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Re PD

[2015] EWCOP 48

17/07/2015

Barristers
Henry Setright KC

Court
Court of Protection

Practice Areas
Court of Protection - Vulnerable Adult

Summary
Court of Protection judgment in which Baker J decided that enforcement and recognition of foreign orders for deprivation of liberty under Schedule 3 to the Mental Capacity Act 2005 can be made without joinder of the subject adult as a party where that adult had been a party in the substantive foreign proceedings

Facts
The court determined whether an adult who is the subject of an application under Schedule 3 to the Mental Capacity Act 2005 to recognise and enforce an order of a foreign court that deprives the adult of his or her liberty must be joined as a party to the application.

The subject of the application ('PD') was a 21-year old woman who suffered from severe anorexia nervosa. The High Court of Ireland had made an order providing for her transfer from Ireland to a specialist unit in England and Wales for urgent treatment.

In Irish proceedings PD had been represented by her Father acting as a guardian ad litem. The Health Service Executive of Ireland ('the HSE') now sought an order from the High Court of England and Wales for the recognition and enforcement of the Irish order. The application came before Baker J on 19 June 2015 and was granted, even though the young woman was neither a party nor represented. Baker J listed a further hearing at which the court reconsidered the issue of whether it was necessary to join PD as a party.

The court began by noting that in The Health Service Executive of Ireland v PA and Others [2015] EWCOP 38 Baker J had considered the provisions of schedule 3 to the Mental Capacity Act 2005 in detail. Schedule 3 gives effect in England and Wales to the Convention on the International Protection of Adults signed at The Hague on 13th January 2000, creating obligations in respect of the recognition, enforcement and implementation of "protective measures" imposed by a foreign court (as defined in para 5(1)). Under para 19 the court is required to recognise a protective measure taken under the law of the country in which the adult is habitually resident, but the court may disapply this provision in relation

to a measure if it thinks that the case in which the measure was taken was not urgent, that the adult was not given an opportunity to be heard, and the omission amounted to a breach of natural justice (paragraph 19(3)). In PA the court had been invited to consider whether 19(3) had a bearing on the opportunity which must be provided to the subject of a recognition and enforcement application (as opposed to the original application), but had declined to do so.

The court next considered the judgement of the Court of Appeal in Re X (Court of Protection Practice) [2015] EWCA Civ 599 in which Black LJ had cited the ECtHR in Winterwerp v Netherlands (1979) 2 EHRR 387 (seminal in relation to the procedural guarantees required in deprivation of liberty cases). Black LJ had concluded that whilst she could "accept that, in theory, P need not always be a party to the proceedings if his participation in them can reliably be secured by other means" (para 60), she "would have held that in order that deprivations of liberty are reliably subjected to scrutiny and effective procedural safeguards are provided against arbitrary detention in practice, it is presently necessary for P to be a party in the relevant proceedings" (para 108). This was distinguished on the basis that the issue in that case had been party status in substantive domestic proceedings, whereas in Schedule 3 cases the nature of the court's enquiry was one of limited review.

Held

Baker J cautioned that each case will turn on its own facts but concluded that, given the limited scope of the enquiry required of this court when considering an application under Schedule 3, it is not "indispensable" for that adult to be a party before this court on an application for recognition and enforcement of the foreign order where the adult has been a party and represented in the proceedings before the foreign court (paras 31 – 33).

Having regard to the importance of comity, Baker J said that "the court to which such an application is made [under Schedule 3 to the MCA 2005] must ensure that the limited review required by Schedule 3 goes no further than the terms of the Schedule require and, in particular, does not trespass into the reconsideration of the merits of the order which are entirely a matter for the court of origin" (para 37).

However, the court heeded some of the criticisms made by the Official Solicitor in relation to the precise nature of the order that the HSE sought to enforce and (at this review hearing) and amended it to address those criticisms. Further clarification on the process by which PD had been represented by her Father was sought from the Irish court. The court considered that, given the original urgency of the application the procedure employed, by which the order was made and reconsidered shortly thereafter when that urgency had abated, was appropriate in the circumstances.

Permission

To read the judgment click here.