



SHERIFF APPEAL COURT

DNN-AW15-19

Sheriff Principal M W Lewis
Appeal Sheriff A MacFadyen
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in the appeal by

JK

Respondent & Appellant

in respect of the application by

ARGYLL AND BUTE COUNCIL

Applicant & Respondent

Respondent & Appellant: Leighton, advocate; Civil Legal Assistance Office

Applicant & Respondent: Blair, advocate; Brodies LLP

13 May 2021

Introduction

[1] The principal issue in this case is whether the sheriff is entitled to grant powers to a welfare guardian which have the effect of depriving the adult of her liberty.

The Application

[2] Argyll & Bute Council made an application under Section 57 of the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") seeking the appointment of the Chief Social

Worker as welfare guardian with a series of powers relating to the personal welfare of the adult. The order was sought for a period of three years.

[3] The adult's father, her nearest relative, supported the application as did the primary carer.

[4] The adult opposed the application. She disputed that she had a mental disorder and that any of the powers were necessary.

The powers

[5] Although the adult was opposed to the grant of any powers, two of the powers craved were bitterly contested and these are:

(a) The power to decide where the adult should live, to require her to live at that location, to convey her to that location and to return her to that location in the event of her absencing herself therefrom ...

(j) The power to decide where the adult is permitted to go and decide whether or not the adult should be accompanied by a person nominated by her guardian to assist with her personal safety and welfare.

The hearing and outcome

[6] The sheriff heard evidence from a consultant psychiatrist, the adult's GP, and the Mental Health Officer ("MHO"). The primary carer and the adult relied upon the terms of their respective affidavits.

[7] The evidence which the sheriff found to be credible and reliable reveals the following. The adult is 57 years of age. She has a diagnosis of schizophrenia and delusional disorder. She has been engaged with the community mental health team in Dunoon since 2013. She was the subject of a short term detention order from January 2019 until her discharge to her home on 01 July 2019. Those involved in the adult's care at that time considered that she would require 24 hour care within a residential setting to address her complex needs and to ensure her

health, safety and welfare. However, to support the adult's request to return home, an alternative care package was created and implemented on a trial basis. It was not successful.

[8] The adult lives alone. She requires support and assistance with all aspects of her daily life. She does not engage with the care plan and the carers, distrusts her carers and the health care professionals, and refuses all offers of support and assistance with personal care. She lives in squalor, is dishevelled and unhygienic. Her health is at risk. The current arrangements are not sustainable. The care team is reluctant to enter the property.

[9] The adult does not accept that she requires assistance with all aspects of daily life. She does not want to leave her home and is vehemently opposed to being placed in a care home. The adult endeavoured to explain the squalid conditions in her home by pointing to an olfactory disorder. The sheriff found that this disorder had no physical basis. He did not accept that this disorder caused the failure to shower or bathe for almost a year or the failure to change clothes and bedding reeking of urine, or the refusal of all offers of assistance with basic cleaning and domestic support.

[10] All of the witnesses were of the view that a welfare guardianship is the most suitable means by which to provide the appropriate level of care for the adult. The MHO considered that an appropriately tailored package of care to meet the adult's specific needs could be provided at a specialist mental health facility in Glasgow called The Oaks. The adult would be provided with her own room and would have the freedom to move around the whole facility. She would not be under constant supervision from the staff but would be checked from time to time to ensure her wellbeing. The accommodation is secure and if she leaves the premises she would be brought back. This package is intended to facilitate reintegration into the community rather than provide long term care.

[11] The sheriff concluded that the adult is suffering from a serious delusional disorder which affects her substantially in her everyday life. Her level of self-neglect and lack of personal hygiene are potentially life threatening. She requires and will require constant support with all aspects of her life because she lacks the cognitive ability to look after her own basic needs. The carers are now reluctant to enter the home for health and safety reasons.

[12] The sheriff granted the order and appointed the Chief Social Worker as welfare guardian for a period of one year. As a matter of law the sheriff found that the adult is incapable in relation to decisions about or of acting to safeguard her personal welfare and that she is likely to continue to be so incapable for the foreseeable future. He also found that there are no means which would be sufficient to enable the adult's interest in her personal welfare to be safeguarded or promoted other than by way of a Guardianship Order. He concluded that this form of intervention would benefit the adult and that it would be the least restrictive option to her freedom consistent with the purpose of the intervention.

[13] In light of the proposed care package at The Oaks the sheriff considered that many of the powers craved were not necessary, but he was persuaded that it was essential to grant powers (a) and (j) to facilitate the care package. He acknowledged that placing the adult against her wishes in a secure facility under continuous supervision and control where she is not free to leave and if she did she would be returned would result in deprivation of liberty. However based on *Muldoon, Applicant* 2005 SLT (Sh Ct) 52 and *M, Applicant* 2009 SLT (Sh Ct) 185 the sheriff concluded that the deprivation of liberty is nonetheless compliant with Article 5 of the European Convention on Human Rights because the 2000 Act provides the necessary legal and procedural safeguards for the adult. In recognition of her rights and wishes and the rehabilitative purpose of the application, the sheriff selected a period of one year for the duration of the order, expressly noting that the limitation on duration would permit the court

to review progress with rehabilitation and deprivation of liberty within a reasonable timeframe.

The grounds of appeal

[14] At the commencement of the appeal counsel for the adult invited us to receive late an additional authority – the Scotland Act 1998. Given the terms of the note of appeal and the note of argument for the adult we had cause to ask counsel whether he intended to raise a devolution issue or amend the grounds of appeal. He advised that he did not so intend and had simply lodged the 1998 Act to deal with a point raised by the respondent. He confirmed that the adult did not challenge the granting of the order or seek to argue that the powers generally were not justified. The challenge rests primarily on *vires* – although the 2000 Act is compatible with the adult’s Article 5 right, the provisions of the 2000 Act do not permit the sheriff to impose any power which would have the effect of depriving the adult of her liberty.

[15] There are three grounds of appeal.

(1) The adult asserts that the sheriff erred in law in authorising deprivation of liberty through the granting of powers (a) and (j). The principle of legality requires the power to detain or to deprive of liberty to be explicit or necessarily implied by the section. The power to deprive an adult of liberty is not explicit in section 64 of the 2000 Act nor is it necessarily implied. There was an appropriate scheme for deprivation of liberty under the Mental Health (Care and Treatment)(Scotland) Act 2003 which contained appropriate safeguards.

(2) The adult challenges the granting of the same powers in so far as they authorise the return of the adult to secure premises. The principle of legality has equal application to the power to apprehend because it strikes at the personal liberty of the individual. Furthermore the adult asserts that the power is not necessary because

section 70 of the 2000 Act sets out the measures which a welfare guardian can take to ensure compliance with decisions of the guardian, and where non-compliance relates to a decision as to the place of residence the guardian may apply to the court for a warrant authorising the apprehension of the adult and removal to such place as directed by the guardian.

(3) The adult also challenges the sheriff's refusal to grant to the adult the power to litigate against the local authority in respect of matters connected with the guardianship order. She considers that sections 64(3) and 67(1) of the 2000 Act combine to prevent her litigating in relation to certain disputes involving the local authority

[16] Counsel for the adult submitted that the principle of legality requires the power to detain or to deprive of liberty to be explicit or necessarily implied by the relevant section (*Welsh Ministers v PJ* [2020] AC 757 at paragraphs 24 and 25, and *MM v Secretary of State for Justice* [2019] AC 712 at paragraph 31). The power to deprive the adult of her liberty through the imposition of powers (a) and (j) is not explicit in section 64, in contrast to sections 36(8), 44(5), 47(4)(a) and 66(1) of the Mental Health (Care and Treatment) Scotland 2003 ("the 2003 Act") where the power to detain is explicit. The power is not necessarily implied into the 2000 Act. With reference to *PJ* at paragraph 25, counsel for the adult submitted that a necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. The power to detain is not a necessary implication because the language of the 2000 Act does not demonstrate that it must have included a power to detain. Reading the 2000 Act as a whole does not make it clear that the Act must have included a power to detain. The 2003 Act makes explicit provisions for returning patients and where and when that can be done and by whom (sections 301-303) whereas once again the 2000 Act is silent.

[17] Counsel for the adult made various submissions about the application and interpretation of section 70:

- If section 64 permits a court to authorise a welfare guardian to determine where an adult is to live and to return the adult to the premises should the adult leave, then section 70 would be *otiose*. Its inclusion in the 2000 Act illustrates that there is no need to even contemplate the granting of powers (a) and (j).
- Section 70 operates retrospectively - it is only when the adult fails to comply with a decision of the welfare guardian that application can be made to the court whereas the powers (a) and (j) provide a compulsion in advance, thus circumventing a safeguard for the adult.
- Section 70 relates to the power of the welfare guardian to choose where the adult is to live which is distinct from the power to return the adult to a particular location.
- Section 70(1)(b) relates to “a warrant” which is indicative of a single event whereas the power (j) operates as a warrant to apprehend without limit.

[18] Counsel for the respondent submitted that the 2000 Act afforded such power as the decision appealed against, accorded with the weight of existing authority; and was within the scope of the 2000 Act properly construed, which afforded both a “lawful” basis and a “procedure prescribed by law” under Article 5. The Code issued under section 13 of the 2000 Act by the Scottish Government expressly recognises that the Act does authorise deprivation of liberty. The Code is “law” for the purposes of Article 5 and is relevant to understanding what is “lawful” in the Convention sense under the Act.

[19] Under reference to *Stanev v Bulgaria* (2012) 55 EHRR 22 it was submitted that the 2000 Act is a carefully constructed system which is Article 5 compliant and which allows the

Adult to express her views, past and present and where measures can only be authorised where they are necessary.

[20] Section 70 is a further means by which a *lawful* deprivation of liberty is effected under a “procedure prescribed by law,” but the court could not grant a warrant under section 70 if there was no relevant underlying power on the part of the respondent.

Decision

[21] Before dealing with the provisions of the 2000 Act we think it important to observe briefly on the matter of Article 5 which guarantees the right to liberty. The proposed care package at the Oaks is a situation to which Article 5 applies. Powers (a) and (j) are contrary to the expressed wishes of the adult. They amount to a deprivation of her liberty and are an interference with her right to choose her place of residence. However the powers were granted in a specific context namely the safeguarding of the welfare of an adult who lacks capacity and whose living conditions, self-neglect and lack of personal hygiene are potentially life threatening. The decision to grant these powers is in accordance with a line of existing sheriff court decisions (*Muldoon*, *Applicant* 2005 SLT (Sh Ct) 52, *M*, *Applicant* 2009 SLT (Sh Ct) 185, and more recently *Scottish Borders Council v AB* 2020 SLT (Sh Ct) 41). In each of these cases the courts concluded that intervention leading to deprivation of liberty should not be taken without express statutory authority governing it. This was not contentious.

[22] The statutory authority in the present case, and in the foregoing cases, is the 2000 Act. That Act established a comprehensive system for safeguarding the welfare and managing the finances and property of adults who lack capacity to make some or all of the decisions for themselves. Section 1 sets out fundamental principles to be applied throughout the operation of the Act. The principles are:

- (i) Any action or decision taken must benefit the adult and must only be taken when that benefit cannot reasonably be achieved without it (section 1(2));
- (ii) Any action or decision taken should be the minimum necessary i.e. the least restrictive option (section 1(3));
- (iii) The adult should be consulted about anything that might be done under the legislation and account should be taken of the present and past wishes and feelings of the adult as far as can be ascertained (section 1(4)(a));
- (iv) Account shall be taken of the views of the nearest relative and the primary carer of the adult, the adult's named person, any guardian or attorney with powers relating to the proposed intervention, any person whom the sheriff has directed should be consulted and any person appearing to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known, in so far as it is reasonable and practicable to do so (section 1(4)); and
- (v) Any guardian, attorney, or manager of an establishment exercising functions under the 2000 Act shall in so far as is reasonable and practicable to do so encourage the adult to exercise whatever skills he/she has concerning property, financial affairs or personal welfare as the case may be and to develop new such skills (section 1(5)).

[23] Section 64 of the 2000 Act sets out the functions and duties of a guardian and

specifies that an order may confer on the guardian certain powers. It provides:

- (1) Subject to the provisions of this section, an order appointing a guardian may confer on him—
 - (a) power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;
 - (b) power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;
 - (c) power to pursue or defend an action of declarator of nullity of marriage, or of divorce or separation in the name of the adult;
 - (d) power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;
 - (e) power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.

It is not unusual for Guardianship Orders to contain various elements from two or more of the above categories.

[24] Principles (i) - (iv) apply to whether a guardianship order is granted, and if it is granted, to which category or categories of powers are applied under section 64. Each of the

powers conferred by the court must be appropriate with reference to the general principles. The sheriff recognised the importance of the section 1 principles and applied them assiduously in considering whether to grant the order and in his assessment of the powers craved (paragraph [19] at page 22 and paragraph [20] at page 23). We reject any contention that the sheriff failed in his duty to apply those principles.

[25] In our view, conducting a comparative exercise between the 2000 Act and the 2003 Act is misconceived. They have distinct purposes and operate different schemes. The 2000 Act, as already noted, was established for a specific purpose - to permit a principled intervention in relation to the personal welfare of an incapable adult. It is aimed at securing the Article 5 rights of the adult.

[26] The 2000 Act seeks not only to recognise but to respect and where appropriate to foster and encourage such capacity as the adult may have, and it also seeks to minimise the discrimination and disadvantages which might result from incapacity. That protection is provided in the form of multiple safeguards which can be found within the broad terms on which the 2000 Act is drawn. At the risk of repetition, section 1(3) recognises that the freedom of the adult may be subject to intervention. Section 64 gives context to the scope of that intervention. It is in wide terms. It does not contain a lengthy list of possible powers. It includes power to deal with **all** aspects of the personal welfare of the adult (section 64(1)(b)) as well as power to deal with particular matters in relation to the personal welfare of the adult (section 64(1)(a)), and as we have already noted any intervention must be based on the least restrictive option in relation to the freedom of the adult and be consistent with the purpose of the intervention – in other words it must be proportionate.

[27] The Code of Practice (Adults with Incapacity (Scotland) Act 2000: Code of Practice for Local Authorities Exercising Functions under the 2000 Act, 1st April 2008) issued under

section 13 of the 2000 Act expressly recognises that the Act does authorise deprivation of liberty. The Code applies to local authorities on the exercise of functions under the Act and it also applies to guardians. It is published, it is public, and it is accessible for Article 5 purposes. It has a legal basis. It does not however fetter the Act; it does not foresee all possible circumstances which might arise; and it does not contain a list of possible powers.

[28] We recognise that section 64 does not contain an explicit power to detain but it seems to us that sections 64(1)(a) and (b), subject to the application of the principles, may usefully be deployed to address the very sad and unfortunate situation which has arisen here. In effect a detailed and bespoke care package has been created for the adult to address her specific needs. We are satisfied, given the factual matrix, that “a matter” or “all aspects” would cover dealing with the welfare issues of transitioning an adult from one form of care and accommodation (eg supported care at home) to another form of care and facility (eg care in secure premises), ensuring that the adult remains within the facility to address her needs, and to return her there should she leave. The narrow interpretative analysis of the provisions of the 2000 Act by counsel for the adult would serve to undermine the purpose of the 2000 Act and would curtail interventions tailored to the needs of the individual.

[29] We derive no assistance from *Welsh Ministers v PJ* [2020] AC 750 and *MM v Secretary of State for Justice* [2019] AC 712 which involve an entirely different scheme in a different factual matrix.

[30] For the foregoing reasons we have concluded there is no merit in ground of appeal one.

[31] Parties were in agreement that section 70 represents a safeguard for the adult in that the welfare guardian can make decisions about the adult but cannot exercise compulsion at his own hand – he requires to apply to the court for authority to do so. It provides:

(1) Where any decision of a guardian with powers relating to the personal welfare of the adult is not complied with by the adult and the adult might reasonably be expected to comply with the decision, the sheriff may, on an application by the guardian—

(a) make an order ordaining the adult to implement the decision of the guardian; ...

In addition this section makes provision for the apprehension of adults who abscond. It provides:

(b) where the non-compliance relates to a decision of the guardian as to the place of residence of the adult, grant a warrant authorising a constable—

(i) to enter any premises where the adult is, or is reasonably supposed to be;

(ii) to apprehend the adult and to remove him to such place as the guardian may direct.

[32] In our view sections 64 and 70 are distinct; the former is focused on the functions, powers and duties of the guardian, whereas section 70 is concerned specifically with non-compliance with decisions of a welfare guardian. It is clear when reading the 2000 Act as a whole that neither section supplants the other. The sheriff addresses this issue in paragraph [18] and does not err in his assessment.

[33] Section 70(1)(a) and (b) provide additional safeguards in that application has to be made to ensure compliance. The adult has the opportunity to participate in this process (section 70(3)). The granting and the use of compulsive powers under this section should be a last resort and must accord with the general principles set out in section 1 - in other words the sheriff would need to be satisfied that the granting of the order would benefit the adult, that the adult could reasonably be expected to obey the decision and that it was the only reasonable way of achieving that benefit.

[34] We agree with counsel for the respondent that the court could not grant a warrant under section 70(1)(b) if there was no underlying power on the part of the welfare guardian. We also agree with him that the words used in section 70(1)(b) express recognition that there

may be an existing power embedded in the Order to determine where an adult should live and that by clear implication an officer of law can use force to ensure this. The sheriff has made a decision providing the welfare guardian with the power to decide where the adult is to live based on evidence which he found to be credible and reliable. An appropriate suitable location has been identified. Section 70(1)(b) authorises an orderly process whereby a return can be affected by officers of the law using such force as reasonable in the circumstances.

[35] In summary, we detect no error in respect of the sheriff's assessment of power (j). The statutory provisions (sections 64(1)(a) and (b)) are wide enough to accommodate such a power, subject of course to the section 1 principles. We detect no error in the sheriff's assessment of the need for this power, and he did not err in considering the interaction between sections 64 and 70. For the foregoing reasons there is no merit in ground of appeal two.

[36] The third ground of appeal was not pressed upon us to any material extent. In our view it is misconceived. The order as granted has not removed from the adult any right to litigate against the council. Section 64(3) gives the welfare guardian the general power

“by virtue of his appointment to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order.”

But the application did not seek any power on the part of the welfare guardian to make decisions for the adult in relation to any litigation brought or to be brought by the adult against the local authority either under the 2000 Act or otherwise and we do not see how the general provision in section 64(3) constrains the adult in that regard.