Neutral Citation Number: [2017] EWCA Civ 34

Case No: B4/2016/2837

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
Mr Justice BAKER
[2016] EWCOP 45

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 January 2017

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

- -

Re MM (A Patient)

Between :

TERESA KIRK	**Appellant**
- and -	
(1) DEVON COUNTY COUNCIL	
(2) MM (by his litigation friend the Official Solicitor)	**Respondent**

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- -

Application dealt with on paper

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Approved Judgment

Sir James Munby, President of the Family Division :

1. This is an appeal from an order made by Baker J in the Court of Protection on 20 June 2016. Permission to appeal was granted by the full court (Sir James Munby P, Black and McFarlane LJJ) on 8 November 2016, on which occasion we stayed Baker J's order: *Devon County Council v Kirk* [2016] EWCA Civ 1221, paras 32-38. That judgment sets out the background in some detail.

2. For present purposes the key facts can be quickly summarised. The Court of Protection has for some time been dealing, on the application of the relevant local authority, Devon County Council, with an elderly man, MM, who lacks capacity. MM was born in Madeira but had lived in this country for many years. He had been removed to Portugal, where he remains, by the appellant, Ms Kirk. A number of judges have found that his best interests will be served by his return to his familiar surroundings in this country. In a detailed judgment which he delivered on 10 June 2016, Baker J gave reasons for coming to that view and explained why he was making the order which is now under challenge: *Re MM, Devon County Council v MM and TK* [2016] EWCOP 45. Paragraph 7 of the order provided as follows:

> "No later than 4 p.m. on 27th June 2016 Ms Theresa Kirk shall provide to Devon County Council a signed copy of the written declaration of authority appended to this order and having signed the said document shall not thereafter take any steps or measures to withdraw or countermand such authority whether by herself or by instructing or encouraging any other person to do so."

3. Ms Kirk failed to comply with that order and refused to sign the required document. The local authority applied for her committal. On 18 August 2016, Newton J found her guilty of contempt and sentenced her to six months' imprisonment: *Re M* [2016] EWCOP 42. Her appeal against that order came before us on 8 November 2016, when we quashed the committal order and directed Ms Kirk's immediate release from prison, essentially on the ground that Newton J should not have embarked upon the hearing of the committal application while her application for permission to appeal against Baker J's order was pending: *Devon County Council v Kirk* [2016] EWCA Civ 1221, paras 28-30.

4. In explaining why we were granting Ms Kirk permission to appeal against Baker J's order, McFarlane LJ said this, *Devon County Council v Kirk* [2016] EWCA Civ 1221, paras 33-36:

> "33 Where Mrs Kirk may have an arguable appeal is in relation to the order that followed on from the overall welfare determination insofar as it made her subject to mandatory orders to sign documents which were backed up by a penal notice and an express warning of potential committal proceedings. It is certainly possible to argue that any determination of MM's welfare should have included consideration of how any move from Portugal to Devon could be achieved. Where, as was apparently taken to be the case before Baker J, it is said that the move could only be secured by placing Mrs Kirk under threat of the sanction of imprisonment, it is arguable that the very

> question of whether Mrs Kirk should be put in that position and face the prospect of a prison sentence for non-compliance should have been addressed by the COP in the context of MM's welfare. In short terms, that question might be 'is the move to Devon still in MM's best interests if it may only be achieved by sending to prison someone whose interests he could be expected to have at heart, had he the capacity?'
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> 34 In addition, during the course of the oral hearing before this court, the issue of what alternative means there may have been to achieve MM's repatriation without having to require Mrs Kirk's signature was raised but not satisfactorily answered.
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> 35 Neither of the above points were seemingly addressed by Baker J in the main welfare judgment which has now been transcribed …
>
> 36 … I propose that the court should refuse her application for permission to appeal as it is presently drawn, namely against the substance of the welfare judgment, but grant her permission to appeal against the mandatory orders that were made against her in June 2016 on the two basic grounds that I have identified, namely whether it was in MM's best interests to make such an order and, secondly, possible alternative methods of repatriation. It will be open to Mrs Kirk to renew her application for permission to appeal against the substantive welfare decision at the hearing of the appeal."

Black LJ and I agreed.

5. The parties have now compromised the appeal and by application dated 11 January 2017 seek, in accordance with CPR PD52A para 6.4, the approval of the court to a consent order *allowing* the appeal. The basis of the application is set out in paragraphs 5-9 of the relevant document attached to the Form N244:

> "As has become apparent from:-
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> a. Ms Kirk's initial stated refusal to comply with paragraph 7, and
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> b. Her subsequent refusal in the face of a committal order to comply with paragraph 7, and
>
> c. Her continuing refusal in the face of her actual imprisonment for contempt of court and her stated position to the Court of Appeal that she will not comply with the terms of paragraph 7 because of her sincerely held view that to do so would not be in MM's best interests,
>
> it is now plain, beyond any doubt, that Ms Kirk will not comply with the terms of the order. Quite apart from arguments as to

> whether or not the order was lawfully or properly made at the time, the order is no longer an effective method of securing MM's return to the jurisdiction and therefore both the first and second respondents agree that the order is now otiose and should be set aside for that reason alone.
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> Furthermore, the first and second respondents accept that with the passage of time since the order of 20 June 2016 there are strong grounds for the court at first instance to revisit the conclusion that the repatriation of MM is in his best interests, which assessment should be based on current up to date evidence as to his best interests.
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> In the light of the foregoing, any appeal against paragraph 7 of the said order would appear to be academic in nature and none of the parties consider that it is appropriate or proportionate to invite the Court of Appeal to determine the appeal on its merits. Such an exercise would be futile in the light of the pressing need to consider MM's best interests today in 2017 and not 7 months ago.
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> The parties reserve their arguments on the merits of the appeal and invite the court to approve the proposed consent order on the simple basis that the order be set aside, that the issues in relation to MM's welfare may continue to be addressed at first instance and that the costs of the appeal be dealt with in the manner suggested in the order, namely on the papers unless one of the parties requires the court to deal with the application at an oral hearing.
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> The suggested course carries with it the clear benefit of saving the significant costs to each party of representation at the appeal, in a case where one party is publicly funded (and has already expended significant sums in this litigation) and MM, the subject of these proceedings, is already exposed to a significant charge upon his diminishing estate to meet the costs of his representation in these proceedings."

6. In support of the application, the Official Solicitor, who acts as MM's litigation friend, has filed an opinion of counsel, Ms Victoria Butler-Cole, dated 11 January 2017. In the circumstances I should set out paragraphs 6-9 of her opinion:

> "… it is now abundantly clear, in a way that was not in my view apparent at the time of the hearings before Baker J, that Ms Kirk has no intention of complying with any orders of the English courts unless they coincide with her own views. This means that there is no realistic prospect of MM returning to [Devon]. He will spend the rest of his life in a care home in a place he had never previously lived, with none of his friends around him or likely to visit, and with limited visits only from Ms Kirk, who lives in England.

> There is, however, nothing further the courts here can do that has a realistic prospect of affecting MM's situation. It is no longer possible or appropriate to rely on the decision taken by Baker J in June 2016 in determining MM's current best interests – a more recent assessment of his presentation would be required. Even if such an assessment took place and concluded, as previously, that MM was well enough to return, and the court accepted that this was in MM's best interests, the court has no power to require the appellant to comply with its orders. Ms Kirk has successfully thwarted the court process so that the continuation of these proceedings would be futile in furthering the best interests of MM.
>
> In my view, therefore, that the Official Solicitor is now forced to the inevitable conclusion that it is not appropriate to expend any more of MM's funds pursuing judgments or orders in relation to his welfare, including defending the appellant's appeal. The provision of Baker J's order in respect of which permission to appeal was granted can be set aside, and any remaining matters that need resolving can be dealt with by Mr Justice Baker or another Court of Protection judge of the High Court. At present, it appears that the following matters will need to be the subject of a final order:
>
> a. management of MM's finances by an independent deputy or the appellant;
>
> b. the reasons why the court can no longer be satisfied that it is in MM's best interests to return to [Devon] and that proceedings should be brought to an end,
>
> c. whether the reporting restrictions preventing MM being identified should be removed now that he will be remaining in Portugal and in view of his identity already having been made public in that country.
>
> … Unfortunately, it is my view that there is no benefit to MM in continuing proceedings aimed at achieving his return, and that the appeal should be disposed of by consent for the reasons given."

7. Ms Butler-Cole added this observation:

> "These proceedings are an unfortunate illustration of the difficulties that the Court of Protection faces when incapacitated adults resident in this jurisdiction are removed to countries who are not signatories to the 2000 Hague Convention on the International Protection of Adults, and where the persons responsible for their removal refuse to comply with orders of the court."

In relation to this aspect of the matter, she had earlier in her opinion supplied the following information:

> "The parties and the court were right to believe that Ms Kirk's signature on the form of authority would be sufficient to enable MM to be returned. The manager of the [Portuguese] care home had informed the parties that Ms Kirk was viewed in Portuguese law as the decision-maker for MM. An analysis of Portuguese law commissioned by Devon County Council confirmed this position: the suspension of the lasting power of attorney in favour of Ms Kirk in this jurisdiction was of no relevance in Portugal. Further, there was no purpose in instituting proceedings in Portugal as they were likely to take up to a year to reach a conclusion."

8. The order which the court is invited to make is in the following terms:

> "UPON the parties to the appeal having agreed that the appeal against the order of Baker J dated 20 June 2016 shall be resolved in the terms of this consent order on the grounds that the order has become otiose and that any appeal against its terms would now be academic but without prejudice to each party's contentions as to whether the order was made wrongly and/or unlawfully
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> AND UPON the court having read the document filed in support of the application notice dated 11 January 2017 being satisfied that there are good and sufficient reasons to set aside paragraph 7 of the order of Baker J dated 20 June 2016 by consent and without determining the merits of the appeal
>
> AND UPON the parties agreeing that the following matters should be swiftly resolved by Mr Justice Baker or another High Court Judge sitting in Court of Protection in order to bring proceedings in respect of MM to an end:
>
> 1. the management of MM's finances by an independent deputy or the appellant;
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> 2. final declarations and orders as to MM's residence;
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> 3. the continuation or removal of reporting restrictions;
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> 4. costs of the Court of Protection proceedings,
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> AND UPON the Applicant agreeing to make an application for the matter to be listed for a further hearing before Baker J, if possible, forthwith
>
> BY CONSENT IT IS ORDERED THAT:-
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> 1. Paragraph 7 of the order of 20 June 2016 is set aside.

> 2. The issue of the costs of the appeal as between the appellant and the first respondent against the order of Baker J dated 20 June 2016 shall be determined as to any liability for such costs on the basis of written submissions which should be filed and served as follows:-
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> a. The appellant: within 7 days of this order;
>
> b. The first respondent: within 7 days of service of the appellant's submissions.
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> 3. Any liability for costs assessed by the court under paragraph 2 above shall be the subject of either agreement, or in the absence of agreement, detailed assessment as to quantum.
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> 4. The application for costs made by the appellant against the first respondent which relates to the appeal against the committal order made on 18 August 2016 which appeal was determined by the Court of Appeal at the hearing on 8 November 2016 shall be determined on the basis of the written submissions which he appellant and first respondent have already filed and any finding as to liability shall be the subject of agreement, or in the absence of an agreement, a detailed assessment as to quantum.
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> 5. Subject to the applications to be determined under the arrangements set out in this order there shall be no orders as to costs in relation to the appeal against the order dated 20 June 2016 and there shall be a detailed assessment of the costs of the second respondent.
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> 6. The hearing of the appeal fixed for 7 February 2017 against the order dated 20 June 2016 is hereby vacated."

9. I am prepared in these unusual circumstances to approve the consent order as drafted. I am satisfied, for the reasons set out by the parties, that this is the proper course to adopt and, for the reasons set out by Ms Butler-Cole in her opinion, that this is in MM's best interests. I make clear that in approving the order I am proceeding on the footing that:

   i) It is futile to make any further attempt to subject Ms Kirk to coercive orders designed to obtain MM's return to this country, and the Court of Protection will not be invited to make any such order.

   ii) Although the Court of Protection is to re-visit the question of MM's best interests, the considered view of the Official Solicitor is, as matters currently stand, that, as Ms Butler-Cole put it, there is "no realistic prospect of MM returning to [Devon]" and "nothing further the courts here can do that has a realistic prospect of affecting MM's situation" and that "it is not appropriate to expend any more of MM's funds pursuing judgments or orders in relation to his welfare."

In these circumstances, I anticipate that the remaining proceedings in the Court of Protection will be brought to a speedy conclusion, dealing with the matters referred to in the consent order as quickly as possible and with the minimum of expense.

10. I will deal with the various outstanding costs issues in accordance with the procedure provided for in the order.

11. Given the basis upon which I am being invited to make this order – the fact of Ms Kirk's continuing obduracy – I need to say a little more about that aspect of the case.

12. On one view of the matter, Ms Kirk has achieved her objective by remaining adamantly obdurate in the face of the court's orders; and the court now is simply caving in to her demands. It is a point which has troubled me, whatever her reasons may be for the stance she has adopted (a matter which there is no need for me to explore). I am persuaded, however, that this is *not* a reason why, in the particular circumstances of this case, I should refuse to approve the consent order.

13. The long-established principle is, as I put it in *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR 523, para 52, referring to what Romer LJ had said in *In re Liddell's Settlement Trusts* [1936] Ch 365, 374, that:

> "the starting point is that the courts expect and assume that their orders will be obeyed and will not normally refuse an injunction because of the respondent's likely disobedience to the order."

As I said in *Re Jones (No 2)* [2014] EWHC 2730 (Fam), para 15:

> "The normal approach of the court when asked to grant an injunction is not to bandy words with the respondent if the respondent says it cannot be performed or will not be performed. The normal response of the court is to say: "The order which should be made will be made, and we will test on some future occasion, if the order which has been made is not complied with, whether it really is the case that it was impossible for the respondent to comply with it." There is a sound practical reason why the court should adopt that approach, for otherwise one is simply giving the potentially obdurate the opportunity to escape the penalties for contempt by persuading the court not to make the order in the first place."

14. That said, however, there are limits to how far the court can go in seeking to coerce the obdurate. In the first place, as I went on to observe in *Re Jones*:

> "I have to recognise that the court – and this is a very old and very well established principle – is not in the business of making futile orders."

See also the discussion on this point in *Re J*, paras 60-62. Secondly, it is well recognised that there will come a point when even the most obdurate and defiant contemnor has to be released, despite continuing non-compliance with the court's order. Well-known examples of this principle are to be found in *In re Barrell Enterprises* [1973] 1 WLR

19, 27, and *Enfield London Borough Council v Mahoney* [1983] 1 WLR 749, 755-756, 758.

15. In this case, it is important to note, the court is *not* caving in at the first sign of obduracy. Ms Kirk remains seemingly determined on her course despite having been taken to prison and, indeed, despite having spent some seven weeks incarcerated in what must for her have been most unfamiliar and very unpleasant conditions. Is there any real reason to believe that a further dose of this medicine might induce compliance within the kind of time it might be appropriate, having regard to the principles in *Barrell* and *Mahoney*, to require her to serve? I very much doubt it. Further attempts at coercion are most unlikely to be successful. Pressing on as hitherto is likely to be an exercise in futility. In the circumstances the consent order marks out the appropriate way forward.

16. I have not been shown the advice in relation to Portuguese law to which Ms Butler-Cole refers and, in that respect, am little better informed than when the matter was last before us. I take her point in relation to the 2000 Convention but, whatever the position may be in relation to Portugal, I would not want it to be too readily assumed that the Court of Protection will be as powerless in other similar cases. If a similar problem arises in future, it might be worth exploring whether the foreign country would recognise and be prepared to give effect either to an order of the Court of Protection or to an authority, of the kind Ms Kirk was ordered to execute in this case, executed by a Deputy or by an officer of the Court of Protection. It is also worth bearing in mind that there have been cases where the foreign court has acted both decisively and speedily in ordering the return to this country of an incapacitated adult who had been taken abroad: see, for example, *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057, paras 27-29.