# Case study

**Manuela Sykes**
Ms Manuela Sykes was by nature a fighter; a campaigner; a person of passion. Having been involved in many of the moral, political and ideological battles of the last century, she was now 89 and fighting another battle: dementia. Diagnosed in 2006, she made a living will – prioritising her quality of life over its prolongation – and campaigned for the rights of dementia sufferers. In 2011, she appointed a close friend under a property and affairs Lasting Power of Attorney, stating: 'I would not like my attorney to sell my property. My wish is to remain in my own property for as long as this is feasible'.

She had lived in a flat in central London for 60 years. A culmination of not accepting care, altercations with others, self-neglect, unhygienic and hazardous living conditions, weight loss (to 41 kg), wandering, and lack of awareness of personal safety, resulted in her compulsory admission to hospital under s.2 Mental Health Act 1983 in October 2012.

In December 2012, it was considered to be in her best interests to be discharged to a nursing home where her deprivation of liberty was authorised, with her close friend appointed as her representative. Unhappy, a trial at home was suggested. But this came to nothing after senior management of the local authority advised that a 24-hour live-in carer at home would be too expensive given their budgetary constraints. With her continued opposition to the nursing home, the local authority sought the Court's review of their standard authorisation via section 21A of the Mental Capacity Act 2005, with her close friend appointed as litigation friend.

In a characteristically thoughtful judgment, District Judge Eldergill concluded that all of the standard authorisation requirements, save that of best interests, were met. Because of her dementia – with her short-term memory lasting less than a minute – Ms Sykes was unable to retain and weigh the information relevant to the decision. The no refusals requirement was satisfied because her living will did not prohibit the treatment being provided in the nursing home; a place she was not ineligible to be. Moreover, all agreed that she was being deprived of her liberty:

*'In this case, MS is readily given permission (leave) to go out on outings with her friend RS, and the routines at QX Nursing Home are benign. RS can take her out to the cinema or for walks. She goes to St Martin's in the Field. However, it has not been argued that she is not deprived of her liberty, or that she is simply residing there in the same way as someone subject to guardianship under the Mental Health Act. This is because of the strength of her objections to living at QX Nursing Home, the fact that she is effectively prohibited from even visiting her own home, and it will be sold and she have to live out her life in residential care, unless the standard authorisation is lifted.*

*In my view, that is correct when one looks at her specific situation, and the situation is not of the subtle Cheshire West kind where it is necessary to think in terms of comparators in order to reach a finding.*

*Patently she is not free to go home or visit her home, and the state claims legal power to control her liberty and movements indefinitely, and not simply to define a place of residence for her; therefore she has been deprived of that usual liberty which the rest of us enjoy. No aspect of her liberty of movement remains under her own control.'*

Importantly, District Judge Eldergill added the following:

*'(If I am wrong on this then, having regard to Articles 6 and 8 of the Convention, in my view it would still be legally necessary for a court to review the fact that she is prevented from returning to and residing at her own home in a situation where the state intends that her home should be sold and this situation endure for the rest of her life notwithstanding her clear objections. I would still need to decide what I have been asked to decide, that is whether it is in her best interests not to return home and whether to permit such an interference with her Article 8 rights.)'*

Having met Ms Sykes at the nursing home, the Court undertook a carefully considered, Aintree-compliant, analysis of her best interests. It was noted that, 'it is her welfare in the context of her wishes, feelings, beliefs and values that is important. This is the principle of beneficence which asserts an obligation to help others further their important and legitimate interests. In this important sense, the judge no less than the local authority is her servant, not her master.' Significant problems and some distress lay ahead but, in a finely balanced decision:

*'Several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress. If a trial is not attempted now the reality is that she will never again have the opportunity to live in her own home. Her home will be sold and she will live out what remains of her life in an institution. She does not want that, it makes her sufficiently unhappy that sometimes she talks about ending things herself, and it involves depriving her of her liberty.'*

Her physical health had improved. She was calmer and her dementia was progressing at quite a slow rate. It was in her best interests for a one-month trial period to be attempted, the local authority having agreed to put in place a transitional plan. Her savings could be used and other financial resources, benefits, and private equity release schemes explored, if she remained at home. Moreover, her attorney for property and affairs had a key to her flat and it would not be unlawful for him to license carers to enter it while she was out to clean, dust, wash her clothes, leave shopping, food de-clutter etc. This might reduce the risks of face-to-face conflict with carers over these care tasks. Accordingly, the Court extended the standard authorisation until Ms Sykes returned home on trial.

Ms Sykes' strong wish was for her situation to be publicly reported in her own name. After explaining that the general rule that hearings are to be held in private to reflect the personal, private, nature of the information being considered, District Judge Eldergill went on to say:

*'That is not the same as being secretive; a GP is not a 'secret doctor' because the press have no unqualified right to be present during patient consultations or to report*

*what is said. All citizens have a right to expect that information about them will be held in confidence by their doctors and social workers, and to expect that any overriding, future, need to breach this right will go no further than necessary, and only exceptionally involve seeing it in national newspapers.*

*Everyone benefits from, and enjoys, this level of privacy and therefore there is a strong public interest in privacy. Not to allow an incapacitated person the same general right to privacy or confidentiality that we claim it for ourselves would be to discriminate against them because of their mental illness and vulnerability.*

*The one, highly important, difference is that whilst in an ideal world incapacitated people would have exactly the same right to privacy and confidentiality that the rest of us enjoy, when judges make decisions for them this brings into play the competing consideration that the public ought to know how courts of law function and administer justice: what kinds of decisions they are making, the quality of those decisions, and so forth.*

*While it is sometimes necessary to distinguish between "the public interest" and "matters which the public finds interesting", there is a high public interest in seeing that hearings which determine the rights of incapacitated people, and their families, are fair and properly administered.'*

The Judge referred to the recent guidance on transparency in the Court of Protection issued by the President. He noted that the normal rule and expectation was to strictly preserve the anonymity of the incapacitated person and family members but to name the local authority and expert witnesses. Indeed, the case was compelling for naming this local authority, thereby 'enabling residents in the borough to know about such cases when they cast their votes, and to be able to ask their councillors suitable general questions about the allocation of resources and services to older people with dementia.'

There was good reason for permitting the press to attend the hearings, and for publishing the judgment. Carefully weighing the competing factors District Judge Eldergill decided on balance that the veil of anonymity should be lifted. Ms Sykes' personality was a critical factor: 'She has always wished to be heard. She would wish her life to end with a bang not a whimper. This is her last chance to exert a political influence which is recognisable as her influence. Her last contribution to the country's political scene and the workings and deliberations of the council and social services committee which she sat on.'

Comment: It is encouraging to see a local authority taking positive steps to, in effect, challenge themselves by initiating these proceedings. Not only does this accord with the positive obligations under Article 5, it enables the Court to determine the nub of the matter: namely the Article 8 dispute over residence and care. For whilst the Deprivation of Liberty Safeguards provide the procedural vehicle for the right to liberty, they do not resolve the underlying welfare dispute as to where Ms Sykes should be living.

This is a textbook judgment on determining best interests, with Ms Sykes properly found at the heart of the decision. It contains numerous insightful judicial comments on a wide variety of issues, including:

The interface between the MCA and public law: 'I accept that this court cannot direct the local authority (or the NHS) to provide services which they have assessed that Ms S does not require or which they have decided at their reasonable discretion not to provide.'

Article 6 and P: 'The person concerned should have access to a court and the opportunity to be heard in person or, where necessary, through some form of representation.'

Institutional risk-taking: 'Risk cannot be avoided of course. All decisions that involve deprivation of liberty or compulsion involve balancing competing risks, of which the risk that others may suffer physical harm is but one. For example, detention and compulsory care or treatment may risk loss of employment, family contact, self-esteem and dignity; unnecessary or unjustified deprivation of liberty; institutionalisation; and the unwanted side-effects of treatment.'

Special protection for children and adults with mental health problems: "This protection involves imposing legal duties on those with power, conferring legal rights on those in their power, and independent scrutiny of how these powers and duties are exercised. The effectiveness of such schemes depends on whether, and to what extent, they are observed."

Liberty and autonomy: 'The importance of individual liberty is of the same fundamental importance to incapacitated people who still have clear wishes and preferences about where and how they live as it is for those who remain able to make capacitous decisions. This desire to determine one's own interests is common to almost all human beings. Society is made up of individuals, and each individual wills certain ends for themselves and their loved ones, and not others, and has distinctive feelings, personal goals, traits, habits and experiences. Because this is so, most individuals wish to determine and develop their own interests and course in life, and their happiness often depends on this. The existence of a private sphere of action, free from public coercion or restraint, is indispensable to that independence which everyone needs to develop their individuality, even where their individuality is diminished, but not extinguished, by illness. It is for this reason that people place such weight on their liberty and right to choose.'

Litigation friends: 'I did not agree that RS was unsuitable to be MS's litigation friend on the ground that in some way he was too partisan or insufficiently objective. A key part of his role as RPR is to represent 'P's' wishes and feelings.'

We also note the Judge's reference to sections 115 and 135 of the Mental Health Act 1983 which enable a speedy response in emergency situations that might arise from the trial at home. Highlighting a point which is often overlooked, the Judge states that 'these powers are not confined to situations where someone needs to be assessed for admission'. Section 115 thus authorises an approved mental health professional ('AMHP') to enter and inspect private premises (although not by force) if they have

reasonable cause to believe that a mentally disordered person is not under proper care.

By virtue of section 135, the AMHP can obtain a warrant from the Magistrates' Court to enter private premises, if need be by force, if certain welfare criteria are met. This power has a dual purpose: the person can (not must) be removed to a place of safety with a view to the making of either (a) an application under the MHA 1983 or (b) 'other arrangements for his treatment or care'. Thus, for example, during Ms Sykes' trial at home, if there was reasonable cause to believe that she was unable to care for herself, a warrant could be obtained to enter her home to review matters and, if necessary, to remove her to a safe place without having to go anywhere near a hospital.

For the most extreme scenarios, urgent police intervention is available under section 17(1)(e) of the Police and Criminal Evidence Act 1984 to save life or limb or to prevent serious damage to property. Risk of serious harm would suffice (Baker v CPS [2009] EWHC 229); mere concern for the person's welfare would not (Syed v DPP [2010] EWHC 81). Whilst this power would not authorise the person's compulsory removal, it would permit compulsory entry.