

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2018] SC GLA 4

GLW-AW240-17

NOTE BY SHERIFF A M MACKIE

In the Application by

DARLINGTON BOROUGH COUNCIL

Applicants

in respect of the Adult: AB

Applicants: Hempsey;

Glasgow, 19 January 2018

Introduction

[1] The adult, AB, lacks capacity to make decisions as to her care and residence and is subject to Orders made by the Court of Protection in England. During 2017 the Court of Protection decided that it would be in AB's best interests to move from a care home in Darlington (hereafter referred to as "the English Care Home") to a care home within the Sheriffdom (hereafter referred to as "the Scottish Care Home") for a trial period.

[2] On 27 April 2017, the Court of Protection ordered and directed, pursuant to section 16 of the Mental Capacity Act 2005 (hereafter "said 2005 Act") and as a relevant decision within the meaning of sections 4A(3) and (4) of said 2005 Act that *inter alia*:

AB is deprived of her liberty as a result of the arrangements made for her care at the English Care Home. The restrictions that are in place at the English Care Home...are lawful, notwithstanding that they amount to a deprivation of her liberty

for the purpose of Article 5 of the ECHR. It is lawful, being in AB's best interests for reasonable and proportionate force to be used to prevent AB from leaving the English Care Home and to return her there if she does leave.

[3] On 27 April 2017 the Court of Protection also ordered, in the interim, pursuant to sections 4A(3)-(5), 16, 21A(2)-(3) and 48 of said 2005 Act that *inter alia*:

- (i) *AB may be deprived of her liberty as a result of the arrangements made by Darlington Borough Council to transport AB from the English Care Home to the Scottish Care Home... The restrictions that are set out in the transition plan are necessary, proportionate and in her best interests and are lawful, notwithstanding that they amount to a deprivation of her liberty for the purpose of Article 5 of the ECHR, if it is necessary for them to be used. Those transporting AB may use reasonable and proportionate force against AB to protect AB or others from harm, such force may involve restraint.*
- (ii) *If AB's trial placement at the Scottish Care Home is unsuccessful, AB may be deprived of her liberty as a result of the arrangements made by Darlington Borough Council to transport AB from the Scottish Care Home to the English Care Home... The restrictions that are set out in the transition plan are necessary, proportionate and in her best interests and are lawful, notwithstanding that they amount to a deprivation of her liberty for the purpose of Article 5 of the ECHR, if it is necessary for them to be used. Those transporting AB may use reasonable and proportionate force against AB to protect AB or others from harm, such force may involve restraint.*
- (iii) *AB will be deprived of her liberty during her trial placement at the Scottish Care Home pursuant to the arrangements made by Darlington Borough*

Council set out in her Care and Support Needs Plan... The restrictions that are set out in the Care Plan are necessary, proportionate and in her best interests and are lawful, notwithstanding that they amount to a deprivation of her liberty for the purpose of Article 5 of the ECHR. It is lawful, being in AB's best interests for reasonable and proportionate force to be used to prevent AB from leaving the Scottish Care Home and to return her there if she does leave.

[4] On 27 April 2017 the Court of Protection also ordered, under section 16(2)(A) of said 2005 Act, that *inter alia*:

- (i) *AB shall travel to, and reside and receive care at, the Scottish Care Home for a trial period of approximately six weeks pursuant to the arrangements made by Darlington Borough Council in accordance with her assessed needs. Darlington Borough Council may extend the trial period if it considers there are good reasons for doing so.*
- (ii) *AB shall return to, and reside and receive care at, the English Care Home pursuant to the arrangements made by Darlington Borough Council if Darlington Borough Council and AB's representatives agree that...her placement is unsuccessful. AB's return to the English Care Home in such circumstances may be effected without further order of the court.*

[5] The Order granted by the Court of Protection on 27 April 2017 provided the legal authority for moving AB from the English Care Home to the Scottish Care Home. Said Order set out the basis on which AB was to travel to Scotland and the conditions that were to govern her stay in the Scottish Care Home for a trial period. The Order also authorised the return of AB to the English Care Home, if required.

[6] On 22 May 2017 AB was moved from the English Care Home to the Scottish Care Home and the said trial period commenced.

The Application

[7] A Summary Application was subsequently submitted to Glasgow Sheriff Court in which the Applicants sought two Orders from the court. Firstly, the Applicants sought an Order under paragraph 7(1) of Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 (hereafter "the 2000 Act"), recognising the Order of the Court of Protection dated 27 April 2017. Secondly, the Applicants sought an Order under paragraph 8(1) of said Schedule 3, directing the Office of the Public Guardian in Scotland to register said Order of the Court of Protection dated 27 April 2017 in the Register of International Measures maintained by the Public Guardian. The Applicants sought warrant to intimate the Application upon *inter alia* the Scottish Central Authority. I granted the warrant sought and intimation was duly made on said Authority.

Jurisdiction

[8] On the basis of the Applicants' averments and productions I was satisfied that:

- (i) AB is an adult incapable within the meaning of the 2000 Act;
- (ii) AB is originally from Glasgow but has lived in Darlington for around 10 years, having moved there to be closer to one of her children;
- (iii) AB is not habitually resident in Scotland;
- (iv) AB is present within the Sheriffdom, having been moved to the Scottish Care Home on 22 May 2017, on a trial basis, in terms of the said Orders and Directions made by the Court of Protection; and

(v) no issues arise in respect of AB's property.

[9] The Applicants averred that, on the date of submission of the Application, not only was AB present within the Sheriffdom but it was also a matter of urgency that the Application be dealt with by the court. The urgency was said to arise from there being no authority, registered in Scotland, authorising AB's deprivation of liberty on a long-term basis and from AB being deprived of her liberty in contravention of her rights in terms of Article 5 of the European Convention on Human Rights, with no legal safeguards in place. The orders sought were said to be for AB's benefit and protection.

[10] Jurisdiction in respect of such Applications is excluded from the operation of section 20 and schedule 8 of the Civil Jurisdiction and Judgments Act 1982 by section 21(1)(b) and schedule 9(3) of the said 1982 Act. Likewise, jurisdiction in respect of such Applications is excluded from the operation of section 43(2) of the Courts Reform (Scotland) Act 2014 by section 43(3)(d) of said 2014 Act on the basis that the jurisdictional rules for such Applications are set out in section 85 and schedule 3 of the 2000 Act.

[11] Section 85 of the 2000 Act provides that said schedule 3 shall have effect for the purposes of defining the jurisdiction, in respect of adults who are incapable within the meaning of the 2000 Act, of the Scottish judicial and administrative authorities and for making provision as to the private international law of Scotland in that respect.

[12] Paragraph 1(1) of said schedule 3 provides as follows:-

“The Scottish judicial and administrative authorities shall have jurisdiction to dispose of an application or other proceedings and otherwise carry out functions under this Act in relation to an adult if –

- (a) the adult is habitually resident in Scotland; or
 - (b) property which is the subject of the application or proceedings or in respect of which functions are carried out under this Act is in Scotland;
- or

- (c) the adult, although not habitually resident in Scotland is there or property belonging to the adult is there and, in either case, it is a matter of urgency that the application is or the proceedings are dealt with; or
- (d) the adult is present in Scotland and the intervention sought in the application or proceedings is of a temporary nature and its effect limited to Scotland.”

[13] I was satisfied that, when the Application was made, AB was present within the Sheriffdom, having already been moved from the English Care Home to the Scottish Care Home. I was also satisfied that it was a matter of urgency that the Application be dealt with by the court for the reasons averred by the Applicants. AB had been lawfully deprived of her liberty in terms of the Order of the Court of Protection dated 27 April 2017. Said Order made provision *inter alia* for AB to be deprived of her liberty in Scotland; to be prevented from leaving the Scottish Care Home; and to be returned to the Scottish Care Home if she left same. Said Order had been made by a court outside Scotland but contained powers which required to be exercised within Scotland. The Applicants sought recognition and registration of said Order in Scotland on the basis that once the said Order had been so registered it “shall be as enforceable as a measure having the like effect granted by a court in Scotland” in terms of paragraph 8(2) of Schedule 3 to the 2000 Act. In view of the nature of the powers conferred by the said Order which require to be exercised within Scotland I accepted that it was a matter of urgency for the court to consider the Application for recognition and registration of the said Order. Accordingly, I determined that Glasgow Sheriff Court had jurisdiction to consider the Application on the basis of paragraph 1(1)(c) of said Schedule 3 to the 2000 Act.

The Orders Sought by the Applicants

(i) Order for recognition

[14] The first Order sought by the Applicants was an Order under paragraph 7(1) of Schedule 3 to the 2000 Act recognising the Order of the Court of Protection dated 27 April 2017 which *inter alia* authorised the deprivation of liberty in respect of AB.

[15] Paragraph 7 of said Schedule 3 provides as follows:-

“(1) Any measure taken under the law of a country other than Scotland for the personal welfare or the protection of property of an adult with incapacity shall, if one of the conditions specified in sub-paragraph (2) is met, be recognised by the law of Scotland.

(2) These conditions are—

(a) that the jurisdiction of the authority of the other country was based on the adult’s habitual residence there;

(b) that the United Kingdom and the other country were, when the measure was taken, parties to the Convention and the jurisdiction of the authority of the other country was based on a ground of jurisdiction provided for in the Convention.

(3) Recognition of a measure may, however, be refused—

(a) if, except in a case of urgency—

(i) the authority which took it did so without the adult to whom it related being given an opportunity to be heard; and

(ii) these circumstances constituted a breach of natural justice;

(b) if it would be manifestly contrary to public policy to recognise the measure;

(c) if the measure conflicts with any enactment or rule of law of Scotland which is mandatory whatever law would otherwise be applicable;

(d) if the measure is incompatible with a later measure taken in Scotland or recognised by the law of Scotland;

(e) if the measure would have the effect of placing the adult in an establishment in Scotland and—

(i) the Scottish Central Authority has not previously been provided with a report on the adult and a statement of the reasons for the proposed placement and has not been consulted on the proposed placement; or

(ii) where the Authority has been provided with such a report and statement and so consulted, it has, within a reasonable time thereafter, declared that it disapproves of the proposed placement.”

[16] The first issue which arises is whether the Order of the Court of Protection granted on 27 April 2017 is a measure for the personal welfare or protection of the property of an adult with incapacity, in terms of paragraph 7(1) of said Schedule 3. The definition of such a measure, as set out in paragraph 14 of said Schedule 3, includes any order, direction or decision effecting or relating to –

- “(a) the determination of the incapacity and the institution of appropriate measures of protection;
- (b) the placing of the adult under the protection of a judicial or administrative authority;
- (c) guardianship, curatorship or analogous institutions;
- (d) the appointment and functions of any person or body having charge of the adult’s person or property or otherwise representing the adult;
- (e) the placement of the adult in an establishment or other place where the personal welfare of the adult is safeguarded;
- (f) the administration, conservation or disposal of the adult’s property; or
- (g) the authorisation of a specific intervention for the personal welfare or protection of the property of the adult.”

[17] On the basis of the Application and the productions I was satisfied that the Order granted by the Court of Protection on 27 April 2017 falls within the said definition of such a measure in a number of respects. The Order granted by the Court of Protection comprises an order effecting or relating to the determination of the incapacity and the institution of appropriate measures of protection; the placing of the adult under the protection of a judicial or administrative authority; guardianship, curatorship or analogous institutions; the placement of the adult in an establishment or other place where the personal welfare of the adult is safeguarded; and the authorisation of a specific intervention for the personal welfare of the adult with incapacity, namely AB.

[18] On the basis of the Application and the productions I was satisfied that the Order granted by the Court of Protection on 27 April 2017 was a measure which had been taken under the law of England and Wales for the personal welfare of AB, an adult with

incapacity. Accordingly, in terms of paragraph 7(1) of said Schedule 3, the Order granted by the Court of Protection on 27 April 2017 shall be recognised by the law of Scotland if one of the conditions specified in paragraph 7(2) of said Schedule 3 is met.

[19] Paragraph 7(2) of said Schedule 3 sets out two conditions. According to the terms of paragraph 7(1) of said Schedule 3 only one of these two conditions requires to be met before the measure taken in the Court of Protection for the personal welfare of AB requires to be recognised by the law of Scotland. The first condition in said paragraph 7(2) is that the jurisdiction of the authority of the other country was based on the adult's habitual residence there. The second condition in said paragraph 7(2) is that the United Kingdom and the other country were, when the measure was taken, parties to the Hague Convention of 13 January 2000 on the International Protection of Adults and the jurisdiction of the authority of the other country was based on a ground of jurisdiction provided for in the Convention.

[20] In the circumstances of this case I need not consider the second condition as the first condition in said paragraph 7(2) is clearly satisfied. In the Order dated 27 April 2017 the Court of Protection declared *inter alia* that AB remains habitually resident in England and will remain habitually resident in England until her trial placement at the Scottish Care Home is completed and a final order is made determining whether it is in the best interests of AB to reside in Scotland.

[21] On the basis of the foregoing declaration and on the basis of the averments in the Application and the contents of the productions, I determined that AB was habitually resident in England. The jurisdiction of the Court of Protection was based on AB's habitual residence there. Accordingly, I determined that the first condition in paragraph 7(2) of said Schedule 3 was met.

[22] In terms of paragraph 7(3) of said Schedule 3, recognition of such a measure may be refused in certain circumstances. I gave consideration to the provisions of said paragraph 7(3). It appeared that the only basis on which recognition could, potentially, be refused in the circumstances of this case was on the basis set out in subparagraph (e) of said paragraph 7(3). The Order made by the Court of Protection would have the effect of placing AB in an establishment in Scotland. Accordingly, recognition of said Order would be a matter for the exercise of my discretion in the event of the Scottish Central Authority having not previously been provided with a report on AB and a statement of the reasons for the proposed placement and having not been consulted on the proposed placement. Further, recognition of said Order would be a matter for the exercise of my discretion where the said Authority had been provided with such a report and statement and had been so consulted but had, within a reasonable time thereafter, declared that it disapproves of the proposed placement.

[23] The Applicants averred that, as required by said paragraph 7(3)(e) of said Schedule 3, a report on the adult and a statement of the reasons for the proposed placement had been sent by fax and post to the Scottish Central Authority on 18 January 2017. I was satisfied on the basis of the Applicants' productions that the Scottish Central Authority had been provided with the necessary documentation and had been consulted on the proposed placement of AB in the Scottish Care Home. As at the date of the Application, the said Authority had not declared that it disapproved of the proposed placement of AB in the Scottish Care Home. The said Authority had declined to approve or disapprove of the proposed placement of AB in the Scottish Care Home. Accordingly, I have determined that recognition cannot be refused on the basis of paragraph 7(3)(e) of said Schedule 3 as the necessary report and statement have been provided to the Scottish Central Authority and

the said Authority has not declared that it disapproves of the placement of AB in the Scottish Care Home.

[24] The said Authority did not enter appearance in these proceedings. The Applicants produced copies of correspondence issued by the Scottish Central Authority in which the Authority questioned whether the proposed placement of AB in the Scottish Care Home was a matter which required to be referred to said Authority. In said copy correspondence the said Authority also appeared to question whether Schedule 3 to the 2000 Act had general application within the UK. The said Authority pointed out that England was not a signatory to the aforementioned Convention and expressed the view that the provisions of said Schedule 3 relate only to said Convention. I have determined otherwise.

[25] If the interpretation suggested by the Scottish Central Authority were to be accepted then no measures taken under the laws of the other countries which comprise other parts of the United Kingdom could be recognised by the law of Scotland in terms of paragraph 7 of said Schedule 3. I do not accept that such an outcome was intended by Parliament when enacting the 2000 Act. The terms of the two separate, stand-alone conditions set out in paragraph 7(2) of said Schedule 3 support my interpretation. Only the second of the two conditions set out in said paragraph makes reference to the United Kingdom and to the said Convention. Satisfaction of the first condition in said paragraph would enable certain measures taken under the laws of the other countries which comprise other parts of the United Kingdom to be recognised in Scotland. I do not understand the basis for contending that paragraph 7(2)(a) of said Schedule 3 does not apply to such countries. I do not consider there is any basis for interpreting paragraph 7 of said Schedule in such a restrictive manner.

[26] Paragraph 10 of schedule 3 to the 2000 Act confers power on the Scottish Ministers, by order, to provide for the recognition and enforcement of orders made, and other

measures taken, by authorities in any part of the United Kingdom other than Scotland. Any such provision is to accord no less recognition and secure that these orders and measures are no less enforceable than if they were measures which are recognised by the law of Scotland under paragraph 7 of said Schedule 3. No such orders have been issued. Thus no alternative method of recognition and enforcement has been provided for by any such order. Therefore, any orders made and other measures taken by authorities in other parts of the United Kingdom can only be recognised by the law of Scotland by the application of paragraph 7 of said Schedule 3.

Decision in Respect of First Order Sought

[27] Accordingly, for the foregoing reasons, in respect of the first Order sought by the Applicants, namely, an Order under paragraph 7(1) of Schedule 3 to the 2000 Act, I determined that I required to grant the Order craved thereby recognising the Order of the Court of Protection dated 27 April 2017 in respect of AB.

(ii) Order in Respect of Registration of First Order

[28] In addition to the Order for recognition, the Applicants sought an Order, in terms of paragraph 8(1) of Schedule 3 to the said 2000 Act, directing the Office of the Public Guardian to register, in its Register of International Measures, said Order dated 27 April 2017 issued by the Court of Protection in respect of AB. Said paragraph 8(1) provides that a measure which is enforceable in the country of origin and which is recognised by the law of Scotland under paragraph 7 of said Schedule 3 may, in accordance with rules of court, be registered.

[29] Having granted the Order for recognition sought by the Applicants, I determined that the Order sought by the Applicants in respect of registration ought also to be granted.

The Order of the Court of Protection in respect of AB dated 27 April 2017 is a measure which is enforceable in the country of origin, namely England, and which is recognised by the law of Scotland under paragraph 7 of said Schedule 3. Accordingly, the said Order of the Court of Protection may be registered in Scotland in accordance with rules of court.

[30] The relevant rules of court are contained in the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) Amendment (International Protection of Adults) 2003. In terms of Rule 3.24.5 a register of international measures requires to be maintained by the Public Guardian.

Decision in Respect of Second Order Sought

[31] Having granted the Order first craved by the Applicants in respect of recognition, I also granted the Order second craved by the Applicants directing the Public Guardian to register in the Register of International Measures said Order of the Court of Protection dated 27 April 2017.