrected insignificant slips in the paperwork (otherwise retaining all details of the original, including the date of the grant). Moreover, it has filed a statement by the authoriser, confirming that:

> "*In error I had used the name Ms. Hull, in part, when I had meant to write [YC]. The substantive information set out in the Form 5 is correct and relates to [YC] only….*
>
> *I can confirm that I undertook the scrutiny of the related assessments. However, I can see that I made a mistake and in part used Ms. Hull's name where clearly the form and all information contained within the form, related to [YC]….*
>
> *I have checked the paperwork relating to Ms. Hull and I can confirm that there are no errors contained within the documentation.*"

E. <u>The hearing on 2nd November 2020</u>

21. In the exceptional circumstances of the global covid-19 pandemic, the hearing on November 2nd 2020 was conducted remotely, by telephone. YC was represented, through her ALR, by Ms. Nizami; and the City of Westminster was represented by Mr. Paget. Mr Seymour, Ms. Tanner and a trainee social worker also joined the hearing. YC's son S did not take part but he had spoken to her representatives before the hearing to confirm his wish to be joined as party to the proceedings.

22. The judge confirmed that she had read the bundle and referred to Counsels' position statements and skeleton arguments. Questions about capacity evidence were considered and then the validity issues were raised by the judge in the following terms:

> "*Going back to Ms. Nizami, the issue of the validity of the standard authorisation, I think I can take this fairly shortly. I very carefully read the document and it seems to me that it's clear that there are typographical errors in the standard authorisation document and that's unfortunate and very regrettable, but as all of us know, typographical errors do find their way into documents and I'm satisfied, having looked at all of the documents in the round, that there was a sufficient consideration of YC's circumstances and the error was in the typography or the form, as Mr. Paget has said, and not in the substance of the consideration.*
>
> *…I'm satisfied that it is a valid standard authorisation; that's on the basis of what I've read, Ms. Nizami. If you want to address me further, then, of course, I'm very happy to hear those things, but I thought having had skeleton arguments, it might help you if I was to tell you where I was on the basis of those*."

23. Ms. Nizami did indeed want to make representations, and began by clarifying the judge's view as to from what point the standard authorisation was valid. The judge confirmed that

> "*My view on the papers is that it has been valid throughout and that the correction of the erroneous name of Ms Hull ….. was a fairly cosmetic change and that the date of the validity started off as June and continues all the way through*."

24. Ms Nizami went on to submit that repeated reference to someone who is not P was insufficient to demonstrate the requisite scrutiny, and the correcting of the form was not effective to validate it. In response to a question from the judge, she accepted that she could not point to any personal or biographical feature in Form 5 which did not relate to YC but argued that many of the sentences where it says 'Ms. Hull' are generic sentences that could apply to any P. The "level of muddle", she contended, "just doesn't indicate that the supervisory body has properly carried out an assessment of this individual case and that the active scrutiny that's required …. has taken place."

25. Mr. Paget made contrary submissions, that the arguments on behalf of YC amounted to "a triumph of form over substance in the extreme," after which the judge turned to other issues. She gave her decision on each issue in turn towards the end of the hearing. In respect of the validity issues she said:

> "*I'm not persuaded on the standard authorisation point. I am not going to make any order regarding the invalidity of the standard authorisation. I'm satisfied that the necessary and proper consideration was given to the circumstances of YC and that what we are faced with is typographical and form errors. As I say, unfortunate, but it happens in many documents*."

26. Ms. Nizami subsequently asked for permission to appeal but it was refused.

27. The order [**AppA57**] which was subsequently issued included the following paragraphs:

> "**AND UPON** the court having considered the documents filed by both parties in advance of the hearing
>
> ….
>
> **AND UPON** the court being informed that the standard authorisation documentation contains typographical errors, these relate to the name of YC, but that there are no personal or biographical details which do not relate to YC
>
> …..
>
> 1. YC is subject to the standard authorisation made on 16th June 2020."

28. There is no explicit reference to the statement by Mr. Seymour, either in the transcript of the hearing, or in the issued order.

F. <u>The appeal proceedings</u>

29. YC's representatives made a further application for permission to appeal (as they are entitled to do pursuant to Rule 20.6(3) of the Court of Protection Rules 2017), on form COP35 dated 19th November 2020, filed with a COP37 Skeleton and a statement of grounds in support.

30. By order made on 9th December 2020, pursuant to Rule 20.8(1)(b) of the Rules, I granted permission to appeal that part of the order of the order of 2nd November which provided that YC "is subject to the standard authorisation made on 16th June 2020". A recital to the order records my satisfaction that "there is a compelling reason why the appeal should

be heard, namely the lawfulness of living arrangements which amount to a deprivation of liberty." The Court staff were directed to obtain a transcript of the 2nd November hearing at public expense. Provision was made for City of Westminster to file a COP36 response, and the appeal was listed for attended hearing.

G. Law and Procedure

31. Article 5(1) of the European Convention on Human Rights ("the Convention") provides that everyone has the right to liberty and security of person and that no one shall be deprived of their liberty save in cases specified in the Article (which include cases involving persons of "unsound mind") and in accordance with a procedure prescribed by law.

32. Article 5(4) of the Convention provides that every person deprived of their liberty by arrest or detention is entitled to take proceedings by which the lawfulness of that detention shall be decided speedily by a court.

33. The Convention was incorporated into domestic law by the Human Rights Act 1998, section 6(1) of which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right.

34. In *M v. Ukraine* [2012] ECHR 2452/04 at paragraph 56, the European Court of Human Rights stated as follows:

> "The lawfulness of detention depends on conformity with the procedural and substantive aspects of domestic law (see *Winterwerp*….). However, not every fault discovered in a detention order renders the underlying detention as such unlawful for the purposes of Article 5(1). A period of detention is, in principle, 'lawful' if it is based on a court order. For the assessment of compliance with art 5(1) of the Convention a basic distinction has to be drawn between *ex facie* invalid detention orders – for example, given by a court in excess of jurisdiction or where the interested party did not have proper notice of the hearing - and detention orders which are *prima facie* valid and effective unless and until they have been overturned by a higher court. A detention order must be considered as *ex facie* invalid if the flaw in the order amounted to a 'gross and obvious irregularity' in the exceptional sense indicated by the Court's case-law (see *Mooren v. Germany* [2009] ECHR 11364/03 ….) The reasoning of the detention order is a relevant factor in determining whether a person's detention must be considered as arbitrary…"

35. In *Mooren v. Germany,* the judgment included a "recapitulation of the relevant principles" in the following terms:

> "72. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5(1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness…..

….

74. … not every fault discovered in a detention order renders the underlying detention as such unlawful for the purposes of art 591). A period of detention is, in principle, "lawful" if it is based on a court order. A subsequent finding of a superior domestic court that a lower court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention….

75. … a basic distinction has to be made between ex facie invalid detention orders….and detention orders which are prima facie valid and effective unless and until they have been overturned by a higher court. A detention order must be considered as ex facie invalid if the flaw in the order amounted to a "gross and obvious irregularity"…. Accordingly, unless they constitute a gross and obvious irregularity, defects in a detention order may be remedied by the domestic appeal courts in the course of judicial review proceedings."

36. The DOLS regime was a late import into the Mental Capacity Act 2005, intended to meet Convention requirements in the light of the protracted *Bournewood* litigation. Paragraphs 1 and 2 of Schedule A1 of the Act together provide that the managing authority of a hospital or care home may deprive a person ('P') of their liberty for the purpose of being given care or treatment if a standard or urgent authorisation is in force, and that authorisation relates to P and to the hospital or care home in which P is detained.

37. Part 4 of Schedule A1 makes provision for standard authorisations. Notably:-

    a. only the supervisory body may give a standard authorisation (paragraph 21);
    b. the supervisory body may not give a standard authorisation unless the managing authority of the hospital or care home has requested it (paragraph 22);
    c. once a request has been made, the supervisory body must secure assessments in respect of six qualifying requirements (paragraph 33);
    d. the supervisory body **must** give a standard authorisation if all assessments are positive and it has written copies of them (paragraph 50) but **must not** give a standard authorisation otherwise (paragraph 51) (emphasis added);
    e. the standard authorisation must be in writing (paragraph 54); and
    f. the standard authorisation must state the name of the relevant person, the name of the relevant hospital or care home, the period during which it is to be in force, the purpose for which it is given, any conditions subject to which it is given and the reason why each qualifying requirement is met (paragraph 55).

38. There is no provision for correction or rectification of documents created as part of the DOLS regime to be found anywhere in the Act, the DOLS Code of Practice, or the Guidance on DOLS forms issued by the Association of Directors of Adult Social Services (ADASS).

39. The Appellant contrasts this absence of provision with the position in mental health law, where:

a. section 15(1) of the Mental Health Act 1983 provides for rectification of "incorrect or defective" forms within 14 days of the start of detention authorised by that statute; but
b. in *R v. South Western Hospital Managers ex p. M* [1994] 1 All ER 161 at 177, Laws J determined that such provision could not "cure a defect which arises because a necessary event in the procedural chain leading to the detention has simply not taken place at all. It is essentially concerned with correction of errors on the face of the document;" and
c. in *Re S-C (Mental Patient: Habeus Corpus)* [1996] 1 All ER 532 at 537, Sir Thomas Bingham MR determined that such provision could not be used to enable a "fundamentally defective application to be retrospectively validated."

40. The Respondent has made some reference to Part 8 of Schedule A1, which makes provisions for review of standard authorisations. Paragraph 102(1) provides that the supervisory body may at any time carry out a review of a standard authorisation "in accordance with this Part." Other provisions of that Part specify the grounds on which qualifying requirements are reviewable, and include requirements both to start a review by deciding which, if any, of the qualifying requirements appear to be reviewable (paragraph 109) and also to give notice to specified persons before the begins or as soon as practicable thereafter (paragraph 108).

41. The Respondent has also referred to "the slip rule". There is such a provision at Rule 5.15 of the Court of Protection Rules 2017 but Mr. Paget was referring more generally to "the context of civil litigation" and Rule 40.12(1) of the Civil Procedure Rules, which provides that "The court may at any time correct an accidental slip or omission in a judgment or order." He invited me to consider the judgment in *Bristol-Myers Squibb Co v. Baker Norton Pharmaceuticals Inc (No. 2)* [2001] RPC 913, where the Court of Appeal stated (at paragraph 25) that the slip rule does not enable a court to have second or additional thoughts but it does allow an order to be amended to give effect to the intention of the court.

42. The general powers of the Court are set out in sections 15 – 21 of the Act. In particular, section 15(1) provides that 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."

The provisions of section 15 are understood to be exhaustive ie there is no power to make declarations other than as specified.

43. The powers of the Court specifically in respect of standard authorisations are set out at section 21A of the Act, in the following terms:

"(2) Where a standard authorisation has been given, the court may determine any question relating to 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.

44. The operation of the DOLS regime was considered by Peter Jackson J (as he then was) in the case of *London Borough of Hillingdon v. Neary* [2011] EWCOP 1377. The Court of Protection was invited to make a declaration that Hillingdon acted unlawfully in breach of Articles 5 and 8 of the Convention in keeping Steven Neary in a support unit between January and December 2010. Hillingdon contended that for a part of that period, from April to December 2010, a series of authorisations granted under the DOLS regime clothed its arrangements for Steven with legal entitlement.

45. Peter Jackson J identified (at paragraph 151) that "the real issue relates to Steven's absence from his home, rather than the deprivation of liberty to which he is to some degree or other necessarily subject wherever he lives." Departing from the approach taken by the parties, Peter Jackson J declined to view the case primarily through the prism of Article 5 because to do so "risks repeating a central fallacy and conflating the secondary question of whether a person is lawfully deprived of their liberty with the primary question of where he should be living" (paragraph 152). Instead, he first considered the question of whether there had been a breach of Steven's right to respect for his private and family life under Article 8 of the Convention. He acknowledged that the mere fact that a local authority's view of best interests is not subsequently upheld by a court does not show that Article 8 rights have been infringed, but he concluded that there had been such an infringement in respect of Steven Neary (paragraph 155).

46. Peter Jackson J then went on to consider whether Steven had been deprived of his liberty without lawful authority in various periods, including those in which standard authorisations had been granted. In doing so, he spelled out what is expected of the supervisory body:

"174. Although the framework of the Act requires the supervising body to commission a number of paper assessments before granting a standard authorisation, the best interests assessment is anything but a routine piece of paperwork. Properly viewed, it should be seen as a cornerstone of the protection that the DOL safeguards offer to people facing deprivation of liberty if they are to be effective as safeguards at all.

175. The corollary of this, in my view, is that the supervisory body that receives the best interests assessment must actively *supervise* the process by scrutinising the assessment with independence and with a degree of care that is appropriate to the seriousness of the decision and the circumstances of the individual case that are or should be known to it.

176. Paragraph 50 provides that a supervisory body must give a standard authorisation if all assessments are positive. This obligation must be read in the light of the overall scheme of the schedule, which cannot be to require the supervisory body to grant an authorisation where it is not or should not be satisfied that the bests interests assessment is a thorough piece of work that adequately analyses the four necessary conditions.

177. In support, I refer to the fact that the supervisory body has control over the terms of the authorisation in relation to its length and any conditions that should be attached. It does not have to follow the recommendations of the best interest assessor on those issues. It would not be possible for the supervisory body to make decisions of this kind rationally without having a sufficient knowledge base about the circumstances of the person affected. In all cases, it is open to the supervisory body to go back to the best interests assessor for discussion or for further enquiries to be made.

178. I also refer to the decision of Mr. Justice Charles in *A County Council v. MB & Ors* [2010] EWHC 2508 (COP). In that case, a best interest assessor had conscientiously concluded that the best interests requirement was not met in the case of an elderly lady in a residential home, even where there was no practical alternative accommodation for her to go to. At paragraph 19, the judge described the assessor's reasoning as flawed because she did not compare and contrast viable and practically available alternative placements. This is an example of the kind of scrutiny that can be carried out by a supervisory body as well as by a court.

179. I also rely on the obvious fact that the intention of paragraph 50 cannot be to require a supervisory body to give an authorisation simply because the best interests assessment makes a positive recommendation, whatever the quality of the work disclosed in the assessment. On behalf of Hillingdon, it was accepted for the sake of argument that it would not be bound by an assessment that was in effect so poor as to be "a joke", so it follows that paragraph 50 cannot be read as if it simply required a positive answer without cogent reasoning. Hillingdon has however suggested that a supervisory body is bound to act upon any best interests assessment that is not grossly and obviously defective.

180. Against this, the EHRC and the Official Solicitor argue that where a supervisory body knows or ought to know that a best interests assessment is inadequate, it is not obliged to follow the recommendation. On the contrary, it is obliged to take all necessary steps to remedy the inadequacy, and if necessary bring the deprivation of liberty to an end, including by conducting a review under Part 8 or by applying to the court. This is in my view a correct statement of the law. The suggestion that the supervisory body is bound to act on any assessment that is not grossly and obviously defective sets the standard too low. It supposes an essentially passive supervisory

body. This would not meet the objectives of the Act and would not provide effective protection against breaches of Article 5.

181. The nature of this process for supervisory bodies is not likely to be very burdensome, given the relatively small number of cases, and if it were it would be fully warranted to ensure that the right outcomes are reached for people who are likely to be the most vulnerable service users. It should never be a rubberstamping process. A standard authorisation has the same effect as a court order and there is no reason why it should receive lesser scrutiny."

47. A litany of flaws was identified in the assessments underlying the DOLS authorisations, and the scrutiny of those assessments, including:

a. (paragraph 182) omission of any mention of Steven's wish to go home, or Mr. Neary's request that Steven should be returned to his care, or of placement at home as a means of avoiding deprivation of liberty;
b. (paragraph 183) the service manager processing the standard authorisation ought to have known that there was a major issue about whether Steven should have been at the support unit at all, and should have sent the best interests assessment back for reconsideration of that issue and for clarification of the other missing elements.
c. (paragraph 187) even in the latest period, when the possibility of a return home was squarely raised, it was not answered. Steven's wishes were not referred to. The length of the authorisation was not explained.

The decision about Steven was found to have been made on the basis of insufficient scrutiny of inadequate information, with the consequence that the resulting standard authorisation did not constitute a lawful basis for deprivation of liberty (paragraph 184).

48. Such were the concerns raised by the facts of the *Neary* case that Peter Jackson J identified (at paragraph 33) "practice issues," two of which bear restating in the present context:

a. <u>The purpose of DOL authorisations and of the Court of Protection</u>: Significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection, where decisions can be taken as a matter of urgency where necessary. The DOL scheme is an important safeguard against arbitrary detention. Where stringent conditions are met, it allows a managing authority to deprive a person of liberty at a particular place. It is <u>not</u> to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all..."
b. <u>The responsibilities of the supervisory body</u>: The granting of DOL standard authorisation is a matter for the local authority in its role as a supervisory body. The responsibilities of a supervisory body, correctly understood, require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision and to the circumstances of the individual case that are or should be known to it. Where, as here, a supervisory body grants authorisations on the basis of perfunctory scrutiny of superficial best interests assessments, it cannot expect the authorisations to be legally valid.

49. I have also been referred to the more recent decision of *Devon Partnership NHS Trust v. Secretary of State for Health and Social Care* [2021] EWHC 101, in which the High Court was asked to consider whether provisions in the Mental Health Act 1983 requiring that a patient be "personally examined" or "personally seen" could, in the circumstances of the covid-19 pandemic at least, be construed as encompassing interaction with the patient by remote technology such as Skype, Microsoft Teams, Zoom, WhatsApp and Facetime.

50. The conclusion reached was that the statutory provisions could not be so construed – they required the physical attendance of the person in question on the patient. Of the six particular considerations which lead to this conclusion, one was expressed as follows:

> "56. **First**, subsections 11(5) and 12(1) [of the Mental Health Act 1983] set preconditions for the exercise of powers to deprive people of their liberty. In this country, powers to deprive people of their liberty are generally exercised by judges. It is exceptional for such powers to be exercisable by others. Where they are (i.e. where statute authorises administrative detention), the powers are to be construed 'particularly strictly': see the extract from *Bennion* cited above, which cites the decision of the Privy Council in *Tan Te Lam v. Superintendant of Tai A Chau Detention Centre* [1997] AC 97, at 111 (Lord Browne-Wilkinson) and the decision of the Court oif Appeal in *R(B) v. Secretary of State for the Home Department* [2016] QB 789, at [32] (Lord Dyson MR). The question of construction with which we are now concerned must, in our view, be seen thorough this lens."

51. Turning to the procedure for appeals in the Court of Protection, the following provisions of Part 20 of the Court of Protection Rules 2017 are relevant:

> **"20.8 Matters to be taken into account when considering an application for permission**
>
> (1) Permission to appeal shall be granted only where –
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard.
>
> ….
>
> **20.13 Power of appeal judge on appeal**
>
> (1) In relation to an appeal, an appeal judge has all the powers of the first instance judge whose decision is being appealed.
>
> (2) In particular, the appeal judge has the power to –
>
> (a) affirm, set aside or vary any order made by the first instance judge;
>
> (b) refer any claim or issue to that judge for determination;

(c) order a new hearing;

(d) make a costs order.

(3) The appeal judge's powers may be exercised in relation to the whole or part of an order made by the first instance judge.

20.14 Determination of appeals

(1) An appeal shall be limited to a review of the decision of the first instance judge unless –

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the appeal judge considers that in the circumstances of the appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless the appeal judge orders otherwise, the appeal judge shall not receive –

(a) oral evidence; or

(b) evidence that was not before the first instance judge.

(3) The appeal judge shall allow an appeal where the decision of the first instance judge was –

(a) wrong; or

(b) unjust, because of a serious procedural or other irregularity in the proceedings before the first instance judge.

(4) The appeal judge may draw any inference of fact that the appeal judge considers justified on the evidence.

(5) At the hearing of the appeal, a party may not rely on a matter not contained in the appellant's or respondent's notice unless the appeal judge gives permission.

H. The submissions of the parties

52. The Appellant: YC's representatives contend that Form 5 provides the assurance, on behalf of the state, that the issues engaged in determination of a detained person's Article 5 Convention rights have been properly considered and determined. Fundamentally, if a reader of Form 5 is forced into making assumptions and guesses about who is being referred to in relevant paperwork, the Form 5 has not fulfilled its purpose.

53. At the hearing on 2nd November the judge asked YC's counsel to indicate whether any of the sentences including the name Ms Hull did in fact not relate to YC. Ms. Nizami could not. As I understand it, the argument on behalf of YC is not that the errors in question definitely do not refer to YC; but rather, that it can't be said with confidence that they definitely do refer to her. It is not clear why the reference to 'Ms Hull' is obviously an error, as opposed to the references to YC being the error. The reader of Form 5 is forced to speculate.

54. YC's representatives refer to the Cambridge Dictionary definition of "typo" as a "small mistake in a text made when it was typed or printed." They concede that, where a supervisory body wrote "his" instead of "her" in Form 5 (which does indeed occur once in this matter, at line 42), such could be considered a typographical error. The actual errors in this matter, however, cannot be so characterised. The location, nature and sheer number of the errors calls into question the level of scrutiny and suggests that there has been "gross and obvious irregularity."

55. Ms. Nizami argues that the requirements of the DOLS regime must be complied with particularly strictly given that the process allows public bodies to deprive individuals of their liberty. The range of checks and balances built into the system is crucial, and relaxation to excuse errors of the instant type is simply not justified. Parliament cannot have intended that supervisory bodies should be able to make multiple errors in the very document intended to evidence scrutiny, and for it not to call into question the level of scrutiny carried out. It is not open to a supervisory body to "correct" deficiencies as it purported to. The first instance judge was wrong to conclude that there was no flaw in the substance of the consideration, and that the subsequent correction was "fairly cosmetic."

56. In oral submissions, I asked Ms. Nizami about the effect of Andrew Seymour's statement. She accepted that Mr. Seymour was not cross-examined, and her recollection was that he was not at the 2nd November hearing. However she maintained that the Appellant "at no stage accepted his evidence." She considers that the consent order of 13th August, her position statement for the hearing on 2nd November 2020, and her skeleton argument for the appeal hearing, make this clear. She said that she had only just become aware, checking the transcript, that Mr. Seymour was in fact at the 2nd November (remote) hearing. In any event, "intention" alone is not sufficient – it is important that the document evidences the process actually undertaken.

57. I also asked if there were any concerns about the assessments underlying the standard authorisation. Ms.Nizami confirmed acceptance on behalf of the Appellant that all the required assessments were properly completed, and that it is not part of her case that there was any substantive flaw in them.

58. <u>The Respondent</u>: Westminster's position is that, all other parts of the standard authorisation having been correctly completed, the errors of referring to 'Ms Hull' rather than using YC's name are not significant. At most they raised a *prima facie* question about the validity of the authorisation. Mr Seymour has confirmed in his statement that it was his intention throughout that the Form 5 would relate to YC, and none of the details refer to any other person. That evidence was not challenged by the Appellant by cross-examination or otherwise, was accepted by the court, and is therefore determinative of any question about the authoriser's intention. The errors are of form, not substance; they do not demonstrate any lack of scrutiny; and they do not affect the lawfulness of the detention. They were legitimately corrected in accordance with what was always the intention.

59. In his written skeleton argument, Mr. Paget suggested that the correction of the Form 5 was in compliance with paragraph 102 of Schedule A1 ie by way of review. Rightly in my view, he did not pursue that argument with any vigour in oral submissions. Rather, he urged a realistic approach to procedures: "errors will be made and errors will be missed." It submits that the supervising body's protocols, and the regulatory oversight of the Care Quality Commission are sufficient to ensure a supervisory body's substantive compliance with its duties under Schedule A1. Any additional requirement, such as every authorisation being checked by another employee, would be disproportionate and in any event not itself fail-safe.

60. The Respondent contends that the position taken by YC's representatives is not properly explained: accepting as they do that *de minimis* errors do not invalidate a standard authorisation, why does repetition of an error make it a matter of substance? And how was the judge's acceptance of the evidence an error of law? "Detailing, categorising and itemising" the errors in Form 5 does not "clearly demonstrate" a lack of scrutiny, and the judge made no error in rejecting argument to that effect.

61. In response to questions from me, Mr. Paget's submission was that section 21A(2) of the Act is wide enough to provide a jurisdiction in the Court to decide "where is the joke?" which would invalidate a standard authorisation but, where the Appellant accepts that all the assessments were satisfactorily completed, a challenge under s21A(2)(a) should be dismissed. An application to the Administrative Court in respect of paperwork errors would have no traction without an underlying error of law in the decision-making process, and would probably fail the "highly likely" test of section 31(2)(A) of the Senior Courts Act 1981, even if such an application was possible from the point of view of costs. In effect, in the absence of any applicable slip rule, there is no remedy to correct an error of the type under consideration. He saw no reason why the role of Relevant Person's Representative could not encompass some sort of checking function.

I. Discussion

62. The Appellant's case rests on the assumption that the Court of Protection has jurisdiction to make a declaration as to the validity of a standard authorisation beyond the scope of the questions which it may determine as identified at section 21A. During the appeal hearing, I questioned that assumption. Although the 'best interests' requirement is in issue, that is not the subject of this appeal. The first instance judge was, and I am, asked to determine the validity of a public body's decision-making process. The Court of Protection does not have a general public law jurisdiction (ie where it is said that a local authority has made a decision unlawfully, judicial review proceedings are required.)

63. In her post-hearing submissions, Ms. Nizami has referred me to *YA(F) v. A Local Authority, YA(M), A NHA Trust, A Primary Care Trust* [2010] EWHC 2770 (Fam), a decision of the then Vice-President, Charles J. The case concerned whether or not the Court of Protection had jurisdiction to award damages to the mother of P in circumstances where "(i) [P] was taken to hospital…by his mother, and (ii) he was not however returned home from the hospital but was moved from that hospital to a placement, the identity of

which was kept from the mother."[1] There is no mention at all in the judgment of any standard authorisation. The decision of Charles J was that an application to the Court of Protection for an award of damages to P's mother for breach of her Convention rights was refused, on the basis that the Court had jurisdiction under the Human Rights Act (although he also provided for further proceedings to be listed before him in the Queen's Bench Division.) In my view, this judgment does not assist in the present context.

64. Careful consideration of Jackson J's reasoning in the *Neary* case is more illuminating. He was asked to, and did in fact, make declarations about breaches of Convention rights, not about the lawfulness of a standard authorisation – see paragraph 32 of the judgment. He expressly declined to consider the case primarily through the prism of deprivation of liberty (Article 5), and focussed instead on Steven's right to respect for his family life (Article 8) – paragraphs 151 and 152.

65. Having determined that fundamentally there was a flawed decision to keep Steven from his home and family, he rejected the argument that a standard authorisation could clothe that fundamental illegality with legal entitlement. Furthermore, at paragraph 26, he stated that "the authorisations relied upon were flawed, and even if they had been valid, they would not in themselves have amounted to lawful authority for keeping Steven at the support unit." (emphasis added)

66. In essence, this approach treats the "dols regime" as a matter of procedure, very much secondary to the underlying question of lawfulness in terms of the Convention. In the matter currently under consideration, there is no issue about underlying lawfulness of arrangements – it is accepted that assessments were properly undertaken and the living arrangements which followed from the conclusions of those assessment were valid. The issue is limited to one of procedure.

67. The context in which the *Neary* case was considered ought to be acknowledged. At paragraph 181, Jackson J observed that the procedural expectations identified in respect of granting a standard authorisation were "*not likely to be very burdensome, given the relatively small number of cases.*" Since then, the understanding of what amounts to a deprivation of liberty has been significantly widened by the Supreme Court in the matter so widely known as to be generally referred to simply as *Cheshire West,* reported at [2014] UKSC 19. The number of cases which fall within the DOLS regime is now far from small. Accordingly, procedural requirements do represent a challenge to the strained resources of local authorities. I acknowledge that changed context.

68. The burden of demand does not however diminish the *ratio* of the *Neary* judgment. Jackson J went on to observe that, even if the authorisation process were burdensome, the requirements

> "*would be fully warranted to ensure that the right outcomes are reached for people who are likely to be the most vulnerable service users. It should never be a*

[1] At paragraph 3

rubberstamping process. A standard authorisation has the same effect as a court order and there is no reason why it should receive lesser scrutiny."

I also acknowledge, and fully agree with, that conclusion.

69. In my judgment, the circumstances currently under consideration are clearly to be distinguished from the circumstances considered by Jackson J in *Neary*. In this matter, it is accepted that all the underlying assessments were properly completed, without substantive flaw. There is no suggestion that the outcome led the process, as it did in *Neary*; and in my judgment, that is relevant to assessing the significance of errors of form.

70. Ms. Nizami's submission to the appeal hearing was that the statement by Andrew Seymour (the "authoriser") was not considered at the first instance hearing. There is indeed no direct reference to it in the transcript of the hearing. However, that statement was clearly before the judge and moreover, Ms. Nizami's own skeleton argument specifically addressed it at paragraphs 15 – 18 [**A15**].

71. In my judgment there are two aspects of the appellant's argument to be considered: firstly whether Mr. Seymour's account of his thinking process was factually accurate, and secondly whether substantive propriety is sufficient in the face of errors of form.

72. It was not suggested, and is not now being suggested, that YC's representatives should be given an opportunity to challenge Mr. Seymour's account by cross-examination. The *Neary* case illustrates the kind of circumstances which could form the basis of a plausible challenge, but it is accepted that such circumstances did not arise here. The argument against Mr. Seymour's account is that that the use of the wrong name in the written form on so many occasions (the "scale of errors" argument) calls into question whether he really exercised any powers of scrutiny. That argument is set out at paragraph 16 of Ms. Nzami's skeleton argument. So, it is clear that the position on behalf of YC was put before the judge.

73. In my judgment, it is also clear from the judge's conclusions (in particular as set out in paragraph 25 above) that Mr. Seymour's account was accepted and the scale of errors argument was not. It was well within the ambit of the judge's powers to accept that evidence and reach that conclusion.

74. So, where the appellant accepts that underlying assessments were properly conducted and the judge accepted the authoriser's account of his thinking process, the appellant's argument comes down solely to a matter of form. In essence, even if the Supervisory Body's duty of scrutiny was in fact properly discharged, do the errors identified render the conclusion of the scrutiny exercise invalid?

75. I accept all that is said on behalf of YC in respect of Form 5 being the *evidence* of proper scrutiny. I agree that it is highly undesirable for Form 5 to leave any doubt as to whom it refers to or whether due process has been followed. However, I do not accept that errors of form *necessarily* invalidate the authorisation. Even in the serious domain of authorisations of deprivation of liberty, there is room for a degree of pragmatic realism, as is recognised in the ECHR decisions contrasting *ex facie* invalid orders and *prima*

facie valid ones, and by the 'correcting' provisions of the Mental Health Act. Where there are standardised documents, and inevitable use of information technology (including the availability of 'cut and paste'), it would be disproportionate to conclude that *every* error of form invalidates Form 5.

76. I am fortified in this conclusion by paragraph 26 of the *Neary* judgment: if even a correct ("valid") standard authorisation process cannot legitimise a substantive breach of Convention rights, it would seem logically to follow that an incorrect standard authorisation process should not *necessarily* invalidate an otherwise proper approach to Convention rights.

77. The Appellant's scale of errors argument should be considered in this context too. YC's case is put on the basis of there being nineteen errors in the Form 5. As Mr Paget says, it could equally be described as a single error, repeated many times. The impression is indeed created that standardised phrases have been used in the administrative process of writing up a decision – which, I would suggest, is very poor practice – but overall, the frequency with which the same error appears points much more clearly to administrative, than substantive, inadequacy.

78. It is also argued on behalf of YC that the errors in this matter are of a kind where it is not apparent to the reader of Form 5 whether they are errors of form or of substance; and since the whole point of Form 5 is to evidence substantive propriety, this failure is fatal. This would be more persuasive if the section headed "Evidence of Supervisory Body Scrutiny" were a free-standing document to be read in isolation. In fact, that section is only part of a longer form. It is accepted that all the identifying details in all other parts of the form relate accurately to YC, and that there is no a single instance where the sentence in which the wrong name is used does not otherwise factually apply to YC. In my judgment, again the effect is much more clearly an impression of using standardised phrases in the administrative process of writing up a decision than of substantive inadequacy.

79. Taking all the circumstances of this case into consideration, I am satisfied that the first instance judge was entitled to conclude that the errors identified in the Form 5 Standard Authorisation relating to YC were merely "typographical." When she expressed her satisfaction that "it is a valid authorisation," and that "it has been valid throughout", the reissuing of the Form 5 in August 2020 being "a fairly cosmetic change" such that the "the date of the validity started off as June and continues all the way through," she was not wrong for the purposes of Rule 20.14(3)(a).

80. It follows that the appeal cannot succeed. I affirm the substance of (the second) paragraph 1 of the order made on 2nd November 2020. In my view, the wording of that provision is questionable - it would be more clearly within the scope of the Act if the decision was expressed as dismissal of YC's application for a declaration that the standard authorisation is invalid. However, in making that observation I acknowledge that I have had the advantage of further argument at attended hearing with bundles of authorities provided, whereas the first instance judge was required to make her decision at a remote

hearing in the context of a wider list, and to approve the terms of an order several days later.

81. Notwithstanding that the appeal does not succeed, in my judgment YC's representatives were right to identify the circumstances of this case as a significant issue. In so far as this appeal offers an opportunity to improve practice, that opportunity should not be lost. I therefore invited the parties to make further written submissions, after the hearing, about how errors of form in a standard authorisation should be considered going forwards.

82. Both parties identify potential for the Relevant Person's Representative ("RPR") to have a role here:

    a. Paragraphs 139 – 140 of Schedule A1 of the Act require the appointment of an ALR whenever a standard authorisation is granted, to "represent…and support the relevant person in matters relating to or connected with this Schedule";
    b. Paragraph 57 of Schedule A1 requires the supervisory body to provide a copy of a standard authorisation to the RPR;
    c. Regulations 5 - 9 of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 make provision for appointment of a family member or otherwise a paid RPR to be appointed;
    d. Paragraph 7.2 of the Deprivation of Liberty Code of Practice describes the role of the RPR as being "to maintain contact with the relevant person, and <u>to represent and support the relevant person in all matters relating to the deprivation of liberty safeguards</u>, including, if appropriate, triggering a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection." (emphasis added).

83. On behalf of YC, it is suggested that an unpaid RPR may be less able critically to review documentation, such ability not being part of the qualifying requirements for appointment. Mr. Paget suggests that a family member RPR may in fact have a better grasp of the relevant person's biographical details. Generalisations are perhaps unwise but experience suggests that unpaid RPRs are often assiduous in their role. However, if assistance is considered appropriate, the additional appointment of an Independent Mental Capacity Advocate ("IMCA") could be considered:

    a. Section 39D of the Act provides for the appointment of an IMCA where requested by the relevant person or their RPR, or where the supervisory body considers that it would assist.
    b. Paragraphs 7.37 – 7.41 of the Code set out the role of the IMCA, including in respect of explanation and support regarding the effect and mechanics of an authorisation.

84. There appears to be broad agreement that the following procedure is both workable and appropriate:

    a. Firstly, the person granting the authorisation should carefully check that all details on Form 5 accurately reflect the other DOLS forms and relate to the particular P;

b. The Form 5 should be checked for accuracy by another member of the DOLS authorisation team of the supervisory body;
c. Form 5 should be provided to the RPR with a covering letter requesting that the RPR carefully checks that the forms, and all the information in them accurately relates to the relevant person;
d. An express requirement for the RPR to confirm accuracy to the supervisory body would be disproportionate but the RPR could do so.

85. It is not suggested that such procedure would in any way delegate the responsibility of the supervisory for the validity of its authorisations to the RPR; or that it would totally eliminate errors of form. However, in my view it would be good practice and would improve the prospects of identifying and addressing errors promptly, if necessary by a completely new assessment process.

86. Conscious of the process of reviewing Codes currently underway, and also of the anticipated introduction of the Liberty Protection Safeguards, in my view it would be appropriate now to take such steps as are required to ensure that the relevant Code explicitly includes requirement for the RPR/ "appropriate person" to check the accuracy of the forms.

J. Conclusions

87. The decision of DDJ Kaufman on 2nd November 2020 is affirmed. The appeal is refused. The application for a declaration that the standard authorisation granted on 16th June 2020 in respect of YC's living arrangements is invalid fails.

88. Nothing in this decision should be taken as undermining the seriousness of the requirements for proper scrutiny by supervisory bodies when considering granting standard authorisations. The errors in this case should not have happened. Rather, it is to be hoped that out of poor practice, the constructive engagement of both parties in this matter can point the way to better practice in the future.

HHJ Hilder

27th May 2021

Schedule

The errors in Form 5

1. line 1	"The assessment confirms that Ms Hull meets the 'acid test' as defined by the Supreme Court Judgment of March 2014."
2. line 5	"The placement is imputable to the state because Ms Hull's care is provided in a care home funded by the local authority."
3. line 8	"Ms. Hull's views have been sought and considered."
4. line 9	"Ms Hull has been encouraged and supported to take part in the assessment process."
5. line 10	"Ms Hull wishes and beliefs have been considered with regard to her current care arrangements as much as possible."
6. line 11	"Ms Hull is clearly saying she wants to go home and feels she would better be able to manage at home."
7. line 13	"The BIA has shown they discussed the role of Paid Representative with Ms Hull's son and have given appropriate reasoning as to why he would be appropriate to take on the role."
8. line 15	"That Ms Hull has been provided with the information to enable her to make a decision about her care arrangements and the reason she lacks capacity to make an informed decision regarding this."
9. line 18	"That Ms. Hull has been supported by her son."
10. line 18	"There is evidence that Ms Hull's son's views have also been considered."
11. line 28	"There is evidence of why Ms Hull moved to Forrester Court and the risks related to her not residing there."
12. line 32-33	"The BIA has also demonstrated the harm and the likelihood of harm which would occur to Ms Hull if the current arrangements were not in place."
13. line 34	"The BIA has demonstrated why she is of the opinion the arrangements are in Ms Hull's best interests."
14. line 39	"The BIA…. has looked at alternative arrangements as part of the assessment process when making a decision about what is currently in Ms. Hull's best interests."
15. line 42	"The doctor's assessment indicates why Ms Hull lacks capacity to make a decision about his care arrangements."
16. line 43	"The assessment shows how Ms Hull has been encouraged to take part in the process."
17. line 44	"The doctor has evidenced why Ms Hull is unable to understand, use or weigh the information relevant to the decision or weigh up the risks associated with the current care arrangements not being in place."
18. line 46	"The doctor has evidenced that Ms Hull has a mental disorder as described in the Mental Health Act and considered the effects of the mental disorder."
19. line 47	"The Dr has also evidenced that Ms Hull is eligible for DOLS and why this is so."

YC's correct name is used in lines 20, 23, 26, 48, 50 and 52.