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Case No: 1352489T

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2020

Before :

THE HONOURABLE MR JUSTICE HAYDEN

- -

Between :

BP	**Applicant**
- and -	
Surrey County Council	**1st Respondent**
- and –	
RP	**2nd Respondent**

- -
- -

Ms Alison Harvey (instructed by **Bison Solicitors**) for the **Applicant**
Mr Scott Storey (instructed by **Surrey County Council**) for the **Respondent**
RP (Litigant in person)

Hearing date: 25th March 2020

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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.

.....

THE HONOURABLE MR JUSTICE HAYDEN

This judgment was delivered following a remote hearing conducted on a video conferencing platform and was attended by the press. 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judgment) in any published version of the judgment the names and addresses of the parties and the protected person must not be published. 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.

Mr Justice Hayden :

1. This is an urgent application made on behalf of BP who is 83 years of age. BP was diagnosed with Alzheimer's disease in December 2018. He is deaf but is able to communicate through a "communication board". Today's emergency application, brought by BP's litigation friend, his daughter FP, seeks to achieve his discharge from the care home where he is presently living and a declaration that it is in his best interest to be returned to his home with an appropriate package of support.

2. The application is generated by the decision of SH care home to suspend all visits from any family members to BP and indeed to the others living in the home. The restriction also extends to any other visitors (see para 9 below). That decision was activated at 5pm on 20th March 2020. It is contended that this application is urgent because the current constrictions imposed by this care home and, of course, many others, is said to constitute an unlawful interference with BP's rights, guaranteed by Articles 5 and 8 ECHR.

3. BP has lived at the SH care home since 25th June 2019. Until that point he had been living at home with his wife Mrs RP, the second respondent to these proceedings. The couple appear to have managed satisfactorily, without any identifiable support but it gradually emerged that BP was sometimes being verbally and, it is said, occasionally physically aggressive towards his wife. It is important to state that this was a manifestation of his Alzheimer's.

4. Plans were tentatively made to provide respite care for BP but, before these could be brought in to effect, he fell ill and was admitted to hospital on 20th June 2019. He had become very dehydrated. He was discharged from hospital to SH care home and his placement there was authorised on 12th August 2019 as a necessary and proportionate deprivation of his liberty. BP resents having to live at the care home and has consistently and unambiguously expressed his wish to return home. The 'standard authorisation' was due to expire 2nd February 2020 but has since been extended until 3rd June 2020, pursuant to the order of HHJ Raeside 6th March 2020.

5. BP was assessed by Dr Brett du Toit, Medical Practitioner, on 30th July 2019, as lacking capacity to make decisions about his accommodation and care needs as a result of his cognitive impairment.

6. Notwithstanding his conclusion, Dr Brett du Toit considered that BP understood most of the relevant information, "on balance", regarding his dementia, his accommodation, his medication, his care needs, his vulnerability and risk of misadventure. Furthermore, BP was thought to be able to retain enough of the information for long enough to 'attempt' to weigh the decision. BP could also communicate his decision to the assessor. Where BP fundamentally struggled, in terms of the capacity assessment, was in his ability to give appropriate weight to his care needs and properly appreciate the risks he faces if left unsupervised. BP also was considered to have an incomplete understanding of his illness overall. Dr Brett du Toit notes that BP does not believe he has dementia or memory problems and ultimately found that *"there was sufficient cognitive impairment on testing to prevent effective judgement of his health and safety if living independently"*

7. There had in fact been an earlier assessment undertaken whilst BP was still in hospital. That assessment was conducted by a Ms Leah Majasi-Ncube. The report is dated 25th June 2019. The conclusion was that BP was able to understand but not retain or weigh information in a manner which would enable him to take informed decisions about his care. The family are divided as to whether it is in BP's interests to return home with a package of care or to remain in the SH care home. It is an invidious and upsetting situation but one that many families must address.

8. BP was, until the crisis presented by the Coronavirus pandemic, receiving regular visits. His daughter FP has visited him six days a week since BP was first admitted. In her evidence she told me that she would stay usually for over an hour and read the paper to her father. AP, BP's son visits four times a week with BP's granddaughters every Wednesday. BP's wife manages to visit three times per week and BP's other daughter KH, has face to face contact with BP at least once per month. In addition, BP receives visits from his extended family and friends. He is self-evidently a popular and much-loved man.

9. Of course, BP's deafness limits some of his options. BP does not use a telephone, face time or Skype. There can be no doubt that the change to BP's quality of life from 5 o'clock on Friday 20th March 2020 was seismic. Additionally, the restriction extended to the Mental Capacity Assessor visiting. Thus, there is need for heightened vigilance to ensure that BP's fundamental rights are not eclipsed by the exigencies of the Coronavirus pandemic. Fundamental to my consideration of the issues presented by this case is Article 11 UN Convention of the Rights of Persons with Disabilities ('CRPD') which provides:

> *"Article 11 – Situations of risk and humanitarian emergencies*
>
> *States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters."*

10. The COVID-19 pandemic plainly falls within the circumstances contemplated by Article 11 and signals the obligation on the Courts, in particular, and society more generally to hold fast to maintaining a human rights based approach to people with disabilities when seeking to regulate the impact of this unprecedented public health emergency.

11. This urgent application, issued on 23rd March 2020, seeks the following:

    a) A declaration that if, within 72 hours of SH Care Home being served with a copy of the relevant order it has failed to take steps to facilitate the attendance of Dr Babalola and to reinstate daily family visits to BP, then it is not in BP's best interests to reside in the interim at SH Care Home;

    b) An order that if the above has not been complied with by SH Care Home, the order dated 6 March 2020 extending the standard

authorisation be revoked and the standard authorisation shall terminate at the expiry of that 72-hour period;

c) A declaration that the total ban on visits is a disproportionate interference with BP's rights under Articles 5 and 8 (read with Article 14) of the European Convention on Human Rights;

d) An interim declaration that whilst the restrictions on visits remain in place it is in BP's best interests to return home with a package of care.

12. On the evening of 23rd March 2020, the Prime Minister announced, during the course of a public broadcast, stricter measures by the Government relating to COVID-19. The essence of the guidance is that people should stay at home, with very limited exceptions and for very tightly constrained purposes. At his age and with his underlying health problems BP is vulnerable to the most serious impact of the Coronavirus. In my view, it is necessary to state the risk BP faces, were he to contract the virus, in uncompromising terms: there would be a very real risk to his life. Manifestly, there are powerful and competing rights and interests engaged when considering this application.

13. The framework of the law to be applied is, in my judgement, largely uncontroversial. The application of it is undoubtedly more challenging. The starting point must be Article 5 of the European Convention on Human Rights which provides:

> **Right to liberty and security**
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […]
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
> [...]
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

14. Article 5(1) of European Convention on Human Rights has been interpreted by the European Court of Human Rights as imposing positive obligations to put in place measures providing effective protection of persons at risk, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.

15. Ms Harvey, on behalf of the applicant, has helpfully drawn my attention to the case law. **Storck v. Germany, (Application no. 61603/00), 16 June 2005** concerned a person detained in a psychiatric hospital. The Court held:

> "101. The Court has consistently held that the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction (see, *inter alia*, *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 57, § 26, and *Woś v. Poland* (dec.), no. 22860/02, § 60, ECHR 2005-IV).
> Consequently, the Court has expressly found that Article 2 […] require the State not only to refrain from an active infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by State agents or by private parties.
> 102. Having regard to this, the Court considers that Article 5 § 1, first sentence, of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens. Any conclusion to the effect that this was not the case would not only be inconsistent with the Court's case-law, notably under Articles 2, 3 and 8 of the Convention, it would also leave a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see, *mutatis mutandis*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 332-52 and 464, ECHR 2004-VII)."

16. **Stanev v Bulgaria (2012) 55 E.H.R.R. 22** 12 January 2012 also concerned mental health issues. The court held:

> "120 … the Court has had occasion to observe that the first sentence of art.5(1) must be construed as laying down a positive obligation on the state to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The state is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge."

17. In **Re (D) (A Child) (Residence Order: Deprivation of Liberty) [2017] EWCA Civ 1695; [2018] P.T.S.R. 1791; [2018] 2 F.L.R. 13**; Munby LJ held:

> "28. In the meantime, I turn to *Storck* component (c), elaborated by the Strasbourg court in *Stork's* case 43 EHRR 6, para 89:
> "in the present case, there are three aspects which could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. First, the deprivation of liberty could be imputable to the state due to the direct involvement of public authorities in the applicant's

detention. Secondly, the state could be found to have violated article 5 in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of article 5. Thirdly, the state could have violated its positive obligations to protect the applicant against interferences with her liberty carried out by private persons."

The present case relates to the first and third aspects. In relation to the third, the court referred, at paras 101–102, to the *positive* obligation of the state "to take appropriate steps to provide protection against an interference with those rights either by state agents or private parties" so as to provide "effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge".

29. In In re A and C (Equality and Human Rights Commission intervening) [2010] 2 FLR 1363 , paras 95–96, I said:

"95. … Where the state—here, a local authority—knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of liberty, then its positive obligations under article 5 will be triggered. (i) These will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty … (ii) If, having carried out its investigation, the local authority is satisfied that the objective element is not present, so there is no deprivation of liberty, the local authority will have discharged its immediate obligations. However, its positive obligations may in an appropriate case require the local authority to continue to monitor the situation in the event that circumstances should change. (iii) If, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation … to take reasonable and proportionate measures to bring that state of affairs to an end. What is reasonable and proportionate in the circumstances will, of course, depend upon the context, but it might for example … require the local authority to exercise its statutory powers and duties so as to provide support services for the carers that will enable inappropriate restrictions to be ended, or at least minimised. (iv) If, however, there are no reasonable measures that the local authority can take to bring the deprivation of liberty to an end, or if the measures it proposes are objected to by the individual or his family, then it may be necessary for the local authority to seek the assistance of the court in determining whether there is, in fact, a deprivation of liberty and, if there is, obtaining authorisation for its continuance.

"96. What emerges from this is that, whatever the extent of a local authority's positive obligations under article 5, its duties … are limited. In essence, its duties are threefold: a duty in appropriate circumstances to investigate; a duty in appropriate circumstances to provide supporting services; and a duty in appropriate circumstances to refer the matter to the court."

18. The other key convention right which falls to be considered is, self-evidently, Article 8 ECHR, which provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

19. Article 14 of the Convention provides that the rights within it shall be secured to all, without discrimination, including on the grounds of disability.

20. Article 15 permits derogation from Articles 5 and 8 in situations of public emergency, threatening the life of the nation. It also requires to be set out:

> Article 15
> Derogation in time of emergency
>
> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

21. On 20th March 2020 the Council of Europe's European Committee for the prevention of torture published a Statement of Principles relating to the treatment of individuals deprived of their liberty in consequence of the COVID-19 pandemic. Saliently, these include:

> "1) The basic principle must be to take all possible action to protect the health and safety of all persons deprived of their liberty. Taking such action also contributes to preserving the health and safety of staff.
>
> […]
>
> 4) Any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time. Persons deprived of their liberty should receive comprehensive information, in a language they understand, about any such measures.

> 5) As close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention; commutation of sentences, early release and probation; reassess the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate, residents of social care homes; and refrain, to the maximum extent possible, from detaining migrants."

22. Additionally, Article 25 of the CRPD emphasises the Right to Health of people with disabilities:

> Article 25
> Health
>
> States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:
>
> a) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;
>
> b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
>
> c) Provide these health services as close as possible to people's own communities, including in rural areas;
>
> d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
>
> e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;
>
> f) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

23. The essence of Article 25 resonates with the fundamental principles of the Mental Capacity Act 2005 (MCA). In the context of Coronavirus, the State's obligation is to ensure equality for people with disabilities and to guard against them being inadvertently left behind by a system which deprioritises them in the urgency of a response to crisis. As has been repeatedly emphasised the objective of the Mental Capacity Act 2005 is to promote and facilitate decision taking by those with some cognitive impairment. Central to its philosophy is the recognition that such decisions may be both wise or foolish. It is autonomy that is protected.

24. It is important to emphasise that BP is the subject of a 'standard authorisation'. There are facets of his general functioning, some of which I have highlighted above, which lead Ms Harvey to submit that the issue of "capacity" remains very much a live one. It is not necessary for me to burden this judgment with the full chronology of the litigation. It is necessary to highlight the key stages, however, in order to give context. This case proceeds as an application pursuant to Section 21A of the MCA.

> "21APowers of court in relation to Schedule A1
>
> [F1(1) This section applies if either of the following has been given under Schedule A1—
>
> (a)a standard authorisation;
>
> (b)an urgent authorisation.
>
> (2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—
>
> (a)whether the relevant person meets one or more of the qualifying requirements;
>
> (b)the period during which the standard authorisation is to be in force;
>
> (c)the purpose for which the standard authorisation is given;
>
> (d)the conditions subject to which the standard authorisation is given.
>
> (3) If the court determines any question under subsection (2), the court may make an order—
>
> (a)varying or terminating the standard authorisation, or
>
> (b)directing the supervisory body to vary or terminate the standard authorisation.
>
> (4) Where an urgent authorisation has been given, the court may determine any question relating to any of the following matters—
>
> (a)whether the urgent authorisation should have been given;
>
> (b)the period during which the urgent authorisation is to be in force;
>
> (c)the purpose for which the urgent authorisation is given.
>
> (5) Where the court determines any question under subsection (4), the court may make an order—
>
> (a)varying or terminating the urgent authorisation, or
>
> (b)directing the managing authority of the relevant hospital or care home to vary or terminate the urgent authorisation.

> (6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person's liability for any act done in connection with the standard or urgent authorisation before its variation or termination.
>
> (7) An order under subsection (6) may, in particular, exclude a person from liability.]"

25. Schedule A1 makes provision for Deprivation of Liberty in the context of Hospital and Care Homes. On 11th December 2019, the Court authorised the instruction of Dr Babalola further to investigate questions of capacity. On 17th March 2020 SH care home sent the following email which gives rise to this application:

> *'Due to the recent advice published by the Government we will be closing our doors to all visitors from 5 pm on Friday March 20th until further notice.*
>
> *We will continue to take Government guidance and will update you where necessary.*
>
> *If there are any changes with your relatives we will notify you immediately by phone. We will be able to set up Skype and Facetime facilities for you to contact your relatives and will pass on any email messages.'*

26. The case is, in any event, listed for further directions on 3rd June 2020. Accordingly, the interim declarations relating to BP's lack of capacity to conduct these proceedings and to make decisions concerning his residence and care remain valid. The focus of the arguments is therefore on whether it remains in BP's best interest to stay in the care home. It is in this context that I must consider the relevant rights and freedoms that all agree are engaged.

27. It strikes me as redundant of any contrary argument that we are facing "a public emergency" which is "threatening the life of the nation", to use the phraseology of Article 15. That is not a sentence that I or any other judge of my generation would ever have anticipated writing. The striking enormity of it has caused me to reflect, at considerable length, before committing it to print. Article 5 protects the fundamental human right both to liberty and, it must be emphasised, to security. It requires powerful reasons to justify any derogation. Those reasons must be confirmed on solid and compelling evidence before any court finds them to be established. The spread of this insidious viral pandemic particularly, though not uniquely, threatening to the elderly with underlying comorbidity, establishes a solid foundation upon which a derogation becomes not merely justified but essential. Ms Harvey referred me to the relevant case law concerning the procedure for derogation. In particular, my attention was drawn to Lawless v Ireland 332/57; Greek case 176/56. I am clear that on a proper construction of these authorities, it is not essential to signal in advance a notification of derogation to the Council of Europe. In any event it would simply not be practical to do so. I will send notification of my decision. It also requires to be stated, in the clearest of terms, that this derogation is to cover a limited period and has been necessary in consequence of an unprecedented pandemic public health crisis. In reaching the conclusion that I have, I bear in mind that fundamental rights and

freedoms require to be protected as vigilantly in times of crisis as in less challenging circumstances.

28. The Statement of Principles by the Council of Europe (see para 21), emphasises that any restrictions should be necessary, proportionate and respectful of human dignity. The obligation to consider alternatives to deprivation of liberty is identified, properly, as an imperative.

29. In his helpful and focused submissions Mr Scott Storey recognised that the restrictions effectively imposed by the SH care home require this court to re-valuate the balance as to where BP's best interests now lie. The Local Authority unhesitatingly recognise that the visiting restrictions are undoubtedly an interference with BP's right to family life. It is entirely acknowledged that in BP's particular case the contemplated interference with that right is further aggravated by his deafness. Ms Harvey submits that the conditions as presently contemplated are designed to apply generally to all residents and visitors. This court she submits, and I agree, is required to evaluate the interference entirely from BP's own perspective. Mr Scott Storey does not demure from this approach.

30. Ms Harvey has drawn my attention to current UK government guidance: Coronavirus (COVID-19), guidance on residential care provision:

> **"How care homes can minimise the risks of transmission**
>
> To minimise the risk of transmission, care home providers are advised to review their visiting policy, by asking no one to visit who has suspected COVID-19 or is generally unwell, and by emphasising good hand hygiene for visitors. Contractors on site should be kept to a minimum. The review should also consider the wellbeing of residents, and the positive impact of seeing friends and family.
>
> **If a resident has symptoms of COVID-19**
>
> Care homes are not expected to have dedicated isolation facilities for people living in the home but should implement isolation precautions when someone in the home displays symptoms of COVID-19 in the same way that they would operate if an individual had influenza. If isolation is needed, a resident's own room can be used. Ideally the room should be a single bedroom with en suite facilities.
>
> All staff will be trained in hand hygiene. Much of the care delivered in care homes will require close personal contact. Where a resident is showing symptoms of COVID-19, steps should be taken to minimise the risk of transmission through safe working procedures. Staff should use personal protective equipment (PPE) for activities that bring them into close personal contact, such as washing and bathing, personal hygiene and contact with bodily fluids. Aprons, gloves and fluid repellent surgical masks should be used in these situations. If there is a risk of splashing, then eye protection will minimise risk.

> New PPE must be used for each episode of care. It is essential that used PPE is stored securely within disposable rubbish bags. These bags should be placed into another bag, tied securely and kept separate from other waste within the room. This should be put aside for at least 72 hours before being disposed of as normal. Care homes have well-established processes for waste management.
>
> Clean frequently touched surfaces. Personal waste (such as used tissues, continence pads and other items soiled with bodily fluids) and disposable cleaning cloths can be stored securely within disposable rubbish bags. These bags should be placed into another bag, tied securely and kept separate from other waste within the room. This should be put aside for at least 72 hours before being disposed of as normal.
>
> Do not shake dirty laundry before washing. This minimises the possibility of dispersing virus through the air. Wash items as appropriate in accordance with the manufacturer's instructions. Dirty laundry that has been in contact with an ill person can be washed with other people's items. Items heavily soiled with body fluids, such as vomit or diarrhoea, or items that cannot be washed, should be disposed of, with the owner's consent.
>
> Guidance has been published recommending action for all members of a household if one person is showing symptoms. This guidance does not normally apply to care homes because of the ability of care homes to provide isolation precautions for individuals living in the home.
>
> Care homes can seek additional advice from their local Public Health England health protection teams. Testing of residents may be organised if care homes have several cases at a time."

31. At the time of the hearing this guidance had not been updated and those drafting it plainly did not have access to the science that underpinned the government announcement on 23rd March 2020. In particular, as Ms Harvey emphasises, the guidance did not contemplate a blanket prohibition on visits, even where there was a confirmed case of coronavirus within the home. She emphasises that aspect of the guidance which requires consideration of the general well-being of residents and *"the positive impact of seeing friends and family"*. Not everybody in a care home will be visited as frequently and with such obvious joy and enthusiasm as BP is. I have no doubt that he derived enormous benefit from contact with his family and friends and that contributed very significantly to his general sense of well-being.

32. During the hearing I received evidence from FP. She is a woman in her 50s who is very close to her father. Though the family is under stress, at the moment, it is, self-evidently, a close one, where there have been frequent and much enjoyed family gatherings. FP told me that, for her father, *"family was everything"*. At my request she told me something about his life. He was a bookmaker, he worked hard and, FP said, *"always provided well for his family"*. FP worked with her father in the bookmakers for many years. It was obvious that FP very much enjoyed that period of her life. She told me that of all the siblings she was probably closest to her father. BP was, she said, *"an easy-going man who got on with people"*. I sensed that BP's

Alzheimer's has not yet robbed him of some of these charming aspects of his personality.

33. FP is also close to her mother but it is a very different and slightly strained relationship. Her mother is a rather more private personality, somewhat guarded and rather formal in her interactions with the world. FP told me that her mother does not like to be called by her first name, unless she knows people well. She prefers to be addressed as 'Mrs'. Mrs RP spontaneously confirmed this in clear and unambiguous terms. FP described the strain on the family in these terms, *"I thought we were a happy family… we probably still are but we are just in a difficult place at the moment."*

34. FP was fulsome in her praise for the care home. She considered the staff to be kind and attentive and she had no complaints about the accommodation. Her father is self-funding his care. It is expensive and it is tearing through his capital. FP's primary concern was to keep her father at SH where she believes his needs have been well met. Her preference, she told me, would be for him to stay where he is with some arrangements put in place for contact with her and his family. If that is not possible FP considers that her father would be better at home with her.

35. Mrs RP has been to the care home and waved to her husband through the window. Ms Harvey suggests that this may be confusing to BP. FP does not consider that her father fully understands the reach and impact of coronavirus. It is also important that I record that FP and the wider family very much miss contact with their father. Again, I emphasise that BP's deafness very much limits the available options for contact.

36. The plan advanced by FP was that her father should come and live with her. She has been self-isolating so as to prepare for his return. The arrangement is that Mrs RP would move out, in light of the safeguarding concerns I have referred to above and that FP would care for her father alone. Ideally, care support would reinforce FP's care but, all recognised that, in the present circumstances, this could not be secured. FP realistically acknowledged that her father is prone to what is termed "misadventure" and should be watched vigilantly. Though she could not quite bring herself to acknowledge it, she recognised that her offer of 24 hour per day single handed care for her father is not, in truth, a realistic option. FP said, *"everyone is a loser in this situation!"*. Both in and out of court, which in this case meant on or off Skype recording, efforts were made to explore the possibilities for contact. It is not necessary for me to work through them in this judgment. Their significance is that the care staff and the family, with the help of their advocates, began to absorb some of the stark realities of their present situation. A great deal of effort was made to see whether it might be possible to unlock a fire door and provide for a visit at a suitably safe distance. In the end and for a variety of reasons that was not possible. The plan that was ultimately put together provides for BP's education in to the world of Skype with creative use of a communication board and the exploration of concurrent instant messaging. Additionally, the family can, by arrangement, go to BP's bedroom window which is on the ground floor and wave to him and use the communication board. All this will require time, effort and some creativity. I am clear that there is mutual resolve by all concerned. When I asked FP what she thought her father would want if he was addressing this question objectively with his full faculties intact, she unhesitatingly told me that the last thing he would want would be to burden her or her family. Approaching this challenging situation from that perspective appeared to give

FP some comfort. I am entirely satisfied that this is a balanced and proportionate way forward which respects BP's dignity and keeps his particular raft of needs at the centre of the plan. Equally, I have no doubt that this application, for all the reasons that I have alluded to, was properly brought. It has been important to recognise that in addition to his Alzheimer's BP's deafness is a separate and protected characteristic, as defined in Section 148(7) of the Equality Act 2010. As such, it requires to be identified and considered as a unique facet of BP's overall needs.

37. Over the last few weeks I have had cause to issue a number of guidance documents to address a rapidly changing landscape. On 19th March 2020 I recognised the reality that capacity assessments would, of necessity, for the time being require to be undertaken remotely. There is simply no alternative to this, though its general undesirability is manifest. Assessments in these circumstances will require vigilant scrutiny. This said, with careful and sensitive expertise, it should be possible to provide sufficient information. In response to an identified question, answered with the benefit of consultation with the profession I was able, in the guidance document, to state the following:

> *'Can capacity assessments be undertaken by video when it is established that P is happy to do so and can be "seen" alone?*
>
> - *Suggested solution: In principle, yes. The assessor will need to make clear exactly what the basis of the assessment is (i.e. video access, review of records, interviews with others, etc.) Whether such evidence is sufficient will then be determined on a case by case basis. It is noted that GPs are rapidly gaining expertise in conducting consultations by video and may readily adopt similar practices for assessments. Careful consideration will need to be given to P being adequately supported, for example by being accompanied by a "trusted person." These considerations could and should be addressed when the video arrangements are settled. It should always be borne in mind that the arrangements made should be those which, having regard to the circumstances, are most likely to assist P in achieving capacity.'*

38. Accordingly, though I recognise the challenges, I consider that the outstanding assessment by Dr Babalola can be undertaken via Skype or facetime with BP being properly prepared and supported by staff and, to the extent that it is possible, by his family too.

39. A final question that arose was the suitability of FP in her role as BP's litigation friend. The Local Authority were concerned that FP may have become too subjective, conflating her own wish to have contact with her father with his own best interests. In **Re UF [2013] EWCOP 4289**, Charles J made the following observations:

> *"23. ... I agree that members of a family, even if there is a family dispute concerning P's best interests could, albeit I think rarely, appropriately act as P's litigation friend in proceedings relating to that dispute. However, it seems to me that he or she would need to demonstrate that he or she can, as P's litigation friend, take a balanced and even-handed approach to the relevant issues. That is a difficult task for a member of the family who is emotionally*

> *involved in the issues that are disputed within the family and it seems to me an impossible task for AF to carry out in this case. One only has to look at her statements to see that she is clearly wedded to a particular answer. You do not see within her statements a balanced approach or anything approaching it, such as: "This is the problem. These are the relevant factors for and against". That is not a criticism. Rather it seems to me that it is a product of the result of there being long-standing family disputes and the existing clear divisions of opinion within the sibling group as to what will best promote UF's best interests."*

40. I agree with Charles J that in these circumstances and particularly where there is a family dispute, a family member will frequently struggle to maintain objectivity and there is a real risk that they may become wedded to a particular and preferred outcome. I also agree that a family member is not automatically disqualified from being a litigation friend in proceedings such as these, even where there is disagreement within the family.

41. In her evidence FP demonstrated compassion, sensitivity and a willingness to engage with the different and sometimes competing considerations that required to be weighed and balanced. To apply Charles J's test, I think that she was *"balanced and even-handed"* in her *"approach to the relevant issues"*. I do not think FP found this easy, which of us would, but I do think that she was able, ultimately, to discharge the responsibilities of the litigation friend with the high standard of integrity required.

Post Script

I heard this case on 25th March 2020. At the conclusion of evidence and submissions, I gave my decision to the parties. Given the importance of the issues raised and in order to do justice to the careful arguments of both advocates I reserved this written judgment.