Neutral Citation Number: [2015] EWCA Civ 1054

Case No: B4/2015/1272

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
LEEDS CIVIL HEARING CENTRE
MR JUSTICE MOSTYN
[2015] EWCOP 13
Case No. 12488518

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2015

Before :

THE MASTER OF THE ROLLS
LADY JUSTICE BLACK
and
LORD JUSTICE UNDERHILL

- -

Between:

KW (BY HER LITIGATION FRIEND,) AND OTHERS	**Appellant**
- and -	
ROCHDALE METROPOLITAN BOROUGH COUNCIL	**Respondent**

- -
- -

Adam Fullwood (instructed by **Peter Edwards Law Solicitors**) for the **Appellant**
Simon Burrows (instructed by **Ann Butterfield, Rochdale Metropolitan Borough Council**) for the **Respondent**

Hearing date: 8 October 2015

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Approved Judgment

Master of the Rolls: this is the judgment of the court.

The background

1. KW is aged 52. She is severely mentally incapacitated. As a result of brain injury that she suffered during surgery in 1996, she was left with cognitive and mental health problems, epilepsy and physical disability. She was discharged from hospital into a rehabilitation unit and thence to her own home with support 24 hours a day.

2. The present position is that she is only just ambulant with the use of a wheeled Zimmer frame. In a judgment given on 18 November 2014 ("the first judgment"), Mostyn J said:

> "She believes it is 1996 and that she is living at her old home with her three small children (who are now all adult). Her delusions are very powerful and she has a tendency to try to wander off in order to find her small children. Her present home is held under a tenancy from a Housing Association. The arrangement entails the presence of carers 24/7. They attend to her every need in an effort to make her life as normal as possible. If she tries to wander off she will be brought back."

3. The first judgment was given in the context of a hearing in the Court of Protection to determine an application by Rochdale Metropolitan Borough Council, being the local authority responsible for KW's care, for directions under the Mental Capacity Act 2005. One of the questions was whether she was subject to a "deprivation of liberty" within the meaning of article 5 of the European Convention on Human Rights ("the Convention"). If there is a deprivation of liberty, then it has to be authorised either by a court or by procedures known as the deprivation of liberty safeguards. In *P v Cheshire West and Chester Council* and *P and Q v Surrey County Council* [2014] UKSC 19, [2014] 1 AC 896 ("*Cheshire West"*) the majority in the Supreme Court held that, in cases involving the placement of mentally incapacitated persons, the test to be applied in determining whether they are being deprived of their liberty is whether they are under continuous supervision and control of those caring for them and are not free to leave.

4. Mostyn J purported to apply the test required by *Cheshire West*, although it is clear from para 19 of the first judgment that he did not agree with it. He said at para 17 that it was impossible to see how the protective measures in place for KW could linguistically be characterised as a "deprivation of liberty". Quoting from JS Mill, he said that the protected person was "merely in a state to require being taken care of by others, [and] must be protected against their own actions as well as external injury". At para 25, he said that he found that KW was not "in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom".

5. For this reason, he felt able to distinguish the case of MIG on the facts (she was one of the parties in *Cheshire West*). The order of the court (issued on 14 January 2015) declared at para 5 that it was in KW's best interests to reside at the address at which

she was residing and to receive a package of care in accordance with her assessed needs. Para 6 recited: "That package of care does not amount to a deprivation of liberty within the terms of article 5 of the [Convention]".

The first appeal

6. KW appealed to the Court of Appeal. Her principal ground of appeal was that the judge erred in concluding that KW was not being deprived of her liberty in her home. Section 5 of the notice of appeal stated that the part of the order which the appellant wished to appeal was "the decision that KW is not deprived of her liberty at home". Section 8 stated that the order that the appellant was seeking was that "KW is deprived of her liberty at home".

7. The respondent did not oppose the appeal. A consent order was made by this court on 30 January 2015 in these terms:

> "UPON reading the appeal bundle filed with the court.
>
> AND UPON the Respondent confirming that it does not intend to oppose the appeal
>
> IT IS ORDERED that:
>
> 1. This appeal is allowed.
>
> 2. For the review period as defined below, KW is to reside and receive care at home pursuant to arrangements made by Rochdale Council and set out in the Care Plan; and to the extent that the restrictions in place pursuant to the Care Plan are a deprivation of KW's liberty, such deprivation of KW's liberty is hereby authorised.
>
> 3. If a change or changes to the Care Plan that render it more restrictive have as a matter of urgent necessity been implemented Rochdale Council must apply to the Court of Protection for an urgent review of this order on the first available date after the implementation of any such changes.
>
> 4. If a change or changes to the Care Plan that render it more restrictive are proposed (but are not required as a matter of urgent necessity) Rochdale Council must apply to the Court of Protection for review of this order before any such changes are made.
>
> 5. In any event. Rochdale Council must make an application to the Court no less than one month before the expiry of the review period as defined below for a review of this order if at that time the Care Plan still applies to KW. Such application shall be made in accordance with any Rules and Practice Directions in effect at the date of the application being filed or, if not otherwise specified, on form COPDOL10.

> 6. Any review hearing shall be conducted as a consideration of the papers unless any party requests an oral hearing or the Court decides that an oral hearing is required.
>
> 7. "The review period" shall mean 12 months from the date on which this order was made or, if an application for review has been filed at Court before that date, until determination of such review application.
>
> 8. Nothing shall published that will reveal the identify of the Appellant who shall continue to be referred to as "KW" until further order pursuant to section 12 of the Administration of Justice Act 1960.
>
> 9. There shall no order for costs between the parties.
>
> 10. There shall be a detailed assessment of KW's public funding costs."

8. Attached to the order was the following:

> "Statement of reasons for allowing the appeal as required pursuant to CPR, PD52A at para 6.4.
>
> The reason for inviting the Court of Appeal to allow the appeal by consent is that the learned judge erred in law in holding that there was not a deprivation of liberty. He was bound by the decision of the Supreme Court in P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & ors [2014] UKSC 19; [2014] AC 986 ("Cheshire West") to the effect that a person is deprived of their liberty in circumstances in which they are placed by the State in a limited place from which they are not free to leave. It is accepted by both parties on facts which are agreed that this was the position in the case of KW and that the learned judge also erred in holding that KW might soon not have the ability to walk or leave home on her own."

The second judgment

9. On 2 February 2015, Mostyn J directed that the case should be reserved to him. On 3 February, he directed that a hearing should take place for:

> "Directions as to the scope of (and reasons for) the additional obligations imposed on this court by virtue of the consent order made by the Court of Appeal on 30 January 2015."

10. The parties appeared before him on 2 March. They expected that he would give effect to the consent order which, it was common ground, had decided that any review hearings would be conducted on the basis that KW was being deprived of her liberty at home. Contrary to their expectations, however, the order that the judge made was that:

> "1. Any review hearing in accordance with paragraphs 3 or 4 of the Court of Appeal's order dated 30 January 2015 can only be triggered if the restrictive changes proposed amount to a bodily restraint comparable with that which obtained in P v Cheshire West and Cheshire Council [2014] 1 AC 896.
>
> 2. A review hearing under paragraph 5 of the Court of Appeal order dated 30 January 2015 shall be a hearing de novo to determine if a deprivation of liberty exists."

11. In order to understand how this surprising decision was made, it is necessary to examine the reserved judgment of Mostyn J ("the second judgment") which he gave on 13 March in a little detail. But before we do so, we need to refer to the relevant procedural rules.

12. CPR 52.11 provides:

> "(1) Every appeal will be limited to a review of the decision of the lower court unless –
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> ….
>
> (3) The appeal court will allow an appeal where the decision of the lower court was –
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> …….
>
> "

13. Section 6 of CPR PD 52A provides:

Allowing unopposed appeals or applications on paper

> **"6.4** The appeal court will not normally make an order allowing an appeal unless satisfied that the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity. The appeal court may, however, set aside or vary the order of the lower court by consent and without determining the merits of the appeal if it is satisfied that there are good and sufficient reasons for so doing.

> Where the appeal court is requested by all parties to allow an application or an appeal the court may consider the request on the papers. The request should set out the relevant history of the proceedings and the matters relied on as justifying the order and be accompanied by a draft order."

14. In the second judgment, the judge said that para 6.4 of the PD cannot be used to determine an appeal on the merits (para 12) and the procedure could not be used "to overthrow **on the merits** the central basis of a first instance decision particularly where that involved a clear statement of legal principle in relation to the facts as found" (para 13). He said that the limited researches he had conducted in the field of family law revealed that, where a merits based decision had been reached at first instance which all parties agreed should be set aside on appeal, there is a hearing and a judgment (para 14). He added: "the judge whose decision is being impugned is surely entitled to no less, and there is a plain need to expose error so that later legal confusion does not arise". He then cited examples of cases where that had happened. The researches of counsel had not revealed any case where a fully reasoned decision has been overturned on the merits by consent and without a judgment.

15. At para 20, he said:

> "If this determination does not fall within para 6.4 then there has to be a judgment explaining why my decision was wrong (no-one has suggested that it was procedurally unjust). But there is no judgment. Mr Fullwood agrees that the annex to the order is not a judgment. So I do not know why my jurisprudential analysis in this case as augmented in the Tower Hamlets case is said to be wrong. The narrative in the annex does not say anything other than that I was wrong, aside from a mere assertion that I made a material error as to KW's downward path in terms of her mobility, which, as I have explained above, was immaterial to my decision."

16. And then:

> "22. Even though the Court of Appeal appears to have taken a procedurally impermissible route, the rule of law depends on first instance judges complying scrupulously with decisions and orders from appellate courts. And so I must here, even if I happen to think that the order of the Court of Appeal is ultra vires. The allowing of the appeal should be construed as setting aside para 6 of my order, even if it does not actually say so. But does the order replace it with a declaration that KW is being deprived of her liberty? It does not explicitly say so, which is highly surprising. Further, para 2 of the order is phrased in highly ambiguous language. It says "to the extent that the restrictions in place pursuant to the care plan are a deprivation of KW's liberty, such deprivation of KW's liberty is hereby authorised." The use of this conditional language suggests to me that Court of Appeal has not actually decided that this is a situation of state detention. What they are saying that **if** it is

> then it is authorised. In my judgment para 2 of the order does not amount to a declaration that KW is being deprived of her liberty.
>
> 23. It therefore seems to me that we are back to square one with no-one knowing whether KW is, or is not, being detained by the state within the terms of Article 5. That issue will have to be decided at the next review hearing whether it is held under paras 3, 4 or 5 of the Court of Appeal order. Pursuant to para 6 I now direct that any review hearing will be conducted by me at an oral hearing and on the basis of full fresh evidence concerning KW's circumstances. Until then KW's status must be regarded as being in limbo.
>
> 24. For the avoidance of any doubt it is my finding that the hearing ordered by para 5 of the Court of Appeal order is not a review of a determined situation of state detention but is, rather, a hearing de novo to determine if one exists.
>
> 25. Further, it is my ruling that a hearing under paras 3 or 4 can only be triggered if the restrictive changes proposed amount to bodily restraint comparable to that which obtained in *P v Cheshire West and Chester Council*. Any restrictions short of that will amount to no more than arrangements for her care in her own home and would not, consistently with my previous judgments, amount to state detention. Therefore, in such circumstances there would be nothing to review under paras 3 and 4.
>
> 26. It will be apparent from what I have written above that in the absence of a reasoned judgment from the Court of Appeal explaining why I was wrong I maintain firmly the correctness of my jurisprudential analysis in my principal decision as augmented in my Tower Hamlets decision. In this difficult and sensitive area, where people are being looked after in their own homes at the state's expense, the law is now in a state of serious confusion."

The grounds of appeal from the second judgment

17. The principal ground of appeal is that the judge misinterpreted the consent order when he said that the Court of Appeal had not decided that KW was being deprived of her liberty.

18. We accept that (i) nowhere does the order explicitly state that there was a deprivation of liberty; and (ii) the use in para 2 of the order of the words "to the extent that the restrictions in place pursuant to the Care Plan are a deprivation of KW's liberty, such liberty is hereby authorised" might suggest that the court was not deciding that the restrictions were in fact a deprivation of liberty. But read in their context, that is clearly not the correct interpretation for at least two reasons. First, para 2 must be read in the light of para 1, which governs the whole order. Para 1 states that the

appeal is allowed. The remaining paragraphs set out the court's directions consequential upon the allowing of the appeal. When read together with section 6 of the notice of appeal, the order that the appeal was allowed necessarily involved the court deciding that KW's care package does involve a deprivation of liberty. The words "to the extent that" etc are perhaps unfortunate, but they cannot detract from what allowing the appeal necessarily entailed. These words were derived from para 11 of the Model Re X Order which had been published on the Court of Protection website and which practitioners had been encouraged to use. We were told by counsel that this form of words is not universally used. We understand that the form of words more often used is along the lines of: "P is deprived of his or her liberty as a result of arrangements in the Care Plan and these are lawful". This is undoubtedly preferable to the earlier version.

19. Secondly, para 2 must also be read in the light of the consequential orders set out at paras 3 to 5 of the consent order. The reviews there provided for are clearly reviews of the kind contemplated where there is a deprivation of liberty.

20. It follows that the judge was wrong to hold that it had not been decided by this court that KW was being detained by the state within the terms of article 5. The appeal must, therefore, be allowed.

Was the consent order made ultra vires?

21. Was the judge right to say that the Court of Appeal took "a procedurally impermissible route" so that its decision was "ultra vires"? It is important that we comment on this statement in view of the general importance of the point and the fact that the judge's comments have apparently given rise to considerable degree of public interest. We acknowledge that, despite these comments, the judge did say that the rule of law depends on first instance judges "complying scrupulously with decisions and orders from appellate courts". And, as we have said, that is what he purported to do.

22. An order of any court is binding until it is set aside or varied. This is consistent with principles of finality and certainty which are necessary for the administration of justice: *R (on the application of Lunn) v Governor of Moorland Prison* [2006] EWCA Civ 700, [2006] 1 WLR 2870, at [22]; *Serious Organised Crime Agency v O'Docherty (also known as Mark Eric Gibbons) and another* [2013] EWCA Civ 518 at [69]. Such an order would still be binding even if there were doubt as to the court's jurisdiction to make the order: *M v Home Office* [1993] UKHL 5; [1994] 1 AC 377 at 423; *Isaacs v Robertson* [1985] AC 97 at 101-103. It is futile and, in our view, inappropriate for a judge, who is called upon to give effect to an order of a higher court which is binding on him, to seek to undermine that order by complaining that it was ultra vires or wrong for any other reason.

23. In any event, the judge was wrong to say that the consent order was ultra vires because it was made by a procedurally impermissible route.

24. The issue turns on the true construction of para 6.4 of PD 52A. Rule 52.11 provides that the appeal court will allow an appeal where the decision of the lower court (a) was wrong or (b) was unjust because of a serious procedural or other irregularity in the proceedings of the lower court. It is concerned with the "hearing of appeals"

which is done by way of a review or, in certain circumstances, a re-hearing. What is envisaged by rule 52.11 is a hearing which leads to a decision on the merits. To use the language of the first sentence of para 6.4 of the practice direction, this is what an appellate *normally* does when allowing an appeal.

25. The use of the word "normally" in this sentence presages a departure from rule 52.11 in specified circumstances. The word "normally" followed by the use of the word "however" in the following sentence makes it clear that what follows specifies the circumstances in which the court may depart from the norm. The second sentence states that the court may set aside or vary the order of the lower court without determining the merits of the appeal, but only if (i) the parties consent and (ii) the court is satisfied that there are good and sufficient reasons for taking this course. That such a decision will be made on paper is clear from the heading to para 6.4 and the words of the third sentence. It is true that the second sentence speaks of setting aside or varying the order under appeal, whereas the first sentence (faithful to rule 52.11) speaks of allowing an appeal. But we do not consider that there is any significance in this difference of language. Rule 52.10 provides inter alia that the appeal court has power to "(2)(a) affirm, set aside or vary any order or judgment made or given by the lower court". These words are picked up precisely in para 6.4 which sets out the powers that the appeal court has when allowing an appeal.

26. The appeal court, therefore, has a discretion to allow an appeal by consent on the papers without determining the merits at a hearing if it is satisfied that there are good and sufficient reasons for doing so. What are good and sufficient reasons? The answer will depend on the circumstances of the case, but we think that it would be helpful to provide some guidance. If the appeal court is satisfied that (i) the parties' consent to the allowing of the appeal is based on apparently competent legal advice, and (ii) the parties advance plausible reasons to show that the decision of the lower court was wrong, it is likely to make an order allowing the appeal on the papers and without determining the merits. In such circumstances, it would involve unnecessary cost and delay to require the parties to attend a hearing to persuade the appeal court definitively on the point.

27. At para 14 of his judgment, the judge said that, where a merits based decision has been reached at first instance which all parties agree should be set aside on appeal, para 6.4 requires there to be a hearing and a judgment. He added: "The judge whose decision is being impugned is surely entitled to no less, and there is a plain need to expose error so that later legal confusion does not arise". We disagree. Para 6.4 does not require a decision on the merits in every case where there has been a decision on the merits in the lower court. There is no reason to restrict in this way the wide discretion conferred by para 6.4 to allow an appeal by consent without a hearing followed by a decision on the merits. The words "good and sufficient reasons" are very wide. Further, we reject the notion that the judge whose decision is under appeal has any entitlement to a decision on the merits. In deciding whether to make a consent order without a decision on the merits, the appeal court is only concerned with the interests of the parties and the public interest. The interests of the judge are irrelevant.

28. We accept, however, that there will be cases where it may be in the interest of the parties or the public interest for the court to make a decision on the merits after a hearing even where the parties agree that the appeal should be allowed. Mostyn J

referred to cases in the field of family law. For example, in *Bokor-Ingram v Bokor-Ingram* [2009] EWCA Civ 27, [2009] 2 FLR 922, the parties by consent asked the court to allow an appeal, set aside the order below and make a revised order. Thorpe LJ said:

> "5. A short disposal might have followed but for our concerns that the judgment below had already been reported …..and was causing, or was likely to cause, difficulty for specialist practitioners and judges in this field of ancillary relief.
>
> 6. Accordingly, we decided to state shortly why we had reached a preliminary conclusion that the appeal, had it not been compromised, would in any event have been allowed."

29. The fact that the decision of the lower court in that case was causing difficulty led the appellate court to conclude that there were not "good and sufficient reasons" for departing from the normal procedure of conducting a hearing and giving a decision on the merits.

30. An example from a different area of law is *Halliburton Energy Services Inc v Smith International (North Sea) Ltd* [2006] [EWCA] Civ 185. The lower court had held that a certain patent was invalid. Following the issue of appeal proceedings, the case was settled. The Court of Appeal was asked to make a consent order for the restoration of the patent to the register without deciding the merits of the appeal. The court decided that it had to hear the merits on the grounds that, for a patent to be restored to the register, what was needed was a decision reversing the order for revocation and showing that the previous decision was wrong. Here too (but for a very different reason), the appellate court considered that a decision on the merits was needed.

31. Mostyn J's first judgment did not raise any issue of law. It is true that his criticism of *Cheshire West* (what he describes in para 20 of the second judgment as his "jurisprudential analysis") raised a question of law. But this question has been settled by the Supreme Court relatively recently. The judge's analysis was, and could be, of no legal effect. It was irrelevant. Indeed, he purported to apply *Cheshire West* to the facts of the case. The basis of the appeal was that he had failed to apply *Cheshire West* to the facts properly. The public interest in the first judgment has focused on his criticisms of *Cheshire West.* Unlike *Bokor-Ingram*, the decision of the lower court in the present case should have caused no difficulty for practitioners or judges in the field. It was a decision on the facts which, with benefit of the advice of counsel and solicitors, the parties agreed was wrong. The Court of Appeal must have taken the view that the parties had advanced plausible reasons for contending that the judge's decision was wrong, so that there were good and sufficient reasons for allowing the appeal without deciding the merits. In our view, it was clearly right to do so.

32. This litigation has an unfortunate history. The judge has twice made decisions which have been the subject of an appeal to this court. On both occasions, the parties have agreed that the appeal must be allowed. This has led to considerable unnecessary costs to the public purse and unnecessary use of court time. We regret to say that it is the judge's tenacious adherence to his jurisprudential analysis leading to his conclusion that *Cheshire West* was wrongly decided that has been at the root of this.

He says at para 26 of the second judgment that "the law is now in a state of serious confusion". Even if *Cheshire West* is wrong, there is nothing confusing about it.

33. In our view, the judge's passionate view that the legal analysis of the majority in *Cheshire West* is wrong is in danger of distorting his approach to these cases. In the light of the unfortunate history, we are of the opinion that the review should be conducted by a different judge, who need not be a high court judge,

34. For the reasons that we have given, this appeal is allowed.