Neutral Citation Number: [2012] EWHC 1518 (COP)

Case No: COP 11982012

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2012

Before :

MRS. JUSTICE ELEANOR KING

- -

Between :

EM (by the Official Solicitor as his litigation friend)	**Applicant**
- and -	
S C	**1st Responent**
- and -	
CM	**2nd Respondent**

- -
- -

Mr. Parishii Patel (instructed by **Anthony Collins Sols**) for the **Applicant**
Miss Melanie McDonald (instructed by **Shropshire CC Legal Services**) for **1st Respondent**
CM (no solicitors instructed and no attendance) for **2nd Respondent**

Hearing dates: 14th February 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS. JUSTICE ELEANOR KING

Mrs. Justice Eleanor King :

1. This is an application made by the Official Solicitor on behalf of the Applicant EM, for the discharge of the latest of a series of standard authorisations made on 16 January 2012 pursuant to the Mental Capacity Act 2005. The effect of the standard authorisation is to deprive EM of his liberty and oblige him to live at a nursing home, RH, rather than at the home which he had shared with his wife and son for many years.

2. EM was born on 8th December 1919. He is now 92 years of age. EM is Polish but has lived in the United Kingdom since the Second World War, during which he flew spitfires. EM is rightly proud of his illustrious war record. For a period of time he was a Russian prisoner of war. He likens his present living arrangements to that grim period of his life. The first respondent, S C, is the Local Authority responsible for EM and the relevant supervisory body under the Mental Capacity Act 2005. The second respondent, (CM), is EM's daughter and has taken no part in these proceedings.

3. EM resides in *RH* a nursing home in Roden in T. He has lived there since 21st July 2009. S C case is that EM has a cognitive impairment, particularly short-term memory difficulties, which affect his day-to-day living. EM requires help with all of his personal care, and has very limited mobility; he uses a wheelchair and has limited sight and poor hearing. Since his arrival at RH, EM has consistently and forcefully expressed his wish to leave the nursing home and to return home to live with his son, MM. The Local Authority consider, that it is in EM's best interests to remain living at *RH* for a number of reasons details of which are particularised in the statement of the social worker, RA. The reasons include the poor state of repair of his home, the risk to his health if he refused to engage with care providers the risk of his falling and also of causing a fire by smoking in bed. In addition the relationship between EM and MM is highlighted as likely to be a cause of sufficient difficulty and distress (as opposed to support) to EM should they live together.

BACKGROUND

4. EM married his wife, GM, in 1943. They had a daughter, CM in 1944 and adopted their son, MM, in 1958. EM worked as a commercial pilot after the war and retired in 1984. Social Services involvement began in February 2008, initially for GM, at a time when EM was in hospital having been diagnosed with stomach cancer. The social worker, RA, has prepared a useful chronology which is attached to her statement and contained in the bundle. I have read it in its entirety, but incorporate it in this judgment only to the extent necessary to have a proper understanding of the issues which arise.

5. In December 2008 EM fell downstairs. When carers came to his aid it was discovered that both EM and GM had serious chest infections requiring hospital treatment. In due course, when they recovered, they were transferred to a nursing home to recuperate. During the early part of 2009 plans were put in train to return them both to their home. In preparation for going home the house was deep cleaned and repairs were carried out; before they could return however EM had another fall, this time at the nursing home, further surgery was required.

6. By June 2009 those involved in the care of EM concluded that he had fluctuating capacity to decide where he should live he was, however, adamant that he wanted to return home. Despite the social workers reservations, plans were made to allow this to happen and on 6th July 2009 EM did, indeed, return home. [So far as I understand the position, GM did not return home with him and she has remained in the care of the Local Authority ever since]. MM was at home at the time but was adamant that he would not provide any care for his father. The Local Authority therefore put in place a support plan which included four visits daily from carers. During the night of 7th and 8th July 2009, just two days later, EM again fell, this time fracturing his femur. Even though MM was in the house at the time, EM lay on the floor for some hours until a carer arrived the following morning and arranged for his admission to hospital for further surgery.

7. Later on in July 2009, EM having recovered from the surgery, was moved to RH where he joined his wife in a shared room. A formal capacity assessment was carried out on 3rd August by a social worker which concluded that EM no longer had capacity to decide where he should live. On 7th October 2009, therefore, the first of a series of so called standard authorisations were made authorising EM's deprivation of liberty at the nursing home. The authorisation, currently the subject of challenge by EM through the Official Solicitor who acts on his behalf, was made on 16th January 2012.

8. In the early days EM was taken home regularly. Following a very unpleasant incident with MM on 12th April 2010, when MM threatened to shoot his father, a condition of the deprivation of liberty which had provided for the home visits was varied to record that:

> "Risks of visits home considered high at this time; to keep options under review."

EM has, however, been taken to his home on two occasions in the last couple of months. The first was on 8th December 2011 when EM's social worker, RA, took EM to the house. They went together with a man called A P who is the case welfare officer for the RAF. The second occasion was on 6th January 2012 when the Official Solicitor's representative took EM to the house, again with RA. It seemed to me when EM addressed the court yesterday that he remembered little of these visits. He thought he had last visited the house five months ago with his grandson, Shaun, and that he had stayed for about ten minutes.

9. Mr Poole filed a statement in these proceedings. He explained that the purpose of the visit was to give EM the opportunity to see the condition of the house. MM was present. MM refused to communicate with EM. The house was, in Mr Poole's view, uninhabitable. The gas services had been condemned; the bath, sink area and WC were all broken. The downstairs rooms were dirty, damp and neglected. Mr Poole went upstairs in an attempt to speak to MM. MM told him that he lived entirely in one rear room together with his large German shepherd dog, that he only had cold washes and that he had broken the bath when he fell. Mr Poole concluded that:

> "My overall impression of the house is that it is in need of considerable work to bring it up to a habitable state. Apart from poor decoration and deterioration caused through neglect and damp, the mains services are either unsafe or inoperable. My impression of the relationship between

> EM and his son led me to believe that it is highly unlikely that it will ever be considered wise to allow them to meet face to face."

10. On the occasion of the second visit to the house with the Official Solicitor in January 2012, by CM letting them in to the house, EM immediately went upstairs refusing to come down again or to speak to EM. EM told the Official Solicitor's representative that if his father moved into the house, he would move out. As the parties left the house, EM called upstairs to MM asking him what he EM "had done." EM, I am told, was pleading with MM to explain what he had done to upset him, but MM would not respond.

11. It has been of assistance to this court that those two visits have taken place. An understanding of the condition of the house and the observation of no less than three individuals of MM's animosity to his father is valuable to the court when carrying out its statutory exercise under the Mental Capacity Act and in particular in considering EM's ability *to "use or weigh up that information as part of the process of making a decision"*. In saying that, I should be clear that at this stage I am not considering what is or is not in EM's best interests, but rather the quality and strength of the information available to EM and how he has thereafter been able to use it to weigh up the risks as a part of his decision making process.

THE LAW

12. Section 4A(5) of the Mental Capacity Act provides that D may deprive P of his liberty if the deprivation is authorised under the terms of Schedule A1. A person may be deprived of their liberty under Schedule A1 providing a number of conditions are met these are contained in paragraphs 1 to 28 of the Schedule,and include:

> (a) P is detained in a care home for the purposes of being given care or treatment in circumstances which amount to a deprivation of liberty;
>
> (b) there is a standard authorisation in force which relates to P and to the care home in which P is detained;
>
> (c) the supervisory body must not give a standard authorisation unless satisfied that P meets the qualifying requirements *inter alia* the mental capacity requirement that:
>
> "The relevant person meets the mental capacity requirement if he lacks capacity in relation to the question whether or not he should be accommodated in the relevant care home for the purpose of being given the relevant care."

13. Paragraphs (a) and (b) are satisfied the issue is therefore whether the mental capacity requirement is satisfied in EM's case. For the court to be satisfied that the criteria in Schedule A1 are, in their totality, satisfied it must consider the terms of the Mental Capacity Act and in particular sections 1 – 3 of the Act which provide:

> Section 1
> The principles
> (1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Section 2
People who lack capacity
(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person (“D”) may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

Section 3

Inability to make decisions
(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

> (d) to communicate his decision (whether by talking, using sign language or any other means).
>
> (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
>
> (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
>
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
>
> (a) deciding one way or another, or
>
> (b) failing to make the decision.

14. The court therefore applies the two stage test; only if the diagnostic test set out in S2(1) is satisfied can the court move on to consider the functional crieria set out in section 3

15. Recently in the case of *PH [2011] EWHC 1704 Fam* Baker J set out a useful summary of the application of the principles which apply to these cases. I have read and adopted Baker J's judgment.

EM

16. On 10th February 2012 Macur J made provision for EM to attend court for yesterday's hearing. He came, together with a carer from RH. Initially Mr Patel, on behalf of the Official Solicitor, opposed EM doing other than speaking to the court as there had been no formal assessment of his capacity to give evidence. The Local Authority for their part indicated that they did not intend any formal cross-examination but merely to "ask a few questions." When EM spoke it immediately became clear to everyone in the court that it would not be appropriate for EM to take the oath and, by common consent, no attempt was made to do so.

17. EM spoke directly to me in order to tell me what he wanted. He said he had been in a "caring" house for two years," that he did not "ask to go" and that a woman had taken him there and had told him that he would stay there until he died. He told the court that he was "fed up" and wanted to go home and that he feels "sick to stay there." It was, he said, "a murder house." They would not "let him go home" he said and they are" killing him by keeping him there":

> "If I go home," he said "they lose £140 a week so they keep me there. I can care for myself. During the war I flew spitfires. I did everything for my country and I am now in prison and not allowed home."

I should say in parenthesis that, throughout the time that EM was talking to the court, either directly or in reply to questions by either the Official Solicitor or the Local Authority, the leitmotif was his stated belief that the only reason he was being

detained in RH was so that RH would be able to continue to claim £140 a week for his keep.

18. When asked questions about how he would manage if he went home EM suggested that "he would see" when he got home. For example, in relation to the stairs he said that when he goes home, "I'll see if I can stay down or go up". He said that he was not worried that he would fall over as he is careful. His son, he said, will help him. They lived together he told me, in the house all the time until he went into RH "Something has upset him," he said, meaning his son, and he will not talk. He described going to the house last year and of MM saying he was going to kill him but, he said, "We've been together for 50 years and he will help me. There is no problem with him".

19. EM described the dullness of his routine at RH. His eyesight is poor, so, he says, he sits and likes to go for a cigarette. He criticised the home in a number of respects but particularly the food. He says that at home he will cook, garden, paint the fences and he will not be "sitting miserable." When asked about food EM said that he would go to the kitchen and do his meal. He is not, he said forcefully, "stupid." "I can," he said, "ask you to come for a meal and you will see". When asked about shopping he said that MM would take him in the car to shop. When asked how he would manage if MM did not take him, he said that there was a shop only 100 yards away and he would go there if necessary. EM said that he wants a normal life, not prison and that they only keep him in order to get money. He said that he would not say "no" to help and that if the court said that he could choose whether to go home he would go straight away today, he would see to the house repairs once he was back.

20. MM was not present in court but had written a short letter to the court dated 1st February 2012, it was read out to EM. In the letter MM says that he does not visit his father and does not wish to, that if his father came home he would not give him any support or help and would have nothing to do with him. MM emphasised the strength of his feelings by saying, "I would not do any shopping, housework, gardening, cooking or provide support of any kind".

21. Having had the letter read out to him, EM responded by speaking of his daughter who he referred to as "evil" and of "hating". The letter, he said, was written at her instigation; MM could not have written it. The letter was in fact submitted to the Official Solicitor, by CM on behalf of MM. EM, simply dismissed the possibility of the contents being true and was unable to make any connection between the letter and MM's behaviour to him both last year and in the previous few weeks, (the latter of which he appears to have forgotten). I did ask him if he would still go home if MM was not there and he said that he was "not sure". EM despite the letter nevertheless proceeded blindly on, on the basis that MM would be there at the house and would look after him. At the conclusion and before he left court EM said poignantly:

> "Please send me home. I won't disappoint you. I will be happy until I die. I will do something useful; I am a useful man. I will be grateful if I can go home. They just want the £140 a week. If I go home I will find out about my pension."

ASSESSMENT OF EM'S MENTAL CAPACITY

22. TW is a social worker authorised to carry out mental capacity assessments. *She most recently assessed EM on 13th January 2012. She was not required to* give evidence but her assessment is contained in the trial bundle. Miss Waterhouse, having carried out her assessment, concluded:

> "M gave reassurances that everything would be fine. He based this on his previous ability to cope with difficulties, quoting his experiences in the war. He did not recognise his limitations or frailty, nor did he acknowledge the level of animosity between him and his son. During the conversation it became clear that M was not able to understand the relevant information, especially in relation to risk, or retain that information or use it as part of his decision-making process."

23. Dr R was jointly instructed by the Official Solicitor and the Local Authority following the making of this application. He is a consultant psychiatrist in old age psychiatry working with the community health team. Dr R stated that whilst he is aware of the principle of the Mental Capacity Act and assessments, he claims no special expertise over and above that of his peers in a similar position. This was apparent in his first report which did not correctly address the questions to be answered in a mental capacity assessment.

24. Dr R visited *RH* to meet EM on January 16th 2012 and again on January 24th 2012 In an undated report received by the Official Solicitor on 25th January, Dr R concluded that EM did not lack capacity. The structure of his report, however, was such that the Official Solicitor wrote to Dr R again on 8th February setting out, for a second time, sections 1 to 3 of the Mental Capacity Act and reminding Dr R of the two stage test under the Act, and in particular reminding him that a reference in his first report to the "nature and degree" test went to the issue of detention under the Mental Health Act 1983 and not impairment of or disturbance in the functioning of the mind or brain, (the issue going to the first stage or "diagnostic" test under the Mental Capacity Act). In his letter the Official Solicitor also asked Dr R to have a discussion with TW who had, as I have already noted, assessed EM's capacity for the most recent standard authorisation.

25. Dr R accordingly spoke to TW and thereafter sent a letter dated 9th February responding to the Official Solicitor's letter this time by reference to the two stage test. Dr R said that EM's decline in cognitive function, albeit it mild or moderate in degree, has arisen as a result of impairment of or a disturbance in the functioning of the mind or brain. Dr R therefore now concluded that the diagnostic criteria were made out. Moving on to the second stage, Dr R said that EM:

> "Appeared unable to appreciate or assimilate the information and opinions of others about the potential risks and potential difficulties in returning home and to use this information to reach a balanced decision."

25. Dr R said that the difficulty in reaching a conclusion in what he described as this "difficult borderline mental capacity assessment," was caused by the fact that EM's pre-morbid personality was described as "difficult, stubborn and controlling." Dr R in his written material said:

> "I am not sure the link between the two, i.e. his impairment and his inability to weigh the relevant information, could be attributed entirely to, for example, short-term memory disturbance or an observable mental illness such as depression… It seems to me that longstanding attributes such as, for example, personality traits or cultural inferences play a role here. It may be one way of understanding EM's difficulties is that even a minor degree of cognitive attrition combined with these predisposing factors could render him incapacitated."

26. Dr R, having been specifically directed to the two stage process by the Official Solicitor in her letter of 8th February, revised his original conclusion and stated that in his opinion that EM lacks capacity.

27. Dr GKR prepared, at short notice, a second psychiatric opinion dealing with EM's capacity. His report is dated 11th February 2012. When speaking to Dr R, EM did not think he would have any problems at home. He said he could manage the stairs "as there are rails on both sides" and he said could wash and dress himself. EM had declined to take any part in any memory function tests, but Dr R noted that when memory tests had been previously carried out in 2009 (by Dr R himself), the results had shown a moderate degree of memory impairment. Dr R was able to see current evidence of short-term memory impairment in EM.. He gave as examples EM's inability to remember what he had had for lunch just two hours earlier and also of accusations made by him that were nurses stealing his cigarettes because he could not remember having smoked them himself earlier in the day.

28. Dr R was able, in the early part of his interview with EM and at a time when Dr. R felt EM was engaged in the process, to conduct a standard memory test for frontal lobe functioning. The importance of this test is that frontal lobe functioning contributes to judgment and the ability to weigh up information. The test is straightforward. The subject is asked to name items in various categories. In the case of EM, naming domestic animal test was chosen. Dr R was absolutely clear that EM had genuinely attempted to complete the test, this was not a case of him failing to co-operate. Dr. R said, "He, "really struggled. He tried and failed". Dr R explained that EM had been able to manage just three animals and that one would have expected him to name over ten had frontal lobe function been normal. Dr R concluded, that EM suffers form loss of frontal lobe function. Dr R said that EM was so fixated on going home that he could not take in or weigh up the risks. So far as MM was concerned MM was of the opinion that he would help him to cope on a day-to-day basis. It was clear, Dr R said, that MM is not prepared to help but EM has not absorbed that fact and was, as a result failing to factor it into his decision-making process.

29. Mr Patel had three main lines of attack pursued forcefully in evidence and again in submissions, namely:

> (1) that EM does not lack capacity but his seeming inability to weigh up information is a function of his somewhat challenging personality;
>
> (2) that there is no discrepancy between EM's perception and reality as he could consider that he might not go home if MM was not there. He was saying that he would paint fences and live at home because that was what

> he dreamed of doing once he escaped the boredom of life in a care home and he did not, in fact, really believe he could do these things;
>
> (3) EM does appreciate risks. He said he might not go home if M was not there and he appreciated that the central heating does not work.

30. With regard to EM's personality, with respect to Mr Patel I do not accept his submission. Dr R was not failing to take into account the role of EM's personality. He was, in fact, engaging in a rather more sophisticated analysis of the second stage than that conducted by TW; (no doubt this is as a consequence of the fact that, no matter how considerable TW's experience may be, she is not, a psychiatrist). It was the very issue of the import of EM's personality which made the case "complicated and difficult" in the mind of Dr R. What Dr R concluded was that those very features of EM's personality described as "stubbornness" and being "opinionated" which when put together with various cultural factors meant that only a mild to moderate cognitive attrition rendered him incapable of making judgments. That consequential inability was unlikely to be due to his personality. When asked about issues such as EM saying he could garden and paint, Dr R was of the opinion that EM did not, as submitted by Mr Patel, know that he could not do those things. He genuinely believed he could, he was not saying such things in order to provide an example of the contrast of life at home and life at the care home.

31. Having seen and heard EM, I agree with the analysis of Dr R.

32. When asked questions by Mr Patel, on behalf of the Official Solicitor, Dr R identified a number of areas where he believed there to be significant discrepancies between EM's perception of matters and reality; by way of example, EM spoke of cooking, gardening and painting the garden fences when he got home and said that he could get up the stairs (when he could not use the stairs at RH.) EM had also described to Dr R how MM would help him to bring furniture downstairs and that his son would do what he told him. I accept the evidence of Dr R that EM is no longer able to marry up perception and reality, this inevitably impacts on his ability to weigh up factors in order to make decisions, particularly in relation to risk.

33. Mr Patel submits on behalf of the Official Solicitor that the fact that EM says that he "might not want to go home" if MM is not there to look after him shows capacity and an appreciation of risk. With respect to Mr Patel, that, in my judgment, misses the point. The point is that despite the overwhelming evidence to the contrary, EM does not begin to appreciate that MM will not, under any circumstances, look after him.

34. In the abstract, EM may say that if MM was not there he may not wish to go home, the reality is that in his mind it is simply not an issue that arises MM <u>will</u> care for him. In the same way that he does not weigh up the difficulties presented by the state of the house, (despite having visited it with the Official Solicitor as recently as 6th January 2012), neither does he weigh up the fact that MM is unequivocally clear that he will not care for him or help in anyway. On the contrary MM is aggressive and neglectful.

35. Mr Patel argues that this lack of acceptance of MM's animosity is neutralised by the fact that EM offers explanations for MM's behaviour; the letter he suggests was written at that his daughter's instigation and in relation to MM's behaviour to his father on 6th January, that he was cross because he, MM, thought that EM was going

to send around the police about the threats he had made. That submission might have had some force had EM then gone on to say something along the lines that, even if MM would not help him he, would do, A, B or C instead. Rather he simply continues to work on the basis that his son will be his carer.

36. Having listened carefully to EM, I am entirely satisfied that he is unable to weigh up the information relating to the foreseeable consequences of deciding to go home.

37. In my judgment, therefore, Mr Patel cannot successfully support a submission that EM has an appreciation of risk. On the contrary Dr GKR was of the opinion that by saying that he was not sure if he would want to go home if his son was not there, this in itself showed a lack of perception on EM's part, as such a move would undoubtedly be very risky and should have brought any thoughts of going home to an end. Neither, as submitted by Mr. Patel, does recognition by EM that the central heating is broken show perception and an ability to assess risk given the numerous other ways in which the house is wholly unsuitable, particularly the fact that EM cannot use the stairs and the only lavatory in the house is upstairs.

38. Dr GKR concludes that EM demonstrates impairment of short-term memory and an inability to appraise risks. I agree.

CONCLUSION

39. There is no dispute as between either the experts or the parties that the stage one diagnostic test is satisfied. EM has suffered a decline in cognitive function of mild to moderate degree as a result of impairment of or a disturbance in the functioning of the mind or brain, specifically pathological processes occurring in the brain causing cognitive decline and dementia.

40. I accept also the evidence of Dr GKR that this includes not only short-term memory problems but also frontal lobe attrition affecting reasoning and judgment. I do not accept the submission of Mr Patel that the court should give little weight to Dr GKR's evidence in this regard because the more sophisticated frontal lobe tests available were not carried out. Dr GKR is an experienced psychiatrist specialising in old age. He conducted a well recognised test at the beginning of the interview when EM, I am satisfied, was engaged and co-operative and he, Dr GKR, was satisfied that EM tried his best to complete the task and he was simply unable to do them.

41. I turn then to the second stage "functional" of the test by reference to section 3 of the Act, having first reminded myself that there is an assumption that EM has capacity (section 1(2)), that he is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success (section 1(3)), and that a person is not to be treated as unable to make a decision merely because he makes an unwise decision (section 1(4)).

42. In the present case EM's social worker and the Official Solicitor's representative have done everything possible to take such steps as they can to help EM to be in the best possible position to make his decision. Miss Adams took EM to the house in December and arranged that they should be accompanied by a member of the RAF welfare service, an excellent idea given EM's pride and longstanding connections with the RAF. The Official Solicitor's representative, herself, went to the house as

recently as 6th January again with RA, so that EM could see both the house and also how MM behaved towards him. The Official Solicitor went a step further and asked for written statements from MM and from CM setting out their views. MM's views expressed in writing could not have been clearer or more painful.

43. Turning then to section 3

> *3(1)(a): to understand the information relevant to the decision:*. It is common ground that EM understands the information.
>
> *3(1)(b): to retain the information:* EM is capable of retaining the information to a point. His short-term memory is, however, compromised. Looking at the totality of the evidence, in my judgment this does affect his ability to make a decision as he forgot the visits to the house and seems to have only a vague, if any, recollection of how MM consistently behaves towards him. Although he does know that MM does not come to visit him at *RH* and did threaten to kill him, he feels this was at the instigation of his sister.
>
> *3(1)(c): to use or weigh that information as part of the process of making the decision*: It is accepted that this element of the test goes to the root of the issues to be decided in the case of EM. I bear in mind that if EM can only retain relevant information for a short time, it does not prevent him from being able to make a decision (section 3(3)) and, importantly, in this case, that the relevant information includes information about the reasonably foreseeable consequences of deciding one way or another (section 3(4)(a)). This must involve in my judgment an ability to weigh up the information which will inform an understanding of the risks for EM in returning home including the condition of the house, the risk of falling and the relationship with MM.

44. I have reluctantly, but firmly, concluded that EM is unable to use or weigh the information as part of the process of decision-making. I have considered with care the question of whether that inability is, in fact, only a facet of EM's somewhat challenging personality. I have considered also Mr Patel's invitation to reject the evidence of the jointly instructed expert, of Dr GKR and of the social worker, and to substitute my own judgment having seen and heard EM yesterday morning.

45. I accept the evidence of the psychiatrists that EM is unable to make a decision as to residence, not because of his personality but because of his impairment of mind. It was a privilege to see and hear EM, a spitfire pilot who risked his life time and again for his adopted country. His forceful personality was evident and it was obvious to all why he is sometimes described as controlling and opinionated. To me, however, the dementia (from which it is common ground he suffers), was also apparent and in my judgment he truly believed that all would be well if he went home. He was wholly unable to weigh up the information about the state of the house, about his physical frailty and about MM. He could not factor those matters into his decision-making process; that inability is wholly different from simply making an unwise decision.

46. In reaching the conclusion that EM lacks capacity I have been careful to bear in mind that the task of this court is at this stage is limited to deciding whether or not EM has

the capacity to decide whether to return home and not whether or not such a return would, from an objective point of view be contrary to his best interests.

47. In all the circumstances, having applied the test prescribed by the Mental Capacity Act as incorporated into Section 4A(5) of the Act, Schedule 1A, I have concluded that EM does not have capacity to determine where he will live and I therefore, accordingly, dismiss the application.

[Discussions re order followed]