SOLICITORS JOURNAL

Decide for yourself

The judgment in CH v A Metropolitan Council demonstrates that before making decisions for a vulnerable person, there is a real obligation to support them to gain capacity where possible, writes **Sophia Roper**

14 September 2017

Sir Mark Hedley has given an impressively short judgment approving an unusual settlement of a claim for damages under the Human Rights Act 1998. The claim was brought by CH, a 38-year-old man with Downs Syndrome and an associated learning difficulty. CH married WH in 2010 and they lived together in his parent's home, enjoying normal 'conjugal' relations like any other married couple. In 2014, the couple sought fertility treatment, which led to a query as to whether CH had the mental capacity to consent to sexual relations at all. He was assessed by a consultant psychologist, who considered that CH did not have such capacity, but needed a course of sex education to help him achieve it.

The generally under-regarded section 1(3) of the Mental Capacity Act 2005 provides that a person is not to be regarded as lacking capacity to make a decision 'unless all practicable steps to help him to do so have been taken without success.' In CH's case, the practical assistance he needed was clearly defined: a course of sex education. This was duly requested, but not provided. Instead, the local authority wrote to the couple in March 2015 saying that WH could no longer have sex with her husband because this would be a serious criminal offence. WH understood that if she flouted this, the couple would be separated. She therefore moved into a separate bedroom, and 'significantly reduced any physical expressions of affection' so as not to lead CH on. As Sir Mark Hedley commented: 'the impact of all this on CH is not difficult to imagine.'

After what sounds like a lot of unproductive correspondence, CH's sister seems to have despaired and started proceedings in the Court of Protection in February 2016. Even then, it took a court order for the local authority to provide sex education which eventually started in June 2016, over a year after the couple had been banned from having sex. CH made progress and by March 2017 had acquired capacity to consent to sexual relations. A declaration was made to that effect and conjugal relations were restored.

The essence of the claim was the delay in implementing the course of sex education between March 2015 and June 2016, which was considered to be a period of 'not less than 12 months,' given that even if the local authority had acted straight away, it would have taken time to set up the course.

Sir Mark's analysis led to the conclusion (undisputed) that 'enforced abstinence from conjugal relations' was a breach of Article 8(1), but that some interference with this right was justified under Article 8(2) as a result of the psychologist's conclusions. He commented that it might be surprising that a declaration of incapacity could be made where a couple had already married, saying that most declarations of incapacity were made where there was sexual disinhibition and protection from abuse was required. However, he pointed out that the criminal law does not distinguish between sex within and outside of marriage: this, he said, was 'the price of protection for us all.'

The local authority agreed to pay CH's costs, both of the Court of Protection proceedings and of the HRA claim (both pre-action and Part 8), which meant that there was no concern that his damages would be clawed back by the Legal Aid Agency under the statutory charge. The only question for the judge, therefore, was whether the proposed sum of £10,000 for at least 12 months' loss of conjugal relations was the right quantum. He noted that although the impact on CH must have been profound, there was fortunately no evidence of long term damage. Since there was no case law, he concluded that in the end a 'broad, instinctual view' was required. He felt that the sum was at the lower end of a possible range of 'less than £10,000' to £20,000, but approved it, noting that the apology and prompt settlement, avoiding the distress to CH of contested proceedings, were factors he should properly take into account.

The most interesting feature of this case for anyone supporting P to make capacitated decisions is the fact that ultimately, failure to comply with s1(3) of the MCA 2005 has been held to constitute a breach of P's Article 8 rights. The absence of sanctions for non-compliance with the MCA 2005 is an ongoing source of frustration, but this judgment suggests that if there are defined steps which may lead to P's acquiring capacity to make a decision,

these steps must be taken to avoid a similar HRA claim. There is no reason why this should be confined to cases of sexual relations, although there are plenty of cases where vulnerable people (usually learning disabled) have been considered incapacitated in the absence of sex education - which is not always provided, since the acquisition of capacity may make the task of protecting P much more difficult. If the effect on P of not providing necessary support - speech and language support, communication aids, advocacy from someone familiar with P's communication - is that P is stripped of autonomy, with important decisions - where to live, who to see - being made for him/her, this is just as much as infringement of P's Article 8 rights as enforced abstinence from sex.

So what does this judgment tell us? First, assessments of capacity should address any steps which could enable P to gain capacity in appropriate cases. This is not just confined to learning disabled people: I have recently acted for an elderly gentleman with dementia who was able to communicate much more effectively if people talking to him followed the recommendations in a report from Communicourt. Experience suggests that expert psychologists and psychiatrists are routinely instructed to advise as to remedial steps, but that this is less common in s49 instructions and assessments by social workers. If no one has considered the point, a further assessment may be justified. Second, if any remedial steps are identified, interim declarations of capacity may be justified but final declarations are surely not. Third, the practical steps identified need to be taken so that P can make his/her own decisions if possible. I am involved in one COP case at the moment where, on the advice of an expert psychiatrist, a young man is being provided with 'structured support' to enable him to gain capacity to make his own decisions, because P needs concrete experience within a protective environment to learn how to use and weigh the information relevant to the decisions he has to make. This will take time, but if the consequence of the COP proceedings is that he can make his own decisions in the future, this will be a great result. Thankfully, the agencies who have to provide this support have engaged in doing so and progress is being made. In many cases, however, this is not done at all. This judgment demonstrates that before making decisions for a vulnerable person, there is a real obligation to support him/her to make them for him/herself, and the consequence of a failure to do so is potentially expensive. If put into practice, we could see more COP proceedings ending with a declaration that P has gained capacity and the court has lost its jurisdiction: in terms of empowering the vulnerable, this must surely be the best possible outcome.

Sophia Roper is a member of the Court of Protection team at the Serjeants' Inn. Her Chambers colleague Bridget Dolan QC acted for the successful claimant, CH.