Neutral Citation Number: [2022] EWCOP 12

Case No: 12717426

IN THE COURT OF PROTECTION

Manchester Civil Justice Centre,
1, Bridge Street West,
MANCHESTER
M60 9DJ

Date: 14 March 2022

Before :

HIS HONOUR JUDGE BURROWS

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Between :

PH **(by his litigation friend, LH)** **- and -**	**Applicant**
A CLINICAL COMMISSIONING GROUP **(by her litigation friend, the Official Solicitor)** **-and-**	**First Respondent**
A CITY COUNCIL	**Second Respondent**

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Ben McCormack (instructed by **Irwin Mitchell**) for the **Applicant**
Adam Fullwood (instructed by **Hill Dickinson**) for the **CCG**
Roger Hillman (instructed by **LA Solicitor**) for the **LA**

Hearing dates: 1 March 2022

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APPROVED JUDGMENT

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of PH must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HIS HONOUR JUDGE BURROWS :

INTRODUCTION

1. This case is about a young man who I will call Peter (or PH). He lives in the North West of England. He has a diagnosis of Autistic Spectrum Disorder, moderate learning disability and Tourette syndrome. He has been detained under section 3 of the Mental Health Act (MHA) for a number of years- almost since he became an adult, in fact. He is subject to very considerable restrictions on his liberty beyond those detained patients usually experience. No one believes him to be in the right place. Everyone seems to believe he ought to move to somewhere which meets his needs much better. It is anticipated that place will be outside a hospital setting.

2. These proceedings have been brought on Peter's behalf by his mother, who acts as his litigation friend. I will refer to her as LH. It is not disputed between the parties that PH lacks the capacity to make decisions about his residence, care and treatment, and to conduct this litigation.

3. I have used names that are not those of Peter and LH, and have not identified the Council or the CCG because I wish to preserve Peter's privacy in the future. His mother was particularly keen for this, and none of the other participants disagreed. This judgment will be delivered in public, so it is important for there to be anonymity.

THESE PROCEEDINGS

4. The nature of the claim needs some explanation. It is brought under s. 16 of the Mental Capacity Act 2005, seeking declarations as to what residence and care options are in Peter's best interests.

5. In the Statement of Facts and Grounds, Peter's lawyers elaborate on their case. At paragraph (3), they say (emphasis added):

> The application is brought under section 16 Mental Capacity Act 2005 to seek an order authorising **PH's future deprivation of liberty in the community on discharge from the Mental Health Act 1983** and authorising a care plan on PH's behalf. The application is also brought to seek declarations as to PH's capacity to make decisions to conduct the court proceedings, on his care and residence, and contact with others. **The Court is invited to make best interests declarations in respect of decisions he cannot make for himself**.

6. I appointed LH to be Peter's litigation friend and I joined the responsible Local Authority (the City Council) and CCG to be parties. I did not join the detaining authority under the MHA.

7. On 1 March 2022, there was the first hearing in these proceedings. It was attended. I read focused and helpful written and oral argument from Mr Ben McCormack on behalf of Peter, Mr Adam Fullwood on behalf of the CCG and Mr Roger Hillman on behalf of the Council. I also read statements prepared on behalf of the CCG as well as an expert psychiatric report and care plans.

8. In summary, Mr McCormack wants these proceedings to continue even though there is no immediate prospect of Peter leaving mental health detention. There is an expert report, commissioned to provide Peter with a better living environment in his present hospital setting. Once adopted, that could form something of a template for a living arrangement outside hospital in the future. Mr McCormack considers it appropriate and helpful to have this Court overseeing the process of Peter's discharge. The progress of that discharge has been slow so far. This Court will almost certainly have to authorise Peter's destination in the community once he is discharged. In the meantime, the Court

can assist progress by making orders for disclosure and the provision of evidence and to coordinate its procedures with those of the First-tier Tribunal within the MHA jurisdiction.

9. Mr Fullwood and Mr Hillman are sympathetic towards Peter's plight and the approach taken in issuing these proceedings. That sympathy, however, is qualified by their clear view that the proceedings are not necessary and would be a costly way of providing oversight to the discharge of their duties under the MHA.

10. At the end of the hearing, I decided to consider carefully whether these proceedings should continue. Having taken time for that consideration, I have come to the firm view that they should not. Here are my reasons.

A BRIEF LEGAL FRAMEWORK

11. As a patient detained under the MHA, Peter is subject to the extensive powers, obligations, and checks and balances of that statute. He is detained for treatment for this mental disorder in a hospital so long as he comes within the criteria under s. 3 of MHA. His Responsible Clinician and the Hospital Managers must consider whether he continues to meet those criteria and must discharge him if he does not. His Nearest Relative (LH) has certain rights including requiring Peter's discharge, although that would probably be blocked at the moment, I imagine, by the RC because it would not be safe for him to be discharged.

12. Peter is also entitled to an appeal to the First-tier Tribunal, and failing that a periodic referral to the tribunal. The tribunal must order his discharge if his continued detention is not necessary under the MHA. The tribunal has some,

albeit limited powers to make statutory and non-statutory recommendations as to transfer to another hospital and care planning, and can also adjourn for those recommendations to be adhered to. The tribunal can also defer the patient's discharge for a modest period of time until a reasonably imminent and feasible care plan can be put in place for discharge.

13. The most significant provision of the MHA for present purposes is s. 117. The crucial part of the section is (2) which provides (materially):

> It shall be the duty of the clinical commissioning group ……..and of the local social services authority to provide or arrange for the provision of, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the clinical commissioning group………. and the local social services authority are satisfied that the person concerned is no longer in need of such services

14. Section 117 is the vehicle by which detained patients under the MHA should be moved along their pathway within the Hospital towards a package of care outside hospital which hopefully will keep them reasonably well and out of detention in the future. The section imposes on the CCG and the Council a statutory duty to work together and with other agencies to ensure Peter is given the best opportunity to be discharged. If they fail in that duty- either by not observing it, or falling short of complying adequately with it, Peter is able to challenge them in the Administrative Court by way of judicial review.

15. What was interesting in this case was the consensus amongst the lawyers that the CCG and Council were genuinely trying to ensure that Peter was moved towards the exit from Hospital. Steps are being taken to ensure that the

recommendations of the psychiatric report I referred to earlier are implemented. There is even building work taking place at the Hospital to ensure that.

16. One major step that is just about to be taken is an application to NHS England for funding which, if granted, will be a significant step towards the creation of a supported living placement for Peter at discharge. Even if that is successful, it is likely to be a reasonably significant period of time before discharge into a placement becomes a realistic and clear option. If it is not successful, the planning and assessments will have to continue.

17. In the meantime, I was left wondering what role this Court might play?

18. The interaction between the Mental Capacity Act (MCA)/ Court of Protection and the MHA is a difficult area of law. The MHA is mainly concerned with the detention and treatment of mentally disordered patients in hospital. In respect of those patients, the MCA largely defers to the MHA. This is explicitly so in s.28 of the MCA and Schedule 1A. Indeed, once a patient is detained under the MHA, decisions about medical treatment for mental disorder including the manifestations of the mental disorder are, for all intents and purposes outside the reach of the MCA/COP.

19. The position is different once a MHA patient who lacks the relevant capacity is discharged into the community and made subject to one of the community orders under that Act: a community treatment order (CTO)(s. 17A MHA), guardianship (s. 7 MHA) or (in the case of a restricted patient) by way of a conditional discharge. Then the two regimes may have to work together. This is particularly so where the patient is subject to restrictions that amount to a deprivation of his liberty- something the MHA cannot authorise, save in the

very limited circumstances of a condition attached to leave of absence (s. 17(3) MHA).

20. The use of the MCA and COP becomes relevant where the detained patient is moving towards a discharge where there will be a need for orders from that Court to enable discharge to take effect. There is a rich and complex jurisprudence in this area. There are COP decisions dealing with conditionally discharged patients living in the community under MCA Orders: see for instance Birmingham City Council v SR, Lancashire County Council v JTA [2019] EWCOP 28 (Lieven, J.). Then there is the relationship between standard authorisations and guardianship: see C (by his litigation friend, the OS) v A Borough Council [2012] COPLR 350 (Peter Jackson, J.). Finally, the Birmingham case confirms the decision of the Upper Tribunal in DN v Northumberland, Tyne and Wear NHS Foundation Trust [2011] UKUT 327 (UTJ Jacobs) and in AM v South London & Maudsley NHS Foundation Trust [2013] COPLR 510 (Charles, J.) namely that there is nothing wrong in principle for the COP to make best interests declarations, and to authorise deprivation of liberty where P is detained under the MHA, but where the COP order will take effect only at the point of his discharge- that order indeed enabling the discharge to take effect.

21. Consequently, and as agreed by all counsel, in this case:

    a) There is no jurisdictional bar to this Court making orders of the type sought for Peter.

    b) It is, however, a matter of case management.

22. There is no doubt that in many cases the involvement of the COP is essential where a patient under the MHA is approaching discharge, as I have suggested above. The previous Vice President, who was also the President of the Upper Tribunal dealing with appeals from the First-tier Tribunal, Mr Justice Charles grappled with these procedural issues in a number of cases, most notably in Secretary of State for Justice v KC & C Partnership NHS Foundation Trust [2015] UKUT 376 (AAC).

23. However, Peter is still detained in a hospital under the MHA. His discharge from that regime is not imminent, even on his own case. The role of the Court in this case would be as some form of observer, with a view to becoming actively involved in the future. But that future is not as close as was envisaged by Charles, J in the KC case. The COP's involvement is someway down the line, and it will depend on the speed with which the CCG and the LA are able to discharge their s.117 duties.

DECISION

24. I am unable to see how this Court has any useful and proper function in this process at this stage. Overseeing the statutory bodies in the discharge of their duties by the periodic ordering of statements, assessments and reports is a very costly and inefficient way of proceeding. That is from the viewpoint of those statutory bodies. However, it is equally so from the Court's point of view. I must look at this from the perspective of the overriding objective in COPR 2017 r.1.1. The proceedings at this stage will be expensive and lengthy. They will not be considering decisions that Peter would be making if he had the capacity to do

so until there is a discharge plan readily available to be chosen and approved. In those circumstances, allotting any of the Court's time to the application at the moment is inappropriate.

25. For these reasons, it is my judgment that this application must be dismissed.

26. Having stated in their submissions that the proceedings were properly brought and not being critical of those bringing them, I anticipate the statutory authorities will be happy with no order for costs, save for the usual public funding assessment of the Applicant's costs.

27. That is my judgment.