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## Finding a willing supervisor for an unfit defendant

*City and County of Swansea v Swansea Crown Court* [2016] EWHC 1389 (Admin)

**Keywords:** Unfitness to plead; capacity; disposals; supervision order; judicial review; matters relating to trial on indictment

B had been charged with numerous historical sexual offences against a child family member. By the time of his trial, B was suffering from dementia and was found unfit to plead. A jury was empanelled under s.4A of the Criminal Procedure (Insanity) Act 1964 ('CP(I)A') to determine whether B 'did the act[s] ... charged against him as the offence[s]'. The jury found that B had 'done the acts' relating to 13 counts of rape of a child under 13 and seven counts of causing a child to engage in sexual activity.

Following a finding that an unfit accused did the relevant act(s), s.5 of the CP(I)A (as amended) requires the court to make a hospital order, a supervision order or an absolute discharge. In the present case, Mr Recorder Philpotts purported to make a supervision order for two years, naming Ms Beasant, a social worker for the City and County of Swansea ('the Council'), as the supervising officer. The order required B to: keep in touch with Ms Beasant; reside at a specified care home; and, submit to treatment by a named medical practitioner. However, Ms Beasant was not asked whether she was willing to act as B's supervisor for the purposes of the supervision order.

Shortly before the hearing at which the supervision order was made, B had been referred to the Council's Social Services Department and placed in a care home pending a formal assessment of his needs. The conclusion of the assessment had been that B did not meet the necessary criteria for local authority accommodation or services. Ms Beasant had been the social worker in charge of B's case at that time.

Upon discovering that the order named Ms Beasant as B's supervising officer, the Council applied to the Crown Court to revoke the order. Ms Beasant made a statement explaining that she had not agreed to take on this role. The Recorder dismissed the application and the Council applied for judicial review of the imposition of the order.

**HELD, ALLOWING THE APPLICATION AND QUASHING THE SUPERVISION ORDER**, the Council's contention that the Recorder had no jurisdiction to make the order was 'unanswerable' (at [7]). Schedule 1A, para. 2(2) of the CP(I)A provides that,

- [t]he court shall not make a supervision order unless it is ... satisfied—
- (a) that the supervising officer intended to be specified in the order is willing to undertake the supervision; and
  - (b) that arrangements have been made for the treatment intended to be specified in the order.

Ms Beasant had not indicated that she was willing to supervise the order 'and there was no evidential foundation upon which the Recorder could properly have made a finding that she did' (at [7]).

Where a Crown Court judge has no jurisdiction to make the order he purports to make, it cannot be regarded as a 'matter relating to trial on indictment'. Accordingly, the decision to make the order was amenable to judicial review and was not excluded by s.29(3) of the Senior Courts Act 1981 (at [8]).

## COMMENTARY

Schedule 1A of the CP(I)A prescribes clear criteria for making a supervision order in respect of an unfit defendant. If the order is to be supervised by a social worker, it must specify the local social services authority in which the supervised person will reside (para.3), as well as naming the supervising social worker (para.2). If the order is to be supervised by a probation officer, the order must identify the local justice area (para.3) and the probation officer who will supervise the order (para.2). Para.2 states that the court 'shall not' make an order unless satisfied that the relevant supervising officer is willing to undertake the supervision.

In the present case the order named Ms Beasant and stated that 'the court was satisfied that Ms Beasant was willing to supervise B' (at [2]). This was incorrect. A supervision order is different to the supervision that may take place as part of a community order imposed upon a convicted offender under the Criminal Justice Act 2003. A court cannot simply assume that someone will supervise an order made under the CP(I)A and there is no power to compel a social worker or probation officer to supervise such an order.

An unfit defendant who is found to have done the relevant act or made the omission has not been convicted and so he cannot be sentenced. The disposal options available to the court are, therefore, 'not intended to have a punitive or retributive ('pay-back') element to them. Rather, the disposals are imposed to support the individual to live without engaging in criminal behaviour, and to protect the public, where that is necessary' (Law Commission, *Unfitness to Plead: Volume 1*, Law Com. No.364, para. 6.3). However, by enabling a proposed supervising officer to refuse to supervise an order, the current law potentially takes the disposal of the case out of the hands of the judge and places it in the hands of those employed by agencies that may have to bear external considerations in mind.

In its recent report, *Unfitness to Plead* (Law Com. No.364, 2016), the Law Commission expressed concerns that difficulties identifying willing supervisors 'are only likely to become more frequent as a result of current resourcing constraints across the criminal justice system' (para. 6.26). The Commission recommended that the local authority area in which a defendant who lacks capacity ordinarily resides should have sole responsibility for supervising that individual if the court deems a supervision order to be appropriate. The Commission concluded that local authorities, rather than probation providers, are 'the most appropriate bod[ies] to fulfil the supervisory role' (para.6.39). Local authorities 'work closely with NHS bodies and Clinical Commissioning groups and would be well-placed to co-ordinate the socially

supportive and health elements of the order' (para.6.39(1)). They are also 'in a position to co-ordinate [any] constructive aspects of the order' (para.6.39(2)). Under the Commission's proposals, an individual officer would not be entitled to refuse to supervise the defendant, although a judge would only be able to include a constructive requirement in the order if the supervising officer 'is able to make such arrangements as are necessary to give effect to the requirement' (para.6.47).

Unless and until the Commission's recommendations are enacted, a supervision order cannot be made unless it is possible to identify a social worker or probation officer who is prepared to supervise it. As the Court of Appeal pointed out in *R v Chinegwundoh* [2015] EWCA Crim 109, 'particular care' is required when making supervision orders under the CP(I)A, 'for sorting them out on appeal is wasteful of valuable time and resources' (*Chinegwundoh* at [18]).

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