MHLA Conference 2019

Case Law Update

Key developments over the last 12 months

- KC, MM, PJ – where are we at now?
- Inherent jurisdiction puts in an appearance
- Nature: risk, relapse and timescales?
- FTT(MH) – re-instating, giving the wrong decision
- s.117 gets a mention

Secretary of State for Justice v KC and C Partnership NHS Foundation Trust [2015] UKUT 376 (AAC)

- KC was a restricted patient seeking conditional discharge
- He lacked capacity to consent to his care and treatment arrangements
- Could the FTT discharge him conditionally, imposing conditions which deprived him of his liberty?
- Charles J said YES:
- MHA and MCA are applying different tests from different perspectives.
- Both can only choose between available options.
- SSJ and FTT must take into account detail of arrangements for care, treatment and supervision needed to protect patient and public.

Welsh Ministers v PJ [2018] UKSC 66

- Para 36 : per Lady Hale - There is no power to impose conditions in a CTO which have the effect of depriving a patient of his liberty

- Not really much to add to that – unsurprising result.

Welsh Ministers v PJ – the Tribunal and human rights

- "…if the tribunal identifies a state of affairs amounting to an unlawful deprivation of liberty, it must be within its powers to explain to all concerned what the true legal effect of a CTO is……
- Furthermore, once it is made clear that the RC has no power to impose conditions which amount to a deprivation of liberty, any conscientious RC can be expected not to do so."
- MHA Review - MHT should bring this to attention of CQC.

SSJ v MM [2018] UKSC 60

- Para 38 : per Lady Hale – the MHA does not permit either the FTT or the Secretary of State to impose conditions amounting to a deprivation of liberty upon a conditionally discharged restricted patient.
- *(Lord Hughes dissenting – 4:1)*
- BUT……
- High Court inherent jurisdiction (see later)…

Hertfordshire County Council v AB[2018] EWHC 3103 Fam

- Use of inherent jurisdiction to rationalise and legitimise the position of a capacitous patient consenting to conditions amounting to a deprivation of their liberty
- AB was a s.37/41 patient, with IQ of 71; registered category 1 sexual offender, voluntarily wearing a tag
- CD – with requirement to comply with risk and management plan
- Which included “he is supported – that is, supervised – at all times across a 24 hour period including when he is visiting his family”
- Care plan required AB to be supervised at all times, save when he was with his mother on very, very limited occasions. She was then responsible for supervising him.
- AB “did not appear and was not represented”

The 3 options available to local authority

- For HCC to do nothing and wait for JR / HRA claim by AB
- For the care plan to be amended so that there was no longer a deprivation of liberty
- For HCC to seek to regularise AB's position by asking High Court to exercise its inherent jurisdiction

- For option 3, High Court had to ask itself if

(a) *Could* it exercise inherent jurisdiction, as per 3rd option

(b) *Should* High Court exercise its inherent jurisdiction in this case?

Findings

- Yes, AB was a vulnerable adult in respect of whom inherent jurisdiction could be applied
- Yes, High Court should exercise its inherent jurisdiction in respect of AB
- Because: there was no legislative provision governing the situation in which AB found himself; in the interests of justice; strong and sound public policy justifications

Decision

- Declaration that AB's care plan involved a deprivation of his liberty
- Provision for regular court review of that care plan
- Authorised for 12 months

- Order drafted that permitted HC to come back before High Court no less than one month before the expiry of the authorisation for paper review, unless oral hearing requested by the Court, or on review, decides that oral hearing is required

So, where did we end up, eventually…?

- Lacks capacity: CD + DoLS / CoP order = fine = KC
- Has capacity: CD + DoLs / CoP order = no = MM
- Has capacity: Already CD'd + depriving of liberty = maybe (IJ of High Court) = AB
- Conditions amounting to a DoLs in a CTO = no = PJ

- MM is pending in the ECtHR – watch this space….

Birmingham City Council v SR; Lancashire County Council v JTA [2019] EWCOP 28

- The local authorities both applied for authorisation of care plans of 2 restricted patients, which included plans to deprive the respondents of their liberty, following their discharge [JTA] and upon their proposed conditional discharge [SR], respectively, from hospital.
- The court decided both cases should be heard together at an oral hearing, given they raised issues about the inter-relationship between the MCA and MHA
- Neither appeared or were represented

- Held: under the MHA, as interpreted in MM, there was no power to deprive the patient of their liberty, but that that *did not prevent* MCA 2005 powers being used.
- SR and JTA had no capacity to consent to the relevant care plans and that it was in their best interests to be allowed to live at the named placements, and to be deprived of their liberty.
- Accordingly, the court allowed both local authorities' applications, under MCA 2005, for authorisations relating to the proposed care plans, including the deprivation of their liberty. (ie, the *KC* position)
- In their best interests “keep him out of mischief”

Comment:

- It is clearly stated that MHA cannot deprive of liberty. If lacking capacity, MCA can be considered to lawfully deprive of liberty
- Depriving of liberty has to be in P’s best interests…. And these cases suggest that it is in P’s best interests to not reoffend (only one aspect of the rationale for deprivation, not the whole story in these cases!)
- Still doesn’t take us any further forward for patients with capacity.

Wakefield Metropolitan District Council & Wakefield CCG v DN & MN [2019] EWHC 2306 (Fam)

- Is DN a person to who falls into the category of "vulnerable" adults … for whom the inherent jurisdiction is available to offer protection and/ or facilitate decision making?
- Whether, if DN is a vulnerable adult over whom the court can exercise its IJ, it can or should do so to authorise his deprivation of liberty at Stanford House
- Whether the court could or should make anticipatory declarations as to DN's capacity and best interest under s.15 and 16 of MCA to cover those occasions when he has "meltdowns" and is "at that point, it is agreed) unable to make a capacitous decision as to his care

DN

- DN lives with his mother, MN.
- Diagnoses of autism & general anxiety disorder; poor emotional regulation; poor social communication - but no LD
- MN struggling to manage DN's complex behaviours and keep DN safe
- Experiences "meltdowns" when stressed, anxious or aroused – has assaulted others in this state
- DN was detained under s2 then s3 MHA approximately 5 years ago – last experience of detention was not a good one
- Prosecuted for public order offences in early 2019 and pleaded guilty

Sentencing options for MN

- Custodial sentence if no residential unit could be found for him to provide DN with a mental health treatment programme – *everyone wanted to avoid imprisonment*
- Psychiatric report for sentencing stated:
- "the best scenario for DN would be a setting where he would be monitored in a residential setting without him feeling locked up and his freedom is removed. Thus, residential care may be the best option for DN where he can live in a communal setting but where staff are available 24 hours a day"
- MHA would not provide the correct framework for this – it is a deprivation of liberty; further, diagnosis of ASD => MHA not the first port of call

- Local authority made application to High Court for Inherent Jurisdiction to be exercised in respect of DN
- Inbetween times – DN breached a community protection notice and was remanded into custody
- There was a significant concern that DN would deteriorate severely in prison (persuasive factor for HC to exercise IJ)
- DN moved to Stamford House residential placement by order of the Court exercising its Inherent Jurisdiction, which also authorised his deprivation of liberty
- DN *had* capacity to consent, and did so – absent a “meltdown”
- DN was also subject to a Mental Health Treatment Requirement

Local Authority's position:

- Local Authority said that DN was vulnerable and warrants the intervention of HC to ensure care and support is delivered under a lawful framework
- DN's consent to stay at Stamford House was not "freely given" – the alternative was prison
- If DN did not accept any aspects of his care plan, then the placement would be terminated – which would have implications for the on-going criminal case

DN and MN’s position (NB- both represented):

- DN had at all material time the ability to make free, meaningful and un-encumbered decisions
- DN and MN accepted that although DN was vulnerable, he was not <u>*so*</u> vulnerable as to require the Court’s protection
- Facing a choice between a residential placement or prison did not *per se* render DN vulnerable

Decision:

- An interim DOL was authorised by HC [ie MHTR + DOL in place] – to allow for issues to be aired (but would not authorise a DOL is the longer term as Article 5 requirements were not met)
- *When the issues were then aired………*
- Inherent jurisdiction not applicable to DN
- A CoP order could be made - anticipatory declarations pursuant to ss15 and 16 MCA
- *"whatever the outcome of the case, this has already been a success story for DN. He has avoided incarceration, and the very deleterious consequences which would follow to his mental and physical well-being, and for a time, made incredible progress. It is hoped that as way forward is found to maintain DN's placement, and that strategies are successful in getting on the path to his own, independent living in a straight-forward community setting"*

Comment:

- The DN case, the linked case of PR, along with AB, show that the High Court's inherent jurisdiction is *potentially* available.

- However, MN and PR are a reminder (particularly to local authorities) of the limits of the inherent jurisdiction – yes, it is "available" and LA's might find it useful (eg as part of their safeguarding role under the Care Act), but given the lack of statutory under-pinning etc, the Courts will be cautious concerning its use – and particularly cautious when it comes to deprivation of liberty

- Typically, it will be for the Local Authority to make the application; but if, as practitioners, we are more alert to spotting these cases, we will be better placed to suggest LA's seek some guidance and take their own legal advice.

London Borough of Barnet v JDO [2019] EWCOP 47

- Application by local authority for orders under s.16 MCA 2005- the “streamlined” provisions for authorizing deprivation of liberty
- Local authority failed in its duty of disclosure and suggested that JDO agreed to his care arrangement when he did not.
- JDO was not made a party to the application.
- Strongly criticized by HHJ Hilder
- A cautionary tale about cases where the vulnerable adult is not joined and not represented when DOL orders are made.

LW v Cornwall Partnership NHS Trust; SE v Devon Partnership NHS Trust; TS v Birmingham & Solihull MH NHS Trust [2018] UKUT 408 (AAC)

- Is a defined degree of imminence of likely relapse required in order to justify not discharging a patient from a CTO? What is to be expected of the FTT's reasons in such a case?
- What is the correct approach to the likelihood of relapse if a patient, once free of the CTO, does not take medication?
- And what are the probable consequences if such a relapse were to occur?

- Three cases heard together
- Looking at “nature”
- Referring to CM v Derbyshire (likelihood of relapse in the “near future”
- What factors should the Tribunal consider in respect of arguments on nature and risks if patient relapses at a future date?

Looking first at CM Derbyshire

- Para 12:
- “If the nature of a patient’s illness is such that it will relapse in the absence of medication, then whether the nature is such as to make it appropriate for him to be liable to be detained in hospital for medical treatment depends on an assessment of the probability that he will relapse in the near future if he were free in the community and on whether the evidence is that without being detained in hospital he will not take the medication (Smirek v Williams (2002) 1MHLR 38 CA; R v MHRT ex p Moyle [2000] Lloyd’s LR 143 HC

- NB – CM was a s3 in-patient

UTJ Ward’s views in LW etc. (CTO patients)

- In cases where there is a risk of a relapse which might necessitate recall, “when” a relapse will occur is a relevant consideration
- That factor itself is not determinative – other factors, including risk to the patient / others if a relapse were to occur may also be relevant
- The legal authorities do not establish as a matter of law that likely relapse must be “soon”, in “the near future” or within the permitted duration of a CTO (ie until the next renewal date) for discharge to be lawfully refused
- The case for discharge may be stronger if the anticipated timescale for relapse is protracted, but all relevant circumstances must be taken into account in decking what is “appropriate” for purposes of s72(1)(c)

- Essentially –
- The tribunal should look at all factors to establish whether the certainty or possibility of need for in-patient treatment at some point in the future makes it appropriate for a CTO to continue
- Relapse in the “near future” is not the only relevant factor
- Risk is also a consideration – ie what is the level of risk (low / medium / high severity) to which patient or others would be exposed if the patient were to relapse – it is an assessment of time vs level of risk
- ie (relatively) short time to relapse vs low level risk upon relapse; long time to relapse vs high level of risk upon relapse

Re-instatement after withdrawal

- *JS v South London & Maudsley NHS Foundation Trust & Secretary of State for Justice* [2019] UKUT 172 (AAC)

- What factors should be taken into account when an application to re-instate a withdrawn case is made?

The background

- JS was detained under MHA and eligible to appeal until 21/08/2018
- Applied to FTT(MH) on 30/05/2018
- Application to withdraw made on 18/08/2018 [TPR17(1)(a)]
- Withdrawal accepted on 20/08/2018
- On 12/09/2018, JS decided to re-instate the application [TPR17(4)]
- Refused by judge on 14/09/2018
- NB – in a new period of eligibility as of 22/08/2018; JS given full legal advice at each stage

What’s the picture so far….

- JS applied within eligibility period “A”
- JS decided to withdraw, and was given legal advice on this
- JS then decided to seek to re-instate the application made in period “A”, within the 28 day time limit to make this request following withdrawal
- By now, JS was in eligibility period “B”
- The Tribunal refused to accept the re-instatement request

Reasons for refusal

- JS was now in a new period of eligibility and had right to submit an application
- JS withdrew the application made in period “A” only 2 days before the expiry of period “A”
- “Allowing the reinstatement would have the result of allowing the applicant to have two tribunal hearings within one period of eligibility, which is not the purpose of the re-instatement provision”

- JS then applied for the re-instatement decision to be set aside (TPR 45), but Tribunal refused this application on 26/09/2018
- Refused:
- “I accept of course that, had the application not been withdrawn, he might have had 2 hearings within the one entitlement period. But I cannot agree that that fact entitles the patient to reinstatement of a withdrawn application”
- JS appealed

JS’ argument

- That the FTT had no power to do anything other than reinstate a withdrawn application on request. Any other approach would be a violation of Art 5(4)
- ie that the right to apply in the first place is unconditional, “it can be made for good reasons, bad reasons or no reasons at all” – so “why should JS have to give any reasons for reinstatement?”

The argument is rejected – why?

- Firstly noted that this argument only arises if the request to reinstate is made if between withdrawal and reinstatement, the patient enters into a new period of eligibility.
- It is not correct to conflate an application with a reinstatement
- Patients have a statutory right to apply, but the situation changes once the application is withdrawn with the consent of the Tribunal
- Then the issue becomes whether the Tribunal should reverse its decision, ie it is not solely a matter for the patient/applicant
- …because as a matter of principle, a judicial decision should only be reversed by an equal or higher authority, and not by virtue of any rigid rule

Addressing the Art 5(4) point

- There is no violation of Art 5(4) when a patient has withdrawn an application
- The patient was *entitled* to apply and did so, but then *decided* to apply to withdraw

2 hearings in one period of eligibility?

- The patient has a right to apply in each period of eligibility
- That is not the same thing as the right to have it considered in respect of that period

Comment:

- Which makes sense – if patient applies near the end of a period of eligibility, it is highly likely indeed that the case will be heard when the patient has entered a new period of eligibility
- Patient cannot “carry over” their right to appeal to the next period of eligibility – it is a case of “use it or lose it” wrt entitlement to apply

A right or a discretion to reinstate?

- Para 16 – as there is no right to reinstate, the Tribunal has a discretion whether or not to reinstate
- Discretion must be exercised judicially and comply with over-riding objective
- There is no default position of the Tribunal allowing reinstatement; there is no legitimate expectation

Factors the Tribunal should consider: 1

- Is there anything to undermine either the patient's application to withdraw, or the Tribunal's consent

- Eg's: application made on mis-understanding of the law or of the facts; capacity to withdraw (AMA); Tribunal's reasons for consenting to withdrawal defective

Factors the Tribunal should consider: 2

- Has there been a change of circumstances that will make it appropriate to agree to reinstatement

- Eg’s : material change of facts in the case; events that would have hampered a successful application have been overcome (eg funding arguments, identifying placement, inter alia)

Factors the Tribunal should consider: 3

- Any other factors that may be relevant under the over-riding objective
- "Including the reasons given in support of the application to reinstate; any prejudice to the patient in refusing consent; any detriment to other parties if consent is given; any prejudice to other parties if consent is given; the impact that reinstatement might have on the operation of the Tribunal's MH jurisdiction system as a whole"

Decision:

- “Each case must be considered individually on its own merits. However similar the facts and circumstances may appear to be, there may be aspects of other cases that influenced the decision but were not included in the reasoning or are not readily apparent from the way the reasons were expressed”

- No error of law – JS was advised at each stage, there was no change of circumstances – JS changed his mind about the withdrawal.
- A change of mind is not a compelling reason to reinstate
- No evidence of prejudice to JS if reinstatement not allowed (was in new period of eligibility “B”) – but acknowledged that JS would lose the right to use the entitlement to apply relating to period “A”

- “There is no objection to having 2 hearings in the same eligibility period”
- “What is not allowed is having more than one application in one period”
- “There was nothing to undermine JA’s application to withdraw, or the Tribunal's consent to withdrawal. There was no change in circumstances since consent to withdraw was given. There was nothing in the reinstatement application that could properly allow the Tribunal to accept that application”
- The reasoning was garbled in parts, but the reinstatement was correctly refused *on the facts of this case*.

CXF v Bedfordshire Council & ors [2018] EWCA Civ 2852

- CXF (s.3) had ASD and severe LD, in secure hospital in Norfolk (120 miles away form family home)
- CXF has escorted s17 leave, to be escorted by hospital staff. Mother would also join these trips once per week, travelling from home to Norfolk
- There was no funding for mother in respect of her travel costs. CXF submitted that whilst he was on leave, he was entitled to s.117 and therefore mother's travel costs should be reimbursed pursuant to s. 117 as a result

Appeal dismissed

- S.117(1) states that a person becomes eligible for s.117 aftercare when, having been detained under relevant provisions of the MHA, they subsequently cease to be detained *and* leave hospital

- S.117(6) defines services which both:
  - Meet a need arising from or related to MD; and
  - Reduce the risk of deterioration of the person's mental conditions and also reduce the risk of the person requiring admission to hospital again for treatment for MD

- The court did accept that there could be cases in which a patient grated s.17 leave “ceases to be detained” and also “leaves hospital”, hence triggering s.117.
- The court also accepted that s.117 could apply to patients living in the community on long term s.17 leave, even if they have not been conditionally or absolutely discharged

- Opinion - This case was possibly more about statutory interpretation of the Act… but may well cause difficulties in times to come…

PAA v Secretary of State for the Home Department [2019] UKUT 00013 (IAC)

- "In accordance with R29(1) of the Tribunal Procedure (First Tier Tribunal) (Immigration & Asylum Chamber) Rules 2014 may give a decision orally at a hearing
- If it does so, that is the decision on the appeal, and the effect of Patel v SSHD [2015] EWCA Civ 1175 is that there is no power to revise or revoke the decision later. The requirement to give written reasons does not mean that reasons are required in order to prefect the decision
- If the written decision, when issued, is inconsistent with the oral decision, both decisions, being decisions of the Tribunal, stand until set aside by a court of competent jurisdiction; but neither party is entitled to enforce either decision until the matter has been sorted out on an appeal"

- Tam Gill - Gledhill Gill Solicitors
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