Neutral Citation Number: [2011] EWCA Civ 1305

Case No: B4/2011/0258

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
MR JUSTICE MOSTYN
COP 11760866

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2011

Before :

LORD JUSTICE THORPE
LORD JUSTICE GROSS
and
MRS JUSTICE BARON

- -

Between :

RK	**Appellant**
(By her litigation friend the Official Solicitor)	
- and -	
(1) BCC	**Respondents**
(2) YB	
(3) AK	

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- -

Richard Gordon QC and Joseph O'Brien (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Jonathan Cowen (instructed by **BCC**) for the **First Respondent**
David Lock QC and Laura Davidson (acting pro bono instructed by **Anthony Collins Solicitors**) for the **Second and Third Respondent**

Hearing dates : 12 – 13 October 2011

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Approved Judgment

Lord Justice Thorpe:

The Facts

1. This is an appeal from the judgment of Mostyn J dated 21 December 2010 pursuant to permission granted by Wilson LJ on 9 June 2011. Although we heard the appeal in open court on 12 and 13 October 2011, we hereby impose reporting restrictions. In particular, nothing must be published which in any way identifies any of the parties to the proceedings, whom we propose to identify only by initials or function. Any application to lift the restrictions imposed by this judgment should be made on notice to the full court. Mostyn J sat as a judge of the Court of Protection. These proceedings in that court were initiated by the mother of RK as her litigation friend. By her Application Form issued on the 23 September 2009 the applicant stated the matters that she wanted decided in paragraph 5.1, the orders that she sought in paragraph 5.2, and the perceived benefits to RK in paragraph 5.3, all as follows:-

> "5.1 Upon determination of whether RK lacks capacity to decide the following:
>
> 1. What her health and social needs are;
>
> 2. Identify an appropriate residential placement suitable for her needs;
>
> 3. Identify appropriate medical and/or therapeutic interventions to meet her needs.
>
> 5.2 1. An interim report be prepared in relation to RK's capacity to make decisions specified in 5.1 above.
>
> 2. An up to date core assessment and care plan be completed.
>
> 3. An interim report be prepared in relation to whether KC home is appropriate to meet RK's needs.
>
> 4. BCC disclose details of why RK has moved residence, the s47 investigation, risk assessments and any other documents relating to RK and which impact upon her under the s20 agreement.
>
> 5. It be declared that BCC will not take any decision in relation to RK's welfare or residence without consulting her parents as required.
>
> 5.3 To determine RK's capacity to make welfare decisions.
>
> To investigate the risks posed to RK by BCC's choice of residence and decision making and whether those choices and decisions are reasonable and in RK's best interests.
>
> To ensure RK's parents are kept informed as required under s20 agreement of BCC's proposed decisions in relation to RK's welfare.

> To protect RK from abuse she may be suffering whilst in the care of BCC, and investigate the nature of that abuse."

2. In her Application Notice dated 30 September 2009 the applicant sought a direction for the appointment of the Official Solicitor to represent RK if she were deemed to lack capacity. The stated grounds were as follows:-

> "YB is RK's representative and litigation friend. RK is voluntarily placed with the Local Authority and as such parental responsibility is shared with BCC. As RK can not communicate, YB as her mother is best placed to indicate what RK's wishes and feelings are and for this reason is acting as her litigation friend. RK is very upset in her current placement and is not eating which among other reasons, is why YB wishes to bring the application on RK's behalf to have RK's best interests determined. YB has no view on what is in RK's best interests in so far as she will agree with whatever the Court decides, should RK be deemed as not having capacity.
>
> As there is a degree of urgency to the application, RK via YB made the application for determination of her best interests rather than negotiating with the Local Authority to make the application.
>
> Once capacity has been determined, if RK is deemed to not have capacity; YB wishes to step aside as RK's litigation friend and allow the Official Solicitor to represent her daughter's interests."

3. The order of 24 September 2009 to which the later Application relates was made by District Judge Walton in London. He granted the applicant permission to proceed pursuant to Section 50(2) of the Mental Capacity Act 2005, he joined BCC and the father as parties and he directed a Section 49 report.

4. The District Judge made a further order on 25 November following the arrival of the Section 49 report completed on the previous day. By the second order he appointed the Official Solicitor as RK's litigation friend, transferred the case to Birmingham and added standard directions.

5. As the case papers demonstrate, the issue raised by the applicant was a practical one: She wanted the Court of Protection to rule on BCC's case management and particularly its continuing placement of RK at KC home. The application had been issued in a rush following an emergency move.

6. In Birmingham the matter was listed before HHJ Cardinal, the Court of Protection nominated judge. At a directions hearing on 2 June 2010 the Official Solicitor asserted that the current care plan and arrangements for RK might include a deprivation of liberty. Accordingly the first paragraph of the order of 2 June 2010 transferred the case forthwith to a high court judge sitting in the Court of Protection 'for a hearing on the issue of whether the current arrangements amount to a deprivation of RK's liberty.'

7. The matter came before Mostyn J on 28 July 2010 when he fixed the preliminary issue hearing for December 2010.

The Law

8. Most of the argument focused on the second of the 3 elements that must be satisfied to establish a breach of Article 5, namely the element of consent.

9. Mostyn J dealt with this element in paragraph 33 of his judgment when he said:-

> "My primary decision is that, given the terms of Section 20(8), the provision of accommodation to a child, whether aged seventeen or seven, under Section 20(1), (3), (4) or (5) will not ever give rise to a deprivation of liberty within the terms of Article 5 of the European Convention on Human Rights. If the child is being accommodated under the auspices of a care order, interim or full, or if the child had been placed in secure accommodation under Section 25, then the position might be different, but that is not the case here. "

10. This proposition is of course heavily criticised by Mr Gordon QC and Mr Lock QC and even Mr Cowen chooses to modify the proposition before defending it.

11. Mr Cowen's modification expressed in paragraph 12 of his skeleton argument is to the following effect, italicising his additional words:-

> "Given the terms of Section 20(8) of the Children Act 1989 *where the accommodation was being provided with the consent of a person who is lawfully exercising parental responsibility,* the provision of accommodation to a child of any age under Sections 20(1), 20(3), 20(4) or 20(5) will not ever give rise to a deprivation of liberty within the terms of Article 5 of the ECHR."

12. The point that Mr Cowen sought to make in this paragraph was not generally understood and indeed the paragraph was described as Delphic.

13. It was not until Mr Cowen was invited to respond on this aspect that a consensus emerged at the Bar.

14. The consensus is to this effect: The decisions of the European Court of Human Rights in *Neilson v Denmark* [1988] 11EHRR 175 and of this court in *Re K* [2002] 2WLR 1141 demonstrate that an adult in the exercise of parental responsibility may impose, or may authorise others to impose, restrictions on the liberty of the child. However restrictions so imposed must not in their totality amount to deprivation of liberty. Deprivation of liberty engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the deprivation of liberty of a child.

15. This consensus was supported and accepted by the court. How does it apply to this case on its facts?

16. There is no doubt in my judgment that RK's parents consented to the restrictions that were imposed on her liberty on or after her reception into Section 20 care. Mostyn J concluded that a finding of consent was inevitable from the simple fact that the parents had not exercised their power to remove RK from care in the exercise of their rights under Section 20(8). It has been submitted that is not a proper inference and further that the decision of this court in *Re T* [1999] 3WLR 182 establishes that a consent originally given cannot be taken to be continuous simply because it has not been withdrawn.

17. However that may be, the facts of the present case are all one way.

18. Obviously a reception into Section 20 care must be documented by the use of prescribed forms. The absence of those forms from the wealth of documents prepared for this appeal seemed remarkable. No less remarkable was the laboured efforts of BCC to produce these documents at our request.

19. However we eventually received the statutory form dated 22 May 2009 which marked RK's first reception into Section 20 care. Her parents signified their consent by signing the appropriate box.

20. Clearly the parents were apprehensive at the prospect of RK's removal from her first placement at O house. However the evidence demonstrates that when that move was made on 10 September 2009 it was in the circumstances of a dramatic emergency when it emerged that RK had been physically abused at O house and therefore could not safely return there, even for a last one night.

21. The evidence also demonstrates that BCC made every effort to engage the parents in the situation but without response.

22. However on the 14 September 2009 the parents signed the Looking after Children Care Plan thereby recording their consent.

23. Finally I record their stance in the court below recorded in paragraph 34 of the judgment as follows:-

> "(Mr Lock's position) on behalf of the parents is that whilst they have considerable reservations about the care regime for their daughter at KCH, in the absence of any practical alternative they accept that KCH is the most suitable place for RK at these present times. "

24. Taking this evidence as a whole it is plain that Mostyn J was correct to record the parents' consent, even if his analysis is open to question.

25. Accordingly the crucial point returns to the first element. Did the restrictions authorised by the parents, individually or cumulatively, amount to deprivation of liberty?

26. In paragraph 39 of his judgment, Mostyn J trenchantly declared they did not. He said:-

> "I find it impossible to say, quite apart from s20(8) Children Act 1989, that these factual circumstances amount to a "deprivation of liberty". Indeed it is an abuse of language to suggest it. To suggest that taking steps to prevent RK attacking others amounts to "restraints" signifying confinement is untenable. Equally, to suggest that the petty sanctions I have identified signifies confinement is untenable. The supervision that is supplied is understandably necessary to keep RK safe and to discharge the duty of care. The same is true of the need to ensure that RK takes her medicine. None of these things whether taken individually or collectively comes remotely close to crossing the line marked "deprivation of liberty"."

27. In my judgment he was right to do so. The restrictions were no more than what was reasonably required to protect RK from harming herself or others within her range.

28. It was the parents' case that home care was impossible without an extensive supportive care package. The purpose and effect of such a home care package would be to protect RK and others from harm. In other words wherever RK is accommodated the same restrictions on her liberty are essential.

29. According I am in no doubt that Mostyn J reached the correct conclusion on the evidence before him even if I would not support all his reasoning.

30. By the time of our hearing the appeal appeared academic. RK had achieved her majority and was no longer placed at KC home but was in adult supported accommodation. With hindsight it appeared that the sole effect of the Art 5 challenge was to deprive the parents of the review of the day to day case management review sought by the Application of 23 September 2009. In those circumstances I consider it sufficient to express no more than a clear conclusion on the outcome below. I would dismiss this appeal.

Lord Justice Gross

31. For the reasons given by Thorpe LJ, I agree that this appeal should be dismissed and add only a very few words of my own.

32. Mostyn J gave two grounds for his decision:

    i) The primary ground (judgment, at [33]) was that, given the terms of s.20(8) of the Children Act 1989 ("the Act"), the provision of accommodation to a child under s-s 20 (1), (3), (4) or (5) "will not ever give rise to a deprivation of liberty within the terms of Art 5 of the European Convention on Human Rights." The learned Judge acknowledged that the position might be different if the child was accommodated under the auspices of a care order or if the child had been placed in secure accommodation under s.25; but that was not this case.

    ii) The secondary ground (judgment, at [39]) was that, on the facts of the present case and quite apart from s.20(8) of the Act, it was "impossible" to say that

> there had been a "deprivation of liberty" within Art. 5, ECHR. To suggest that it was, the Judge said, amounted to "an abuse of language".

Provided either of these grounds is well-founded the appeal must be dismissed.

33. As I am firmly of the view that the decision of the Judge was correct on the secondary ground, it is unnecessary to add anything as to the primary ground, beyond that which Thorpe LJ has already said.

34. In reaching this conclusion as to the secondary ground, in full agreement with the reasoning of Thorpe LJ, I am particularly and respectfully struck by the force of Lord Hope of Craighead's observation in *Austin v Metropolitan Police* [2009] UKHL 5; [2009] 1 AC 564, at [34]:

> " I would hold therefore that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances. "

35. Once such a "pragmatic approach" taking "full account of all the circumstances" is adopted, the conclusion follows, as explained by Thorpe LJ at [27] – [29], *supra.* The restrictions in question did not amount to a deprivation of liberty. Unfortunately, certainly with hindsight, the Art 5 challenge has had the consequence underlined by Thorpe LJ at [30], *supra*, at a not insignificant cost to the public purse.

Mrs Justice Baron

I agree also.