

Neutral Citation No: [2024] NIFam 10

Ref: ROO12564

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No:

Delivered: 02/07/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF P, A PATIENT

Between:

MB

Applicant

and

THE NORTHERN HEALTH AND SOCIAL CARE TRUST

First Defendant

and

GOLD HEALTH CARE

Second Defendant

and

THE OFFICIAL SOLICITOR TO THE COURT OF JUDICATURE IN
NORTHERN IRELAND

Third Defendant

Moyne Anyadike-Danes KC with Malachy McGowan (instructed by Phoenix Law
Solicitors) for the Applicant

Matthew Corkey (instructed by the Directorate of Legal Services) for the First Defendant

Sean Mullan (instructed by Hunt & Co, Solicitors) for the Second Defendant

Sinead O'Flaherty KC and Timothy Ritchie (instructed by the Official Solicitor) for the
Third Defendant

ROONEY J

Introduction

[1] I have anonymised this judgment in order to protect the identity of the patient. A cipher 'P' has been applied.

[2] This is an application for an interim declaratory order pursuant to the inherent jurisdiction of the court that, in the best interests of P, a Patient (hereinafter 'P'), CCTV cameras should be installed in his private apartment at a residential care unit operated by the second defendant.

[3] The applicant, MB, is the sister and next friend of P and conducts these proceedings on his behalf. MB has filed six affidavits which set out in considerable detail the background circumstances and reasons behind this application for declaratory relief.

[4] I am grateful to Counsel for their succinct position papers and skeleton arguments and their eloquent oral submissions.

Background

[5] P is a 58-year-old man with a diagnosis of profound intellectual disability and autistic spectrum disorder. P was admitted to Muckamore Abbey Hospital ("MAH") on 22 February 1988, when aged 21, due to self-injurious behaviours, physical aggression towards others and destructive behaviour in his home environment. A number of years ago, P was moved to a community placement, but unfortunately this was unsuccessful, and he returned to MAH in February 2017. Throughout his placement in MAH, P's siblings have displayed regular and consistent dedication to maintaining contact with P and to his care. P does not use speech to communicate but instead uses various non-verbal methods to communicate his needs or to convey distress. These methods take the form of body actions (gestures, facial expression, vocalisations) and the use of objects. P has deficits with sensory processing in several areas, such as auditory (hearing), vestibular (balance and direction of movement), tactile (pain, temperature, touch) and proprioceptive (body awareness and force of pressure). In terms of his physical health, P experiences issues in relation to hay fever, constipation and gastro-oesophageal reflux.

[6] P displays a range of behaviours which have been evident throughout his life and were present before his admission to MAH in 1988. In summary, the behaviours include self-injurious behaviour, which involves P striking his head/face with his hands, nipping his body, scratching himself, banging his head and hands off hard surfaces, rubbing his arms off rough surfaces, such as trees, brick walls and window ledges, rubbing the bridge of his nose with objects, picking at sores on his skin, pulling on his privates/groin area and using plastic ends of drawstring trousers to scratch his skin.

[7] The range of behaviours also include physical aggression towards others, which involve pulling hair, clothing and glasses. In times of agitation, he is prone to throw things within his reach and destroy property.

[8] On 15 April 2021, P was referred to the first defendant's Positive Behaviour Support Service (PBSS) which became involved in planning P's transition from MAH to a placement at a care home, a seven-bedroom residential care home under the control of the second defendant. The home is not a hospital or a registered nursing home. Rather, it is a residential care home specifically tailored to meet the requirements of adults living with a learning disability and longer-term complex care needs.

The proceedings

[9] As stated above, prior to the transition of P's care from MAH to the home, the applicant sought a declaratory order that CCTV should be installed and operated in the proposed placement in P's best interests.

Interim Declaratory order of the court dated 18 May 2023

[10] On 18 May 2023, with the consent of all the parties, the court made the following declaratory order:

"IT IS ORDERED that the following relief is granted:

1. A Declaration that P (hereinafter referred to as "the Patient") lacks capacity to consent to the installation of CCTV cameras in his anticipated future place of residence, namely an allocated apartment at the home.
2. The court makes a further declaration that prior to the commencement of the placement:
 - (i) The care plan for the Patient following the end of the transition period will be finalised but may be subject to review;
 - (ii) CCTV cameras will be installed and switched on throughout and around the Apartment, save for the CCTV installed in the bedroom and bathroom of the apartment, which will remain turned off unless there is a further Order of this court;
 - (iii) CCTV in the bedroom and bathroom will remain installed for a period of 6 months from the date of the completion of the transition and the full commencement of the placement, or for such further time as is Ordered by this Court

(‘the Trial Period’). At the conclusion of the Trial Period the CCTV cameras in the bedroom and bathroom of the Apartment shall be removed unless otherwise ordered by this Court.

3. The Court declares that, during the Trial Period, should the Court Order that the CCTV should be switched on in the bedroom and bathroom of the Apartment, the following safeguards shall be in place with regard to the CCTV provision:
 - (i) The room which contains the monitor for the CCTV cameras located in the Apartment’s bedroom and bathroom shall remain locked,
 - (ii) The retention of the images recorded by the CCTV cameras located in the Apartment’s bedroom and bathroom will be for 31 days only,
 - (iii) The access and viewing of the CCTV shall be subject to strict controls which are consistent with the ‘Use of CCTV’ component of the Second Defendant’s CCTV policy,
 - (iv) Such further safeguards as the Court deems in the Patient’s best interests.
4. A Declaration that the installation and use of CCTV cameras as set out at 2, and with the safeguards set out at 3 above, is, in the existing circumstances, necessary, proportionate and in the best interests of the Patient.
5. An Order that all parties to these proceedings may be at liberty to apply.
6. This matter shall be listed for review before the assigned Judge prior to the conclusion of the Trial Period for the purpose of the Court being updated on any matters relevant to this application.”

[11] P first moved to the home on 9 August 2023. Prior to this date, P had visited the placement on several occasions during the transition period under the care of staff from MAH and the home.

[12] The first defendant had commissioned the second defendant to deliver a package of care for P which comprised two staff members supporting him 24 hours a day when he was awake and asleep. The reason for such a level of observation was in order to ensure support for P and to intervene in order to reduce the likelihood of him engaging in behaviours of concern by implementing preventative and early intervention strategies (including active support). During the night, the court was advised that two staff would sit within the lounge area, outside his bedroom. The “saloon” style doors were kept ajar, to allow the staff to maintain a level of observation and to monitor P if he became distressed or needed further support.

[13] In the first defendant’s clinical psychology report from Fiona McClements and Dr Richard Whitehouse (June 2024), the following is stated in relation to P’s self-injurious and sexualised behaviours and the strategies to be implemented:

“Self-injurious behaviour

10. In relation to P’s self-injurious behaviour, this appears to be multi-functional. He can engage in these behaviours to express a variety of needs such as expressing agitation with his environment (eg his room is too warm or too noisy, he is feeling under/over stimulated), physical health issues (pain, constipation, UTI), sensory needs (the sensory feedback of the contact of his head on hard surfaces). P has a high pain threshold and can bang his head with such intensity that it may cause a cut/laceration to his head where it has connected with a hard surface. These types of behaviours are high frequency and longstanding for P. Reports highlight that these behaviours were evident throughout his time in Muckamore Abbey Hospital. Since moving to the home he has continued to engage in self-injurious behaviour, albeit this seems to have increased following medication changes in February 2024 and who have begun to reduce again following further changes to medication regime in May 2024.

11. Whilst there is a focus on preventative and early intervention strategies within positive behaviour support plans, reactive strategies are also important (ie what to do should a behaviour commence). In regard to P’s self-injurious behaviours, it would appear that

distraction, redirection and the use of PRN medication has historically been more successful than staff physically intervening and attempting to prevent him from hitting his head or banging his head on items by using padding or restraint.

12. It is reported that the use of physical intervention or the use of padding can cause an escalation in his distress and prolong incidents. Indeed, the reports/records reviewed evidence that this was discussed by the multi-disciplinary team on 31 August 2023 and more recently on 10 June 2024.

13. It is acknowledged that the use of physical intervention is likely to be traumatic for P. However, as a last resort (ie to prevent serious harm) an intervention of this nature may need to be considered if this is deemed proportionate in the circumstances. This will be a subjective decision made by staff supporting him (and senior members of staff) in line with their safety intervention training.

Sexualised behaviours (Masturbation)

14. It is reported that P can engage in masturbation on a frequent basis (several times a week). This usually occurs in his bedroom when he is under the covers of a quilt.

15. While masturbation in his bedroom is entirely appropriate, it is also reported that on occasion, he may engage in this behaviour in communal areas, or he may place his hands down his trousers. If this occurs, P is redirected to his bedroom which is reported to be largely successful. If this strategy is not successful, he will be covered by a blanket or quilt by staff to protect his privacy. It is reported that he can also occasionally expose himself by lowering his trousers in communal places. He is reported to respond well to staff encouragement to pull his trousers up at these times."

[14] Since P moved on a full-time basis to the home, the applicant and her brothers noted that P had displayed several injuries, including bruising to his chest, arms and legs. On each occasion when the applicant sought an explanation from the staff on duty, their response was that they were unaware as to how the injuries had occurred but assured P's family they would find out and report back to them. At monthly

review meetings, no satisfactory explanation was provided despite the fact that the staff attending to P were required to complete daily body charts and care logs to record all incidents and injuries.

[15] A serious incident occurred on 27 April 2024 when P sustained significant injuries to his face, nose, neck and eyes. The family were told the injuries were self-inflicted. Prior to a zoom call with P on 28 April 2024, the family received a call from staff at the home to warn them as to the extent of P's facial injuries before they saw him on the screen. When the family saw P's face, they immediately terminated the zoom call and went to the home. They were horrified as to the nature of the injuries observed and understandably upset. Photographs were taken of the said injuries.

[16] The applicant and her family sought an explanation from the home's management team. No satisfactory explanation was provided. The applicant requested to view the CCTV footage, but this was denied by senior management. In an email from AA, Regional Manager for the second defendant, P's family were told that the incident fell outside the remit of the CCTV policy and procedure and that footage could only be accessed "in the instance of a serious safeguarding investigation." It was stated that since P's injuries were explained, namely due to self-infliction, the threshold for access to the CCTV footage had not been met.

[17] The applicant and her family raised additional concerns regarding P's care. During a meeting with the Official Solicitor, Jacque Kher, the applicant stated that P was not receiving previously agreed activities, partly due to staff departures and, in her view, lack of training. The family had provided a van to the home to enable staff to transport P to weekly swimming sessions, an activity he particularly enjoyed. The family claim that often these activities did not take place. The family also complained about a lack of communication from staff, a lack of clarity regarding the duties of the staff, insufficient stimulation for P and reduced access to outdoor space. The applicant stated that, in the opinion of P's family, they felt P had regressed since moving to the home.

[18] Following the Official Solicitor's meeting with the family, she contacted representatives of the second defendant and directed them to secure and preserve the CCTV footage. On 27 May 2024, the Official Solicitor met AA, Regional Manager, AB, Director of Strategy and AC, the Manager of P's unit.

[19] Before the CCTV footage was viewed, the Official Solicitor was told that the footage had not been reviewed following the incident because it was determined, based on the staff logs and incident reports, that the said incident did not meet the threshold for safeguarding. The Official Solicitor was also told that the notes regarding P's injuries involved two incidents which occurred on 27 April 2024. The first incident, which was noted in the incident report at 1:17pm in the living room, stated that P "bumped nose on settee - then settled." The Official Solicitor was not

provided with the record relating to the second incident but was made to understand that it occurred in the bathroom.

[20] The Official Solicitor, AA and AB watched the footage for almost seven hours without a break. The court commends the Official Solicitor for her determination and perseverance. A comprehensive summary of the CCTV footage is provided in the Official Solicitor's third report dated 17 June 2024 which I have considered in some detail. The incidents recorded provide a most distressing picture of a vulnerable man repeatedly engaged in self-injurious behaviour over a prolonged period of time whilst several of his carers, who were only a few feet away, did nothing to intervene or attempt to distract P from injuring himself. As stated by the Official Solicitor, due to the inaction of his carers, P suffered significant injuries.

[21] The CCTV footage only captured the incidents in the lounge area. On some occasions, P leaves his lounge and walks into his bathroom. Staff members are seen putting on gloves and walking into the bathroom after P. Since there is no provision for CCTV cameras in P's bathroom/bedroom, it is not possible to ascertain precisely the staff's treatment and care of P in those areas. The applicant argues that this must change.

[22] Having reviewed the CCTV footage, the Official Solicitor requested the second defendant to provide the logs and reports of the incidents in question. It was of considerable concern to the Official Solicitor and, indeed to this court, that the relevant logs and reports for the dates in question did not accurately reflect Ms Kher's observations of the events involving P on the CCTV footage. It is axiomatic that if the notes and records had accurately reflected the CCTV content and P's presentation, the safeguarding threshold would have been reached, thereby permitting the applicant and her family to review the CCTV footage.

[23] In paragraph 30 of her report dated 17 June 2024, the Official Solicitor reflects on the CCTV footage and P's movement from his lounge into his bedroom/bathroom. Ms Kher states that the written logs do not give an accurate picture of P's movements within his apartment. From her observations, she states that P moves between each room and that there are periods when he remains in his bedroom/bathroom which were not captured on CCTV. According to the applicant incidents have occurred in the bathroom.

[24] In paragraph 23 of her said report, the Official Solicitor reaches the following conclusions:

"While the installation of CCTV in private areas raises significant privacy concerns, the right to privacy is not absolute and can be limited when necessary for the protection of others. I believe the unique circumstances of P's case justify this measure as being in his best interests, as being necessary and as being proportionate. The

debate over installing CCTV in private areas hinges on two critical considerations: safeguarding P's well-being and protecting his right to privacy. In this case, I am of the view that safeguarding P, one of the most vulnerable individuals in our society, outweighs the privacy concerns. This recent incident has emphasised the urgent need for enhanced protective measures, tipping the delicate balance in favour of increased CCTV into his bedroom and bathroom to ensure his safety."

[25] The above submission of the Official Solicitor is endorsed by the applicant in her position paper dated 6 June 2024. Furthermore, at paragraph 31 of the position paper, the applicant states as follows:

"The reality is that CCTV footage from the home will only be viewed in very limited circumstances, which is where there is specific and proportionate justification. That reinforces the conclusion that the interference which would actually be caused to P's Article 8 ECHR rights by switching on this CCTV in private areas of the placement would be very limited. The footage would only be viewed where this is necessary for safeguarding reasons. Any such viewing would inevitably satisfy the tests of necessity and proportionality. The footage will only be watched where the objective of protecting his health or life of P, outweighs the severity of any impact on P's privacy. As such the intrusion involved would be clearly justified as lawful under Article 8 ECHR."

[26] Gold Health Care, the second defendant, in response to the report from the Official Solicitor and the position papers from all the parties, submitted an affidavit from AA, Regional Manager, dated 25 June 2024. AA's qualifications are noted. She completed a BSC in psychology in 2007 and then qualified as a social worker in 2010. Her experience includes care of the elderly, children and adults with learning disabilities. AA indicated that she has worked exclusively in mental health and learning disability across different Trust areas. In her affidavit, AA was keen to emphasise that the home is not a hospital or a registered nursing home. Rather, it is a residential care home which has been specifically tailored to meet the requirements of adults living with learning disabilities and complex care needs. Therefore, care provision within the residential home setting differs significantly from hospitals and registered nursing homes. In the home, there are no medical staff, nursing staff or allied health professionals. The staffing structure within the home consists of a registered manager, deputy manager, an Intensive Support Practice Lead, team leaders, care assistants, kitchen and domestic teams.

[27] At paragraphs 10-13 of her affidavit, AA documents the training provided by the Northern Trust's Multi-disciplinary Team to the home's staff during P's transition process from MAH to the home. P's self-injurious behaviour was well-known and documented in the care records. It is significant that P's care plan incorporated a Positive Behaviour Support Plan (PBSP), a Therapeutic Support Plan and a Head Injury protocol. Within the agreed care plan for P, no physical intervention by staff was prescribed when P engaged in self-injurious behaviour.

[28] Regarding the subject incident which occurred on 27 April 2024, it is stated that the Registered Manager communicated the incident to the Trust, the applicant and her family and also RQIA as per the reporting procedure. Also, pursuant to the head injury protocol, the out-of-hours GP service was contacted, and the nurse advised them to monitor P for vomiting etc.

[29] Significantly, as stated above, a safeguarding referral was not considered necessary since the view was taken that P's injury was consistent with self-injurious behaviour. Accordingly, AA took the decision that it was not necessary to view the CCTV.

[30] Having viewed the CCTV with the Official Solicitor, AA states as follows:

“32. ... I sat with the Official Solicitor and also viewed the footage for many hours. On the footage I could see self-injurious behaviour by [P]. At no stage was there any injury noted by myself, or the [Official Solicitor] which was directly caused by staff.

33. However, I did see certain staff members not providing the level of care expected of them. This included the lack of interaction with [P], staff being on their phones in the lounge area and lack of proactive support to distract [P] when he was being self-injurious.

34. I was very disappointed with the staff, and this gave rise to concern on our part. We made an adult safeguarding referral to the NCSCT including the completion of an APP1 incident report. Below I document significant steps taken post-incident with regard to a refreshed approach to staff training and staff development.”

[31] Since May 2024, AA states that the second defendant “recognises and accepts that a more evidenced based governance arrangement is required to oversee ... the outcome of care provided to P.” At paragraph 42 of her affidavit, AA details the additional safeguards which have been introduced by the first defendant post incident. The additional safeguards are stated as follows:

“42. The following arrangements are now currently in place:

- (i) Team Leader review – the Team Leader/Key Worker identified for [P] has now changed to the Deputy Manager LG. LG was a key part of the initial in-reach team that met with [P] and ward staff at Muckamore Abbey, as well as family, spending days with the team during the transition period.
- (ii) Half Hourly Checks are now completed by the Team Leader in Charge of all apartments in the home to monitor care being provided. Please see document 1.
- (iii) A Team Leader is present for all waking hours in [P]s apartment, working alongside a care assistant. The previous arrangement agreed with the NHSCT was 2 care assistants 24 hours per day. We have now changed this to 1 Team Leader and 1 care assistant for waking hours and 2 care assistants when sleeping. Changing to 1 Team Leader during daytime hours allows for greater leadership in care provision for [P], the Team Leader, a more senior, experienced staff member is able to demonstrate appropriate communication and interventions as well as guide activities for [P]
- (iv) Weekly Positive Behaviour Support (PBS) Team Meetings take place with the PBS members of the NHSCT. These have been happening since the service opened and will continue weekly. These meetings provide an open forum to discuss how residents have been in the last week and also evidence actions to be completed by either the home or the trust.
- (v) A “Flash meeting” now takes place daily – this is so staff can regroup and discuss any concerns or issues that have arisen throughout the shift and to ensure everyone is aware of how to proceed and what the plan is for the hours ahead.

- (vi) Increased Senior Management presence in the service. Announced and Unannounced visits are in place to ensure staff are observed providing care and discussions with the Manager and Team leaders to ensure care plans and activity plans are followed.
- (vii) Weekly training sessions, generally a Friday taking place for care staff and Team Leaders delivered by Senior Management team and/ or Intensive Support Lead. Sessions are focusing on care delivery, PBS plans and activities. This is also an opportunity to discuss care provided to specific residents.
- (viii) Communication Pathway - this has been agreed between the family and Senior team in the home. The Communication Pathway was introduced by Senior Team LC and CT as a way of ensuring that family are kept up to date with [P]'s care and that communication is open and transparent. The Communication Pathway requires a Daily phone call from Team Leaders followed by an email of the conversation. Details of the phone call will be logged in family contact records and reviewed twice weekly during Zoom meetings with the family. There will be twice weekly Zoom Meetings with the family, Senior Management alongside the Home Manager will attend. Care provision and activities will be discussed and a follow-up note of the meeting is provided to the family from the Home Manager. As well, a weekly email from the Home Manager to recap the week will be sent to the family.
- (ix) Monthly Meetings with NHSCT Multi-Disciplinary Team, family and the home have been in place since transition and will remain. I am aware that the placement of [P] has been passed from the NHSCT resettlement team to the NHSCT community team.
- (x) Twice weekly review of specified care records will be undertaken by Senior Management to ensure recording is appropriate and as required. Please note the home is a Residential Service, staff are not

required to be clinically trained and whilst record keeping is part of the essential training, the level of record keeping due to the complexities of this case would be a challenge for even learning disability clinically trained staff.

- (xi) Twice monthly Team Leader meetings commenced at the beginning of June chaired by Senior Management and will continue.”

[32] In respect of P’s Article 8 ECHR rights, the position adopted by the second defendant, as stated in the affidavit of AA, is that CCTV should not be switched on in the private areas of P’s apartment because it will impact on his privacy and dignity. Within the private areas, P can be unclothed or engaged in toileting. At times, P chooses to masturbate. Use of CCTV, it is argued, would be a disproportionate intervention which would infringe his right to privacy.

[33] The Northern Health and Social Care Trust, in its skeleton argument dated 24 June 2024, emphasised the following. Firstly, it is clear from the review of the CCTV footage from 27 April 2024, that significant deficiencies were noted in the care provided to P. In particular, it is accepted that the CCTV shows a level of complacency in respect of the implementation of distraction and redirection techniques which should have been deployed in managing P’s self-injurious behaviour. Secondly, when the matters were brought to the attention of the Trust, a designated Adult Protection Officer, Sarah Dallas, attended at the home. Following a viewing of the CCTV footage, the designated Adult Protection Officer formulated an Interim Protection Plan with the second defendant’s staff and instigated the Adult Joint Protocol (“AJP”) with PSNI. Thirdly, it is claimed that since the implementation of the Interim Protection Plan, there have been no further safeguarding issues. Fourthly, a review of the medical records, noted that P was subjected to a temporary reduction in his anti-psychotic medication in February 2024 and that instances of self-injurious behaviour materially increased from that date. A medical report from Dr Ling dated 24 June 2024 provides that since the level of anti-psychotic medication was increased, there has been a notable reduction in P’s agitation and self-injurious behaviour.

[34] In both written and oral submissions, the Trust maintains its position that CCTV in private areas constitutes a disproportionate and unnecessary interference with P’s right to privacy.

[35] Furthermore, it is argued that CCTV cameras in the bathroom/bedroom is not in P’s best interests and that the relevant safeguarding concerns can be met by less intrusive means. In this regard, the Trust refers to and endorses the safeguards introduced by both the Trust and the second defendant as detailed by Ms AA at paragraph 42 of her affidavit (see para [30] above).

Article 8 ECHR

[36] Article 8 ECHR provides as follows:

“Right to respect for private and family life

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.”

[37] Section 6 of the Human Rights Act 1998 prohibits a public authority, from acting in a manner that is incompatible with the Convention rights of the individual.

[38] Human rights under the ECHR are universal in their application. As stated by the Supreme Court in *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents)* [2014] UKSC 19 at para [36]:

“36. The whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to “everyone” (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws. [...]”

[39] The concept of “private life” in Article 8 is a broad term which covers the physical and psychological integrity of a person. Article 8 plainly applies to a disabled person suffering from a mental disorder and individuals, like P, who lack capacity to make decisions affecting their lives and their privacy, to include providing consent to the installation of CCTV cameras in his place of residence.

[40] As stated in *Lester, Pannick and Herberg: Human Rights Law & Practice* (3rd Edition) at para 4.8.33:

“[...] Article 8 undoubtedly calls for respect for the individual's privacy in a personal or private space. In some cases, the applicability of art 8's privacy guarantees can be presumed simply by reference to the nature of location which an individual occupies, most obviously a

dwelling or other personal property, such as a car, caravan or private garden and so forth. That is because such spaces are either coterminous with or are closely linked to the notion of the 'home' considered below, such that a reasonable expectation of privacy will necessarily arise upon which any form of surveillance or reporting will encroach. Any substantial direct or indirect intrusion into such spaces will necessarily require justification, whether it is direct (e.g., the placing of a bug, the use of a long-lens camera to photograph someone's house) or indirect (e.g., the reporting of a private conversation heard in such a location). Within this compass, even quotidian or routine activity is protectable (e.g., a photograph of someone washing up) simply because the recording of or publication of such events inevitably engenders a feeling of unjustified intrusion."

[41] Article 8(2) provides that there shall be no interference by a public authority with the exercise of an article 8 right, unless it is in accordance with the law, pursues a legitimate aim and is justified. In essence, in terms of justification, the determining question is whether the proposed interference is necessary and proportionate. The existence of less intrusive means of achieving the aim will serve to render the interference unlawful (see *Peck v United Kingdom* (2003) 36 EHRR 719 at paras [76]-[78]).

Decision

[42] On the factual matrix of this case, it is clear that P's Article 8 rights are engaged. This is not disputed by the parties.

[43] Following an application by P's sister and next friend to install and switch on CCTV cameras in P's apartment in the home (to include the lounge, bathroom and bedroom) a compromise was reached between the parties that, for a trial period, CCTV cameras would only be switched on in P's lounge. This agreement was approved by the court and reflected in the court's interim relief order dated 18 May 2023. The order also provides that in all the circumstances, the proposed interference is necessary and proportionate.

[44] Pending the substantive hearing, following the revelations from the CCTV footage in P's lounge area on 27 April 2024 as discussed above, the applicant, supported by the Official Solicitor seeks an interim declaratory order that the CCTV cameras should now be switched on in P's bedroom and bathroom, subject to a condition that the CCTV would only be viewed when it was considered necessary for safeguarding reasons. The CCTV footage would only be viewed where the objective is to protect P's health and his life which would outweigh the impact on P's privacy.

[45] The third report from the Official Solicitor, Jacquie Kher, is a powerful document for several reasons. Firstly, following a painstaking review of the CCTV footage in P's lounge area, the report exposes substandard and unacceptable care of a vulnerable man who repeatedly injured himself over a prolonged period, without any effective attempts of intervention or distraction.

[46] Secondly, a review of the logs and records by Ms Kher demonstrated a failure of the second defendant to accurately record the nature and extent of P's behaviour and the failure to implement safeguarding measures.

[47] Thirdly, the report demonstrates the second defendant's failure to adequately consider and activate the safeguarding threshold to view the CCTV footage.

[48] The report from the Official Solicitor and the position papers from the applicant provide compelling reasons for extending the CCTV cameras to cover P's bedroom and bathroom. The delicate balance between P's right to privacy and the imperative to protect a vulnerable man is acknowledged. As stated in paragraph 32 of the report:

"32. P is a vulnerable individual who, as we can see from the CCTV footage, is at a heightened risk of neglect and harm. He requires 24-hour 2:1 supervision, and while a right to privacy is a fundamental consideration, it must be balanced against the imperative to protect those who cannot protect themselves. Both careful implementation, strict adherence to policies and procedures, and protective measures to minimise the intrusion into his privacy, I believe the benefits of extending CCTV to be used in all areas of Apartment 5, significantly outweigh the privacy concerns. I am of the view that P's best interests are for this CCTV to be switched on in the entirety in Apartment 5."

[49] The first and second defendants, as discussed above, submit that the focus of attention must be on P's article 8 privacy rights. It is argued that the introduction of CCTV into the bedroom and bathroom area of P's apartment will represent a significant intrusion into his private life. It is accepted that P engages in sexualised (masturbating) behaviour. He is discouraged from such behaviour in his living space or communal areas, but otherwise he is actively redirected to go to the privacy of his bedroom. His toileting and showering take place in the privacy of his bedroom. On occasions, he will be naked in both his bedroom and bathroom. The clinical psychology report from McClements and Whitehouse obtained on behalf of the Trust, acknowledges that the CCTV footage on 24 April 2024 raises issues of concern, to include lack of engagement by staff supporting P, staff using their mobile

phones and the lack of intervention (ie no attempts to distract or redirect) when P was engaged in self-injurious behaviour.

[50] However, the report also highlights positive features when staff did interact and engage with P, to include dancing and playing ball games.

[51] At paragraph 25 of the report, McClements and Whitehouse state as follows:

“25. It is our opinion that the introduction of CCTV in the bedroom and bathroom area of P’s apartment will not impact on the frequency, duration or severity of the profile of his self-injurious behaviour. P’s behaviours are longstanding and will continue to require long-term management. What is important, is ensuring that the staff supporting him implement strategies to help keep him calm and recognise and respond appropriately to his behaviours when they occur. CCTV in his bedroom and bathroom will allow management of incidents to be seen but will not prevent them; management of incidents can already be seen in the CCTV in communal areas without the further infringement of article 8 rights.”

[52] It is clear from the above analysis of the competing arguments that a decision to turn on CCTV cameras in P’s bedroom and bathroom is finely balanced. In *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 39, Lord Reid formulated the test for justification in four questions:

- “(i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
- (ii) whether the measure is rationally connected to the objective;
- (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
- (iv) whether, balancing the severity of the measures effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.”

[53] Applying the said test to the facts of this case, the objective of the measure is to protect P's health, physical and mental welfare. The provision of CCTV is plainly rationally connected to that objective.

[54] In carrying out the proportionality assessment, the critical question in my judgment is whether a less intrusive measure or measures could be used without unacceptably compromising the achievement of the objective. The first defendant and the second defendant acknowledge that the primary objective is to provide for and operate measures to safeguard P. The first defendant submits that, since 28 May, it has implemented additional safeguarding measures, to include an Interim Protection Plan which will be monitored. In addition, Trust staff from the Positive Behaviour Support team and the Community Learning Disability team will carry out frequent visits with P. An ASG team will provide oversight of the Protection Plan to ensure support to care staff in the home in relation to safeguarding concerns. As stated by Sarah Dallas and Amanda Burgess, in their report dated 22 June 2024:

“... this model of providing bespoke training on developing an open, just and learning culture has been embedded in a Trust facility and has been recognised by RQIA as being exemplary.”

[55] In effect, the argument advanced by the Trust is that the said additional safeguarding measures, together with the enhanced implementation of the Positive Behaviour Support Plan and oversight by the Trust are more effective and less intrusive to extending CCTV coverage, in that they are aimed at ensuring high quality care is provided to P at all times.

[56] A similar argument is made by the second defendant. The additional safeguarding measures introduced by the second defendant are as documented at paragraph 42 of AA's affidavit, set out at para [31] above.

[57] Having carefully considered the said detailed reports, position papers, skeleton arguments and counsels' helpful submissions and thereafter undertaking a proportionality assessment, it is my decision that an interim declaratory order should not be made at this stage to extend the operation of CCTV coverage to P's bathroom and bedroom. In coming to this decision, I am persuaded that the above-mentioned additional safeguards constitute less intrusive measures which should be capable of protecting P and providing him with high quality care, while preserving his private rights within his bedroom and bathroom.

[58] Whether the additional safeguarding measures are successfully implemented will undoubtedly be a matter for consideration at the substantive hearing and will have an impact on whether a final declaratory order should be made in this matter.

[59] In conclusion, I direct that the declaratory order of the court dated 18 May 2023 remains, and that the trial period will continue and extend until a review by this court on 23 September 2024.

[60] Furthermore, the said declaratory order will be amended to include a provision that the Official Solicitor, for any reason she deems appropriate, can request and will be provided with the CCTV footage of the lounge area in P's apartment.