Neutral Citation Number: [2021] EWCOP 68

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2021

Before:

MRS JUSTICE KNOWLES

Between:

ROYAL FREE LONDON NHS FOUNDATION TRUST	**Applicant**
- and -	
AA [1]	**Respondents**
(by her proposed litigation friend, the Official Solicitor)	
NA [2]	

Mr Rhys Hadden (instructed by **Bevan Brittan LLP**) for the Applicant
Miss Emma Sutton (instructed by **the Official Solicitor**) for the First Respondent
Mr Varun Zaiwalla (instructed by **Zaiwalla & Co)** for the Second Respondent

Hearing date: 14 December 2021

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was delivered following remote hearings conducted on a video conferencing platform. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the Respondents and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court

Mrs Justice Knowles :

1. I am concerned this afternoon with a lady, AA, who is 73 years old, and who is presently being treated in hospital in the intensive care unit. She has been diagnosed with a significant hypoxic brain injury which the Trust, who bring this application, say has caused her irreversible brain damage. She is currently intubated, ventilated and is receiving clinically assisted nutrition and hydration. The Trust say that AA lacks capacity to make any decisions regarding her care and treatment. The Applicant Trust is represented by Mr Hadden, the first respondent through her proposed litigation friend, the Official Solicitor, is represented by Miss Sutton, and the second respondent, NA, who is one of AA's sons, is represented by Mr Zaiwalla. Also in attendance at the hearing, and whose oral representations have been heard, is NVA, another of AA's sons, who appears in person.

2. I am asked as a preliminary issue to determine whether or not this court has jurisdiction to make any order in relation to AA. I pause to explain that the court is being invited by the Trust to withdraw life sustaining treatment for AA and place her on a palliative care pathway which will eventually result in her demise. The application before me this afternoon is opposed by the family. The Official Solicitor is present and has made submissions (through Miss Sutton) and prospectively acts as AA's litigation friend.

3. NVA has stated in clear terms that this court has no jurisdiction as AA is a Pakistani national and is domiciled in Pakistan. He has obtained a legal opinion from a former Chief Justice, Syed Haider Ali Pirzada of the Sindh High Court in Pakistan, dated 6 December 2021, which suggests that the Pakistani courts have 'exclusive jurisdiction' and that 'Pakistani law applies'. NA, another member of AA's family present today, is represented by Mr Zaiwalla. Mr Zaiwalla says to me (as far as I understand his position) that this court has no jurisdiction and (as I understand it) he relies in part on the submissions made by NVA who appears in person.

4. The justification of the Court of Protection to use its powers in relation to a person who appears to lack capacity is set out in the Trust's skeleton argument at paragraph 34. Paragraph 7, schedule 3 of the MCA 2005 ("the MCA") provides that:

> *(1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to—*
> *(a) an adult habitually resident in England and Wales,*
> *(b) an adult's property in England and Wales,*
> *(c) an adult present in England and Wales or who has property there, if the matter is urgent, or*
> *(d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.*
>
> *(2) An adult present in England and Wales is to be treated for the purposes of this paragraph as habitually resident there if—*
> *(a) his habitual residence cannot be ascertained,*
> *(b) he is a refugee, or*

(c) he has been displaced as a result of disturbance in the country of his habitual residence.

5. Paragraph 7(1)(a) and/or paragraph 7(1)(c) are relied upon by the Trust and the Official Solicitor – namely, that AA (on an interim basis) can be said to be habitually resident in England and Wales, and/or that she is present in England and Wales and that the matter is urgent. The other 2 categories do not apply in this case.

6. The legal framework regarding the court's jurisdiction in cross border matters was set out in my decision of last year in *The Health Service Executive of Ireland v IM et Ors* [2020] EWCOP 51 at paragraph 24-33. The applicable law has not altered to any great extent regarding habitual residence since that time. In the case of *IM* I said this:

> "24. The starting point for consideration of the court's jurisdiction in cross-border matters is Schedule 3 of the Mental Capacity Act 2005 ["the MCA"]. Section 63 of the MCA provides as follows:
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> "*Schedule 3 –*
> *a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2020 (Cm. 5881) (insofar as this act does not otherwise do so), and*
> *b) makes related provision as to the private international law of England and Wales.*"
> The 2000 Hague Convention ["the Convention"] relates to "*adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests*". Like other Hague Conventions, this provides a framework for the mutual recognition of measures by contracting states. Underlying the Convention is a presumption that jurisdiction over persons to whom the Convention applies will primarily be exercised by the courts of the state in which they are habitually resident. The Convention came into force on 1 January 2009 (following its ratification by three states). It has now been signed by 18 states including the United Kingdom and Ireland. Though the United Kingdom has ratified the Convention, it has declared that the ratification applies to Scotland alone and thus the Convention is not yet in force in England and Wales. Ireland has not ratified the Convention. Therefore, the Convention does not apply in this case and recourse must thus be had to the wider provisions of Schedule 3 of the MCA.
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> 25. In summary, certain provisions within Schedule 3 which make direct reference to certain aspects of the Convention (such as cross-border placements) are not yet in force. However, the greater part of Schedule 3 is in force and these provisions are clearly based upon the Convention and make use of Convention terms including "*habitual residence*". Schedule 3 para 2(4) expressly provides that "*an expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention*". The effect of the parts of Schedule 3 currently in force is to (a) clarify the scope of the Court of Protection's substantive jurisdiction and provide for the court to exercise this jurisdiction in certain circumstances even where the person in question is not habitually resident in England and

Wales; and (b) provide for the recognition and enforcement in England and Wales of orders of foreign courts relating to persons who lack capacity. However, these provisions are of general application and, unlike the Convention, do not require the relevant foreign state to have assumed reciprocal obligations to recognise English orders.

26. Schedule 3 para 7(1) provides as follows:
(1) "The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to –
a) an adult habitually resident in England and Wales, b) an adult's property in England and Wales,
c) an adult present in England and Wales or who has property there, if the matter is urgent, or
d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him."

27. It should be noted that "*adult*" has a specific definition under Schedule 3 para 4, namely being a person who "*as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and has reached 16*". This definition is not identical to the Convention meaning and is not confined to persons who lack capacity within the meaning of section 2 of the MCA. Further, it should also be noted that Schedule 3 para 7 is not on all fours with the Convention. Under Article 9 of the Convention, the authorities of a Contracting State where the property of the adult is situated have jurisdiction to take measures of protection concerning that property, "*to the extent that those measures are compatible with those taken by the authorities of the state of habitual residence*". That limitation is not found in Schedule 3 para 7(1)(b), so where an adult has property in England and Wales, the Court of Protection has jurisdiction over it concurrent with the courts of the state of habitual residence (see Re O (Court of Protection: Jurisdiction) [2014] Fam 197 at [10] and [28]).

Habitual Residence

28. "*Habitual residence*" is defined in neither the MCA nor the Convention. In An English Local Authority v SW and Others [2014] EWCOP 43, Moylan J (as he then was) held that the meaning to be given to habitual residence in the context of the Convention and the MCA should be the same as in other family law instruments such as the 1996 Hague Child Protection Convention and Council Regulation EC 2201/2003 (Brussels IIA) though he also acknowledged that different factors will be relevant and will bear differential weight (see [64]-[65]).

29. Thus, habitual residence is to be determined in accordance with the guidance given by the Supreme Court and the Court of Justice of the European Union in a number of recent cases. The following principles are key:

a) Habitual residence is a question of fact and not a legal concept such as domicile (A v A (Children: Habitual Residence) [2014] AC 1 at [54]);
b) The test adopted by the ECJ is the "*place which reflects some degree of integration by the child in a social and family environment*". The child's physical presence should not be temporary or intermittent (Proceedings brought by A (Case C-523/07) [2010] Fam 42 at [38]);
c) Consideration needs to be given to conditions and reasons for the child's stay in the state in question (Mercredi v Chaffe (Case C-497/10PPU) [2012] Fam 22 at [48]);
d) The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce (see A v A above at [54]);
e) Both objective and subjective factors need to be considered. Rather than consider a person's wishes or intentions, it is better to think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there - their state of mind (Re LC (Children) [2014] AC 1038 at [60]);
f) It is the stability of the residence that is important, not whether it is of a permanent character (Re R (Children) [2016] AC 76 at [16]); and
g) Habitual residence is to be assessed by reference to all the circumstances as they exist at the time of assessment (FT v MM [2019] EWHC 935 (Fam) at [13]).

30. In *Re LC (Children)* (see above), Baroness Hale stressed the need to look at the circumstances which led to the move in question:
"*The quality of a child's stay in a new environment, in which he has only recently arrived, cannot be assessed without reference to the past. Some habitual residences may be harder to lose than others and others may be harder to gain. If a person leaves his home country with the intention of emigrating and having made all the necessary plans to do so, he may lose one habitual residence immediately and acquire a new one very quickly. If a person leaves his home country for a temporary purpose or in ambiguous circumstances, he may not lose his habitual residence there for some time, if at all, and correspondingly he will not acquire a new habitual residence until then and later. Of course there are many permutations in between, where a person may lose one habitual residence without gaining another*".

31. In *An English Local Authority v SW* (see above), Moylan J made the following additional points:

a) The overarching test for habitual residence should be the same whether one is considering adults or children, although different factors may or will have differing degrees of relevance [66].
b) The expression "*degree of integration*" is an overarching summary or question rather than the sole, or even necessarily the primary factor in the determination of habitual residence. The court's focus should not be narrowed to this issue alone as a question of fact [68] and [72].
c) Integration, as an issue of fact, can be an emotive and loaded word. It is not difficult to think of examples of an adult who is not integrated at all

> in a family environment and only tenuously integrated in a social environment but who is undoubtedly habitually resident in the country where they are living. Integration as an issue of fact can also raise difficulties when a court is determining the habitual residence of a person who lacks capacity [70].
>
> d) The court "should not lose sight of the wood for the trees" [71].

32. Where an incapacitous adult has been moved from one jurisdiction to another, the question of the authority that the person effecting the move had to make it is also important. In *Re MN (Recognition and Enforcement of Foreign Protective Measures)* [2010] EWHC 1926 (Fam), Hedley J held that a move which was wrongful should not effect a change in the habitual residence of the incapacitated adults and should leave the courts of the country from which that person was taken free to take protective measures [22]. In determining whether a decision is wrongful, the court must look not only at the terms of the authority conferred upon the person taking the decision, but also at their motives for taking that decision.

33. The fact that the person effecting the move has formed a subjective view that it is in P's best interests may not suffice to prevent the move from being wrongful. Pursuant to s.4(9) and s.5(1)(b) of the MCA, a person making a decision on behalf of an incapacitous adult must "*reasonably believe*" the decision to be in their best interests. Thus, in *Re QD (Jurisdiction: Habitual Residence) (No 1)* [2019] EWCOP 56, Cobb J held that a decision by P's children to move him from Spain to England was wrongful and that they could not rely upon the doctrine of necessity [29]. The judge indicated that, whilst they may have believed that they were acting in P's best interests, this was not a reasonable belief on their part"

7. I turn now to the two bases for the court's jurisdiction that I am invited to consider, which I emphasise, is on an interim basis. Firstly, paragraph 7(1)(a) of schedule 3, MCA, and whether there is a reason to believe that AA is habitually resident in England and Wales. The position as far as habitual residence, is (and if I may summarise), not as clear as it might be. There is a deficit of information regarding those matters, but what is available here, as relied on by the Trust and the Official Solicitor, is the following:

   (1) Until 2 November 2021, when AA had capacity, it appears that she chose to live in England. The evidence is that prior to her hospitalisation she was 'well' and there were no concerns regarding her cognitive functioning;
   (2) The medical records refer to AA undergoing treatment for an ameloblastoma in the UK some 8 years ago in 2013;
   (3) Prior to her hospitalisation, AA resided in a property in London;
   (4) AA has been registered with a GP in England since 2018. I note that prior to her collapse on 2 November 2021, AA would have been in regular communication with her GP surgery as a consequence of significant health difficulties. Her past medical history includes Type 2 diabetes (insulin dependent), Osteoporosis, Hypertension and Reflux. She was prescribed medication and was therefore receiving treatment from her GP. She was registered here for ongoing health conditions prior to her collapse;

(5) She is currently receiving health care in England;
(6) She has family members here in the jurisdiction with whom she has contact.

8. In those circumstances, I am, on an interim basis, persuaded that AA is habitually resident in this jurisdiction and therefore the jurisdiction at paragraph 7(1)(a) of schedule 3 MCA is open to me.

9. Even if I am wrong about that, the jurisdiction set out in paragraph 7(1)(c) of schedule 3 MCA is also open to me in this case. AA is present in this jurisdiction, and the matter is urgent. The Official Solicitor and the Trust rely upon the decision of Mr Justice Cobb in *Re QD (Jurisdiction: Habitual Residence)* [2019] EWCOP 56 at paragraph 30 - that substantive orders are necessary in order 'to avert an *immediate threat* to life or safety and that there is an *immediate need* for further or other protection'. Applying that test, I am satisfied today that this court has to 'hold the ring' pending resolution of the dispute between AA's family and the Trust. Without jurisdiction, the Official Solicitor cannot be appointed to act as AA's litigation friend and an independent expert cannot be instructed to act independently and provide a proper analysis of AA's current medical state.

10. Additionally, this is a case where the family, by urgent means today, via air ambulance, seek to transfer AA from the jurisdiction across Europe to Istanbul, and then to Karachi. As far as I am aware, there has been no liaison between those who the family propose transfer and care for AA and her current treating clinicians in respect of the medical issues which would be necessary to allow a transfer to take place urgently. In those circumstances I am satisfied that the matter is urgent and that orders are necessary to avert an imminent threat to AA's wellbeing. I am not satisfied that I can avoid the exercise of my jurisdiction on an urgent basis. That seems to me to be inevitable given the position reached today, and in those circumstances, I conclude that both grounds are satisfied.

11. I am also required to give a ruling regarding an independent expert which is sought by the Official Solicitor in respect of AA's clinical condition. The instruction of a second opinion expert is a matter which is agreed between the Trust and the Official Solicitor, though of course it is the Official Solicitor who will instruct the proposed expert, pay the cost of that instruction, and make the necessary arrangements for that Doctor to see AA and consult with members of her family. The expert who is proposed is Dr Danbury who is a well-known intensive care specialist, and who has additional expertise to assist the court with the questions which the court will be concerned with at a substantive hearing. A draft letter of instruction has been provided which addresses AA's clinical condition, her prognosis and a consideration of the proposals of both the Trust and the family in order for an independent opinion to be provided about what is in AA's best interests regarding her future medical care. Dr Danbury can report by the 22 December 2021 and can see AA tomorrow afternoon.

12. The instruction is opposed by Mr Zaiwalla who says that the instruction is not necessary as there is sufficient clinical information before the court and that the court is able to make a substantive decision based on this current material. The instruction of Dr Danbury is also opposed by NVA, one of AA's other sons, but who opposes it on entirely different grounds. NVA says he does not place any trust in any Doctor in the UK or one appointed

by the court process, and that he already has second opinion evidence. On that basis, he opposes the instruction of an independent expert.

13. As submitted by the Official Solicitor, this court is going to be asked to make extremely difficult and complex decisions regarding AA's future care and treatment. The court will need to look at whether treatment should be withdrawn resulting in AA's inevitable death. In those circumstances, it is absolutely clear to me, as a Judge faced with making life changing decisions of the utmost importance, that all reasonable efforts should be taken to obtain the necessary information. It is necessary for AA to be properly examined by Dr Danbury and for him to discuss matters with her clinical team, and for him to have access to her notes and records. This is absolutely crucial. Whilst I appreciate that NVA says that he has obtained second opinion evidence from other sources, as I understand it, those opinions are from abroad, and the relevant professionals have not had the benefit of seeing AA in the flesh. In those circumstances, I approve the application of the Official Solicitor for the instruction of Dr Danbury to act as an independent expert to assist the court in this complex case.

14. Finally, I will determine an issue raised by AA's family regarding the involvement of the Official Solicitor. During the course of the hearing this afternoon, it has been said by the family that they speak with 'one voice', although this does not appear to be the case regarding the involvement of the Official Solicitor. Although no objections were made by Mr Zaiwalla on behalf of NA to the appointment of the Official Solicitor, it was through my exchanges with NVA, who appears in person, that it became clear that he opposes her involvement. He says that the Official Solicitor is not an independent person and suggests that it would be better for a family member better to act as AA's litigation friend.

15. This court is going to have to make some very difficult decisions if there is no agreement regarding what future medical care and treatment is in AA's best interests. In those circumstances, given AA lacks capacity to conduct these proceedings, it is self-evident that AA has to be represented in these proceedings. As this hearing has demonstrated, there is a clear divide regarding what is in AA's best interests between the family and the Trust. There is no basis in fact, and there is no evidence that the Official Solicitor is not independent as asserted by NVA. It is a mere assertion of his opinion. The Official Solicitor acts independently of the other parties and does not 'take sides'. In circumstances where there is no-one presently advanced as an alternative litigation friend who can act impartially to assist the court, I decline to endorse NVA's objection to the appointment of the Official Solicitor to act as AA's litigation friend. The Official Solicitor having accepted the invitation will so act. That is my decision.