CO/5216/2011

Neutral Citation Number: [2011] EWHC 3652 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Leeds Combined Court Centre
Oxford Row
Leeds LS1 3BG
Friday, 16th December 2011

B e f o r e:
MR JUSTICE LANGSTAFF
Between:
DM

Claimant

and

DONCASTER METROPOLITAN BOROUGH COUNCIL

Defendant

and
SECRETARY OF STATE FOR HEALTH (First Interested Party)
and
FM (Second Interested Party)
(DAR Transcript of
WordWave International Limited
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr Mansfield QC & Mr Gearty (instructed by Switalskis LLP) appeared on behalf of the **Claimant**
Mr O'Brien (instructed by Doncaster Metropolice BC In House) appeared on behalf of the **Defendant**
Mr Coppell (instructed by Department of Work & Pensions) appeared on behalf of the First Interested Party

J U D G M E N T
(As Approved)

MR JUSTICE LANGSTAFF:

1. The claimant has been married for 63 years to FM. As both have grown into their 80s, so ill health has affected them. FM has suffered mental deterioration. He now suffers from some dementia. After a distressing incident in December 2009 FM was taken first to a Police Station and then to a care home. His continued detention there is authorised by statute (the Mental Capacity Act 2005, as amended in 2007). His wife wants him to be able to return home, but he is not allowed to do so. This is said to be for his own good, and necessary to prevent harm befalling him. He has been charged for his accommodation there by DMBC, involuntary resident though he is. The money to pay has come not only from the limited income he has, but also from those savings built up by the couple in their earlier years. The question that arises in these proceedings is whether the charges are lawfully imposed – DMBC says it has no option, and is required by Act of Parliament to impose them. The Secretary of State supports that view. But DM, the claimant, argues that there is no right to make any such charge (and, it would follow, that the moneys her husband and she have paid already should be refunded.)

The Claim

2. The claimant argues that without legal authority to do so, her husband cannot be charged for his accommodation. Mr. Mansfield QC (who appears with Professor Conor Gearty for the claimant) submits on her behalf that there is none. He accepts that if FM was accommodated under the regime set up by the National Assistance Act 1948, which imposes a duty on local authorities to make arrangements to provide residential accommodation (to such extent as the Secretary of State shall direct) "..for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them" then s.22 would require that the authority made a charge for that accommodation.

3. S.22 is headed "Charges to be made for accommodation". Sub-section (1) is in these terms:

> "(1) Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section."

Whether those provisions as to the precise charge to be levied were applied properly in this case is no longer in issue, having been resolved by agreement during the course of the hearing before me.

4. Mr. Mansfield QC argues however that this provision requiring the local authority to levy a charge does not apply. This is because the duty to accommodate does not (he

says) arise under s. 21, but under the provisions of the Mental Capacity Act 2005. This Act either provides upon a plain application or interpretation of its wording for a duty to be placed on local authorities to provide accommodation for someone in the position of FM when he was first taken to Castle Garth Care Home (additional force for this approach being gained by considering those human rights of FM which would be infringed if it was not) or the natural and ordinary meaning of the relevant statutory provisions ought to yield to the interpretation suggested by considering those rights.

5. He draws attention to s. 21(8) of the 1948 Act which provides

> "Nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act or authorised or required to be provided under the National Health Service Act 2006…"

6. The regime set up by the Mental Capacity Act 2005 is such a provision, says Mr. Mansfield QC. He argues that it contains a duty obliging a local authority to accommodate someone such as FM. If it does, then it is common ground between him and both Mr. Coppel (who appears for the Secretary of State, as First Interested Party) and Mr. O'Brien (who appears for the Defendant, but who by agreement between counsel made his submissions after the court had heard from Mr. Coppel) that there would be no power to charge. It would follow that the charges already recovered had been unlawfully imposed.

7. Similarly, Mr. Mansfield agrees that if FM was accommodated under s.21 National Assistance Act, then s.22 obliges the local authority to charge him for that accommodation, and subject only to points relating to computation of the charge, the Defendant and Secretary of State are entitled to succeed.

8. The central issue thus is one whether the Mental Capacity Act 2005 imposes a duty on a local authority to accommodate a person such as FM whose detention in a care home is authorised by its provisions.

9. The material provisions of the Mental Capacity Act 2005 provide:

> "4A **Restriction on deprivation of liberty**
>
> (1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.
>
> (2) But that is subject to—
>
> (a) the following provisions of this section, and
>
> (b) section 4B.

(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.

(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty)."

I shall consider the provisions of Schedule A1 later.

"**5 Acts in connection with care or treatment**

(1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if—

(a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and

(b) when doing the act, D reasonably believes—

(i) that P lacks capacity in relation to the matter, and

(ii) that it will be in P's best interests for the act to be done.

(2) D does not incur any liability in relation to the act that he would not have incurred if P—

(a) had had capacity to consent in relation to the matter, and

(b) had consented to D's doing the act.

(3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.

(4) ….."

"**6 Section 5 acts: limitations**

(1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.

(2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.

(3) The second is that the act is a proportionate response to—

(a) the likelihood of P's suffering harm, and

(b) the seriousness of that harm.

(4) For the purposes of this section D restrains P if he—

(a) uses, or threatens to use, force to secure the doing of an act which P resists, or

(b) restricts P's liberty of movement, whether or not P resists.

(5) . . .(the following subsections are not material)"

10. Although section 8 appears to provide that where D incurs expenditure which he reasonably believes to be in P's best interests, he is entitled to be indemnified for it, no party founded any submissions on it. However, this section indicates a policy that actions taken in respect of a patient by reference to the Mental Capacity Act should not be provided at the expense of any public authority, and to this extent might be thought to be against the claimant. Since I have received no detailed submissions I have not decided the case on this basis: but mention the point in case it should be of future relevance to anyone who reads this judgment.

11. Schedule A1, to which section 4A (5) refers, is entitled "Hospital and Care Home Residents: Deprivation of Liberty". The structure of this is significant. It is in a number of Parts. The first contains the provisions Mr. Mansfield QC submitted were central to the Schedule: this is headed "Authorisation to Deprive Residents of Liberty Etc". It thus explicitly focuses on the grant of permission to detain a person compulsorily. Paragraph 2 empowers the "managing authority" of a care home to detain someone if the conditions in paragraph 1 are met – which (summarising) are that he is at the care home, detained so as to deprive him of his liberty, and that a "standard authorisation" is in force in relation to him and the care home in which he is detained.

12. The focus of these paragraphs is thus (as Mr. Coppel and Mr. O'Brien submit) to ensure that the "managing authority" is thus free of liability for the detention of the patient concerned, provided that there is a standard authorisation in force.

13. A standard authorisation must be sought by the managing authority of the care home, from the "supervising body". This is the local authority concerned, in this case Doncaster. The managing authority has a power, or is under a duty, to do so, as paragraph 24 of the schedule provides:

"24(1) The managing authority must request a standard authorisation in any of the following cases.

(2) The first case is where it appears to the managing authority that the relevant person—

(a) is not yet accommodated in the relevant hospital or care home,

(b) is likely—at some time within the next 28 days—to be a detained resident in the relevant hospital or care home, and

(c) is likely—

(i) at that time, or

(ii) at some later time within the next 28 days,

to meet all of the qualifying requirements.

(3) The second case is where it appears to the managing authority that the relevant person—

(a) is already accommodated in the relevant hospital or care home,

(b) is likely—at some time within the next 28 days—to be a detained resident in the relevant hospital or care home, and

(c) is likely—

(i) at that time, or

(ii) at some later time within the next 28 days,

to meet all of the qualifying requirements.

(4) The third case is where it appears to the managing authority that the relevant person—

(a) is a detained resident in the relevant hospital or care home, and

(b) meets all of the qualifying requirements, or is likely to do so at some time within the next 28 days.

(5) This paragraph is subject to paragraphs 27 to 29."

14. The "qualifying requirements" to which these provisions refer are set out in Part 3 of the Schedule. In short, these are that the person concerned is over 18, suffers from mental disorder, lacks the mental capacity to decide whether he should be accommodated in the care home concerned, it is in his best interests to be there (that is, that it is in his best interests, necessary to prevent harm to him, and that detention is a proportionate response to the seriousness of any such harm and the likelihood of it occurring), that he is not ineligible and no advance relevant refusal has been made. These last two matters do not feature in the case before me.

15. Paragraph 33 obliges a supervising authority which has been requested to grant a standard authorisation to conduct assessments to secure that (a) an age assessment;

(b) a mental health assessment; (c) a mental capacity assessment; (d) a best interests assessment; (e) an eligibility assessment; and (f) a no refusals assessment are conducted, which verify that the qualifying requirements are met.

16. If these assessments verify that an individual meets the qualifying requirements, then the supervising body is, by paragraph 50, obliged to make a standard authorisation.

17. The fact that a local authority, as the supervising body, is under a duty to secure these assessments, and if they are positive, to make a standard authorisation, is said by Mr.Mansfield QC to "authorise or require" the provision of accommodation by the local authority for someone in the position of the claimant at a care home such as Castle Garth. It therefore falls within s. 21(8), and outside the charging regime of s.22, of the 1948 Act. Mr. Coppel, supported by Mr. O'Brien submits to the contrary. The purpose of the Act is to authorise a deprivation of liberty which might otherwise be unlawful, and confers no powers or duties on a local authority otherwise than in connection with granting such an authorisation. It has nothing to say about accommodation, and still less about whether the accommodation is to be provided free of charge.

18. Before turning to the submissions in greater detail, it is appropriate to complete the review of the legislation of greatest relevance to this case by reference to s. 47 National Assitance Act. This (headed "Removal to Suitable Premises of Persons in Need of Care and Attention") provides, so far as material:

> "(1) The following provisions of this section shall have effect for the purposes of securing the necessary care and attention for persons who—
>
> (a) are suffering from grave chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions, and
>
> (b) are unable to devote to themselves, and are not receiving from other persons, proper care and attention.
>
> (1A) But this section does not apply to a person ("P") in either of the following cases.
>
> (1B) The first case is where an order of the Court of Protection authorises the managing authority of a hospital or care home (within the meaning of Schedule A1 to the Mental Capacity Act 2005) to provide P with proper care and attention.
>
> (1C) The second case is where—
>
> (a) an authorisation under Schedule A1 to the Mental Capacity Act 2005 is in force, or
>
> (b) the managing authority of a hospital or care home are under a duty under paragraph 24 of that Schedule to request a standard authorisation, and

P is, or would be, the relevant person in relation to the authorisation.

(2) If the medical officer of health certifies in writing to the appropriate authority that he is satisfied after thorough inquiry and consideration that in the interests of any such person as aforesaid residing in the area of the authority, or for preventing injury to the health of, or serious nuisance to, other persons, it is necessary to remove any such person as aforesaid from the premises in which he is residing, the appropriate authority may apply to the court for an order …..(for)

(3) …. the removal of the person to whom the application relates, by such officer of the appropriate authority as may be specified in the order, to a suitable hospital or other place in, or within convenient distance of, the area of the appropriate authority, and his detention and maintenance therein…..

(4) An order under the last foregoing subsection may be made so as to authorise a person's detention for any period not exceeding three months, and the court may from time to time by order extend that period for such further period, not exceeding three months, as the court may determine.

…….

(9) … any expenditure incurred by virtue of this section in connection with the maintenance of a person in premises where accommodation is provided under Part III of this Act shall be recoverable in like manner as expenditure incurred in providing accommodation under the said Part III.

Argument

19. Mr Mansfield QC argues that the local authority is obliged by these provisions to detain FM. Although Mr Mansfield did not specifically argue it in these terms, effectively he submitted that the local authority has no choice once the managing authority requests it. The managing authority itself has little choice since, if any reasonable managing authority would be bound to hold that the requirements were met, it is. Detention necessarily implies a place in which to detain, which must therefore be provided by the local authority.

20. The fact that the local authority is obliged to grant a standard authorisation recognises that FM will be detained compulsorily. It is this element of compulsion which distinguishes his case from the cases of those who are not detained compulsorily.

21. In this way, he argues the position of FM is analogous to those of the claimants in Stennett [2002] UKHL 34, also reported at [2002] 2 AC 1127. Mr Mansfield does not submit that Stennett is direct authority for an applicable point of principle but that it nonetheless provides a useful analogy.

22. Stennett concerned former mental patients, who having been compulsorily detained under the provisions of the Mental Health Act 1983 and then discharged from hospital, received aftercare services including accommodation from local authorities under section 117 of that Act. The local authorities in each case charged. That was on the basis that section 117 operated as a gateway to the provision of aftercare services under such other provisions as appropriate, in the case of the applicants section 21 of the National Assistance Act 1948, and could thus be charged for it.

23. Section 117 imposed an express duty to provide aftercare services. The issue for the House of Lords was thus whether this express duty was a stand-alone provision or a gateway provision. The reasoning of the House in determining it was the former, and that there was consequently no power to charge, since none was provided for by the Mental Health Act itself was (a) there was a duty to provide aftercare services; (b) there was a duty to secure that at all times during after care, the patient under supervision was in the charge of a registered medical practitioner, experienced in dealing with mental disorder; (c) aftercare services included the provision of accommodation; (d) if it had been intended to access a service such as accommodation, through section 117 as a gateway, appropriate wording would have been inserted in the Mental Health Act to identify those provisions; (e) however there was none. Instead the Act referred to such services being provided "under this section". There were repeated references to "aftercare services provided under section 117," a use of language inconsistent with aftercare being provided under other provisions in other statutes; (f) although the Mental Health Act did not expressly confer a power on local authorities to provide accommodation, setting out an express duty, which was on the construction which followed points (a) to (e) above a stand-alone duty, it imported such a power as a necessary concomitant of the duty.

24. In Stennett counsel for the local authorities argued that the consequences of that approach would be anomalous. Lord Steyn rejected this (see paragraphs 13 to 15 of his speech). Indeed, he thought that the consequences of deciding in favour of the local authorities actually argued against drawing the conclusions they favoured.

25. In this case Mr Mansfield QC argues that the absence of an express power to charge in section 117 was held by the House of Lords not to have the consequence that section 22 charges would apply. He argues the reasoning was premised on the fact of compulsory detention under section 3 and that aftercare was a continuation of treatment freely provided for an exceptionally vulnerable person. It would be contrary to the policy of the 1983 Act for there to be a charge for this aftercare unless there were express provision for it in the legislation.

26. He draws attention to the emphasis placed in the Court of Appeal by Buxton LJ in a passage cited with approval by Lord Steyn at paragraph 14 of his speech in Stennett:

> "The statutory provision is not at all anomalous, and not at all surprising. The persons referred to in section 117(1) are an identifiable and exceptionally vulnerable class. To their inherent vulnerability they add the burden, and the responsibility for the medical and social service authorities, of having been compulsorily detained. It is entirely proper

that special provision should be made for them to receive after-care, and it would be surprising, rather than the reverse, if they were required to pay for what is essentially a health-related form of care and treatment."

27. Mr Mansfield says that section 47 of the National Assistance Act shows that even the draftsman of that statute, despite it containing section 22, assumed that those subject to removal and public health or nuisance grounds would not be subject to a charge without further express provision to that effect. Section 47 provides for recovery of expenditure on accommodation in "like manner" as under Part III, Part III being the Part in which section 22 appears, and not specifically under section 22 itself.

28. It appears to be Parliament's assumption that without such a provision there could be no charge for the accommodation. Further, subsections 1(b) and 1(c) exclude cases in which a standard authorisation has been made. They are thus excluded from the charging regime provided for by subsection (9). If it had been intended to charge for such persons, this would have been the place in which to do it.

29. The element of compulsion makes all the difference. The provision made for FM is not just accommodation. It is accommodation coupled with care. The package must be looked at holistically. Whereas s.47 deals with the incapacitated person who does not meet the stringent requirements of the Detention of Liberty Safeguards (DOLS) under the Mental Capacity Act, and provides expressly that he is to be charged, this does not extend to the separate case of someone whose detention is authorised by the Mental Capacity Act.

30. He argues that paragraph 183 of schedule A1 points in the direction of deciding that there is no power to charge. The paragraph deals with the determination of the ordinary residence of the patient which it is necessary to determine in order to decide which local authority is to act as the supervising body under the Act. Subparagraph 7(c) envisages regulations which will permit one local authority exercising such functions (where it may not be the appropriate supervising body) to recover from another local authority which is, expenditure incurred in exercising functions as the supervisory body. Thus, argues Mr Mansfield, expenditure is envisaged. I understood his submissions to suggest, at least, that that expenditure might include the cost of accommodation.

31. Two points arise, as it seems to me, considering these submissions. First, this is not a matter as between care home resident and authority but as between authorities, suggesting that authorities, not residents, are to bear the expense. Second, Parliament plainly directed its mind to the recovery of expenditure but made no explicit provision for its recovery from the care home resident in respect of whom there was a standard authorisation.

32. Mr Coppel, in response to this particular point, however, draws attention to the fact that acting as a supervising body does include expense. The supervising body must secure that the assessments are made upon which the qualifying requirements may be verified. There are other expenses too which he enumerated.

33. It seems plain to me, in conclusion, on this particular specific argument that there is ample scope for the reference to expenditure to include expenditure in acting as the supervising body, and that the provision is not necessarily nor by implication intended to cover the cost of accommodation provided as the accommodating authority. Indeed, it seems to me that this is the natural interpretation, since paragraph 183 refers to expenditure in exercising functions as the supervisory body. It does not require the refund of expenditure in exercising functions as the accommodating body. Therefore, on this particular point, I accept Mr Coppel's argument.

Discussion

34. The Mental Capacity Act 2005 does not impose a duty to accommodate by any express words. This is a difference, it must be noted, from Stennett, where the duty was clearly imposed by the statutory words in section 117 of the Mental Health Act. The obligations which the Mental Capacity Act does impose, namely, to secure that assessments are carried out, to check that the qualifying requirements under Part III are made out and, if they are, to grant a standard authorisation upon request from a managing authority, do not of their nature impose any obligation upon the local authority itself, either to accommodate or to arrange for accommodation or to pay for it.

35. Although there is no express duty to accommodate, does this expression of this obligation, in the context of this Act, nonetheless imply one? The answer must be that it does not do so. It is not a necessary implication. The whole structure of the Act is designed not to provide for the accommodation of those who lack capacity and who are likely to suffer harm if not detained but to ensure that those who do detain such a person are free from liability for doing so.

36. The significance of the Act being in Parts is that the first Part sets out the central provisions, which are those excusing a managing authority from liability if it should detain a person, in circumstances which are fully developed in the parts and sections which follow. The whole focus of the Act is on this, and not at all on the accommodation of a person whose detention is thus authorised. Secondly, the Act is there to authorise detention not to require it. It is also there to provide safeguards, known in practice by the acronym DOLS, standing for Detention of Liberty Safeguards; thus it seeks to ensure any deprivation of liberty is securely founded, properly necessary and is the least restrictive option available.

37. This view of the purpose of the legislation, initially reached without the benefit of authority, is borne out by such cases as there are. Thus in GJ v The Foundation Trust & Ors [2009] EWHC 2972 (Family) [2010] 3 WLR 840, Charles J demonstrated that the purpose of legislation was to fill what had become known as the "Bournewood Gap". The Bournewood Gap came to light following litigation which in this jurisdiction gave rise to the case of In Re: L [1998] UKHL 24, [1999] AC 458, which subsequently in the European jurisdiction became known as HL [2004] EHRR 761, following on from R v Bournewood Community and Mental Health NHS Trust ex parte L, as ex parte L was known more fully, hence “Bournewood”.

38. In the course of that case it became apparent that the common law defence of necessity, sought to be made out by someone who might otherwise be liable for false imprisonment might excuse the detainor from liability but it did not meet the requirements of Article 5(1)(e) of the European Convention of Human Rights since there was no procedure prescribed by law by which the detention could be carried out and which would operate to safeguard the individual detained. Thus, at paragraph 6 in the judgment of Charles J in the WLR, pages 844D-F, he cited with approval a description derived from lectures given by Professors Fennell and Clements, in which they said:

> "... It follows from the ECHR's ruling that because sections 5 and 6 of the 2005 Act provide a defence to a battery action, rather than prescribe a procedure, they cannot satisfy the requirements of Article 5(1)(e) in relation to a detention on grounds of unsound mind. For that reason, the Government decided to implement the judgment and bridge 'the Bournewood Gap' by way of amendments introduced to the Mental Capacity Act 2005 to provide for Deprivation of Liberty Safeguards in relation to adults who lack capacity to decide where they should reside."

It is these deprivation of liberty safeguards with which schedule A1 is concerned.

39. In Hillingdon London Borough Council v Neary [2011] EWHC 377, a decision of Peter Jackson J. in the Court of Protection, the judgment sets out at paragraph 33 the purpose of DOLS authorisations. This is that the DOLS scheme was an important safeguard against arbitrary detention. Where stringent conditions were met it allowed a managing authority to deprive a person of liberty at a particular place. But it was not to be used by a local authority as a means of getting its own way on the question of whether it was in the person's best interest to be in the place at all. Peter Jackson J. observed further, at paragraph 31(3), what he thought was the role of the local authority provided for by the Mental Capacity Act in this regard. He said:

> "Granting of DOL standard authorisations is a matter for the local authority in its role as a supervisory body. The responsibilities of a supervisory body, correctly understood, require it to scrutinise the assessment it receives with independence and a degree of care that is appropriate to the seriousness of the decision and to the circumstances of the individual case that are or should be known to it."

He said nothing to suggest that it is the role of the supervising body to be an accommodating authority.

40. In my view, these cases are clearly contrary to the argument which Mr Mansfield would make on his primary submissions as to construction.

41. If this is so, then accommodation where provided must be provided under some other duty or power to do so, as it is where either of sections 3 or 112 of the Mental Health Act applies. There are indications in the statutory regime that this is the case. Someone might already be accommodated or brought to the premises under detention – in stating this, the statute presupposes that that accommodation is provided under some other power. In his submissions Mr Coppel emphasised these two points. I am

inclined to think that he placed too much weight upon them. The question whether a person was already accommodated in a care home or not, and a vires of any transfer from his home to a care home do not seem to me to indicate that the accommodation is or is not provided under the Mental Capacity Act. The case of someone voluntarily a resident in a care home, who in time, with age and with mental disorder satisfies, for the first time, the qualifying requirements under schedule A1 of the Mental Capacity Act is a case in point. The fact that he had already been accommodated in the care home says nothing about whether there is a power or duty to continue to accommodate him there compulsorily and if so, whether he should then, by reason of his change of status, be required to pay for that accommodation or not.

42. As to the case of Stennett, that, it seems to me, is to be distinguishable clearly from the position in which FM was. The applicants in Stennett were persons in a different category. The question whether there was a gateway provision, or a stand-alone provision depends upon there being a provision as to duty in the first place. The claimant's arguments that Stennett operates as a useful analogy seem to jump this necessary step in the reasoning.

43. The position of those under section 117 of the Mental Health Act is, as I shall say later in this judgment, materially different from that of those who are detained with authorisation being granted under the Mental Capacity Act.

44. Next, it is accepted by counsel that there is a distinction to be drawn between those homes which provide care and those homes which provide medical treatment. Accommodation in homes providing what is essentially the former are to be paid for by the resident; but in homes providing what is essentially the latter is not.

45. This case may be close to the line of that which divides care, on the one hand, from medical treatment on the other, but nonetheless remains on the care side of the line. It is not taken over that line by submissions by Mr Mansfield QC that the detention of the mentally incapacitated for their own good has more of the flavour of treatment about it than it has the scent of nursing care. Nor does it seem to me that the consequence that accommodation is to be provided, if at all, under some other statute which imposes a charge, affects the interpretation.

46. A conclusion that the Mental Capacity Act 2005 does not provide the power to accommodate does not answer the question directly whether there is a power to charge. For that to be the case, the provision of accommodation has to come within section 21 of the National Assistance Act. This is capable of providing for accommodation subject to the interpretation to be given to the Mental Capacity Act. The claimant argues that the fact of compulsion takes the case of her husband out of the scope of the 1948 Act. Mr Mansfield QC argues that section 21 is there to provide for those who wish accommodation for their needs. But this is not how the section is worded. Accommodation is, according to the section, to be provided for those who "by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them." The word is "need". This is needs and not desires. The test is objective.

47. In the present case it could be tested in this way: does FM, being the age he is, have such illness or disability that he needs care and attention? The answer is obvious. As a matter of interpretation the scope of section 21 is wide enough to cover those who do not necessarily wish to be accommodated by the local authority or who, as in FM's case, are incapable of deciding for themselves whether they wish it. This interpretation needs no external support, but in any event is recognised by the Secretary of State's direction to which the duties in section 21 of the 1948 Act are expressly subject. In Local Authority Circular 93 of 2010, at paragraph 2.3 the Secretary of State gave this direction:

> "... The Secretary of State hereby directs local authorities to make arrangements under section 21(1)(a) of the Act to provide accommodation.
>
> (a) in relation to persons who are or have been suffering from mental disorder; or (b) for the purposes of the prevention of mental disorder, for persons who are ordinarily resident in their area and for persons with no settled residence who are in the authority's area.
>
> 4. Without prejudice to the generality of subparagraph (1) and subsection 224(4) of the Act the Secretary of State hereby approves the making by local authorities of arrangements under section 21(1)(a) of the Act to provide residential accommodation (a) in relation to persons who are or have been suffering from mental disorder; or (b) for the purposes of the prevention of mental disorder for persons who are ordinarily resident in the area of another local authority but who following discharge from hospital have become resident in the authority's area."

46. The Secretary of State therefore made a Direction which is entirely within the scope of the wording of the Act. It relates to those who have mental disability and illness. It must have been within the contemplation of the Secretary of State, on any fair reading of the direction, that many of those might not be capable of deciding for themselves whether they wished, or whether consistently they wished, to be accommodated in the accommodation made available under section 21.

47. This is not a case of subordinate instruments dictating the interpretation of primary provision which is impermissible because a Secretary of State's direction is expressly referred to in the opening words of section 21. If this direction caters for mental health, as the width of its wording plainly suggests it is capable, then section 21 will inevitably cover those who do not consent, whether because they cannot or because they will not. Accordingly, subject to argument as to the effects of the Human Rights Act, I am bound to find:

(a) that the Mental Capacity Act 2005, on any proper reading does not impose a duty, nor confer a power upon a local authority to provide accommodation, such that the accommodation given to FM was to be regarded as provided under it rather than some other provision.

(b) that section 21(8) therefore does not exclude FM's case from the ambit of section 21.

(c) that section 21 is capable of providing and does provide a duty on Doncaster to

provide accommodation for FM; and.

(d) that there being no other statutory duty or power, which it is suggested might apply, such that section 21(8) would take FM's case out of the ambit of section 21, section 22 applies.

Doncaster are therefore bound in law to recover a charge for that accommodation in accordance with regulations.

48. I turn therefore to the arguments which seek to persuade me that this apparently straightforward interpretation should nonetheless yield to second thoughts, derived from a consideration of European Human Rights case law.

49. As to this, I am not persuaded differently by the presumption against deprivation of property. This only has something to say in the construction of the Mental Capacity Act if it can be construed as providing for the deprivation of property. That Act does not do so in terms. Nor is it an integral part of a statutory scheme, another part of which levies charges.

50. The fact that the Act recognises that some of those to whom it applies are resident in care homes or soon will be does not make it such. This says nothing about taking a resident's money.

51. For this reason, Professor Gearty eschews arguing that the interpretive obligation contained in section 3 of the Human Rights Act 1998 applies to the Mental Capacity Act or, I should say, eschews saying it does so directly. His argument is more subtle. The submission is it applies rather to section 21(8). It is said to make that subsection into a gateway through which the court can consider the Mental Capacity Act and thus be drawn into construing that Act again under section 3 of the Human Rights Act in the light of its potential link with section 21 and therefore with charging residents and depriving them of their property.

52. Now able to argue that the Mental Capacity Act should be interpreted to the fullest extent possible to correct the vice of making a charge, one can return, he argues, to apply section 3 of the Human Rights Act for a third time, in concluding that the Mental Capacity Act does indeed make the sort of provision which excludes section 21 from applying.

53. Applying section 3 in this serial manner, such that after a trinity of applications a result can be achieved which is the opposite of that suggested by a natural reading of the statute in the first place, smacks of an argument that proceeds by defining the desired outcome first and then seeking some way of justifying it, however tortuous that way may be. I have no hesitation in rejecting this argument as contrived and unrealistic. It falls at first, let alone second and third base. Section 21(8) provides no natural link with the Mental Capacity Act so as to operate as a gateway. It will only be if the Mental Capacity Act could be construed so as to provide a duty to accommodate, that section 21(8) could come into play and it is for the very reason that it cannot be so construed, even with the help of section 3 of the Human Rights Act that Professor Gearty begins at section 21(8) and not in the provisions of the Mental Capacity Act.

54. Moreover the interpretative obligation under section 3 would come into play only if there was some uncertainty about the correct interpretation of the relevant statutes. Even though the approach under section 3 could lead to an interpretation regarded as heterodox

in conventional English law (see for instance the analogous case of Litster v Forth Dry Dock and Engineering Co [1990] 1 A.C. 546 per Lord Oliver, in the second paragraph of his speech, considering the purposive approach to be adopted under the European law to the application of concepts derived from European sources) this does not permit an interpretation contrary to the plain meaning of the statute. The wording of the Mental Capacity Act and of the National Assistance Act does not lend itself any let alone sufficient uncertainty.

55. The second way in which it is said that the European Convention of Human Rights is relevant, is that Article 14 proscribes discrimination in relation to any of the substantive rights conveyed by the Convention. It is agreed by counsel that charging comes within the ambit of Article 1 Protocol 1, since it requires a person to part with their money by State action. Professor Gearty argues that FM is one of a class: those who are compulsorily detained and lacking capacity. He is required to pay in a way in which those who receive aftercare are not. This, he submits, is discriminatory within the meaning of the European Convention and cannot be justified.

56. I do not accept this. Discrimination is treating differently those who are in materially similar circumstances, by reference to them having some personal characteristic or belonging to some distinct class or group. Proscribing it aims at the vice of taking into account a consideration which is irrelevant to the merits of the actual decision in question: instead, it is a consideration which is a matter personal to the individual class or group. The result is that that person is disadvantaged because of being who is, when being who he is logically irrelevant to the decision being made. This is a slight to his very identity and an assault on the integrity of his personality. This is why discrimination can be so deeply wounding.

57. So understood, the approach in case law is coherent. The concentric circles of diminishing status of which Lord Walker spoke in R (On the application of RJM) v Secretary of State for Work and Pensions [2008] UKHL 63, [2009] 1 AC 311 at paragraph 5, with the approval of at least the majority if not all their Lordships, represent the lessening of sensitivities as the characteristics of the individual in question become less integral to the personality of the individual. Whereas matters such as one's sex, race, religion or sexual orientation are deeply personal, other characteristics are less so. The less they are so, the more likely it tends to be that the decision in question has less to do with that characteristic, the more likely it will be that it is a relevant if peripheral characteristic, and the more open the decision in question will be to justification.

58. The first step, here, is determining if FM was in materially similar circumstances to others, who are treated differently from him as a result of his being without mental capacity and detained.

59. What are those material circumstances? Mr Coppel argues that they consist of being accommodated by the local authority. Under section 21, those accommodated are subject, all of them, to precisely the same financial obligations as to payment. The amounts may differ but the principles on which those amounts are determined are the same, and make no distinction between individuals on the basis of their mental state or their freedom to come and go. He argues that FM does not possess the appropriate status in this case in any event.

60. Professor Gearty, in response, refers me to the case of Bah v United Kingdom, in which

judgment was recently given in Strasbourg on 27th September 2011, at paragraphs 25 and 45 of the judgment. He argues, further, by reference to AL (Serbia) [2008] UKHL 42, that the classic Strasbourg statements of law do not place any emphasis on the identification of an exact comparator. They ask whether differences in otherwise similar situations justify a different treatment. He points to paragraphs 24 and 25 in demonstrating that the approach to be taken is one which looks at the whole of the circumstances in concluding whether there has or has not been discrimination.

61. I note, so far as status is concerned, that in the citation from the judgment of Buxton LJ in the Stennett case in the Court of Appeal, he appeared to assume intuitively that those who were receiving aftercare, under section 117, were a class of persons. If so, he was naturally according them that status.

62. I am happy to adopt Professor Gearty's preferred approach to the questions which arise here. But it still leaves me with having to identify whether the circumstances of FM are materially similar to the circumstances of those who are treated differently and more advantageously than he. He identifies a smaller comparison group than Mr Coppel would. His group is those who are subject to aftercare under section 117. They are the appropriate comparison group, he submits. He maintains that they share the characteristics of being vulnerable, detained, receiving care and health related treatment, suffering from mental disorder or mental incapacity, that detention is required to prevent harm, and that they receive what is essentially a form of health based treatment.

63. But, in my view, those receiving after-care are not in the same material circumstances. They are different, in my view, because all of them necessarily (because of the statutory provision) have been detained earlier under section 3 or other provisions of the Mental Health Act. Those provisions require not only that the detention of the individual is in, and is proportionate to, his own interests in protecting him from harm, as in the case of FM, but also in the public interest as protecting them from harm, which is not the case with FM. The public has a distinct interest in the detention of those who have been released into aftercare, under section 117, in a way which it does not in the case of someone whose detention is authorised by the Mental Capacity Act.

64. A second point of distinction is that the individual who is receiving aftercare is receiving care which is intrinsically linked to medical treatment he has been receiving for his mental disorder. As is well-known, there was a change of national policy seeking to shift the treatment of mental patients from institutions set apart from society, to treating them within the community. As a result, those who might previously have remained incarcerated were released into a regime of accommodation and treatment which bridged the gap between the institution and unsupported return to the community. Aftercare provided under section 117, as Stennett recognises, was part of this scheme. Viewed broadly, it thus took the place of what had been detention at public expense when there would otherwise have been continuing medical treatment, designed to secure eventual release perhaps but medical nonetheless, as a necessary follow on from that treatment and as an integral part of the scheme by which that treatment was hoped to be rendered effective. This is demonstrated by the fact that the local authority does not have a choice whether to accommodate under section 117 or under section 21, or, as it may be, to authorise detention under the Mental Capacity Act with the consequences that follow. Statute applies, and provides no choice.

65. Those statutes do not both apply to FM. He was not detained under the Mental Health

Act. He is not a danger to others. GJ v The Foundation Trust makes it plain that the Mental Health Act has primacy over the Mental Capacity Act. The latter is not an alternative choice for a decision maker where the individual concerned comes within the scope of the former. Nor would someone who is detained initially under the Mental Health Act and thereby entitled to receive free accommodation be in the same position as someone who is removed to a care home as FM was.

66. Although I am inclined to accept Professor Gearty's argument as to status – just as Buxton LJ in Stennet intuitively recognised a group there – the situation is that the group consists of those who are accommodated by the local authority under the National Assistance Act, and the true comparison is between those in the class of the Claimant (with mental incapacity) within the group, and those who do not have mental incapacity but are within the group and accommodated. They pay.

67. There is nothing implicit in the fact of compulsion which requires those compulsorily detained to be treated differently. But if it were, that is not the question which arises – the question is whether FM is treated disadvantageously because of his status, not whether it would be a desirable policy that he should be treated preferentially. Application of discrimination law allows for the remedy of disadvantage not the creation of preference.

68. As to the comparison with those receiving aftercare, there is nothing inherently unreasonable in persons in closely related but different situations being treated differently. This is inevitable in any system where a dividing line is drawn, consequent upon the application of some rule. Those who fall just on one side of the line cannot expect a complaint that there are those who fall just on the other to have the legal consequence that the line should be redrawn so as to include both, at least where the line itself is not inherently discriminatory on some other basis.

69. Thus, in paragraph 13 in Stennett, Lord Steyn was able to point to two examples (which it is unnecessary to set out here save by reference) which were placed before him in the argument of counsel for the local authorities, suggesting that there was an anomaly created by the argument which the House of Lords were subsequently to adopt. He rejected the argument, although it is plain that the circumstances in the two examples are close to one another. There is however a dividing line between them. He said nothing to suggest that line was wrongly drawn.

70. My conclusion thus has to be that there is no discrimination. Those in aftercare, under section 117, are not in the same material circumstances as is FM. But if I were wrong on this, I would hold the provision justified. Government necessarily legislates for the generality. A decision that those who are accommodated in a care home should pay is not inherently unreasonable. It may be seen to be just. If a person wishes it, it is not unfair that he should pay. If he is incapable of forming a wish whether for or against accommodation then others may have to do that for him. Providing it is in his best interests to be in such a home, it is not unreasonable to suppose that if he had capacity, he would see that for himself and would wish to be in such accommodation. He would be in precisely the same position as the true volunteer. It is not inherently unreasonable for the State, in making its general provisions, to require a charge be paid by such a person.

71. A policy to charge is in itself not unreasonable. The observations in Stennett as to the inequity of requiring mental health patients to pay for accommodation are not statements of legal principle, however compelling they may be socially and morally. The National Assistance Act looks to make a charge (see for instance the policy described by section 47). The charges are carefully regulated. The fact that the aftercare patient, in a materially different situation, statutorily defined, is free of charge, or the patient in hospital is freely cared for, does not mean that those on the other side of the line from such a person, on the social care side of that line, can complain about where the dividing line is placed.

72. No declaration of incapability as between the legislative provisions and the European Convention is sought by the claimant despite the fact that if the point made in this part of the argument is a good one, it would be good only as a systemic point. However, the claimant's argument draws back from going that far.

73. Summary

1. The Mental Capacity Act does not create either a duty or power to accommodate FM.

2. FM falls within the terms of section 21 of the National Assistance Act and is not excluded from its scope by the operation of section 21(8).

3. Section 3 of the Human Rights Act gives no reason to read down section 21(8) to reach any other conclusion.

4. FM's accommodation at Castle Garth care home has thus to be paid for by him or on his behalf, in accordance with section 22 of the National Assistance Act and regulations made under it.

5. This is not discriminatory upon an application of Article 14 read with Article 1 of Protocol 1. FM is not materially in the same position as those who receive after care under the provisions of section 117 of the Mental Health Act and the State would in any event have offered sufficient justification for the result.

6. Next, domestic legislation requires the result that I have reached and it is not suggested that this legislation is incompatible with European obligations .

74. In the result, I have to dismiss this application save as to one matter reflected in the agreement of the parties, which is in respect of a third argument in respect of the quantification of the sums due (raised on the papers), it has been agreed between counsel, for whose labours I am grateful, that £5855.83 is owed by FM to Doncaster in respect of his accommodation and under the terms of section 22 of the National Assistance Act.

75. Finally, I should record two things: first, FM himself has played no part directly or by others in this argument. Although he is described as "a second interested party" and although it was optimistically thought in the skeleton argument of the claimant that he would be represented by the Official Solicitor, the Official Solicitor made it clear, in a letter to the court of 7th December 2011, that he had neither been invited nor had he accepted appointment to act as FM's litigation friend and that the paragraphs to that effect in the detailed statement of facts and grounds were incorrect.

76. Secondly, I should record my appreciation of the careful and skilful way in which counsel on all sides have put their arguments before me and the very considerable assistance which they have given to the court.

77. For those reasons this claim is dismissed save as to quantification.

[MR JUSTICE LANGSTAFF (addressing solcitors present to receive judgment): You probably do not want to say anything at the moment. I am happy to hear any submissions which you or your counsel may wish to make by paper communication in the usual way and you can talk to the Associate, if you wish, to get the communication details.]