Neutral Citation Number: [2014] EWCOP 37

Case No: 12488518 and 28 others

COURT OF PROTECTION
(In Open Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 October 2014

Before:

SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

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Re X and others (Deprivation of Liberty) (Number 2)

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Mr Alexander Ruck Keene and Mr Benjamin Tankel for the Official Solicitor as advocate to the court
Ms Joanne Clement for the Secretary of State for Health and the Lord Chancellor and Secretary of State for Justice
Mr Stephen Cragg QC for the Law Society of England and Wales
Ms Alison Ball QC and Mr Andrew Bagchi for the Association of Directors of Adult Social Services
Mr Neil Allen for Cheshire West and Chester Council, Surrey County Council and Northumberland County Council
Mr Michael Dooley for Cornwall Council
Ms Bethan Harris for Worcestershire County Council
Mr Conrad Hallin for Sunderland City Council
Ms Natalia Perrett and Ms Emily Reed for Barnsley Metropolitan Borough Council
Mr Simon Burrows for Rochdale Metropolitan Borough Council
Mr Michael Mylonas QC for Surrey Downs Clinical Commissioning Group
Mr Jonathan Auburn for NHS Sheffield Clinical Commissioning Group
Mr John McKendrick for Nottinghamshire Healthcare NHS Trust
Mr Jonathan Butler for KW (a patient)
Ms Katie Scott for AS and GS (patients)
Mr Joseph O'Brien for PMLP (a patient)
Mr Ian Wise QC, Ms Martha Spurrier and Ms Alison Fiddy filed written submissions on behalf of Mind

Hearing dates: 5-6 June 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

This judgment was delivered in Open Court

Sir James Munby, President of the Court of Protection :

1. I handed down a preliminary judgment in these matters on 7 August 2014: *Re X and others (Deprivation of Liberty)* [2014] EWCOP 25. I do not propose to rehearse what I then said. I need now to supplement and elaborate what I said in my previous judgment in relation to Questions (7), (9) and (16).

2. For ease of reference I set out those questions again:

> "(7) Does P need to be joined to any application to the court seeking authorisation of a deprivation of liberty in order to meet the requirements of Article 5(1) ECHR or Article 6 or both?
>
> (9) If so, should there be a requirement that P … must have a litigation friend (whether by reference to the requirements of Article 5 ECHR and/or by reference to the requirements of Article 6 ECHR)?
>
> (16) If P or the detained resident requires a litigation friend, then: (a) Can a litigation friend who does not otherwise have the right to conduct litigation or provide advocacy services provide those services, in other words without instructing legal representatives, by virtue of their acting as litigation friend and without being authorised by the court under the Legal Services Act 2007 to do either or both …?"

3. These questions require consideration of a number of issues which I take in order, formulating each of these issues in the form of a question.

4. The first question is whether as a matter of principle, and specific legislative provisions apart, there is any requirement in domestic law for P to be a party to welfare proceedings, whether in the Family Division or, as here, in the Court of Protection. The answer, in my judgment, is that there is no such requirement.

5. I start with the analogous question in relation to welfare proceedings about children, beginning with wardship. It is quite clear, in my judgment, that there is not, and never has been, any requirement that the ward be a party to the wardship proceedings. That was the position in the days before 1971 when wardship was still in chancery: see *Daniell's Chancery Practice*, ed 8, 1914, Vol 1, p 976 and, in particular, *In re an Infant* [1950] Ch 629, 632, where Roxburgh J said:

> "At first sight, it might seem strange to make an order about a person who is not a party to the proceedings. On the other hand, the infant is generally very young, and the appointment of a guardian ad litem and service on him or her involves expense which generally results in no corresponding benefit. The court would, of course, not make the order if in doubt whether it was for the infant's benefit, and it has indisputable jurisdiction to order the infant to be made a respondent if it desires to do so. For example, the infant might be approaching full age; or the

> parties might be so much wrapped up in matrimonial disputes that they cared nothing for the infant. The court has an unfettered discretion. But I propose to express the view, after consultation with my brethren of the Chancery Division, that an infant should not be made a respondent to an originating summons under the Act unless the master or a judge so directs".

6. That remained the position thereafter, following the transfer of wardship to the Family Division. As *Lowe & White*, Wards of Court, ed 2, 1986, para 9-7, put it, "There is no requirement that a ward be made a party to wardship proceedings." Indeed, a Practice Direction made in December 1981, following comments made by the Court of Appeal in *In re F (A Minor) (Adoption: Parental Consent)* [1982] 1 WLR 102, spelt out that "only in special circumstances should the child be joined": *Practice Direction (Child: Joinder As Party)* [1982] 1 WLR 118. That Practice Direction is no longer in force, but rule 12.37(1) of the Family Procedure Rules 2010, carrying forward in somewhat different language provisions previously in rule 5.1(3) of the Family Proceedings Rules 1991, provides that, "A child who is the subject of wardship proceedings must not be made a respondent to those proceedings unless the court gives permission."

7. The same practice, reflecting the practice in the Probate, Divorce and Admiralty Division and in the Family Division in custody cases arising after divorce (see, for example, *In re F (A Minor) (Adoption: Parental Consent)* [1982] 1 WLR 102, 112, per Ormrod LJ and rule 115 of the Matrimonial Causes Rules 1977), applies in private law proceedings under Part II of the Children Act 1989: see the table in rule 12.3(1) of the Family Procedure Rules 2010.

8. The basis of this approach is no doubt to be found in the special nature of welfare proceedings. As Cross J said in *In re B (JA) (An Infant)* [1965] Ch 1112, 1117:

> "Wardship proceedings are not like ordinary civil actions. There is no "lis" between the parties. The plaintiffs are not asserting any rights; they are committing their child to the protection of the court and asking the court to make such order as it thinks is for her benefit."

This reflects the classic analysis, applying be it noted to both children and those who were then labelled lunatics, to be found in *Scott (Otherwise Morgan) v Scott* [1913] AC 417. One short extract will suffice, from the speech of Viscount Haldane LC, at 437, 438:

> "The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge … In the two cases of wards of Court and of lunatics the Court is really

> sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction."

9. Is there a distinction to be drawn because I am here concerned not with children but with adults who lack capacity? In my judgment, there is no distinction: compare *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057, para 45, a case relating to an adult decided in the Family Division, and *RC v CC (By Her Litigation Friend the Official Solicitor) and X Local Authority* [2014] EWCOP 131, [2014] COPLR 351, para 20, a case relating to an adult decided in the Court of Protection. As I said in the latter case, where the issue related to disclosure of documents to the parties,

> "Thus far, as will be appreciated, the authorities to which I have referred have mainly related to children. Do the same principles apply in cases in the Court of Protection relating to adults? To that question there can, in my judgment, be only one sensible answer: they do. One really needs look no further than *Scott v Scott* to see that the same fundamental principles underlie both jurisdictions."

10. In *Cheshire West and Chester Council v P and M* [2011] EWHC 1330 (COP), [2011] COPLR Con Vol 273, para 52, Baker J, in a passage I expressed my agreement with in *Re G (Adult)* [2014] EWCOP 1361, para 26, said this:

> "The processes of the Court of Protection are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests."

The resonance with what Viscount Haldane had said in *Scott v Scott* and Cross J had said in *Re B*, is palpable.

11. The second question is whether, whatever the position in domestic law, there is any requirement under the Convention for P to be a party to welfare proceedings, in particular, proceedings relating to deprivation of P's liberty. The answer, in my judgment, is that there is no such requirement, though Article 5(4) of course entitles P to "take proceedings".

12. In matters going to deprivation of liberty P is entitled to the procedural safeguards mandated by Article 5 and, because deprivation of liberty goes to something which is a civil right (see *Aerts v Belgium* (2000) 29 EHRR 50, para 59), also to those mandated by Article 6. The court must also have regard to Articles 13 and 14 of the Convention on the Rights of Persons with Disabilities (as to which see *RP v United Kingdom* [2013] 1 FLR 744, para 65, and *Surrey County Council v P and others (Equality and Human Rights Commission and others intervening), Cheshire West and*

Chester Council v P and another (Same intervening) [2014] UKSC 19, [2014] AC 896, para 36).

13. Article 6 requires that P be able to participate in the proceedings in such a way as to enable P to present his case "properly and satisfactorily": see *Airey v Ireland* (1979) 2 EHRR 305, para 24. More specifically, referring to Article 5, "it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty'.": *Winterwerp v Netherlands* (1979) 2 EHRR 387, para 60. This may require the provision of legal assistance: *Megyeri v Germany* (1992) 15 EHRR 584, para 23. There is a margin of appreciation (see, for example, *Shtukaturov v Russia* (2012) 54 EHRR 962, para 68), but this cannot affect the very essence of the rights guaranteed by the Convention. The Strasbourg court has made clear that deprivation of liberty requires thorough scrutiny and that any interference with the rights of persons suffering from mental illness must, because they constitute a particularly vulnerable group, be subject to strict scrutiny. So the process must meet that demanding standard.

14. More generally, P should always be given the opportunity to be joined if he wishes and, whether joined as a party or not, must be given the support necessary to express views about the application and to participate in the proceedings to the extent that they wish. Typically P will also need some form of representation, professional though not necessarily always legal.

15. So long as these demanding standards are met, and in my judgment they can in principle be met without P being joined as a party, there is, as a matter of general principle, no requirement, whether in domestic law or under the Convention, for P to be a party.

16. At present, the matter is regulated by Rule 73(4) of the Court of Protection Rules 2007 ("the Rules") which, without making any different provision for deprivation of liberty cases, provides that:

> "Unless the court orders otherwise, P shall not be named as a respondent to any proceedings."

That is complemented by Rule 74, which provides that P "shall be bound by any order made or directions given by the court in the same way that a party to the proceedings is bound."

17. Nothing I have heard in argument leads me to doubt the validity of Rule 73(4). Whether Rule 73(4) should be retained in deprivation of liberty cases (or, indeed, more generally) is, of course, a different question – and not one which it would be appropriate for me to address in this judgment.

18. In paragraph 7 of my earlier judgment I referred to the ad hoc, non-statutory, committee ("the Committee") which had recently been set up to review the Rules and associated practice directions and forms. I recorded that, at its first meeting on 14 July 2014, the Committee had identified as a major issue for consideration the question of whether Rule 73(4) requires amendment. In paragraphs 21 and 27 of that judgment I

said that the matters which I am now considering required urgent consideration by the Committee as part of its more general review of Rule 73(4). I remain of that view. It is a topic I return to below.

19. The next question is whether, as a matter of principle, and specific legislative provisions apart, there is any obstacle to P participating and being represented in proceedings in the Court of Protection without being joined as a party. The answer, in my judgment, is that there is no such obstacle.

20. Two examples illustrate the point. The practice in wardship has long been that where the ward has formed an association, considered to be undesirable, with another person, that other person, although entitled to be heard, should not be made a party to the proceedings: see now the Family Procedure Rules 2010, PD12D, para 3.1, replacing *Practice Direction (Wardship: Parties To Proceedings)* [1983] 1 WLR 790, itself superseding *Practice Direction (Parties to Wardship Proceedings)* [1962] 1 WLR 61. For a more recent example, in the Court of Protection, see *Re G (Adult)* [2014] EWCOP 1361, paras 51-52, involving a newspaper whose joinder as a party was held to be both unnecessary and undesirable albeit that it would be entitled to be heard in certain circumstances.

21. I should add that, if P is participating other than as a *party*, there is no need for a litigation friend.

22. The next question is whether, assuming that P is a party, he is required to act by a litigation friend. The general principle is long-established, and hardly requires citation of authority, that in welfare proceedings, as in any other kind of litigation, a child or incapacitated adult can participate as a party only if represented by a litigation friend. But there are exceptions to this general rule. I mention two, though the first is now only of historical, indeed almost antiquarian, interest. In the days of the Lunacy Act 1890, although a person of unsound mind not so found by inquisition sued, like an infant, by a next friend or guardian ad litem, a lunatic so found by inquisition sued by the committee of his estate: see *Daniell's Chancery Practice* pp 118-119, 121. Of more contemporary significance is rule 16.6 of the Family Procedure Rules 2010, replacing rule 9.2A of the Family Proceedings Rules 1991, which permits a child in certain circumstances to conduct proceedings without a children's guardian or litigation friend.

23. In his submissions, Mr Jonathan Butler helpfully drew attention to the practice in the First-tier Tribunal (Health Education and Social Care Chamber), and previously in the Mental Health Review Tribunal, where the relevant rule provides for the appointment of a legal representative – *not* a litigation friend – where the patient, a party to the proceedings before the Tribunal, lacks capacity: see *AA v Cheshire and Wirral Partnership HNS Foundation Trust and ZZ* [2009] UKUT 195 (AAC), [2009] 1 MHLR 308. Mr Butler suggests that the sole question to be asked is whether the requirement for a litigation friend is necessary for P to have a voice within proceedings? The answer, he suggests, and I agree, can in part be found in the decision in that case.

24. These examples demonstrate, in my judgment, that there is no fundamental principle in our domestic law which dictates that P, if a party, must have a litigation friend. The

question is ultimately one going to the practice of the particular court or tribunal. Generally speaking, the practice – the rule – has long been that those who lack capacity must have a litigation friend. But that is all.

25. At present Rule 141(1) requires P, if a party, to have a litigation friend.

26. The requirement to have a litigation friend is compliant with, but not mandated by, the Convention: *RP v United Kingdom* [2013] 1 FLR 744. The Convention requirement is to ensure that P's interests are properly represented and that does not, of itself, require the appointment of a litigation friend.

27. Again, this is a matter which requires consideration by the Committee.

28. The final question is whether a litigation friend who does not otherwise have the right to conduct litigation or provide advocacy services can provide those services for P, in other words without instructing legal representatives.

29. The long established practice was that a litigation friend (i) was not a party to the proceedings (and therefore could not in the absence of specific rules be ordered to give discovery (disclosure) of documents), (ii) was not entitled to sue or be heard in person on behalf of the person under disability and (iii) was liable to the defendant for the costs of the proceedings: *Daniell's Chancery Practice*, pp 101, 110. The question is whether the second of these rules is still in place.

30. There is nothing to indicate that this was, or is, some fundamental, immutable rule. As Ms Joanne Clement for the Secretaries of State points out, the County Court Rules 1981 contained no requirement that a litigation friend (to use the modern terminology) act by a solicitor. Order 10 rule 12 (corresponding to Order 80 rule 2(2) of the Rules of the Supreme Court) made clear that the litigation friend could, in the ordinary conduct of the proceedings, do any act required or authorised to be done by the party under disability were he not under disability. But significantly, as she also points out, there was nothing in the 1981 Rules corresponding to the requirement in Order 80 rule 2(3) of the Rules of the Supreme Court that a litigation friend "must act by a solicitor."

31. Ms Clement points to the fact that Order 80 rule 2(3) of the Rules of the Supreme Court is not replicated in Rule 21.2 of the Civil Procedure Rules – she says as the result of a conscious decision of the Civil Procedure Rules Committee to adopt the old County Court rule – and submits that the present position is correctly set out in the 2014 White Book, para 21.2.1 ("There is no requirement that a litigation friend must act by a solicitor in the High Court."). Likewise, as she points out, there is no such requirement in the 2007 Rules.

32. Mr Alexander Ruck Keene, for the Official Solicitor as advocate to the court, put forward a detailed and subtle argument to which I cannot hope to do full justice. He made two key points. First, he submitted that Order 80 rule 2(3) of the Rules of the Supreme Court reflected rather than replaced a pre-existing common law rule, with the consequence that when the Rule was revoked the common law rule revived. I cannot accept either limb of the argument. Secondly, and pointing to the decision of Toulson J, as he then was, in *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272, he submitted that what was here involved was a fundamental right or

something sufficiently close to it to bring Toulson J's approach into play. I reject that argument. Toulson J was concerned with the question of legal professional privilege, a matter of fundamental importance recognised and protected not merely by domestic law but also by the Convention and by EU law. The principle I am here concerned with is of a wholly different order of magnitude. *Patel* does not assist.

33. Mr Stephen Cragg QC, on behalf of the Law Society, suggests that the matter is not as clear cut as either Ms Clement or Mr Ruck Keene would have it. He submits that clarity is required, not least because, he says, it is impossible to give definitive advice to a litigation friend as to whether or not he can conduct the proceedings without a solicitor. He suggests that the point needs urgent consideration by the relevant rules committees, and, on that basis, wonders whether there is in fact any need for me to decide the point.

34. In my judgment the matter was correctly stated by Brooke LJ in *Gregory v Turner* [2003] EWCA Civ 183, [2003] 1 WLR 1149. A litigation friend does not have to act by a solicitor and can conduct the litigation on behalf of P: *Gregory v Turner*, para 63. A litigation friend who does not otherwise have a right of audience requires the permission of the court to act as an advocate on behalf of P: *Gregory v Turner*, para 64.

35. Each of the matters I have been considering is, for the reasons I have given, within the proper ambit of the Committee. They are all, in my judgment, matters that can properly be regulated by the 2007 Rules. They are all issues which, as it seems to me, require urgent consideration by the Committee, both as a matter of principle and also to achieve the necessary clarity for which Mr Cragg appropriately called. Some, it may be, might also merit consideration by both the Civil Procedure Rules Committee and the Family Procedure Rules Committee.

36. It is not for me in this judgment to advise the Committee how to proceed. There is, however, one aspect of the matter to which the Committee will, I suggest, need to give careful consideration. It is essential that where the issue concerns P's deprivation of liberty the Court of Protection's processes are rigorous, so that the circumstances of the individual case are subjected, as they must be, to the strict scrutiny demanded by the Convention. Both our domestic law and the Convention impose demanding standards. But the need to meet this challenge must not be allowed to lead to a system of technical requirements which may, in the real world, operate to deny P the speedy access to a judicial determination which is the very essence of what is required. To speak plainly, the Committee will have to consider how best to craft a process which, while it meets the demanding requirement of the law, also has regard to the realities consequent upon (a) the legal aid regime and (b) the exposure of a litigation friend to a costs risk. There is no point in a system which requires there to be a litigation friend, let alone which requires the litigation friend to instruct lawyers, if the reality is that there is, because of an absence of legal aid and possible exposure to an adverse costs order, no-one willing and able to accept appointment as litigation friend. Indeed, such a system would be self-defeating. And in this connection it needs to be remembered that the Official Solicitor can never be compelled to accept appointment. Moreover, as I understand it, he is not funded to act as a litigation friend in deprivation of liberty cases, so he is dependent on external funding which in many cases will not be available in the absence of legal aid.