

Neutral Citation Number: [2016] EWCOP 47

Case No: COP 12084627

IN THE COURT OF PROTECTION

21 November 2016

Before :

THE HONOURABLE MR JUSTICE PETER JACKSON

Between:

N (by his litigation friend, the Official Solicitor)

Applicant

-and-

A LOCAL AUTHORITY

Respondent

Nicholas O'Brien (instructed by Richard Charlton Solicitors as agents for the Official Solicitor) for N
Christine Cooper (instructed by Legal Services) for the Local Authority

Hearing date: 16 November 2016
Judgment date: 21 November 2016

JUDGMENT: N (Deprivation of Liberty Challenge)

IMPORTANT NOTICE

This judgment was handed down after a hearing under the Court of Protection pilot scheme. It can be reported provided that the names of the parties are not identified. Failure to comply with this condition may be a contempt of court.

Mr Justice Peter Jackson:

1. This judgment contains fuller reasons for a decision given at the end of a hearing on 16 November 2016.
2. N is a man in his 40s who has lived in residential care for much of his life. He has mild learning difficulties and suffers from a paedophilic disorder. He has a history of fire-setting and self-harm and a tendency to try to make contact with children for sexual gratification, though there is no suggestion that he has ever committed any offences of that kind. He maintains contact with his mother, with whom he spends the weekend every three weeks.
3. In 1999, after facing charges of arson and assault, N was made subject to a hospital order under s.37 Mental Health Act 1983. After 18 months, he was discharged into supported residential care. In 2005, a guardianship order was made under s.7 of the 1983 Act, allowing the local authority to determine where he should live, and a number of placements followed. Efforts were made to reduce the level of supervision, but after an increase in sexualised behavior, one-to-one supervision was reintroduced. Even then, in 2010 he was found to be dropping notes for children, despite being supervised in the community. This led on one occasion to an angry relative trying to lure him to a meeting with a view to harming him. He had to leave the home he was in and has been resident in his current placement since September 2010.
4. This is a largish residential placement funded by the local authority. It is a locked environment for managing people with challenging behaviour. N is escorted at all times in the community and closely monitored in the home. He has some unsupervised time in the garden. Since 2016, he has been offered daily shadowed leave in the community, when he is not so closely supervised, but he has not taken up as much of this as he could. Nor does he participate in the full range of activities that are available to him.
5. N has been subject to deprivation of liberty authorised under Schedule A1 of the Mental Capacity Act since July 2010. This is the second time that the matter has come before the Court of Protection. In July 2012, Mr Justice Moor upheld the supervision arrangements after a substantial hearing: see *Y County Council v ZZ* [2012] EWCOP B34. I refer to that judgment for its full description of the statutory principles and of the prior history.
6. N now brings a further challenge under s.21A Mental Capacity Act 2005. In form, this is a challenge to a standard authorisation granted by the local authority to the management

of the residential placement as long ago as April 2013. N's application was issued in April 2014, just as the authorisation was about to expire. Since then, the deprivation of liberty has been authorised by interim orders of the court. In July 2015, the Official Solicitor was once again invited to act on behalf of N. I comment at the end of this judgment on the length of time it has taken to resolve the matter.

7. As well as challenging the deprivation of liberty authorisation, N has challenged the guardianship order before the mental health tribunal. The order, which governs the fundamental question of where he is to live, falls under the mental health legislation and takes precedence in that respect over the deprivation of liberty issue that is now before this court. N's application was made in July 2014 and dismissed by the First Tier Tribunal in September 2014. His appeal against that decision was dismissed by the Upper Tribunal in March 2015.
8. There is no dispute that the arrangements that are currently in place amount to a deprivation of N's liberty. He is under continuous supervision and control and he is not able to go out and about freely. Nor is there any issue about N's lack of litigation capacity.
9. What is in issue is (1) whether N has capacity to decide on his care arrangements, and specifically to decide whether or not he should be accompanied in the community, and (2) if he does not, whether the deprivation of his liberty is necessary and proportionate and in his best interests.
10. As to **capacity**, all professional opinion is that the presumption of capacity has been displaced. I have heard evidence from three witnesses: DM, the local authority's specialist care manager, who has known N since 2009, and bases his own assessment on that of a multi-disciplinary team; MM, a registered mental health nurse, who carried out a capacity and best interests assessment in June 2015; and Dr Richard Noon, consultant forensic psychiatrist jointly instructed by the parties, who carried out a capacity assessment in March 2016. Although the emphasis varied between the witnesses, each of them considers that N's learning disability, combined with his paedophilic disorder, makes him unable to understand and weigh the risks that he poses to himself and others if he was unsupervised in the community. Although N has undertaken three SOCSET sexual offending courses, they have not achieved any real change in his thinking. The professionals all consider that he would be likely to succumb to temptation if he was not supervised, and that this could lead to serious consequences for him in the form of criminal sanctions or reprisals.
11. N himself does not consider that he poses a risk to himself or others, and points to the fact that he has been largely compliant for the past six years. I note, however, that when speaking to MM he described his feelings for children as natural, saying that everyone has them to some extent. Also, for some years, he has expressed a wish to adopt a child, despite being repeatedly counselled that this is unrealistic. These are to my mind clear

examples of his inability to understand the issues that have to be considered when making decisions about his care arrangements. I note Dr Noon's view that they might also be an example of minimization, but he too considered that N's paedophilic disorder probably also affects his capacity, though the fundamental difficulty springs from his learning disability.

12. N attended the hearing and addressed the court through Mr O'Brien. He draws attention to the fact that he has not offended and shows some recognition of his situation by looking for support when he wants it. Also, he says (and has said to professionals) that he has shown that he understands that his feelings about children are wrong and that they would lead to punishment if acted on. Mr O'Brien accordingly argues that while N's capacity may be affected by his conditions, it has not been shown that he lacks capacity.
13. Having considered all the evidence, I accept the professional conclusion and, like Moor J, find that N lacks the capacity decide on his care arrangements. His learning disability deprives him of insight into the persistence of his paedophilic disorder. For him to go into the community alone would not be merely an unwise decision, but an action taken without any real understanding or balancing of the risks he poses and the risks he faces.
14. In relation to **best interests**, N himself says that he could manage without supervision. He would not go out at night. He would like a bit more freedom. It would improve his mood and state of mind. He does not mind having an accompanying person but does not want to have to wait for them to be available to accompany him.
15. However, the professional advice is again clear. The boundaries that are being set allow N to develop in a way that he is not able to achieve for himself. The level of risk if he was unsupervised is real and the nature of the risk is serious. It could lead to N being returned to a prison or hospital environment indefinitely, quite apart from the risk of a violent response from others.
16. Mr O'Brien argues that the professional position has been over-influenced by an understandable concern to protect others, as opposed to giving benefit to N. I found no sign of this in the witnesses' evidence.
17. The central question is whether the measures are proportionate to the risks, also taking account of the benefits of more freedom. These are not negligible, but they are in my view markedly outweighed by the need to reduce the risk to N's wellbeing from a lack of supervision. I accept that it is a serious infringement of liberty to be unable to go into the world as and when one chooses, but instead to have to fit around the availability of others and be limited in where one goes. The presence of constant supervision is also a real infringement of privacy. I also accept that N has not engaged in any obviously risky behaviour for the past six years. However, that is best seen as showing the success of the supervision arrangements, rather than showing them to be unnecessary. Overall, I

conclude the arrangements that are in place are proportionate and necessary. There is no lesser form of interference, in the form of medication or treatment, that could be offered. My conclusion is that nothing material has changed since the hearing before Moor J. I also take note of the fact that N's mother, who takes a close and sympathetic interest, does not think it would be right to remove supervision.

18. There is, however, agreement that the efforts to relax supervision whenever possible should continue. The granting of a deprivation of liberty authorisation permits controls but does not compel them. Furthermore, a search is now going on to find a smaller, more domestic placement that might be more suitable for N. A potentially suitable placement has been identified and it is currently considering whether it can offer a place to N. The fact that it will be possible for him to be supervised where necessary will not make it any harder to find a suitable placement, and may in fact make it easier. I would encourage the local authority to continue with this process and hope that it is successful.
19. As to the outcome, the local authority asks the court to authorise a continued deprivation of liberty for 12 months. In response, Mr O'Brien argues that if the court is to authorise at all, it should only do so for a period of weeks to allow the local authority to pursue the normal statutory process. He points out that a standard authorisation cannot be granted for more than one year: Sch. A1 paragraph 42. So far, the court has already authorised an additional deprivation of liberty for 2½ years.
20. Fortunately, while the court proceedings have continued, the local authority has very correctly carried out its own assessments to ensure that N's deprivation of liberty remains appropriate: the most recent of these involved MM's assessments in June 2015, followed by Dr Noon's assessment in March 2016.
21. In this case, I will authorise a further 12 weeks deprivation of liberty. I agree that the court should only extend the period of its authorisation for long enough to allow the local authority to get matters back onto a proper footing. To deal with the possibility that N will again challenge the likely standard authorisation, I will direct that any such application should be referred to me on the issue for directions or summary disposal.
22. Lastly, I refer to the highly unsatisfactory court process in this case. These features stand out:
 - The proceedings that ended in 2012 with the judgment of Moor J lasted for two years.
 - These proceeding have lasted for 2½ years.
 - They began in April 2014 and were promptly transferred to High Court level by the District Judge in May 2014.

- They came before this court in May 2014, on which occasion the standard authorisation was extended until further order. Mr O'Brien rightly queries whether the Court of Protection should use its powers to extend a deprivation of liberty for longer than the statutory scheme allows. The short answer is that the question of an extension for longer than 12 months should not have arisen at all because the proceeding should have been concluded within, say, six months.
 - Instead, no progress was made until the matter returned to the same judge in August 2015, at which point N had new solicitors. The Official Solicitor was invited to act.
 - In November 2015, the Official Solicitor accepted the court's invitation.
 - It was not until January 2016 that a suitable capacity expert was found, and in March 2016, Dr Noon reported.
 - In April 2016, the matter came before a different judge, who gave directions for a three-day hearing that was intended to take place in July. However, witnesses were not available, and in the end the case was heard in November, taking one day.
 - The effect of this delay and uncertainty on N has been unsettling.
 - The total legal costs of the two represented parties exceeds £45,000. This is all public money that could self-evidently be better spent. In addition, there is the opportunity cost of professional time devoted to servicing proceedings that should have ended in 2014.
23. I note that the tribunal system was able to resolve the objectively more serious issue of guardianship in a matter of seven or eight months, appeal included.
24. The Court of Protection has the fullest powers to regulate its proceedings efficiently. The procedure for an application of this kind has since July 2015 been specifically governed by Practice Direction 10AA. During the hearing, I apologized to the parties, and particularly to N, for the length of time the proceedings had taken, and I reiterate the court's apology in this judgment.
25. Looking to the future, I repeat my encouragement to N to make the best use of the many freedoms that he does have, rather than dwelling on those of which – for his own sake – he is deprived.

JUDGMENT APPROVED FOR PUBLICATION
