Local Government &
Social Care
OMBUDSMAN

Report by the Local Government and Social Care Ombudsman

Investigation into a complaint against Kent County Council (reference number: 19 015 406)

14 July 2021

The Ombudsman's role

For more than 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- apologise
- pay a financial remedy
- improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names

Mr C The complainant

Ms D His late partner

Report summary

Adult social care – council assessment

Mr C complained there was fault in Kent County Council's (the Council's) decision to place his late partner Ms D in a care home. He complained about:

- inadequate arrangements in a best interests' meeting and a lack of consultation before placing Ms D in the care home;
- the appointment of an Independent Mental Capacity Advocate;
- a standard authorisation to deprive Ms D of her liberty; and
- the failure to apply to court.

Mr C said the Council's actions caused him and Ms D distress as it meant they could not live together.

Finding

Fault found causing injustice and recommendations made.

Recommendations

The Council should apologise to Mr C and pay him £500 to reflect his avoidable distress. It should also, within timescales set out later in this report:

- ensure all current and future requests for standard authorisations are completed within prescribed timescales, including low and medium risk cases currently held as pending;
- provide us with written evidence showing it has monitored all requests for standard authorisations post-dating our final report and completed them within the legal timeframes described in this report;
- review its Care Act assessment processes to ensure case managers document consideration of Article 8 rights when making decisions about care placements which separate couples;
- ensure relevant case managers receive training on the Human Rights Act 1998 and how it may apply to their role;
- review all cases from January 2019 to date where Deprivation of Liberty Safeguards assessments have not been completed at all or not been completed within the prescribed timescales and consider whether any injustice has arisen because of the delay. If so, the Council should take action to remedy any injustice in line with the principles set out in our published Guidance on Remedies. We can advise the Council on individual cases if needed. Before starting the review, the Council should provide us with an action plan of how it intends to conduct the review. The action plan should set out numbers, methodology and scope and should be agreed with us before the Council starts the review;
- provide us with a written summary of the cases it has reviewed and what, if any action, it took as a result of the reviews.

The complaint

1. Mr C complained there was fault in Kent County Council's (the Council's) decision to place his late partner Ms D in a care home. He complained about:
   - inadequate arrangements in a best interests' meeting and a lack of consultation before placing Ms D in the care home;
   - the appointment of an Independent Mental Capacity Advocate;
   - a standard authorisation to deprive Ms D of her liberty; and
   - the failure to apply to court.
2. Mr C said the Council's actions caused him and Ms D distress as it meant they could not live together.

Legal and administrative background

The Ombudsman's role and powers

3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. ***(Local Government Act 1974, sections 26(1) and 26A(1), as amended)***
4. If we find fault and injustice, we may recommend improvements to services to prevent future injustice. ***(Local Government Act 1974, section 31(2B)(b))***
5. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. ***(Local Government Act 1974, section 26D and 34E, as amended)***

Relevant law and guidance

The Human Rights Act 1998

6. The Human Rights Act 1998 brought the rights in the European Convention on Human Rights into UK law. Public bodies, including councils, must act in a way to respect and protect human rights. It is unlawful for a public body to act in a way which is incompatible with a human right. 'Act' includes a failure to act. ***(Human Rights Act 1998, section 6)***
7. It is for the courts, and not for us, to decide whether a person's human rights have been breached. We decide whether there has been fault causing injustice. Where relevant, we consider whether a council has acted in line with legal obligations in section 6 of the Human Rights Act 1998. We may find fault where a council cannot evidence it had regard to a person's human rights or if it cannot justify an interference with a qualified right.
8. Article 8 of the European Convention on Human Rights says everyone has a right to respect for their private and family life, home and correspondence. This right is qualified which means it may need to be balanced against other people's rights or those of the wider public. A qualified right can be interfered with only if the interference is designed to pursue a legitimate aim, is a proportionate interference and is necessary. Legitimate aims include:

- the protection of other people's rights;
- national security;
- public safety;
- the prevention of crime; and
- the protection of health

9. Article 5 of the European Convention on Human Rights says everyone has the right not to be deprived of their liberty except in limited cases specified in the article. It is permissible to detain someone who is of 'unsound mind'. There should be a proper legal basis for any detention.

The Mental Capacity Act 2005 and Code of Practice to the Mental Capacity Act

10. A person lacks mental capacity to make a decision if they have a temporary or permanent impairment or disturbance of the brain or mind and they cannot make a specific decision because they are unable:
    - to understand and retain relevant information; or
    - weight that information as part of the decision-making process; or
    - communicate the decision (whether by talking using sign language or other means). ***(Mental Capacity Act, 2005 section 3)***

11. The Code of Practice to the Mental Capacity Act (the Code) is statutory guidance which councils must have regard to. The Code sets out the principles for making decisions for adults who lack mental capacity. An assessment of a person's mental capacity is required where their capacity is in doubt. (***Code of Practice paragraph 4.34)***

12. Decisions taken for a person lacking mental capacity must be in their best interests. The Mental Capacity Act and the Code provide a checklist of factors decision-makers must work through when deciding what is in a person's best interests.
    - Take into account all relevant circumstances.
    - If faced with a particularly difficult or contentious decision, practitioners should adopt a 'balance sheet' approach.
    - Involve the individual as fully as possible.
    - Take into account the individual's past and present wishes and feelings, and any beliefs and values likely to have a bearing on the decision.
    - Consult as far and as widely as possible.
    - Record the best interests' decision. Not only is this good professional practice, but decision-makers will need an objective record should the decision or decision-making processes later be challenged.

13. A decision-maker should consider the least restrictive option. This means before a person acts or makes a decision for someone who lacks capacity, they should consider if the purpose can be achieved in a way that is less restrictive of the person's rights and freedoms. ***(Mental Capacity Act 2005, section 1)***

14. An Independent Mental Capacity Advocate (IMCA) is an advocate who supports people who lack capacity. IMCAs are usually involved where the person lacking capacity has no other person involved in their life and where a decision about

serious medical treatment or a change of accommodation may be needed. But a council may involve an IMCA even if there is a close family member, if it considers the family member is not appropriate to consult. The IMCA considers relevant information, meets the person and writes a report to help decision-makers decide what is in the person's best interests. IMCAs are appointed by a council. ***(Mental Capacity Act 2005 sections 35 and 36)***

15. Chapter 8 of the Code says an application to the Court of Protection may be necessary for disagreements that cannot be resolved any other way. If professionals are concerned about a decision affecting the welfare of a person who lacks capacity, the relevant local authority should make the application. Examples of cases where a court decision might be appropriate include where there is a major disagreement about where a person who lacks capacity should live.

16. Chapter 15.3 of the Code provides information on best practice for settling disputes short of an application to court, which should be a last resort. It says it is best to try and resolve disagreements by taking time to listen and address concerns, including by setting out the options and using an advocate.

The Deprivation of Liberty Safeguards

17. In 2014, the Supreme Court decided in the 'Cheshire West case' that a deprivation of liberty occurs when '*the person is under continuous supervision and control and is not free to leave and the person lacks capacity to consent to these arrangements'.* ***(P v Cheshire West and Chester Council and another; P&Q v Surrey County Council [2014] UKSC 19)***

18. The Deprivation of Liberty Safeguards (DOLS) framework protects people who lack capacity to consent to being deprived of their liberty in a care home or hospital and who are not detained under the Mental Health Act 1983. People are instead detained under a standard or urgent authorisation.

19. Schedule A1 to the Mental Capacity Act 2005 establishes the DOLS. It says the following.
    - Where it appears a person in a hospital or care home is being deprived of their liberty and lacks capacity, the hospital or care home must request a standard authorisation. ***(paragraph 24)***
    - To obtain a standard authorisation, the care home or hospital ('the managing authority') makes a request to a team in the council ('the supervisory body'). The supervisory body then carries out six assessments to decide whether to approve the authorisation: age, mental health, mental capacity, best interests, eligibility and 'no refusals'. ***(paragraph 33)***
    - A managing authority can grant itself an urgent authorisation for up to seven days to allow for completion of a standard authorisation. ***(paragraph 76)***
    - The managing authority should give the detained person a copy of the urgent authorisation and advise them about its effect and their right to apply to the Court of Protection ***(paragraphs 82-83).*** (There is no provision for a relative or next of kin to be told about the existence of an urgent authorisation.)
    - A managing authority can ask the supervisory body to extend an urgent authorisation for a maximum of seven further days if the supervisory body has not completed the assessments for a standard authorisation. The supervisory body may approve an extension if it appears there are exceptional reasons

why it has not yet been possible to complete the assessments for a standard authorisation. ***(paragraph 84)***

- A supervisory body can grant or refuse an authorisation and it can make conditions including changes to a care plan to ensure there are fewer restrictions. It also sets a time limit for the authorisation. ***(paragraphs 50 to 53)***
- Once a supervisory body has approved a standard authorisation, it must appoint a relevant person's representative (RPR) as soon as possible and practical to represent the person who has been deprived of their liberty. The RPR's role is to represent and support the person in relation to the deprivation of liberty safeguards, including, if appropriate, triggering a review, using the complaints procedure or making an application to the Court of Protection. RPRs must have regular contact with the person. ***(paragraphs 139-140)***
- The supervisory body must, as soon as is practicable, give a copy of the standard authorisation to the person, their RPR, the managing authority and every interested person consulted by the best interests' assessor. An interested person includes the partner of the detained person where the couple live together. ***(paragraphs 57 and 185)***

20. If there is no-one (other than a professional carer) appropriate to be an RPR, the supervisory body should instruct an IMCA to represent the person ***(Mental Capacity Act 2005, section 39C).*** An IMCA under this section is known as a 'paid RPR'.

21. Where a managing authority has granted itself an urgent authorisation, the process for a standard authorisation must be completed within the urgent authorisation period. ***(Regulation 13(2), the Mental Capacity (Deprivation of Liberty: Standard Authorisations Assessments and Ordinary Residence) Regulations 2008)***

22. The effect of the Cheshire West case was to include a larger number of people in hospitals and care homes as being subject to a deprivation of their liberty and therefore needing the protections described in the previous paragraphs. The judgment resulted in an increase in the numbers of requests for authorisations including in Kent. There were and continue to be large backlogs with authorities in England being unable to respond to the increased demand.

23. Recognising the large increase in applications, the Association of Directors of Social Services (ADASS) developed a screening tool to help councils prioritise DOLS requests. We understand many, if not all, local authorities use this tool or a version of it. ADASS's introduction to the tool cautions that "*use of this tool must be balanced against the legal criteria for the Deprivation of Liberty Safeguards which remains unchanged*". The tool suggests criteria for prioritising requests into 'higher', 'medium' and 'lower' priorities. It does not suggest that councils should not carry out assessments for requests classed as medium or lower priority.

24. The Council uses an adapted version of the ADASS tool to screen and 'triage' all applications it receives for standard authorisations. The aim of the tool is to assist councils to respond in a timely manner to those requests it considers have the highest priority.

25. In interview, senior officers responsible for the DOLS service confirmed that low and medium cases were screened and checked when received but that unless further information from a managing authority, RPR, advocate or family member suggested they were high priority, they would not receive further assessments after triaging. Low and medium cases are instead held as 'pending' and are reviewed by a qualified practitioner after three months, but still may not proceed to full assessments.

26. We published a report in 2019 (reference 18 004 809) about a council's failure to deal with DOLS applications. The council in that report also used the ADASS screening tool described in the previous paragraph and we were critical of this because 'low' and 'medium' cases did not receive full DOLS assessments. Our report found the council to be at fault and made recommendations for the council to take to improve its service and minimise recurrence. We also issued a focus report about DOLS and mental capacity in 2017: *The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty.* The focus report highlighted common faults we find in our complaint investigations, including complaints we have upheld about delays in completing DOLS assessments and about handling disagreements with families about best interests' processes.

27. At the time of writing, it is expected that the Liberty Protection Safeguards (LPS) will come into force in April 2022 and will replace the DOLS. Under the LPS, councils will still be responsible for authorising a DOL in care homes.

The Care Act 2014

28. A council must carry out an assessment for any adult with an appearance of need for care and support, applying national criteria to decide if a person is eligible for care. ***(Care Act 2014, section 9)***

29. If a council decides a person is eligible for care, it should prepare a care and support plan which specifies the needs identified in the assessment, says whether and to what extent the needs meet the eligibility criteria and specifies the needs the council is going to meet and how this will be done. The council should give a copy of the care and support plan to the person. ***(Care Act 2014, sections 24 and 25)***

30. The Council does not allow people to make their own audio recordings of best interests' meetings. The policy is for written minutes to be taken.

How we considered this complaint

31. We produced this report after examining relevant documents and speaking to Mr C and senior council officers responsible for the Deprivation of Liberty Safeguards service in Kent.

32. We shared a confidential draft of this report with Mr C and the Council and took their comments into account before issuing this final report.

What happened

33. Mr C lived with his partner Ms D who suffered brain damage some years ago. Mr C had been looking after her at home without any involvement from the Council. Following a stroke in July 2019, Ms D went to hospital and then in the middle of July, to a rehabilitation unit in a community hospital. The Council received a referral for a social care assessment from the rehabilitation unit. Staff at the unit felt Ms D may need care at home after rehabilitation. There were also concerns about Mr C's ability to care for Ms D.

34. Ms D had a professional Deputy appointed by the Court of Protection to manage her finances. The records indicate the Council invited the Deputy to meetings, but the Deputy declined to attend.

35. On 26 July, the community hospital granted itself an urgent authorisation to deprive Ms D of her liberty. At the same time, the community hospital requested a standard authorisation and an extension to the urgent authorisation. The community hospital said on the application that:

- staff had not told Mr C about its request for a standard authorisation and that he had threatened to remove Ms D if social services got involved; and
- Ms D was unkempt on admission to the previous hospital and her partner did not bring her in any personal effects for several days.

36. The Council received the community hospital's request, but it did not act on it for six weeks. The Council told us this was because it was receiving many DOLS applications: about 150 a week.

37. The Council did not approve an extension to the urgent authorisation which therefore expired on 2 August.

38. In September, a case manager carried out an assessment of Ms D's mental capacity to make decisions about her care and accommodation. Mr C was present. The outcome was she lacked mental capacity to make choices about these matters.

39. The case manager referred Ms D to an Independent Mental Capacity Advocate (IMCA). There is no record of any discussion with Mr C or Ms D before the case manager made the referral. The IMCA asked the case manager to tell Mr C that she was involved.

40. Assessors appointed by the Council carried out the six assessments described in paragraph 19 and the Council (as the supervisory body) granted a standard authorisation on 16 September, to come into force straight away and to last for four months. The Best Interest Assessor noted:
    - she consulted with Mr C after she had spoken to Ms D on the ward. Mr C expressed his unhappiness at the involvement of social care and with the DOLS process;
    - she also spoke to professionals caring for Ms D; and
    - there was no-one appropriate to be Ms D's RPR.

41. The Council referred Ms D to the local advocacy service and a paid RPR was appointed on 19 September.

42. Mr C complained to the Council in October, raising the same issues as in his complaint to us.

43. The IMCA prepared a report at the end of October which summarised Ms D's wishes and feelings. The IMCA noted Ms D shook her head when asked if she wanted to move into a care home and said she would like a carer at home. The IMCA also noted Mr C wanted Ms D to come home but may not be realistic about her current care needs. The IMCA said she would support a move home in Ms D's best interests, but only if there was a supportive care plan in place in addition to the care Mr C was providing.

44. The case manager arranged a best interests meeting and spoke to Mr C beforehand. The records show the case manager told Mr C who would be going to the meeting and explained the aim was to decide where Ms D would live after she left the community hospital.

45. The best interests meeting did not go ahead as planned because the IMCA could not attend. The case manager met with Mr C to discuss Ms D's future care needs. Mr C described the daily care and support he gave Ms D at home. The case manager said Ms D needed more care than before the stroke, she was incontinent and needed supervision with many daily tasks. The records show

Mr C said he did not want Ms D to have any type of paid care at home and felt he could look after her without paid carers. The case manager said she had involved an IMCA to support Ms D at a best interests meeting that would be rearranged for a later date. Mr C said there was no need for an IMCA because he was Ms D's advocate. The case manager said an IMCA was needed because of the disagreement about Ms D's future care.

46. The Council wrote to Mr C on 1 November to advise him about the standard authorisation and gave him contact details of the paid RPR. The Council told us it accepted it had delayed telling Mr C about the standard authorisation. Mr C contacted the DOLS office on receipt of the standard authorisation saying he was not happy about it and he was also unhappy he had not been made aware of the urgent authorisation. Mr C also spoke to the paid RPR to raise concerns about the DOLS process including the delay in receiving a copy of the standard authorisation.

47. The best interests meeting took place at the start of November. Mr C started recording the meeting. The chair asked him to stop and explained there would be written minutes. Mr C left the meeting which continued in his absence. The minutes indicate attendees, including Ms D's IMCA, discussed the advantages and disadvantages of Ms D returning home with or without a care package or going into a care or nursing home. The outcome was it would be in Ms D's best interests to go into a nursing home. The case manager told Mr C the decision. He said he did not agree and felt professionals were ignoring him.

48. The case manager carried out a social care assessment in the middle of November. The outcome was Ms D was eligible for social care. A care and support plan set out her care needs. Internal records show the case manager requested a long-term nursing home placement for Ms D, but the Council's funding panel refused this, recommending a short-term placement.

49. Mr C contacted the social care team saying he disagreed with the decision to move Ms D into a nursing home and had not been included in the discussions. He said he wanted to stop the placement from going ahead and asked for a review. He later spoke to a new case manager who said she was reviewing Ms D's case.

50. The Council apologised in its complaint response for the changes to the best interests' meeting. It explained Mr C had been told about the decision for Ms D to live in a nursing home. The Council said it had arranged for a different case manager to review the discharge arrangements.

51. The Council found a placement in a nursing home close to Mr C and Ms D's home and Ms D moved there at the end of November. There was no decision made about her long-term care. The new case manager visited Ms D at the nursing home. Ms D said she wanted to go home. The case manager also visited Mr C to see their house and noted it had been adapted to Ms D's needs. Mr C changed his mind and agreed to a care package. The case manager discussed the options with her manager who noted nursing care was not the least restrictive option and that the Court of Protection may criticise the Council for not enabling Ms D to return home.

52. The case manager carried out a second social care assessment and devised a further care and support plan with a view to Ms D returning home with a care package. Ms D returned home with a care package just before Christmas 2019. She became unwell and died at home in April 2020.

Comments from the Council

53. The Council told us:

- it accepted there were failings in communication with Mr C and it did not ensure he had a voice or was part of the discharge planning process for Ms D;
- its ability to complete DOLS assessments within the required timeframe depended on the number of referrals it received, their priority, the number of Best Interest Assessors and the complexity of each case. The average response time was four to six weeks from the date of receiving the request;
- it had instructed officers to ensure all attendees at best interests meetings were made aware of the policy on audio recording before the meeting started;
- it had a new client monitoring tool which was incorporated into the electronic case records and allowed the DOLS team to track assessments;
- it had invested £1.54 million in DOLS to deliver a project to respond to the high number of applications which were not high priority under the ADASS screening tool. Pending applications were reviewed and people were seen;
- it had trained 12 new Best Interest Assessors to carry out assessments and intended to train another 15;
- it received about 150 DOLS applications a week, a mix of urgent and standard authorisations as well as further authorisations/renewal applications; and
- there would be staffing issues if the Ombudsman recommended a retrospective/historical review of DOLS cases because the same Best Interest Assessors would have to carry out those reviews as well as conducting current assessments. There were 8,800 applications received between January 2019 and October 2020.

Was there fault and if so did this cause injustice?

Complaint: The arrangements in a best interests meeting and a lack of consultation before placing Ms D in a care home

54. The Council already apologised in its complaint response for poor communication with Mr C about meetings. It acknowledged consultation with Mr C was poor in response to our enquiries. This was fault which caused Mr C avoidable frustration.

55. Mr C left the best interests meeting after a dispute about recording. This could have been avoided if the Council had explained its policy on recording meetings beforehand. The failure was fault causing additional frustration, which the Council acknowledged during our investigation.

56. We consider the case manager should have met with Mr C separately after he left the best interests meeting, to give him a further chance to express his views. As the Council held the balance of power in terms of decision-making, fairness required a further attempt to consult with him. We do not consider the Council made enough effort to consult with Mr C in line with the approach in the Mental Capacity Act which sets out the need to consult as far and widely as possible. The Council's failure to take additional steps to consult Mr C after the meeting was fault causing Mr C avoidable distress.

57. We do not consider the Council had regard to the couple's Article 8 rights when making decisions about Ms D's future care. This was a further fault. We would expect a decision preventing a couple from living together to be considered in the

context of their right to respect for family and private life. While a public authority may interfere with this right in pursuit of a specific aim, an interference should be necessary and proportionate. There is no evidence officers considered whether the placement was necessary or was a proportionate response to the concerns raised about Mr C's ability to care for Ms D when he had done so successfully without any paid carers for many years. We note there were safeguarding concerns raised by the community hospital, but the Council did not pursue these through safeguarding processes. Unproven allegations not subject to investigation could not have been a legitimate aim or proportionate justification to interfere with Article 8 rights.

58. A manager recognised the Court of Protection may not have regarded the move to a nursing home as the least restrictive option. A review of the case led the Council to pursue a care package to enable Ms D to go home. It is unclear why this option was not pursued earlier as it should have been. The failure to consider the least restrictive option for Ms D's post-discharge care was not in line with the principles set out in section 1 of the Mental Capacity Act 2005 and was a further fault.

59. The fault described in the previous two paragraphs caused Mr C and Ms D injustice because their views were not heard and their right to a family life not considered. Had these matters been considered, the Council may well have made different decisions about placing Ms D in nursing care and she may have been able to return home earlier. Mr C and Ms D suffered avoidable distress at being unable to live together, against their expressed wishes.

Complaint: The appointment of an IMCA

60. There was a dispute between the Council and Mr C about Ms D's case and so it was appropriate to involve an independent advocate who could establish Ms D's wishes. We do not regard this as fault as it was in line with Chapter 15.3 of the Code of Practice to the Mental Capacity Act which recommends using an advocate where there are disagreements, notwithstanding the involvement of a close family member.

Complaint: The failure to apply to the Court of Protection

61. We do not consider the Council had regard to Chapter 8 of the Code of Practice to the Mental Capacity Act which says an application to the Court of Protection may be necessary if there are serious disagreements which cannot be resolved. Mr C continued to disagree with the decision to place Ms D in nursing care. When asked, Ms D also said she wanted to return home. This was an important decision about residence which was unresolved even with the IMCA's involvement and so a court was the most appropriate forum to resolve the dispute. The Council did not document a reason for failing to apply to court and this was an additional fault. This failure denied Mr C and Ms D the opportunity to have their case considered by an independent body.

Complaint: The DOLS authorisations

62. Regulation 13(2) of the Mental Capacity (Deprivation of Liberty: Standard Authorisations Assessments and Ordinary Residence) Regulations 2008 requires the supervisory body (the Council) to complete six assessments to approve a standard authorisation during the period of an urgent authorisation. The urgent authorisation which the managing authority (the community hospital) granted itself, expired on 2 August. The Council did not deal with the request for an extension to the urgent authorisation and so from 2 August to 16 September,

there was no valid authorisation for Ms D's continued detention. This was a failure to follow the DOLS framework in Schedule 1A to the Mental Capacity Act 2005 and is fault.

63. The DOLS require there to be either an urgent authorisation in force or a standard authorisation for a deprivation of liberty to be lawful. The Council's failure to act within the prescribed timescales engaged Ms D's Article 5 rights. She was being cared for in conditions which amounted to a deprivation of her liberty without the legal protections afforded by the DOLS. The Council was at fault because there was no legal basis in place for Ms D's detention in the community hospital between 2 August and 16 September. For these six weeks, the detention was unauthorised which meant Ms D did not get the protections afforded by the DOLS. The protections Ms D was entitled to included the earlier support of an RPR from 2 August, who could have challenged the detention in the Court of Protection or asked the Council for a review of the standard authorisation. We do not conclude on a balance of probabilities that had it not been for the fault, Ms D would have been able to leave hospital. In practical terms, the failings we have identified may not have made any difference to Ms D's circumstances for those six weeks.

64. When asked, both Ms D and Mr C expressed their unhappiness and dissatisfaction with being in hospital. And, Ms D told the IMCA she wanted to be cared for at home by Mr C.

65. The Council did not inform Mr C of the standard authorisation until the beginning of November. This delay of six weeks is not in line with the requirements of a supervisory body set out in paragraph 57 of Schedule 1A to the Mental Capacity Act 2005. Paragraph 57 says an interested person should receive a copy as soon as is practicable. We note Mr C was also unhappy he was not made aware of the urgent authorisation, however, there is no specific requirement in Schedule 1A on either the managing authority or supervisory body to advise a relative of the existence of an urgent authorisation.

Additional issues

66. We may investigate matters coming to our attention during an investigation if we believe others may have been affected by fault and injustice but have not complained. The Council told us that there were other applications for standard authorisations where it did not meet the statutory timescales. And, the Council also told us that it did not fully assess those applications triaged as low or medium priority and instead placed them in a 'pending' queue. We consider this was fault. While the Council is entitled to deal with the most urgent cases first, the law prescribes timescales for authorising DOLS applications and neither the law nor the ADASS screening tool say a council can refuse to assess cases where a request for a standard authorisation has been made. We have previously criticised another council's use of the ADASS screening tool in a way which was not intended and we are disappointed to see this practice continuing here. Without proper assessment of all cases, the status of people in the pending queue is unclear and some or all may be being unlawfully deprived of their liberty, despite being assessed as low or medium risk. Those people have not had the protections designed to provide checks and balances which may include refusing an inappropriate request, placing conditions on an authorisation and limiting its timescale.

Recommended action

67. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. ***(Local Government Act 1974, section 31(2), as amended)***

68. We found fault with the Council as set out in the previous section. The failure to implement the least restrictive option (care at home) meant Mr C was separated from Ms D for about a month and this caused them both avoidable distress. Mr C suffered further distress and frustration at the Council's poor communication and inadequate consultation about Ms D's future care. And, there was the loss of opportunity to have their case considered by an independent court.

69. To remedy the injustice, the Council should, within one month of the date of this report, apologise and make a symbolic payment of £500 to recognise Mr C's distress. We have not recommended a payment for Ms D as she has died and we regard distress as a personal injustice. We are pleased the Council has already agreed to apologise and make the payment.

70. We acknowledge the standard authorisation was eventually granted in Ms D's case and the delay was not an extended one. But, this did not absolve the Council of its responsibility to act by the statutory timescales which exist as a safeguard to protect the most vulnerable adults who lack a voice.

71. The Council should also, within three months of the date of this report:
    - ensure all current and future requests for standard authorisations are completed within prescribed timescales, including low and medium risk cases currently held as pending;
    - provide us with written evidence showing it has monitored all requests for standard authorisations post-dating our final report and completed them within the legal timeframes described in this report;
    - review its Care Act assessment processes to ensure case managers document consideration of Article 8 rights when making decisions about care placements which separate couples; and
    - ensure relevant case managers receive training on the Human Rights Act 1998 and how it may apply to their role.

72. We are pleased the Council has accepted the recommendations in the last paragraph, although it suggested we give a timeframe of one year. We consider a year is too long because the action we are recommending is what the Council should be doing already to comply with the law and statutory guidance set out in this report.

73. Within one year of this report, the Council should review all cases from January 2019 to date where DOLS assessments have not been completed at all or not been completed within the prescribed timescales and consider whether any injustice has arisen because of the delay. If so, the Council should take action to remedy any injustice in line with the principles set out in our published Guidance on Remedies. We can advise the Council on individual cases if needed. Before starting the review and within three months of the date of this report, the Council should provide us with an action plan of how it intends to conduct the review. The action plan should set out numbers, methodology and scope of the review and should be agreed with us before the Council starts the review.

74. The Council should then, within one year of the date of this report, provide us with a written summary of the cases it has reviewed and what, if any action, it took as a result of the reviews. We accept this recommendation places a heavy demand on the Council at a time when funding from the government has not necessarily mirrored the increased demands caused by the Cheshire West case. However, where we identify fault and injustice, our role is to recommend action to put things right, especially where those suffering are within the most vulnerable groups in society.

75. We also note the new Liberty Protection Safeguards are due to come into force in April 2022 to replace the DOLS. However, the Council needs to ensure the current arrangements comply with existing timescales pending implementation of the new system.

Decision

76. We have upheld Mr C's complaints about delay in deprivation of liberty assessments and a lack of consultation over decisions about his late partner Ms D's care and residence. The Council needs to apologise to Mr C, make him a symbolic payment, review other cases, ensure there are no more delays in completing DOLS assessments and make sure it also assesses cases it has classified as low and medium priority.