When Should an Application be made under MCA s21A:? RD and Ors [2016] EWCOP 49

(http://www.bailii.org/ew/cases/EWCOP/2016/49.html)

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Summary

Five test cases involving elderly people (RD, JB, JP, EP and JW – collectively referred to as 'P') suffering from a form of dementia were identified, to enable the court to consider the question of when an application should be made under s21A.

A brief description of the five cases is as follows:

1. RD had a lifelong presentation of mental and physical disabilities with a historic diagnosis of chronic schizophrenia although her symptoms were more closely akin to learning disabilities and autism. During the initial stages of her stay, she frequently expressed an objection to being at the care home and a desire to leave. More recently, she became inconsistent about her wishes and expressed a fear of moving from the care home;

2. JB had Alzheimer's disease. After moving to the care home, she was frequently agitated, attempted to leave the building and became verbally aggressive when prevented from doing so. At other times she requested to leave and thought she had to pick up her children (all of whom were grown up) from school. In more recent months the episodes of agitation had decreased and she was no longer attempting to leave the property. She was engaged more in activities and enjoyed walking around the grounds;

3. JP had a history of physical medical problems and suffered from moderate to severe dementia. On arrival at the nursing home, she repeatedly asked to be allowed to return home. She was regularly distressed and agitated, calling out loudly with repetitive sounds. JP moved to a quieter wing in the nursing home but once again became very agitated. When her RPR discussed with her the option of bringing an application to court JP emphatically stated that she would like this to happen;

4. EP had vascular dementia. After an admission to hospital following a fall, EP was discharged to a care home. She clearly objected to being at the care home, saying that it was like a prison, and that she wanted to return to her own home. The RPR concluded that there was a fluctuation in EP's compliance with the care arrangements and her acceptance of the situation;

5. JW suffered a series of strokes. He consistently expressed objections to his placement at a nursing home. He became more settled and willing to engage with staff and activities but whenever questioned about his placement he reiterated his wish to return home. Over time, JW increasingly appeared settled but always maintained his position of wanting to return home.

Deciding whether to issue proceedings under s21A

Baker J gave some helpful general guidance as to the approach that should be adopted by Relevant Person's Representatives (RPRs) and Independent Mental Capacity Advocate (IMCAs) in deciding whether to issue proceedings under s21A at para 86:

(1) The RPR must consider whether P wishes, or would wish, to apply to the Court of Protection. This involves the following steps:

(a) Consider whether P has capacity to ask to issue proceedings. This simply requires P to understand that the court has the power to decide that he/she should not be subject to his/her current care arrangements. This is a lower threshold than the capacity required to conduct proceedings.

In the event that P has capacity to ask to issue court proceedings, then those wishes must be followed. It is quite possible that P may have capacity to ask to issue proceedings but lack capacity to conduct them (in which case, P will require a litigation friend)

(b) If P does not have such capacity, consider whether P is objecting to the arrangements for his/ her care, either verbally or by behaviour, or both, in a way that indicates that he would wish to apply to the Court of Protection if he had the capacity to ask.

The focus of the question is whether P wishes to apply to the court and not simply whether he or she objects to the arrangements for his/ her care.

(2) In considering P’s stated preferences, regard should be had to:

(a) any statements made by P about his/her wishes and feelings in relation to issuing proceedings,
(b) any statements made by P about his/her residence in care,
(c) P’s expressions of his/her emotional state,
(d) the frequency with which he/she objects to the placement or asks to leave,
(e) the consistency of his/her express wishes or emotional state; and
(f) the potential alternative reasons for his/her express wishes or emotional state.

(3) In considering whether P’s behaviour constitutes an objection, regard should be had to:

(a) the possible reasons for P's behaviour,
(b) whether P is being medicated for depression or being sedated,
(c) whether P actively tries to leave the care home,
(d) whether P takes preparatory steps to leave, e.g. packing bags,
(e) P's demeanour and relationship with staff,
(f) any records of challenging behaviour and the triggers for such behaviour,
(g) whether P's behaviour is a response to particular aspects of the care arrangements or to the entirety of those arrangements.

*In considering other possible reasons for P’s behaviour, it can be extremely difficult for RPRs and IMCAs to accurately assess whether P really wants to, or would want to, apply to court. In cases of doubt, 39 Essex Chambers suggests that RPRs should also apply the best interests test in para 86(5) of Baker J’s judgment. See below***

(4) In carrying out this assessment, it should be recognised that there could be reason to think that P would wish to make an application even if P says that he/she does not wish to do so *(AJ may have been an example of this)* or, conversely, reason to think that P would not wish to make an application even though he/ she says that she does wish to, since his/ her understanding of the purpose of an application may be very poor.

(5) When P does not express a wish to start proceedings, the RPR, in carrying out his duty to represent and support P in matters relating to or connected with the Schedule, may apply to the Court of Protection to determine any of the four questions identified in s21A(2) i.e.

a) on the grounds that P does not meet one or more of the qualifying requirements for an authorisation under Schedule A1;
b) or that the period of the standard authorisation is given are contrary to P's best interests;
c) or that the purpose of the standard authorisation could be as effectively achieved in a way that is less restrictive of P's rights and freedom of action
d) or the conditions subject to which the standard authorisation is given are contrary to P's best interests.

(6) Consideration of P's circumstances must be holistic and usually based on more than one meeting with P, together with discussions with care staff familiar with P and his/ her family and friends. It is likely to be appropriate to visit P on more than one occasion in order to form a view about whether proceedings should be started.

(7) By way of an alternative to proceedings, it may be appropriate to instigate a Part 8 review, or to seek to work collaboratively with the family and the commissioning authority to see whether alternate arrangements can be put in place. Such measures should not, however, prevent an application to the court being made where it appears that P would wish to exercise a right of appeal.

(8) The role of the IMCA appointed under s39D is to take such steps as are practicable to help P and the RPR understand matters relating to the authorisation set out in s39D(7)(a) to (e), and the rights to apply the Court of Protection and for a Part 8 review, and how to exercise those rights. Where it appears to the IMCA that P or the RPR wishes to exercise the right, the IMCA must take all practical steps to assist them to do so. In considering P's apparent wishes, the IMCA should follow the guidance set out above so far as relevant.

Differences between the role of RPR and 39D IMCA

In his judgment, Baker J emphasised that there is an important distinction between the roles of the RPR and the s39D IMCA. The RPR has a wide role to represent and support P in matters relating to or connected with Schedule A1, MCA. The s39D IMCA's role is more narrow and confined to the specific duties in s39(7), (8) and (9) (para 72).

The Role of the RPR

Whilst an IMCA will not be involved in every case, the supervisory body must appoint a RPR for every person to whom they give a standard authorisation for deprivation of liberty. Baker J described the RPR as "a crucial role in the deprivation of liberty process, providing the relevant person with representation and support that is independent of the commissioners and providers of the services they are receiving" (para 32).

Under paragraph 140 of Schedule A1, the RPR is obliged to:

- Maintain contact with the relevant person;
- Represent the relevant person in matters relating to or connected with Schedule A1;
- Support the relevant person in matters relating to or connected with Schedule A1. Baker J made clear that this obligation includes:
    - Taking all steps to identify whether P wishes to exercise the right to apply to the Court of Protection (or the right to Part 8 review) and, if so, it is the RPR's duty to ensure that the application is brought (para 73).
    - Representing and supporting P in making an application to the Court of Protection where the RPR concludes that P would wish to make the application in circumstances where P is unable to communicate that wish (para 77); and
    - In supporting P, the RPR must assess for himself or herself whether an application should be made to the court in P's best interests, independent of any wishes

expressed by P, and must therefore assess for himself or herself the matters in s21A(2) namely:

- Whether P meets one or more of the qualifying requirements;
- The period for which the standard authorisation is to be in force;
- The purpose for which the authorisation is given; and
- The conditions subject to which the authorisation is given (paragraph 78).

The role of a s39D IMCA

Baker J made clear that the role of a s39D IMCA is much more limited. Under the MCA, the IMCA is obliged to:

- Take such steps as are practicable to help P and the RPR to understand the effect, purpose, duration, conditions, and reasons for the DOLS authorisation, and the relevant rights and how to exercise them;
- Take such steps as are practicable to help P or the RPR to apply to court or exercise the right of Part 8 review. By contrast with the RPR, it is not the role of the IMCA;
- Where P is unable to express a wish, either verbally or through behaviour, to analyse whether P would wish to apply. That is the role of the RPR
- To consider whether there is any other reason to apply to the court to consider the questions in s21A(2). That is also a matter for the RPR (para 84).

The role of best interests**

Baker J rejected the Official Solicitor's contention that an RPR's decision to apply to court is always a best interests' decision. Instead, "[w]here the RPR concludes that P wishes to apply to the court, it is not the function of the RPR to consider whether such an application would be in P's best interests" (para 74). However, when the RPR decides, independent of P's wishes, that an application should be made to court under s21A, then he is bound to apply the best interests principle (para 80). So, in short, "the best interests principle does not apply where the RPR is facilitating P's wish to apply to the court, but it does apply when the RPR himself is deciding whether or not to apply" (para 81).

It is very important that the second limb of the RPR's duty to make an application to court in P's best interests is not overlooked, even where P is not objecting (verbally or by his/ her behaviour) to the care arrangements or expressing any wish to apply to court. RPRs must assess for themselves whether the conditions of a standard authorisation are met and whether the arrangements are the least restrictive. This is a vital part of the overall protection afforded for P's rights. As Baker J recognised in the judgment, it is the statutory scheme as a whole that guarantees that P's rights under Article 5(4) are adequately protected (para 85).

More help?

A useful flowchart illustrating when to bring court proceedings to challenge a standard DoLS authorisation can be accessed here http://www.mentalcapacitylawandpolicy.org.uk/when-to-bring-an-s21a-application-flowchart/