

Neutral Citation Number: [2022] EWHC 3544 (Admin)

Case Nos: CO/4400/2021/ & CO/1854/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 8 September 2022

Before :

HHJ RICHARD WILLIAMS
(sitting as a judge of the High Court)

Between :

THE KING
on the application of
PHILIP PERCIVAL

Claimant

- and -

(1) POLICE & CRIME COMMISSIONER FOR
NOTTINGHAMSHIRE
(2) POLICE & CRIME COMMISSIONER FOR
DERBYSHIRE

Defendants

- and -

(3) THE CHIEF CONSTABLE OF
NOTTINGHAMSHIRE POLICE
(4) THE CHIEF CONSTABLE OF
DERBYSHIRE POLICE

Interested
Parties

The Claimant appeared In Person
MS C VENTMAN appeared on behalf of the
Defendants & Interested Parties

JUDGMENT

HHJ RICHARD WILLIAMS:

Introduction

1. The hearing before me today has been listed primarily to determine whether or not Professor Percival has mental capacity to conduct claims for judicial review of decisions made by the Police and Crime Commissioners for Nottinghamshire and Derbyshire respectively on 30 September 2021 and 22 February 2022.
2. Those decisions were ultimately not to review earlier decisions made by the relevant Chief Constables not to uphold Professor Percival's complaints of police misconduct.

Background

3. By way of agreed or not seriously disputed background, and by way of brief summary in the context of long-running litigation, in April 2017, Professor Percival issued proceedings against the Chief Constable of Nottinghamshire.
4. By those proceedings, Professor Percival claimed damages for psychological injury and pecuniary loss allegedly suffered as a result of two separate incidents:
 - a. firstly, when on 11 April 2011, he was detained by officers under section 136 of the Mental Health Act 1983; and
 - b. secondly, when on 13 April 2011, he was visited by an officer and issued with a harassment warning in relation to continuing contact with his former partner.

Professor Percival alleged by his claim that the conduct of the officers on both occasions was unlawful.

5. The claim was listed for trial to commence on 1 December 2021.
6. On 18 November 2021, HHJ Gosnell heard an application dated 15 November 2021, and made on behalf of Professor Percival, to vacate the trial date on the ground that he lacked litigation capacity. In support of that application, Professor Percival relied in particular on the written evidence of Professor Morgan.
7. It is clear from the transcript of the judgment of HHJ Gosnell that he was critical of the evidence of Professor Morgan, who failed to address specifically the test for incapacity under the Mental Capacity Act 2005 ("*the 2005 Act*"). Nevertheless HHJ Gosnell concluded:

[28]there is sufficient.... to convince me that I can take as evidence of at least one qualified clinician that this claimant does not have capacity in the legal sense, pursuant to the Mental Capacity Act.

[29] That being the case, I have no choice at this stage but to implement the procedure under Civil Procedure Rule 21.3, which states:

“If during proceedings a party lacks capacity to continue to conduct the proceedings, no party may take any further steps in the proceedings without the permission of the Court until the protected party has a litigation friend, for any step taken before.. the protected party has a litigation friend has no effect unless the court orders otherwise.”

.....

[31] For those reasons, I am very reluctantly, prepared to vacate the trial. I do so very reluctantly because.....there is no real confidence.....expressed by any medical expert that this claimant will be any better in a year’s time. He was facing a trial which he thought was a trial of all the issues in late November last year and his condition worsened to the effect that Dr Goodhead formed the view he did not have capacity.

[32] I do not know whether he has ever recovered capacity, because I do not have the opinion of a medical expert for the period from June onwards. However, I am concerned he may not have had, and he certainly does not have capacity now. If he does not have capacity, then it would be wrong for a trial to take place.”

8. HHJ Gosnell then made an order staying the claim until the appointment of a litigation friend and invited the Official Solicitor to act as litigation friend of last resort, since Professor Percival had indicated that he was unable to provide a litigation friend.
9. At this time, almost 10 months later, the Official Solicitor has still not been appointed as litigation friend nor indeed is there any updating medical evidence regarding Professor Percival’s litigation capacity.
10. What has, however, happened in the meantime is Professor Percival has issued these judicial review claims in relation to the handling of complaints that he has made about alleged police misconduct in connection with their defence of the personal injury claim, including, by way of example, alleged destruction of relevant evidence.

Analysis and conclusion

11. It is not in dispute that Professor Percival has a mental health disability and is, thereby, vulnerable. In particular, he has been diagnosed with longstanding depression and anxiety.
12. The *Equal Treatment Bench Book* provides the following useful guidance for judges when addressing the issue of litigation capacity, which includes the following [at Chapter 5]:

“.....

[11]

- Capacity is an issue of fact, though it is necessary to identify and apply

the appropriate legal definition or test.

.....

- In legal proceedings, a Judge makes the determination not as medical expert but as a lay person and on the basis of evidence not only from doctors but also from those who know the individual.

[12] General reputation is not admissible in evidence, but the treatment by friends and family of a person alleged to lack mental capacity may be admissible. Evidence of conduct at other times is admissible, and the general pattern of life of the individual may be of great weight, although it is the state of mind at the time of the decision that is material.

[13] Medical evidence is admissible and usually important, but it must be considered whether the opinion of a medical witness as to capacity has been formed on sufficient information and on the basis of the correct legal test.

.....

[14] If present capacity is the issue, it will generally be desirable for the judge to see and attempt to converse with this person before making a decision. However, the courts have emphasised that judges should be slow to form a view as to capacity without the benefit of any external expertise, because of the seriousness of the consequences for the person.

.....

[42] Courts should always investigate the question of capacity at any stage of the proceedings when there is any reason to suspect it may be absent.....

[43] The presumption of capacity is important and ensures proper respect for personal autonomy. Courts should not allow arguments about litigation capacity to be used unscrupulously. However, where there is a good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.

[44]Even where the issue does not seem to be contentious, a judge who is responsible for case management may require the assistance of an expert's report..... Such opinion is merely part of the evidence and the factual evidence of a carer or a social worker may also be relevant and even more persuasive. Caution should be exercised when seeking evidence from general practitioners, as most will have little knowledge of mental capacity and the various legal tests that apply.....

[45] In case of dispute, capacity is a question of fact for the court to decide on the balance of probabilities, with a presumption of capacity. Evidence should be admitted not only from those who can express an opinion as experts but also

those who know the individual.

.....

[49] Where there are practical difficulties in obtaining medical evidence, the Official Solicitor may be contacted, although doing so should be a measure of last resort and all other options should be explored as the Official Solicitor is over-burdened and has limited resources. Because of this, involving the Official Solicitor will also result in delay to the process.

.....”

13. The medical evidence relied upon by HHJ Gosnell in making his decision is now many months old and out of date.
14. I have had the opportunity of speaking at length to Professor Percival today and he has explained that his mental health has improved dramatically in the intervening period, although he is not receiving any treatment and has not consulted his general practitioner.
15. I have not heard from any friends or family, since Professor Percival says that he has none.
16. He says that he finds the judicial review proceedings therapeutic and less daunting, since they are essentially a paper-based exercise and do not involve him having to relive the events in 2011, which he still finds difficult to deal with.
17. Professor Percival has not sought to lift the stay in the parallel personal injury proceedings. It is submitted on behalf of the defendants that Professor Percival’s position is illogical and untenable. The test for determining capacity does not lend itself to different conclusions on the particular type of claim being pursued, particularly where, as here, there is substantial overlap in the subject matter of the claims.
18. However, determining capacity is ultimately a functional test focusing on the ability of a person to make a particular decision. I note that some of the medical evidence, at least before HHJ Gosnell, did suggest that the lack of capacity in that case may have arisen as a result of Professor Percival being faced with the potential of being cross-examined about the events in 2011. In any event, I am not making any decision about Professor Percival’s current capacity to litigate those proceedings, only his capacity in relation to conducting these judicial review proceedings.
19. Whilst it has been emphasised that judges should be slow to form a view as to capacity without the benefit of any external expertise, I do not consider that anything is likely to be achieved, other than further significant delay, by seeking to contact the Official Solicitor to obtain updated medical evidence and in circumstances where, despite HHJ Gosnell’s earlier invitation, the Official Solicitor has still not been actively engaged.
20. Having today listened to Professor Percival and having considered the manner in which he has conducted the judicial review proceedings to date over a prolonged period of time, I am satisfied, on the balance of probabilities and applying the presumption of capacity, that Professor Percival does indeed have capacity to conduct these proceedings when applying

the appropriate legal test as set out in sections 2 and 3 of the 2005 Act. In particular, I am satisfied that Professor Percival is able at least in these judicial review proceedings to understand, retain, use and weigh in the balance relevant information for making decisions in relation to these claims and to communicate those decisions both to the Court and to the defendants.

21. Indeed, in light of their own dealings with Professor Percival in connection with these proceedings, it was conceded on behalf of the defendants that it would be difficult for them to argue against such a conclusion, although ultimately it is a matter for me to determine, which I have now done.

End of Judgment.

Transcript from a recording by Ubiquis
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