

P in Lockdown: getting in to P and getting P out

20 May 2020

Getting in to P: Remote assessments

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Serjeants' Inn Chambers

20 May 2020

Theme of this talk



Technology is your friend

Remote capacity assessments: The “new normal”

- Remote assessments highly encouraged by judiciary
- 18 March 2020: “Can capacity assessments be undertaken by video when it is established that P is happy to do so and can be “seen” alone? **In principle**, yes.” (guidance)
- 25 March 2020: “... capacity assessments would, of necessity, for the time being require to be undertaken remotely. There is simply **no alternative** to this...” (*BP v Surrey CC* [2020] EWCOP 17 at §37)
- 4 May 2020: “assessments of capacity can be conducted ‘remotely’ with both competence and fairness in the **vast majority** of cases”
(letter)

Who should be assessing capacity?

- Section 49 reports: Trusts / LHBs and beyond
 - MCA and DOLS Guidance: “Any decisions must be taken specifically for each person and not for groups of people”
 - Dose of realism: many Trusts clearly overstretched
 - Consider (inevitable) delay *cf.* urgency of case
 - Demands may be easing
 - Regional differences
- Alternative section 49 options:
 - Court of Protection visitors
 - Local authority “officer or employee” (s12 doctor?)

Other practical alternatives

- “Such other person” considered appropriate by the local authority or NHS Trust
 - Clinician with previous involvement in case
 - GP? (pros and cons)
- Independent experts
 - Don’t forget rule 15.3:
 - Must be **necessary** to assist the court to resolve the issues in the proceedings
 - Court may give permission **only if satisfied** the report cannot be provided either: by a rule 1.2 representative; or in a section 49 report

Keeping P at the centre

- Each case must be decided on a case-by-case basis

Consider:

- **Complexity & expertise:** If complex case, may be on borderline as to whether expert required – Covid-19 may be tipping point
- **Urgency:** If delay real issue, expert may be better option
- **Creativity & pragmatism:** (1) Think outside the box; (2) Come armed with several options; (3) Be prepared for setbacks
 - Note on OT assessments & technology
 - Costs

What if P can't be assessed remotely?

Adjourning for an assessment

- Adjourning will be necessary
 - How long?
 - Build in contingencies for delays
 - Consider each case on its own merits
- Think twice before agreeing a stay of proceedings
 - What else can be done in this time?
 - Consider back log

Easements / modifications generally

- KEY CAVEAT: None of the following applies *unless* a local authority has formally decided to apply the easement provisions
 - Status quo remains: Full CA / SSW(W)A applies

Care/SSW(W) Act decision making

- Decision should only be taken when either:
 - (a) the workforce is “significantly depleted”; or
 - (b) demand on social care has increased
- to the extent that it is no longer reasonably practicable to comply with Care Act duties (pre-easements / modifications)
- **and** where to continue to try to do so is likely to result in needs* not being met, potentially risking life (*acute or urgent, CA 2014)
- Decision should be recorded with evidence

Easements in law

- Coronavirus Act 2020, Schedule 12
- Key amendments (CA 2014 / SSW(W)A 2014):
 - Assessment of needs of adult for care and support (s 9 / s 19)
 - Assessment of needs of carer for support (s 10 / s 24)
 - Determination of whether needs meet eligibility criteria (s 13/ s 32(1)(a))
 - Assessment of financial resources / duty to carry out financial assessment (s 17 / s 63(2))
 - Duty to prepare and review care and support plan (s 24, s 27 / s 54)

Key distinction between England and Wales

- Section 18 CA 2014 vs section 35 SSW(W)A 2014
 - In **England**: Duty to meet needs of adult for care and support – only applies if failure would amount to a **breach of ECHR** (Sch 12, para 4)
 - Otherwise a “power”
 - In **Wales**: Duty to meet needs of adult for care and support – only required if local authority considers it necessary to meet the needs in order to **protect the adult from abuse or neglect *or a risk*** of abuse or neglect (Sch 12, para 26)
 - Otherwise a “power”
- * NB: Safeguarding duties have not been amended (E&W)

Other quirks

- Modifications generally should only be used as a “**last resort**”... but only in Wales?
- In Wales (only?): Local authorities **must** also ensure that decisions made by individuals and their families as a direct result of the pandemic **are not used as evidence for determining whether or how to meet needs for the future**
 - Practical implication: Where P’s family looking for return home, current circumstances may not reflect normality

Easements in practice

- On 30 April 2020, it was announced that eight local authorities in England had enacted easements (with seven in use – now six)
 - All in Stage 3 bar one – in Stage 4
- Examples of easements in practice:
 - No hard copy assessments or care and support plans (streamlining)
 - Limiting choices of providers (*happening anyway?*)
 - Less detailed plans
 - Deferrals
 - Suspensions of reviews

No impact on duty to refer for advocacy

- NO changes to rules relating to advocates under MCA, Care Act or SSW(W)A
- If P is eligible, there remains legal duty to refer for advocacy services
- However, concerns have been raised:

“There has been a striking and troubling drop in the number of Section 21A (MCA 2005) applications which has occurred, in some areas, alongside a significant reduction in referrals to advocacy services.”

- Hayden J, Letter to Association of Directors for ASC,

4 May 2020

How to maintain contact and provide support?

- The Obvious Point: Technology is your friend (Camille Ivinson)
 - Consider use of Skype, Zoom, Facetime, Teams, What's app, YouTube, Snapchat (?), TikTok (??)
- The Other Obvious Point: Not all P's will be able to use standard technology
- Consider:
 - Who can you lean on?
 - Assistive technologies?

“Absolutely essential”: Accessing care homes

- No legal blanket ban on accessing care homes
- Guidance from Welsh Government (letter to providers etc), 23 March 2020:

“Visits to a care home should now only take place when **absolutely essential** and not as part of routine visiting previously experienced at the home.”

- If believe absolutely essential, speak to care home manager
- Case-by-case basis requiring common sense approach

End of life care

- Visits on compassionate grounds – matter for care home but not prohibited
- May require involvement of advocate where decisions being made about discharge; access by family members (Emma Sutton)
- Department of Health & Social Care, COVID-19 Adult Social Care Action Plan (15 April 2020):

*“Whilst we have recommended care homes limit **unnecessary** visits, we are clear that visits at the end of life are important both for the individual and their loved ones and **should continue.**”*

Alternative meeting points

- Enjoying the sunshine with P (in England)



Rhys Hadden & Molly Fensome-Lush to discuss access to the community mid-lockdown



- Questions at the end!

P in the Community

Rhys Hadden & Molly Fensome-Lush

20 May 2020

Legislative response to physical distancing

- Regulations made pursuant to powers under **Public Health (Control of Disease) Act 1984**:
 - The Health Protection (Coronavirus, Restrictions) (England) Regs 2020
 - The Health Protection (Coronavirus, Restrictions) (Wales) Regs 2020
- Implemented on 26 March 2020. Reviewed every 21 days. Last amended on 11 May 2020.
- Due to expire in 6 months – 26 September 2020
- Different “road maps” by UK Government and Welsh Government to how these restrictions are to be eased in the future

England: Examples of a reasonable excuse

- Reg 6(1): During the emergency period, no person **may leave or be outside of the place where they are living** without **reasonable excuse**
- Reg 6(2) provides a non-exhaustive list as to what may amount to a reasonable excuse. Some relevant examples are to meet a need to:
 - to **obtain basic necessities**
 - to **take exercise alone**, with one or more members of their household, or **with one member of another household**
 - to **visit a public open space for the purposes of open-air recreation to promote their physical or mental health or emotional wellbeing** alone, with one or more members of their household, or **with one member of another household**
 - to **provide care or assistance**, including relevant personal care or to provide emergency assistance;

England: further examples of a reasonable excuse

- **to work or to provide voluntary or charitable services**, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living
- **to attend a funeral** of a member of the person's household, a close family member, or (if neither of those are attending) a friend
- **to visit a burial ground or garden of remembrance**, to pay respects to a member of the person's household, a family member or friend
- **to fulfil a legal obligation**, including attending court or satisfying bail conditions, or **to participate in legal proceedings**
- to access “critical public services” including **educational facilities** and **social services**
- to undertake **activities in connection with the purchase, sale, letting or rental of a residential property**
- to **avoid injury or illness or escape a risk of harm**

England: Restrictions on Gathering

- Reg 7 - No person may participate in a gathering in a public place of **more than two people** except—
 - (a) where all the persons in the gathering are members of the same household,
 - (b) where the gathering is essential for work purposes,
 - (c) to attend a funeral,
 - (d) where reasonably necessary— (i) to facilitate a house move, (ii) to provide care or assistance to a vulnerable person, including relevant personal care, (iii) to provide emergency assistance, or (iv) to participate in legal proceedings or fulfil a legal obligation

Wales: examples of what may amount to a reasonable excuse

- Reg. 8(1) During the emergency period, no person may leave the place **where they are living or remain away from** that place without reasonable excuse.
- Reg. 8(2) lists examples of what may amount to a “reasonable excuse”
 - To take exercise, **within an area local to the place where the person is living**, alone with other members of the person's household, or **with the person's carer** (NB – no limit to amount of exercise)
 - To attend a funeral – **if invited or as the carer of a person attending**
 - To access critical public services, including educational facilities where these are still available or **to visit a library**
 - To move house **where the move cannot be postponed**

England v Wales: Some key differences

In Wales:

- Any exercise must be “within an area local to the place where the person is living”
- Staying local – exercise or travelling to exercise should not be a “significant distance” from where you live
- Not able to visit a public open space for the purposes of open-air recreation or to promote physical or mental health or emotional wellbeing
- Not permitted to “remain away from” place where living without reasonable excuse

In England

- Unlimited travel to exercise or visit a public open space
- Able to exercise with one member of another household (but maintain physical distancing)
- Outdoor sports courts and playgrounds may reopen
- Not allowed to “be outside of” place where living without reasonable excuse

Are the restrictions on P authorised?

- 2020 Regs do not provide authority to keep a person at home
- No reference to mental capacity in 2020 Regs (in England or Wales)
- If P lacks capacity to decide to remain at home and, if there are practical steps being put in place to stop her leaving, to consent to those steps – has this been authorised under the MCA 2005?
 - Care Home / Hospital – Is there a DoLS in place which already covers any additional restriction? (NB – DoLS cannot be used to protect others from harm)
 - Supported living / at home – additional authorisation needed from the court?
- CoP has taken an approach to interpret ‘best interests’ more broadly so as to encompass a risk of harm to others including by way of ensuring that P is not subject to criminal prosecution: E.g. ***Birmingham City Council v SR*** [2019] EWCOP 28 at [41]

Equality Act 2010 / ECHR

Consider whether discrimination under the Equalities Act 2010?

- Direct discrimination / discrimination arising from a disability
- Indirect discrimination - whether an apparently neutral provision, criterion or practice puts a disabled person at a particular disadvantage
- Failure to make reasonable adjustments

Consider whether breach of P's convention rights – Art.8 ECHR

Some things to consider if supporting P to access community

- 2020 Regs arguably allow going for a drive if will assist to “...avoid injury or reduce the risk of harm.” This can mean avoidance of physical harm or an individual’s mental health or well-being
- Carers themselves can be at “risk of injury” if P is not supported appropriately
- Sensible for support workers to carry ID cards, and if possible, a letter confirming that they are key workers. Letter should set out P’s needs

Relevant Guidance

England

- Guidance / FAQs on the regulations: <https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do>
- Staying safe outside your home: <https://www.gov.uk/government/publications/staying-safe-outside-your-home/staying-safe-outside-your-home>
- Staying alert and safe social distancing: <https://www.gov.uk/government/publications/staying-alert-and-safe-social-distancing/staying-alert-and-safe-social-distancing>

Wales

- Guidance / FAQs on the regulations: <https://gov.wales/coronavirus-regulations-guidance>
- Leaving home to exercise - <https://gov.wales/leaving-home-exercise-guidance>

P in the community: case studies

Molly Fensome-Lush

20 May 2020

Case Study 1

- P has type 2 diabetes and had received a 'shielding' letter so cannot access the community for 12 weeks
- Previously had regular community access and this was key for her mental wellbeing
- Staff have been creative in taking her out and even seeing family

Case Study 2

- P has schizophrenia and a learning disability and struggles with social boundaries
- Independent community access was a key element of his care plan but was stopped due to COVID-19
- Fortnightly reviews have taken place since and unescorted leave has been reinstated (with the addition of a mask and gloves!)

Case Study 3

- P has a diagnosis of Asperger's autism, impaired social interaction and compulsive rigid behaviours
- Difficult relationship with food and will only eat meals purchased in the community
- Success in being able to have two supported trips out in the community per day – one for exercise and one to purchase food

Contact during lock down

Camille Ivinson

20 May 2020

Official Guidance for Care Homes

- Admission and Care of Residents during COVID 19 Incident in a Care Home (due to be updated)
 - Family and friends should be advised not to visit care homes, except next of kin in exceptional situations such as end of life.
 - Strict recommendations for safety and social distancing for essential visits
 - No specific comments on maintaining contact in other ways

Official Guidance for Care Homes

- Additional Welsh guidance – letter from the Welsh Govt to care providers, HBs and Directors of Social Services
 - Reiterates only essential visits
 - Stricter rules for planning and undertaking essential visits
 - “It is essential that moving to an essential only level of visiting from **is supplemented with opportunities for social contact within the care home**, particularly where residents spend time in their individual rooms. Regular telephone calls with family and friends should be encouraged and consideration could be given to visual mechanisms such as video calls e.g. Skype or FaceTime. **We anticipate that these restrictions will be undertaken in the most sympathetic manner and for the shortest possible period and in ongoing consultation with your residents and their friends and families.**”

Article 8?

- BP v Surrey County Council & RP [2020] EWCOP 17
- Application contended that the restrictions on contact imposed by the care home constituted an unlawful interference with BP's Article 5 and 8 rights.
- Restrictions lawful but care homes will need to be creative to help ensure people can maintain contact with their family and loved ones.

Alternative means of contact

- Video calls and other technology
 - Apps for recording videos
- Outdoor contact
- Advice for families from Dementia UK
 - Life story books
 - Sending photos
 - Alerting care home staff to upcoming milestones
 - Plus lots more: <https://www.dementiauk.org/helping-families-keep-in-touch-during-covid-19/>

Practical considerations

- Wifi / internet access in care homes
- Availability of devices
- Level of staff support needed
- Booking contact slots
- Who pays for it?

Most importantly – P’s response?

- Do alternative means of contact actually offer any benefit for P?
- Pitfalls of technology
- Even when alternative means of contact are offered, what is the impact on P of no face to face to contact
 - BP & Surrey County Council: “All agree that BP has struggled to cope with or understand the social distancing policy which it has been necessary to implement. FP said that she believes her father thinks that he is being punished in some way.”

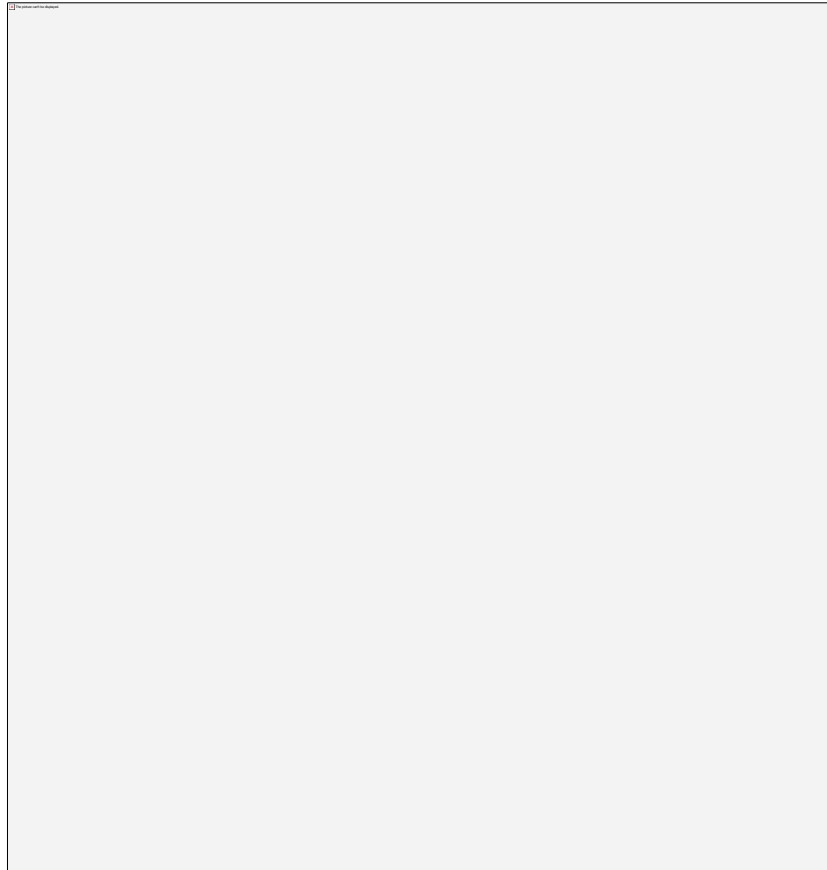
Social Media & Young People

- From one extreme to another - re-examining restrictions on young people's access to social media during lock down
- Increasingly seeing capacity to make decisions about social media and restrictions on internet access in cases about young people
- First and foremost – is there are a **capacity assessment?**
- If P lacks capacity, how should we re-examine the risk matrix when P is deprived of other means of contacting family and peers?

Getting P home!

Emma Sutton

20.05.20



What this talk is NOT about

“I am very conscious that those on the front line and particularly those in the Care Home system, have come under great pressure on many fronts. I am aware, from a variety of sources, that many carers have given selflessly and unstintingly of their time and energy. In some circumstances carers for those with dementia and other cognitive impairments have become their primary source of stability and, to use the phrase which I have heard so frequently, evolved in to “a substitute family””

Letter from Mr Justice Hayden to the Association of Directors
of Adult Social Services dated 4 May 2020

.....BUT what is to be remembered

“The deprivation of the liberty of any individual in a democratic society, holding fast to the rule of law, will always require appropriate authorisation. Nothing has changed. The Mental Capacity Act 2005, the Court of Protection Rules and the fundamental rights and freedoms which underpin them are indispensable safeguards to the frail and vulnerable”

Letter from Mr Justice Hayden to the Association of Directors
of Adult Social Services dated 4 May 2020

Why move?



- As at Tuesday 19 May 2020, more than **12,500** people had died from coronavirus in care homes across the UK since the start of the pandemic (figures suggest)
- Overall, care home deaths account for **over a quarter** of the virus fatalities

Why move?



- Care homes are likely to increase residents' risk of infection because of **physical proximity and multiple contacts** between residents/ staff
- Care home residents are more likely than the general population to **have comorbidities relating** to respiratory disease, heart disease, their immune systems, diabetes and obesity - increasing the risk of a more severe form of the infection

What the COP can and cannot do



- **Go back to basics:** the court can only make decisions that P themselves would be able to make if capacitous
- COVID-19 has not provided the court with a “magic wand” which presents options P that were otherwise not there

What the COP can and cannot do

- Does allow a **shift** of emphasis when undertaking the balance sheet analysis
- Even **more pressing** for a decision to be made swiftly

“Another common driver of delay and expense is the search for the ideal solution, leading to decent but imperfect outcomes being rejected. People with mental capacity do not expect perfect solutions in life, and the requirement in section 1(5) of the Mental Capacity Act 2005 calls for a sensible decision, not the pursuit of perfection”

Mr Justice Peter Jackson in

Cases A & B (Court of Protection: Delay and Costs [2014] EWCOP 48 at §14



Type of application to get P home

- **Section 21A challenge:** argument that the best interests qualifying requirement not met
- **Section 16 welfare application:** re residence/ care/ contact
- **Very similar arguments:** there is a less restrictive option available



Considerations

- **Section 16:** application of section 1 and section 4 MCA 2005
- **Section 21A:** the above, plus, paragraph 16 of schedule A1
- Also consideration of Article 2, 3, 5 and 8 ECHR (dependent on facts)

b. “COVID-19 Authorities”

BP v Surrey CC [2020] EWCOP 17 Hayden J

Application by daughter of elderly man to leave care home to live with her. Declaratory relief sought under section 15. Application not granted

VE v AO & Ors [2020] EWCOP 23, Lieven J

Application by daughter of elderly lady with terminal cancer for an order that it was in her best interests to leave the care home to move to live with her daughter and her family. Originated under section 21A, but proceeded on a section 16 basis. Application granted

c. What evidence will COP need for pushing trials at home / return home

- **Fact specific** (*the court, as decision maker, must consider all the relevant circumstances of a particular case*)
- **BUT** the following are examples of evidence gathered in recent “COVID-19” cases conducted by remote hearings

Necessary evidence: *General BI considerations*



- P's past and present wishes and feelings (section 4(6)(a) MCA 2005)
- P's beliefs and values (section 4(6)(b) MCA 2005)
- Other factors (section 4(6)(c) MCA 2005): for example, the importance of a sense of belonging

Necessary evidence *Assessments*



- **Re P's physical health:** any issues preventing P moving from care home?
Any particular vulnerabilities re contracting the virus?
- **Re P's mental health:** any issues preventing P moving from the care home now?

Necessary evidence *Assessments*



- **Needs assessment** (*from social care/ health, depending on commissioner*): to identify what the necessary care package at home would be
- **OT assessment** regarding the property P returning to, and what assistive technology was required
- **Carers assessment**: if a family member is to assist P at home

Necessary evidence

Witness evidence



- **Care home manager:** re number of residents, number of residents who had tested positive for COVID-19/ died from COVID-19/were showing symptoms of COVID-19
- Information re ‘bio-security measures’ undertaken (*eg, handwashing, and separation/isolation of residents*)
- Allow the court to understand the particular issues within P’s particular care home

Necessary evidence

Witness evidence



- From relevant professional (social care or health)
 1. P's engagement with carers previously
 2. If professional care required, what is the cost?
 3. How will this to be commissioned?
 - a. If by P, do they have the required funds?
 - b. If by the LA and/or the NHS (*CCG (England) LHB (Wales)*), are those public bodies willing to fund?

Necessary evidence

Witness evidence



5. If funding in place, has a care agency been identified/confirmed it can assist?
6. If the care agency *is* able to provide a package of care, what are the timescales?
7. Is this a “trial” at home? If so, should a bed be retained in the care home?

Necessary evidence

Witness evidence



Ensure that “consultation” has taken place (*if practicable and appropriate*):
section 4(7) MCA 2005

- Those caring for P (care home staff) or those interested in their welfare (family members)
- Donnee/ deputy

Submissions



Balance sheet analysis:

- Helpful for the assessments/ evidence to be analysed and set out in a balance sheet analysis
- Particularly important in urgent cases to assist the court

FOR A TRIAL AT HOME

AGAINST A TRIAL AT HOME

DH has been consistent in his wish to return home for over a 2 year period, and has articulated this wish to various professionals (*including his RPR, XX and his solicitor, XX*) (section 4(6) MCA 2005) [F/17, F/62, G/37, G/65, G/68, G/84, G/147, G/175, G/177, G/185, I/2, I/4, I/16, I/18, I/21]

Any distress caused to DH when told that his wishes and feelings are not being given effect to, are likely to be mitigated by him being in an environment where his carers are attuned to his needs, and who will be able to liaise with his GP or the mental health team if necessary [G/198 §8] (section 4(6) MCA 2005)

A package of home care is available for DH. X Healthcare (having undertaken a paper based analysis based on the COVID-19 restrictions) have confirmed that they are willing and able to provide a 24 hour package of support, and have confirmed that this could quickly be put in place

Other care providers have confirmed they would be unable to meet DH's needs at home due to (inter alia) the layout of his property, and his lack of insight into his care needs (XX at B/65, XX at H/30, XX at H/27)

Compliant with the COVID-19 regulations?



Yes. A court order (for P to return home) would not breach:

- Health Protection (Coronavirus Restriction) Regulations 2020 (SI 2020/350)
- Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (SI 2020/353)

Compliant with the COVID-19 regulations?



- Regulation 6(1) (England), regulation 8(1) (Wales) prohibits any person from leaving home **without a reasonable excuse**
- Regulation 6(2) (England) and regulation 8(2) (Wales) lists (apparently non-exhaustively) matters that would amount to a "reasonable excuse"

Compliant with the COVID-19 regulations?



- Regulation 6(2)(d) (England) and regulation 8(2)(d) (Wales) includes **providing care or assistance to a vulnerable person**
- Regulation 6(2)(l) (England) and regulation 8(2)(l) (Wales) includes **moving house where necessary**

d. What types of cases should go to the COP/ what can be done pre-issue to avoid COP

- Always a last resort to bring a case to the COP
- If *already* in court, shift emphasis re BI factors due to COVID-19
- RTM/ advocates meeting: aim to lodge a consent order regarding a return home (approved on the papers)
- If *not* in court, application should be made without delay

Thank you for listening

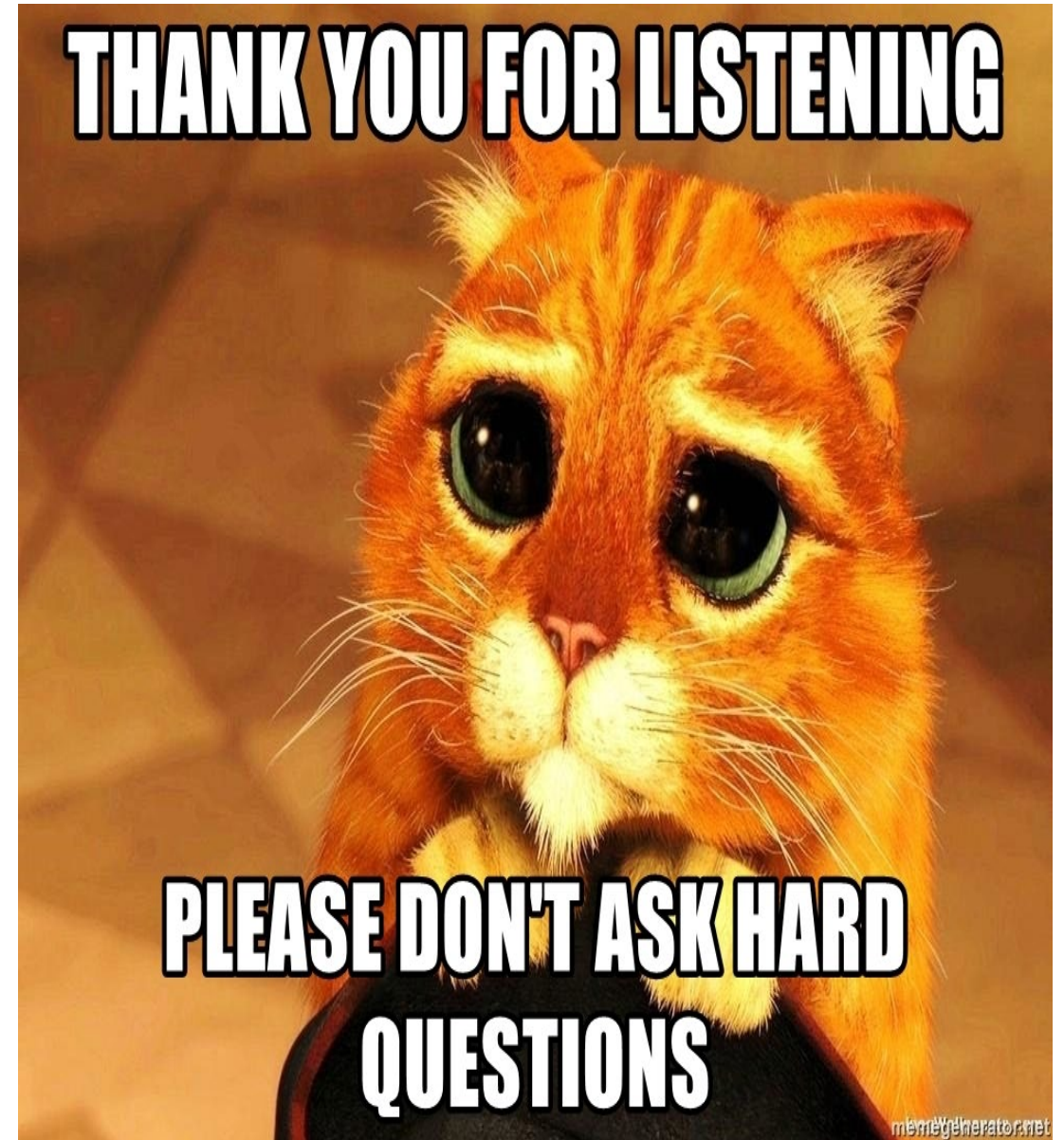
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