

IN THE COURT OF PROTECTION

Sessions House,
Lancaster Road,
PRESTON
PR1 2DP
Date: 07/12/2021

Before :

HIS HONOUR JUDGE BURROWS

Between :

MM
(by his litigation friend, DF)
- and -
A CITY COUNCIL

Applicant

Respondent

PARISHIL PATEL, Q.C. (instructed by Irwin Mitchell) for the Applicant, by DF
ALEX CISNEROS (instructed by City Legal Department) for the City Council

Hearing date: 21/10/2021 (written submissions)

APPROVED JUDGMENT

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of MM must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HIS HONOUR JUDGE BURROWS :

BACKGROUND

1. This case is about a young man in his mid-20s who I will call Michael, or MM. He lives in a large city in the North of England. He has mild learning disabilities. He has Dissocial Personality Disorder. He misuses illicit substances. This can lead to challenging and violent behaviour, and the break down of his residence and care plan.
2. In late March 2021, Michael was regularly absenting himself from his residential “placement” (Placement 1), often not returning for several days. He would be the subject of missing person reports to the police. However, even when the police found him, they did not think there was a legal framework in place to enable them to return him to his placement forcefully. This is despite Michael being subject to a standard authorisation under Schedule A1 of the Mental Capacity Act 2005 (MCA).
3. What was particularly worrying about this is that Michael had already experienced a number of failed placements in the community and had spent time on the streets. Furthermore, in February 2021 he had been detained under the Mental Health Act having been found with wounds to his neck whilst threatening to end his life.
4. Michael had moved to Placement 1 in March 2020. It is 24-hour supported accommodation. The idea was to introduce into Michael’s life a level of structure and security. He was subject to a number of restrictions there. There was a curfew which required him to return home by 10 p.m. each night and then spend the night there. There was also a rule against bringing alcohol or drugs

onto the premises or using them. In Michael's case, that represents a considerable restriction.

5. Not surprisingly, Michael objected to the restrictions. He did so by threatening staff and absconding.
6. In April 2021, this led the City Council to propose a greater level of restriction and a move to a more restricted placement (Placement 2) where the restrictions could be introduced and enforced by trained staff within a purpose-built unit.

THESE PROCEEDINGS

7. Michael's RPR, who I will call DF, was naturally concerned that there needed to be proper Court scrutiny of Michael's situation, and in late March 2021 he brought proceedings under s. 21A of the MCA challenging the present standard authorisation.
8. However, Placement 2 then refused to take Michael because of the perceived risk to other residents. This was despite Michael having indicated that he would be willing to move there.
9. That was in April 2021. These proceedings came to an end by agreement on 18 October 2021. They took so long primarily because the expert instructed to provide her opinion on Michael's mental state and capacity, Dr O'Donovan, could not complete her report in her initial timescale because Michael was unwilling to cooperate with her.
10. I have now approved the final order. However, I also decided to write a short judgment explaining why I did so. This case has no legal novelty. It is a fairly

common sort of case to come before the Court of Protection. However, its very normality hides the profound nature of the decisions made on behalf of Michael, as well as the difficult and finely balanced welfare assessments professionals have to make when planning and caring for those with Michael's challenges.

11. The final Order in this case gives Michael a considerable amount of freedom, which he could use in a way that causes harm to himself. Both the Council and those acting for Michael in these proceedings, and DF in particular, have decided that removing risk with increased restrictions would not be in Michael's best interests. He would feel completely crushed. His life would have little interest. He would become frustrated, angry and resentful. He would become impossible to manage, unless even more restrictive measures were to be introduced.

12. The situation is perhaps best captured by a quote from the report of Dr O'Donovan, Consultant Forensic Psychiatrist, dated 17 September 2021:

“..... at the second assessment despite [MM] being made aware that the assessment was due to take place he was particularly aggressive and hostile and stated that he did not want to participate in the assessment as he did not want people telling him what to do. He repeatedly said, *“I'm my own person, I can do what I want... I'd like to know who the Judge is, I'll smash his head in... I'm not a person to be fucked around with...”*. He went on to state that he was an adult and could make his own decision. He went on to threaten to headbutt myself and at this point stormed out of the property, punching a cabinet on the wall before he left. In order to maintain the safety of all concerned, the assessment was terminated.”

13. On the other hand, Michael will be left with the ability to go out and associate with potentially exploitative people, as well as use drugs and alcohol. He will therefore be exposed to seemingly unnecessary and avoidable risks. In my

judgment, whether a risk is unnecessary or avoidable depends on the context in which it is to be taken. That is what this case is about, and to which I shall devote the rest of this judgment.

MICHAEL'S BEST INTERESTS

14. Earlier in these proceedings an independent social worker (ISW), Mr Caulfield, was instructed to carry out a best interests assessment on Michael. The purpose of the report was to assess whether a greater level of restriction on Michael, perhaps in a different more restrictive placement, might serve his interests.
15. Mr Caulfield provided a lengthy and detailed report, dated 26 July 2021. It was a careful piece of work. It was also very clear that Michael was profoundly troubled by and resentful of the efforts made by other people to control his life. Central to Michael's objections to restriction is his belief that he is not vulnerable. As the ISW states:

“He does not consider that he is vulnerable, and he does not accept that the restrictions are required. His stay at the placement has been notably affected by him regularly absconding from the placement, staying elsewhere for night(s) at a time, being reported missing to the police and being brought back to the placement by the police. That pattern has intensified in the last few months, and it is reported that [MM] has absconded daily, with the placement reporting him missing, and the police then searching and finding him in the community to bring him back to the placement. (P2) This application was brought on an urgent basis on 29th March 2021 as [MM] had been missing since 23rd March 2021”.

16. An important part of Michael's vulnerability is his financial exploitation by others. There is also a related risk of so-called “cuckooing”, where unscrupulous criminals take over a vulnerable person's residence for the purpose of storing

and dealing in drugs under the cover of the identity of that innocent person¹. It is also important to note that Michael's behaviour and mental state have in the recent past reached the stage where he has been detained under the Mental Health Act 1983- where he had been found with wounds to his neck and had stated he was going to take his own life.

17. The ISW report gives a vivid picture of Michael. There are some direct quotes from their conversations. These give a very clear impression of how Michael thinks, of what makes him tick.

18. For instance, on the subject of his girlfriend:

“My girlfriend's a good influence, she's dead clever, she's 21 but she's got the mind of a 30-year-old. She's proper caring and looks after me. She's good at saving money and is helping me get better at saving stuff.”

19. Later:

“I noted that [MM] wanted to be treated like an adult and he would need to take greater responsibility for both maintaining his safety and his tenancy if a “core and cluster” placement was to be considered. [MM] stated:

“That's better, that's what I want. I need to pay my way, here I am not paying anything, I don't learn anything. At least that way I would be learning something.”

20. In his analysis of best interests, the ISW states:

“Having reviewed the possibility of more restrictive placements, it is apparent that there is a lack of clarity surrounding how this would be achieved in practical terms or the legal framework that could be used. If the court directed that [MM] reside in such a facility and [MM] was prevented from leaving, it is highly likely that [MM] would object to this. All the available evidence suggests that [MM] would not accept restrictions on his liberty which are likely to arise from such a placement. This appears to be an

¹ Mr Caulfield's report, in fact, contained a number of different types of cuckooing, and gives great insight into the depth of the problem.

inherent part of [MM]’s personality and is longstanding, an important consideration as noted in *Wye Valley NHS Trust v B*

.....Whilst [MM]’s level of opposition to the current restrictions appears to have reduced, he continues to enjoy a great deal of freedom and levels of supervision are often on his terms. Such a move to a locked facility would likely increase the risks [MM] poses to himself and others. His level of objection in such a facility would likely necessitate detention under the Mental Health Act 1983, especially if a hospital environment is considered, given the decision of *AM v SLAM NHS Foundation Trust*, It is unlikely that any community provider would prevent [MM] from leaving the facility and if they attempted to do so, I anticipate that [MM] would respond very negatively and possibly violently. Any provider’s approach would likely be to report him missing to the Police, whereby [MM] would likely continue to leave until the placement broke down.

21. The ISW then had to balance Michael’s complex needs and vulnerability to exploitation with his need to be able to make decisions for himself. As Mr Caulfield points out, the imposition of a more restrictive setting may provide “an opportunity to sever some of the antisocial links [MM] has developed in the community, there are risks to [MM]’s autonomy as an individual”.
22. Pausing there, of course, it must not be forgotten that those “antisocial links” are themselves a threat to MM’s autonomy, although he would not see it that way. His inability to understand that risk when making decisions is the essence of his incapacity. This is yet another dimension to the risk assessment and the welfare checklist those making decisions for Michael need to take into account when doing so.
23. However, the crux of the ISW’s opinion is contained in the next quoted passage:

“It is unlikely that any of the available options I could present to the court are likely to keep [MM] “safe”. [MM] has both responded poorly to restrictions placed upon his liberty and benefitted from the security provided by robust wraparound care. The nature of his needs indicate that he is likely to, at times, attach undue weight to options which immediately meet his needs, but may place himself at risk. However, whilst he opposes the current restrictions, he appears to find them tolerable at present and has evidenced

greater ability to comply with these, resulting in a more settled mental state and a positive engagement with his staff team at [Placement 1].

.....[MM] has a longstanding pattern of struggling to assess risks in the context of the choices he makes. Whilst I note his poor engagement with health professionals previously involved in his care, he did engage well with me during my assessment and note that he has had episodic periods of engagement with various professionals, including SALT. I note that he will not discuss topics he is uncomfortable with, and he will refuse to engage with others when he identifies their attitudes or approaches as paternalistic. However, in interview, he accepted challenge and was able to discuss these proceedings, including the restrictions placed upon him.”

24. The ISW carries out a detailed consideration of the various decisions that need to be made on Michael’s behalf with reference to case-law. He concludes that Michael should remain at Placement 1 with access to 24 on-site support, and the current package of support, alongside the associated restrictions appear necessary, proportionate and in Michael’s best interests. Restrictions on contact with other people are also likely to lead to unhappiness for Michael. He recognises the significant risk of criminal exploitation of Michael but notes that homelessness and instability in accommodation are significant contributory factors in such as risk. Hence stability and support that the person is actually willing to accept reduces that risk.
25. One issue the ISW deals with in passing- because he did not have enough information to deal with it in any other way- is Michael’s risk of offending, particularly that of sexual offending. This is dealt with in Dr O’Donovan’s first report. She quotes from the PARIS notes:

“he is deemed a high-risk offender and is on the non-registered sex offender list (he was under 16 at the time of the offence). [MM] is on probation for an offence of stealing from cars.

He was convicted at the age of 14 for offences of criminal damage, assault and theft. In 2013 when he was 15 there was an offence of assault of a

female child under the age of 13. In 2017 the first conviction as an adult was for the possession of Cannabis. Also, in 2017 he was charged with obstruction of a Police Officer. In 2018 he was charged with Section 47 assault and received 26 weeks term of imprisonment for this offence. He is due to appear in Court for the breach of Probation on 10th February 2021... Probation ending February 24th, due in Court on 31st March for another offence of carrying a bladed article – not recommended for Probation...”.

26. She also goes on to state that as well as having a mild learning disability, MM fulfils the diagnostic criteria for dissocial personality disorder as defined in ICD-10. His mental picture is further complicated by the long history of polysubstance misuse. There is no doubt that he does at times pose a considerable risk to himself and also to others. She comments, however, that whereas licence conditions do not tend to affect his behaviour, “the containment of supported accommodation” has prompted a response.

27. Dr O’Donovan states:

[MM]’s history of developmental delay and learning difficulties together with his limited ability to manage his activities of daily living indicate the presence of a Developmental Disorder and is consistent with a diagnosis of Mild Intellectual Disability as described in Section 12.1. In addition, [MM] has demonstrated persistent, pervasive and problematic difficulties with managing his thoughts and behaviour, leading to his propensity for angry and aggressive outbursts, together with violent offending. These features of his presentation are consistent with a diagnosis of Dissocial Personality Disorder. Furthermore, he has a history of substance misuse which is consistent with a Dependency Syndrome.

.....The combination of these mental disorders has resulted in [MM] experiencing difficulty with understanding aspects of both his internal and external world. As a result, he communicates his frustration through aggression and has a limited ability to regulate his emotions and subsequent behaviour.

.....In terms of his prognosis, [MM]’s Intellectual Disability is a development disorder and therefore will not change. However, given that it is mild in nature, [MM] in the right circumstances has the potential ability to learn and develop new skills and it would appear that he is beginning to do this. However, his Dissocial Personality Disorder is likely

to be a barrier to the success of this at the present time as he becomes easily frustrated, particularly when faced with challenge or opinion that is not consistent with his own. [MM] has a significant degree of self-entitlement as a consequence of his Personality Disorder and this in turn will act as a barrier to him being able to identify areas of need and seek help and support to address these accordingly.”

28. Dr O’Donovan also confirmed that MM lacked the capacity to manage his property and affairs as well as the consumption of illicit drugs and alcohol.

FINAL ORDER

29. The final order I was asked to approve, and did approve, after making certain recordings about the events leading up to says this:

IT IS DECLARED PURSUANT TO SECTION 15 OF THE MENTAL CAPACITY ACT 2005 THAT:

1. [MM] lacks capacity to (i) manage his property and finances and (ii) make decisions to use and consume illicit substances.

AND IT IS ORDERED THAT:

2.
3. These proceedings are hereby concluded.
4. Permission to disclose this court order, and the further report of Dr O’Donovan received on 18 October 2021 to [Placement 1]....

30. In other words, Michael remains at Placement 1, subject to the curfew and the 24-hour support there. Dr O’Donovan was unable to assess Michael’s capacity to make decisions relating to contact with other people, and also the use of the internet and other social media. That might usually be a serious flaw in the picture before the Court. However, the parties’ position is this. Any restrictions on Michael’s freedom beyond the present care-plan with residence at Placement 1, and the curfew, would be counterproductive. I am therefore asked to approve

an order that remains silent on these issues, in the knowledge that the present restrictions underpinned by the standard authorisation are what is necessary and proportionate to secure Michaels safety, in so far as it can be secured.

31. Having been involved in this case since it began, when urgent decisions were made to try to ensure Michael was kept safe, I am entirely satisfied that the proposed resolution to this application is the right one. It strikes the right balance between keeping Michael safe on the one hand and allowing him to do what he wants to do- including making some mistakes- on the other.

32. I am grateful to Mr Patel and Mr Cisneros and their instructing solicitors for their assistance, and to the City Council's social workers for their hard work. My final word is for DF. He has conducted himself with great professionalism and compassion when dealing with Michael's case. Michael has taken against him and has for some time wanted him replaced, and I believe that has now happened. Michael will probably never know it, but DF has done a very good job for him.