**N v ACCG and Ors [2017] UKSC 22**

"*What is the role of the Court of Protection where there is a dispute between the providers or funders of health or social care services for a person who lacks the capacity to make the decision for himself and members of his family of family about what should be provided for him*?" That was how Lady Hale encapsulated the dispute at the heart of this "*difficult and important*" case.

The facts:

MN was a young man in his twenties with severe learning and physical disabilities, including epilepsy. At the age of eight he had been taken into care. Shortly before his eighteenth birthday, the local authority had issued an application for orders concerning his future residence and care. MN's parents wished him to live with them. The local authority and CCG who took over responsibility for his care (as an adult) considered that was unrealistic. MN's disabilities and nursing needs were so severe, they argued, that he needed residential nursing care. That view was supported by the Official Solicitor. Many months of negotiations, trial contact arrangements and litigation ensued.

By lunch time on the first day of the final hearing there were only two remaining issues in dispute. First, should MN's contact with his parents now take place in their home? Second, should his mother be allowed to participate in his intimate care when she visited him in the care home? The CCG's answer to both requests was "no", partly through concern for MN's safety, given his parents' long history of non-cooperation with care staff and partly as a result of the associated financial implications. An entirely new team of carers would have to be employed for the proposed home visits as the existing team felt too intimidated by the parents to care for MN in their home.

The judge, King J, on the application of the local authority and the CCG, made the final orders sought by both bodies without hearing any evidence. They claimed that as the CCG was unwilling to fund further carers and had cogent reasons for refusing to allow Mrs N to participate in MN's intimate care, a hearing of evidence would be pointless. After all, when determining what was in MN's best interests, the Court of Protection could only chose between available options. The only available option in this case was the current care package, which did not meet either of the parents' requests. The application was vigorously contested by the parents who contended

that any subsequent judicial challenge to the CCG's refusals would be strengthened by a determination of MN's best interests by the Court of Protection.

King J held that it was simply wrong to approach the matter on a "*Best Interests - first, Judicial Review - second*" basis. That would result in "*a situation arising where the already vastly overstretched Court of Protection would be routinely asked to make hypothetical decisions in relation to 'best interests,' with the consequence that CCGs are driven to fund such packages or be faced with the threat of expensive and lengthy judicial review proceedings*." The judge's concern was subsequently endorsed by Sir James Munby P sitting in the Court of Appeal in refusing the parents' appeal.

So what did the Supreme Court decide? In short, that King J and Sir James Munby P were right, but for a slightly different reason. In her judgment on behalf of the whole court, Lady Hale concluded that "*the question* [before King J had not been] *strictly one of jurisdiction but of how the case should be handled in the light of the limited powers of the court*…[This] *was a case in which the court did not have the power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those circumstances, the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing*." The appeal was dismissed.

<u>Key points from the Supreme Court's judgment:</u>

1. The COP has no greater power to oblige others to do what is best than P would have himself. It follows that just like P, the court can only choose between '*available options*.'
2. The COP is not obliged to hold a hearing to resolve every dispute where it will serve no useful purpose to do so. The following factors are likely to be relevant for the court in deciding whether or not such a useful purpose would be served:
    (i) the nature of the disputed issues concerned,
    (ii) their importance for P,
    (iii) the cogency of the requests or demands made of the public body concerned,
    (iv) the reason(s) why those requests or demands have been refused,

(v) any relevant and indisputable fact in the history of the dispute,

(vi) the views of P's litigation friend,

(vii) the consequence of further investigation in terms of costs and court time,

(viii) the likelihood that such investigation might bring about further modifications to the care plan or agreement between the parties

(ix) and finally, whether an investigation would serve any useful purpose.

Concluding comments:

Whilst the Supreme Court stated "*that a care provider or funder* [cannot] *pre-empt the court's proceedings by refusing to contemplate changes to* [its proposed] *care plan* [for P]," it is difficult, on reading the judgment as a whole, to envisage a situation whereby the parents' goal of "*Best Interests - first, Judicial Review - second*" could now be achieved. The Supreme Court has recognised that the considerations before a public body in allocating services are different from those faced by the COP and that they should be challenged via judicial review. That suggests that the Supreme Court upheld Sir James Munby P's comments that "[the] *Court of Protection…can explore the care plan being put forward by a public authority and, where appropriate, require the authority to go away and think again. Rigorous probing, searching questions and persuasion are permissible; pressure is not*. *And in the final analysis the Court of Protection cannot compel a public authority to agree a care plan which the authority is not willing to implement.*" Probing, questions and persuasion must surely be the stuff of judicial exchanges with lawyers, not full best interests hearings.

However, the judgment illustrates that if public bodies and their advisors wish to avoid protracted litigation by asking the court to use its case management powers, they should keep the matters, which remain in dispute under review throughout the proceedings. Part of that review should include a consideration of whether the dispute can be resolved without the intervention of the court and whether in fact, there is more than one option for the court to consider. If it cannot, careful consideration should be given to the cogency the public body's stance and whether further evidence is needed to support it. Armed with such evidence the public body will maximize its chances of bringing the litigation to a conclusion either through an early final hearing or orders being made without the need for a hearing, as happened in the present case.

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