IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

COURT OF PROTECTION

[2011] EWHC 3590 (COP).

No. COP 1208 7274

Royal Courts of Justice

Wednesday, 21st December 2011

Before:

MR. JUSTICE MOSTYN

(**In Private**)

Re "M"

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Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

MR. A. RUCK KEENE (instructed by Bindmans) appeared on behalf of the Applicant.

THE RESPONDENTS did not attend and were not represented.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE MOSTYN:

1. This is an application for the rapid and effective recognition of an order of the High Court of the Irish Republic dated the 15th December 2011 concerning NM. I need not set out the background to this case as it is set out more than fully in the skeleton argument of Mr. Ruck Keene dated the 15th December.

2. By s. 63 of, and Schedule 2 to, the Mental Capacity Act 2005, the terms of the Hague Convention on the International Protection of Adults concluded in the year 2000 is incorporated into English domestic law, and while it is the case that Ireland has not yet ratified the Convention -- and it may well be the case that England has not yet ratified the Convention, albeit Scotland has -- the terms of the Treaty are part of our domestic law whether or not the foreign country whose order it is sought to be enforced is within or without the Convention.

3. Under paragraph 19(1) of Schedule 3 it is provided that,

> "A protective measure taken in relation to an adult under the law of a country other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country".

4. It is to be noted that pursuant to that provision the recognition is mandatory, and in circumstances where (as I shall call him) NM is habitually resident in the Republic of Ireland then at the time that the decision was made then it shall be recognised, subject to sub-paragraphs (3) and (4), which provide as follows,

> "3. But the court may disapply this paragraph in relation to a measure if it thinks that,
>
> (a) the case in which the measure was taken was not urgent,
>
> (b) the adult was not given an opportunity to be heard, and
>
> (c) that permission amounted to a breach of natural justice"
>
> None of these possible exceptions apply in this case.
>
> "4. It may also disapply this paragraph in relation to a measure if it thinks that,

(a) recognition of the measure would be manifestly contrary to public policy,

(b) the measure would be inconsistent with a mandatory provision of the law of England and Wales or,

(c) the measure is inconsistent with one subsequently taken or recognised in England and Wales in relation to the adult".

5. In relation to the question of public policy, the reason for the inclusion of that provision is obvious, because this country is obviously not going to enforce oppressive or tyrannical orders for the detention which amounts to a deprivation of liberty at the behest of a foreign court. It is a sad fact that in the past political systems have used psychiatric institutions to apply their ideology, and one is reminded of what happened in Soviet Russia as dramatised in Sir Tom Stoppard's great play Every Good Boy Deserves Favours and were any kind of protective measure to be stained by any kind of ideology of that nature then I have no doubt that this court would refuse to recognise it as being contrary to public policy. It is interesting to speculate what the framers of the Convention had in mind in sub sub-paragraph (b), and indeed Mr. Ruck Keene has drawn my attention to a footnote to the explanatory notes to the Treaty. It is on page 62 of the notes at footnote 83, in these terms,

> "A number of delegates observed that this edition was pointless and that at the recognition stage the exception of public policy was sufficient to achieve the deserved result, particularly to refuse to recognition a medical measure contrary to a mandatory law of the State addressed".

I have to say, I agree with that observation, and we have struggled in this courtroom to conceive of a measure that fell within sub sub-paragraph (b) which was not contrary to public policy under sub sub-paragraph (a).

6. Mr. Ruck Keene in his skeleton argument has responsibly drawn my attention to the fact that under s. 16A of the Mental Capacity Act, the court may not include in a welfare order a provision which authorises the person to be deprived of his liberty. The reference to a welfare order is to an order under s. 16(2)(a). However, an order made by me under paragraph 19 of Schedule 3 is not a welfare order under s. 16(2)(a). The whole point of s. 16A is to ensure that courts do not outflank the mandatory provisions of s. 4A and Schedule A1 by making, in effect, deprivation of liberty orders under s. 16(2)(a), but that is not connected at all to the freestanding power to recognise a foreign order of this nature under paragraph 19 of Schedule 3, and so whilst Mr. Ruck Keene has fairly and responsibly drawn my

attention to that, it is not something that impacts on any possible exercise of discretion under paragraph 19(4).

7. Accordingly, in these circumstances, I have no hesitation in recognising the Irish order and making the order in the terms that Mr. Ruck Keene has put before me, which I am told by him, on instructions where he has satisfied himself of the accuracy of his instructions, are agreed by the respondents to this application.

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