Neutral Citation Number: [2024] EWCOP 10

Case No: 13974361

IN THE COURT OF PROTECTION

Date: 20 February 2024

Before:

MR JUSTICE POOLE

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Aberdeenshire Council v SF (No.2)

Between:

ABERDEENSHIRE COUNCIL

Applicant

- and –

(1) SF (By her Litigation Friend, the Official Solicitor)
(2) EF
(3) SUNDERLAND CITY COUNCIL

Respondents

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Joseph O'Brien KC (instructed by **DWF Law LLP** on behalf of Aberdeenshire Council) for **the Applicant**
Sophia Roper KC and **Benjamin Harrison** (instructed by **Simpson Millar** on behalf of the Official Solicitor) for **the First Respondent**
The Second Respondent not appearing and unrepresented
Victoria Butler-Cole KC (instructed by **Sunderland City Council**) for **the Third Respondent**

Hearing date: 8 February 2024

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JUDGMENT

This judgment was delivered in public but a transparency order is in force. 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 SF, EF, and any members of their family and of where SF is being cared for must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Poole:

1. I am concerned with SF, a Scottish woman in her 40s who has moderate intellectual disability, autism spectrum disorder, associated periods of severe anxiety, and a diagnosis of difficult to treat schizoaffective disorder (bipolar type). In an earlier judgment in this case, handed down on 30 June 2023, Aberdeenshire Council v SF & Ors [2023] EWCOP 28, I held that SF was habitually resident in Scotland, notwithstanding that she had been living in England and Wales for a number of years, first as a patient detained in hospital under the Mental Health Act 1983 and then, since 2022, in a supported living placement in the community. In this judgment I have to consider whether a Scottish Guardianship Order made on 16 June 2021 (the SGO) authorises SF's mother, the Second Respondent EF, to consent to the deprivation of SF's liberty, as she has purported to do, and whether the court should recognise and enforce the SGO as a protective measure in this jurisdiction.

2. It is agreed, as is clear from the evidence, that SF is not free either to move from her current residence, or to come and go from it. She is subject to physical restraint at times and lives behind doors that may be locked to restrict her movement. She is under the continuous supervision and control of carers. The objective circumstances meet the "acid test" for the deprivation of her liberty set out in the judgment of Lady Hale *in Cheshire West v P* [2011] UKSC 19. The arrangements that amount to continuous supervision and control are imputable to the state. SF herself is unable, by reason of her mental incapacity, to consent to the arrangements that amount to a deprivation of her liberty. However, the SGO gives power to SF's mother to authorise the arrangements and to consent to the same. If the SGO is recognised in this jurisdiction then SF's deprivation of liberty will have been authorised to date and will continue to be authorised so long as the SGO remains in force. If not, then in the absence of authorisation, her deprivation of liberty will have been unlawful and will continue to be unlawful until either it ceases or lawful authorisation is given.

3. The questions for determination are:

    i) whether the SGO gives EF the power to authorise the deprivation of her daughter's liberty in England;

    ii) if so, whether the Court of Protection in England and Wales ("the Court of Protection") should recognise and enforce this, and if so how it should be implemented;

    iii) if not, whether the Court of Protection can, or should, assume jurisdiction over SF's welfare, and to what extent; and

    iv) if the Court of Protection does assume jurisdiction, what the next steps should be.

    I have received very helpful written and oral submissions from Counsel. Proceedings were originally brought by the Third Respondent, but Aberdeenshire Council has since been made the Applicant. It applies for recognition and enforcement of the SGO submitting that it gives EF the power to authorise the deprivation of SF's liberty in England, and that recognition should follow applying the provisions of the Mental Capacity Act 2005 (MCA 2005) Schedule 3. The First and Third Respondents submit

that the court should decline to recognise the SGO by exercising its discretion under MCA 2005 Sch 3, 19(3) and/or 19(4).

The Scottish Guardianship Order

4. The Adults with Incapacity (Scotland) Act 2000 (AISA 2000) is an Act of the Scottish Parliament to make provision as to the property, financial affairs and personal welfare of adults who are incapable by reason of mental disorder or inability to communicate. Part 6 deals with guardianship orders and s64 provides,

> "64 Functions and duties of guardian
>
> (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;"

Applications for guardianship orders are made under AISA 2000 s57. By s58(4),

> "Where the sheriff grants the application under section 57 he shall make an order (in this Act referred to as a "guardianship order") appointing the individual or office holder nominated in the application to be the guardian of the adult for a period of 3 years or such other period (including an indefinite period) as, on cause shown, he may determine."

5. The Act itself is silent as to whether a guardianship order can confer on the guardian the power to authorise the deprivation of an incapacitous adult's liberty but in *K v Argyll and Bute Council* [2021] SAC (Civ) 21 the Sheriff Appeal Court heard argument on the issue and confirmed that a guardianship order may include such powers. The two contentious powers within the guardianship order in that case were,

> "(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 absenting 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 Sheriff Appeal Court noted at [21] and [22],

> "[21] Before dealing with the provisions of the 2000 Act we think it important to observe briefly on the matter of art.5 which guarantees the right to liberty. The proposed care package at the Oaks is a situation to which art.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, M, Applicant, and more recently *Scottish Borders Council v AB*, 2020 S.L.T. (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."

6. Art 5 of the European Convention on Human Rights, to which the Sheriff Appeal Court referred, provides at Art 5(1),

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;"

Art 5(4) provides,

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

7. In *K v Argyll and Bute Council* (above), Counsel for the adult submitted that AISA s64(1)(a) and (b) did not allow for a guardianship order to confer the power to authorise the deprivation of the incapacitous adult's liberty. Accordingly, powers (a) and (j) in the guardianship order in question could not lawfully be used to authorise the deprivation of the appellant adult's liberty. Rejecting that submission, the Sheriff Appeal Court held at [28] that,

> "We recognise that s.64 does not contain an explicit power to detain but it seems to us that s.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 (e.g. supported care at home) to another form of care and facility (e.g. 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."

8. I have not been referred to any contrary authority from the Scottish Courts. Accordingly, I proceed on the basis that AISA 2000 s64(1) does allow a guardianship order to confer on the guardian the power to authorise or consent to the deprivation of the incapacitous adult's liberty. Having regard to its wording, I am satisfied that the SGO in this case does confer such powers. In May 2022 SF's father died leaving her mother EF as the sole guardian under the SGO. The SGO is effective for seven years from the date it was made, i.e. until 15 June 2028.

Legal Framework - Mental Capacity Act 2005 Schedule 3

9. By its application dated 20 March 2023, Aberdeenshire Council invites the Court to recognise and enforce the SGO. The application is made pursuant to Section 63 of the MCA 2005 and Schedule 3 of that Act.

10. MCA 2005 s63 provides,

> "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 2000 (Cm 5881) (in so far as this Act does not otherwise

do so), and (b) makes related provision as to the private international law of England and Wales."

Paragraphs 19 to 21 of Schedule 3 provide,

"Recognition and enforcement

Recognition

19(1) A protective measure taken in relation to an adult under the law of a country other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country.

(2) A protective measure taken in relation to an adult under the law of a Convention country other than England and Wales is to be recognised in England and Wales if it was taken on a ground mentioned in Chapter 2 (jurisdiction).

(3) But the court may disapply this paragraph in relation to a measure if it thinks that—

(a) the case in which the measure was taken was not urgent,

(b) the adult was not given an opportunity to be heard, and

(c) that omission amounted to a breach of natural justice.

(4) It may also disapply this paragraph in relation to a measure if it thinks that—

(a) recognition of the measure would be manifestly contrary to public policy,

(b) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or

(c) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult.

(5) And the court may disapply this paragraph in relation to a measure taken under the law of a Convention country in a matter to which Article 33 applies, if the court thinks that that Article has not been complied with in connection with that matter.

20(1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.

> (2) No permission is required for an application to the court under this paragraph.
>
> 21 For the purposes of paragraphs 19 and 20, any finding of fact relied on when the measure was taken is conclusive."

11. The 2000 Hague Convention referred to at MCA 2005 s63 relates to "adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests". It provides a framework for the mutual recognition of measures taken by contracting states, the underlying presumption being that the courts or administrative authorities where the adult is habitually resident have primary jurisdiction to take such measures. The Convention came into force on 1 January 2009. The UK has signed the Convention and ratified it, but only in respect of Scotland. It is not yet in force in England and Wales but its provisions are mostly reflected in MCA 2005 Sch 3. The Convention is implemented in Scotland by AISA 2000.

12. The parties agree that the SGO is a protective measure for the purposes of MCA 2005 Sch 3 and that sub-paragraph 19(1) applies to the SGO. Hence, the court's focus should be on sub-paragraphs 19(3) and (4) which give the court a discretion to disapply paragraph 19. Recognition of the SGO is mandatory unless either or both of sub-paragraphs 19(3) and (4) apply.

13. The decision whether to recognise a protective measure is not a decision governed by P's best interests - Hedley J in *Re MN* [2010] EWHC 1926 (Fam). The leading judgment on Schedule 3 is Baker J's in *Re PA, PB and PC* [2016] Fam 67; [2015] EWCOP 38. At [55] and [60] to [62] Baker J held,

> "Schedule 3 Paragraph 19(3)
>
> [55] Schedule 3 paragraph 19(3), quoted above, gives the Court a discretionary power to refuse to recognise a protective measure if certain procedural safeguards are not met. It is plain from the way in which Schedule 3 paragraph 19(3) is drafted that the Court only has a discretion to decline to recognise a foreign order if all three of the conditions in the subparagraph are satisfied. In other words, the Court only has a discretion to disapply a measure in a foreign order if it "thinks" that the case in which the measure was taken was not urgent and the adult was not given the opportunity to be heard and that omission amounted to a breach of natural justice. On behalf of PB, Ms Weereratne QC underlines the use of the word "thinks" in paragraph 19(3) – and, indeed, in paragraph 19(4) – and submits that by using this word Parliament has set the bar relatively low. For my part, however, I interpret the word "thinks" as meaning "concludes on a balance of probabilities" rather than any lower standard such as "has reasonable grounds for believing"."
>
> …

> "Schedule 3 paragraph 19 (4)
>
> (a) Introduction
>
> [60] As already stated, paragraph 19(4) of Schedule 3 gives the Court a further discretionary power to decline to recognise a measure in a foreign order in certain circumstances spelt out in the sub-paragraph. In contrast to sub-paragraph (3), these grounds upon which an application for recognition may be refused are separate rather than cumulative. Thus, the Court may refuse recognition if it thinks that recognition would be manifestly contrary to public policy or the measure would be inconsistent with a mandatory provision of the law of England and Wales or the measure is inconsistent with one subsequently taken or recognised, in England and Wales in relation to the adult.
>
> [61] As no subsequent measure has been taken in this country in respect of any of the three adults in these proceedings, it is unnecessary to consider paragraph 19(4)(c) in this case. The two other grounds in subparagraph (4), however, have been the subject of extensive legal argument before me.
>
> [62] At the outset, it should be noted, as observed by Ms Weereratne, that subparagraphs (4)(a) and (b) appear properly to be considered as two sides of the same coin. She reminds me of the comment by Mostyn J in Re M [2011] EWHC 3590 (COP), at paragraph 5, in which he refers to having struggled
>
> "to conceive of a measure which fell within sub-sub-paragraph (b) that was not contrary to public policy under sub-sub-paragraph (a)."
>
> I agree with this observation. It seems to me that recognition of a measure that would be inconsistent with a mandatory provision of the law of England and Wales would, by definition, be manifestly contrary to public policy. In addition, however, it is argued that there are further grounds upon which recognition of the measure would be manifestly contrary to public policy over and above the extent to which it is inconsistent with a mandatory provision of the law of England and Wales. It therefore makes sense to consider the impact of sub-sub-paragraph (b) before sub-sub-paragraph (a)."

14. Baker J went on to make three general points about the scheme set out in Sch 3:

> "[93] First, by including Schedule 3 in the MCA, Parliament authorised a system of recognition and enforcement of foreign orders notwithstanding the fact that the approach of the foreign

courts and laws to these issues may be different to that of the domestic court. These differences may extend not only to the way in which the individual is treated but also to questions of jurisprudence and capacity. Thus the fact that there are provisions within the Act that appear to conflict with the laws and procedures of the foreign state should not by itself lead to a refusal to recognise or enforce the foreign order. Given that Parliament has included section 63 and Schedule 3 within the MCA, clearly intending to facilitate recognition and enforcement in such circumstances, it cannot be the case that those other provisions within the Act that seemingly conflict with the laws and procedures of the foreign state are mandatory provisions of the laws of England and Wales so as to justify the English Court refusing to recognise the foreign order on grounds of such inconsistency. In such circumstances, it is only where the Court concludes that recognition of the foreign measure would be manifestly contrary to public policy that the discretionary ground to refuse recognition will arise. Furthermore, in conducting the public policy review, the Court must always bear in mind, in the words of Munby LJ that 'the test is stringent, the bar is set high'.

[94] Secondly, there is likely to be a wide variety in the decisions made under foreign laws that are put forward for recognition under Schedule 3. As the Ministry of Justice has observed, inevitably there may be concerns about some of the foreign jurisdictions from which orders might come. But as the Ministry also observes, taking account of such concerns is surely the purpose of the public policy review. Although no wide-ranging review as to the merits of the foreign measure is either necessary or appropriate, a limited review will always be required as indicated by the European Court in *Pellegrini*. That will be sufficient to identify any cases where the content and form of the foreign measure, and the processes by which it was taken, are objectionable. It also seems to me that the circumstances in which Schedule 3 is likely to be invoked, and the number of countries whose orders are presented for recognition, are likely to be limited. In oral submissions, Mr Rees pointed out that, in theory, the Court could be faced with applications to recognise and enforce orders from any country in the world, including, for example, North Korea or Iran. That may be right in theory, but common sense suggests it is, to say the least, unlikely in practice, at least in the foreseeable future. And if such orders were to be presented for recognition, the public policy review would surely lead swiftly to identifying grounds on which recognition would be refused. It is much more likely that the orders presented for recognition will be those of foreign countries whose legal systems, laws and procedures are closely aligned to our own. Concerns of this nature can be addressed by admitting evidence of the process by which the foreign protective measures were

> made and general evidence relating to the legal system of the state that made the order.
>
> [95] Thirdly, most orders presented for recognition are likely to be of short duration, and/or in respect of persons whose capacity may fluctuate, and/or who are in receipt of a progressive form of treatment. As a result, in such cases there is likely to be repeated requests to scrutinise a succession of orders. Recognition and enforcement is likely to require close co-operation, not only between the medical and social care authorities of the two countries, but also between the Courts and legal systems. The Convention provides a mechanism using the Central Authorities but, pending ratification of the Convention, there may well be the need for direct communication between judges of the two jurisdictions."

15. Baker J held at [97] that when considering the application of paragraph 19(4)(b),

> " … this court should conduct a limited review to satisfy itself that the Irish orders comply with the European Convention, and in doing so should strive to achieve a combined and harmonious application of the provisions of the two international instruments. I accept their submission that, when considering applications to recognise and enforce compulsory psychiatric placements under Schedule 3, the limited review should encompass the court being satisfied that (1) the Winterwerp criteria are met and (2) that the individual's right to challenge the detention under article 5.4 is effective (i e that they have a right to take proceedings to challenge the detention and the right to regular reviews thereafter)."

At [64] Baker J had summarised the three conditions for lawful deprivation of liberty under Art 5(1)(e) identified in *Winterwerp v The Netherlands* (1979) 2 EHRR 387,

> "In that decision, the European court held that, except in emergencies, depriving the liberty of someone of unsound mind can only be lawful under article 5.1(e) if three minimal conditions are satisfied: (1) the authority responsible for the deprivation of liberty must establish through objective medical expertise that the person is of unsound mind; (2) it must be established that the mental disorder is a kind or degree warranting compulsory confinement; (3) the validity of continued confinement depends on the persistence of mental disorder."

At paragraph [60] of *Winterwerp* (above), the ECHR held in relation to Art 5(4)

> "The judicial proceedings referred to in Articles 5 (4) need not, it is true, always be attended by the same guarantees as those required under Article 6 (1) for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty'. Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves."

16. I have also been assisted by Hayden J's judgment in *HSE of Ireland v Moorgate* [2020] EWCOP 12. At paragraphs [34] and [35] he said,

> "[34] As Baker J properly recognised, there may be a range of decisions made under the laws of different jurisdictions that are advanced for recognition under Schedule 3. Although an extensive review as to the merits of the foreign measure will be neither necessary nor indeed appropriate, a limited review will always be required, the objective of which will be to identify any cases where the content or form of the foreign measure is inappropriate, disproportionate or clearly discordant with sound welfare-focused practice in the UK.
>
> [35] Given the significant restrictions integral to the measures in question in this case, and the draconian nature of any compulsory psychiatric placement and treatment of an individual, there is an obligation on the Court of Protection to be clear that the criteria in Winterwerp v Netherlands (1979) 2 EHRR 387 are met. This is to emphasise the importance of recognising that when depriving the liberty of someone of unsound mind, the Court can only act lawfully where it has satisfied itself that the safeguards guaranteed by Article 5(1)(e) and 5(4) are in place."

Hayden J then noted that whilst he was content to recognise the protective measure in the case before him, in other cases, such as those involving longer term deprivation of liberty for adults with severe autism, particular vigilance might be required to ensure that fundamental human rights were upheld. He could have been envisaging the present case:

> "[41] It is this cooperative arrangement, at senior court level, characterised by what is described as "an extremely active approach" by the Irish High Court to its wardship jurisdiction, that is identified as the primary safeguard in the protection of the fundamental rights and liberties at stake. I consider that the HSE are both entirely correct and accurate when they identify the very close relationship between all those involved in the care and treatment of Irish adults placed in England and those involved at all levels in the Irish system as fundamental both to the fairness and proportionality of the process.
>
> 42. Many of the cases, particularly those concerned with anorexia nervosa, involve circumstances when the professionals are 'firefighting'. By this I mean they are dealing with an urgent and potentially life threatening situation. Frequently, the contemplated treatment is of relatively limited duration, though 18 months is not uncommon. Additionally, long-term deprivation of liberty and compulsory medical treatment is inherently undesirable.
>
> 43. Experience in the Court of Protection makes it easy to contemplate circumstances in which deprivation of liberty and/or medical treatment of some kind might be required on a much longer term basis. In exchanges with Mr Setright, I posited the very real challenges faced by severely autistic adults and their families often requiring long-term intervention. My concern was that there was a risk, with the effluxion of time, that the careful scrutiny afforded by the regime that I have outlined above might become diluted and take on a more routine administrative complexion. Were that to happen it is not difficult to contemplate circumstances developing in ways which might be contrary to an individual's welfare and human rights.
>
> 44. It is self-evident that these cases engage Article 2 ECHR (right to life); Article 5(4) (right to challenge deprivation of liberty); and Articles 6 and 8 ECHR (rights to 'an effective procedural possibility, judicial or otherwise, of influencing the course of [non- consensual] treatment or having it reviewed by an independent authority' (see *LM v Slovenia* [2014] ECHR 608 at 185))."

17. In *MS v Croatia (No. 2*) (Application no. 75450/12), the European Court of Human Rights held in relation to Article 5(4),

> "152. … the Court reiterates that in the context of the guarantees for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of an individual's deprivation of liberty, the relevant judicial proceedings need not always be attended by the

> same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see, amongst many others, *Stanev*, cited above, § 171).
>
> 153. This implies, inter alia, that an individual confined in a psychiatric institution because of his or her mental condition should, unless there are special circumstances, actually receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement. The importance of what is at stake for him or her, taken together with the very nature of the affliction, compel this conclusion (see *Megyeri v. Germany*, 12 May 1992, § 23, Series A No. 237-A). Moreover, this does not mean that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having recourse to a court (see *Winterwerp*, cited above, § 66)."

MCA 2005 Schedule 3 – Recognition of the Scottish Guardianship Order

18. I adopt the analysis and guidance from the judgments referred to when approaching the question of recognition of the SGO in this case. In doing so I note at the outset that it is no part of the First and Third Respondents' case that the process of making guardianship orders in Scotland is systemically defective. The First and Third Respondents have referred me to the Scottish Law Commission's Report on Adults with Incapacity published on 1 October 2014, which recommends amendment of the 2000 Act to include a more detailed legal process for the scrutiny of deprivation of liberty of an adult in a care home or community placement to ensure compliance with ECHR Article 5. The Scottish government published a consultation paper in 2015 but has not yet made any decision as to how to progress the issue. Nevertheless, I am not invited to question whether the guardianship order legislation within Part 6 of AISA 2000 or the Scottish courts' general application of that legislation fails to comply with Art 5, Art 6, or Art 8 Convention rights. I am concerned with the particular SGO, and the process that was adopted to make it, in this case. Whilst I need to consider some of the factual circumstances concerning the making of the SGO, I remind myself that I must conduct a "limited review" as advised by Baker J.

19. Article 22(2)(b) of the 2000 Convention provides that recognition of a protective measure taken by the authorities of a Contracting state may be refused,

> "if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;"

Sub-paragraph 19(3) reflects that provision and gives the court a discretion to refuse recognition of a protective measure if the case in which it was made was not urgent, the adult was not given an opportunity to be heard, and that omission was a breach of natural justice. Mostyn J observed at [32] of his judgment in *HSE of Ireland v Florence Nightingale Hospitals Limited* [2023] 4WLR 3' [2022] EWCOP 52,

> "[32] If the foreign proceedings were not being held on an urgent basis and if P was denied the opportunity of being heard in them, then paragraph 19(3)(c)) allows recognition to be withheld on the ground of natural justice. I suspect that this will very rarely, if ever, arise but if it did the assessment of the standards of natural justice will be made in accordance with our domestic law."

20. The Court of Protection Rules 2017 (COPR) rule 1.2 provides,

> 1.2.—(1) The court must in each case, on its own initiative or on the application of any person, consider whether it should make one or more of the directions in paragraph (2), having regard to—
>
> (a) the nature and extent of the information before the court;
>
> (b) the issues raised in the case;
>
> (c) whether a matter is contentious; and
>
> (d) whether P has been notified in accordance with the provisions of Part 7 and what, if anything, P has said or done in response to such notification.
>
> (2) The directions are that—
>
> (a) P should be joined as a party;
>
> (b) P's participation should be secured by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct;
>
> (c) P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act and to discharge such other functions as the court may direct;
>
> (d) P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur;
>
> (e) P's interests and position can properly be secured without any direction under sub-paragraphs (a) to (d) being made or by the

> making of an alternative direction meeting the overriding objective."

Hence, joinder, appointment of a legal or other representative, and an opportunity to address the court, are not mandatory requirements – P's best interests might be secured without those means.

21. All three conditions within sub-paragraph 19(3) have to be met in order for the court to consider exercising its discretion to refuse recognition. In my judgement, the case in which the SGO was made in June 2021 was not urgent. The application had been made more than three months before the protective measure was granted. There was ample time to have afforded SF an opportunity to be heard. Urgency may explain or excuse the failure to provide an adult with the opportunity to be heard, but there was no such urgency in the present case.

22. The remaining conditions under sub-paragraph 19(3) are that SF was not provided with an opportunity to be heard and that the omission amounted to a breach of natural justice. It is relevant to consideration of those conditions that the protective measure was for seven years, was likely to cover the transfer of SF from hospital detention into the community, and that it included provisions for her physical restraint. These factors point to the importance of protecting SF's fundamental Convention rights in this particular case. It is also relevant that at the time when the SGO was made, SF was detained as a patient in a psychiatric unit and was already the subject of a guardianship order that permitted the authorisation of the deprivation of her liberty. The European jurisprudence such as *MS v Croatia (No. 2)* (above) raises an expectation that an adult in SF's position in June 2021 ought to be heard or, if their condition does not allow for that, ought to have representation.

23. In the present case, a guardianship order had been made in 2016 but it was for a period of five years and so was due to expire in early 2021. It was extended automatically by operation of laws passed during the Covid-19 pandemic. SF's parents made their application for a renewed guardianship order with extended powers in early 2021. Evidence in support included certificates from a medical practitioner Marcin Ostrowski who visited SF on 11 March 2021 and who certified that she lacked capacity to make decisions about her personal welfare and her property and finances. In a separate document he certified that it would pose a serious risk to SF's health if she were to be notified that her capacity was to be medically examined under AISA 2000 s37, to be told of the results of that examination, and to be informed that her affairs were to be managed under AISA 2000 s37. AISA 2000 s37 is within Part 4 of the Act which deals with the management of the *financial affairs* of residents by the managers of authorised establishments. In a "limited review", it is not for me to carry out a detailed analysis of the making of the SGO in 2021 but it appears that the second certificate made by Macin Ostrowski was for an application concerning financial affairs under Part 4 of the Act rather than a guardianship order under Part 6. Nevertheless, he asserted that SF would "not be able to understand any aspects of this process … this could additionally adversely affect her mental state and in turn cause further harm." Notwithstanding this warning, Roddy Gourley, a Mental Health Officer for the Applicant Council, interviewed SF on 24 March 2021, albeit for a "short period" and over a remote link. He reported that "she had no real understanding of Guardianship".

24. On 12 May 2021, Sheriff Miller dispensed with "intimation" or notice of the application for the guardianship order to SF. On 16 June 2021, the Sheriff granted the guardianship order in favour of SF's parents for a period of seven years, the terms of which included decision-making about her residence and care, and:

> (a) "To take necessary and reasonable steps to restrain [SF] or to authorise someone else to do so";
>
> (b) "To regulate and facilitate [her] use of telecommunications, internet and social media"; and
>
> (c) "To lock the external and/or internal doors of [SF's] named place of residence, so far, at such times and for such periods as appear to [them] to be necessary to ensure the welfare and safety of the adult or other persons."

25. As a matter of fact SF was not heard by the Sheriff: she was not notified of the proceedings and did not attend the hearing. There was no direct or indirect evidence of her wishes, feelings, or views. She did not have legal or other representation. There was no person acting as her guardian or similar. There is no evidence that SF was provided with the opportunity to secure representation or to give her wishes, feelings, or views to the court. The s37 certificate did not relate to guardianship or personal welfare. Even if one accepts that Marcin Ostrowski intended to certify that discussions about capacity in relation to personal welfare could be harmful to SF, he did not advise that it would pose a risk to SF to ask her for her views about where she should live, her care, her freedom to come and go, the use of restraint, or whether she was content for her parents to make decisions on her behalf.

26. SF was under Mental Health Act detention at the time, but the nurse to whom Mr Gourlay spoke in 2021 advised that,

> "the hospital believes SF is ready for discharge to an appropriate community resource, but that this should be with sufficient staff, well trained in appropriate restraint techniques, and an environment suitable to allow SF to seclude herself if she becomes agitated or distressed."

SF may have had relevant views about her discharge into the community. Roddy Gourlay's brief conversation with SF by a remote link shows that it was possible to engage with her on that occasion, albeit she was said to be having a "good day", and briefly. It certainly does not show that she was unable to be heard in relation to the application. If anything it demonstrates that she needed assistance by way of representation.

27. The SGO was a renewal and extension of the guardianship order made in 2016. In the case in which that earlier order was made the court had the following evidence,

> "I telephoned X Ward on 9th November 2015, I asked if I could visit SF on the ward. The nurse explained that SF had been having a very disturbed time, which included her being restrained and spending periods in seclusion. SF was asleep and the nurse felt that she needed all the rest she could take and should not be disturbed. Asking SF her views on this application could prove too stressful for her to consider and aggravate her mental health further. It was not considered to be in SF's best interests to seek her views."

No such analysis or opinion was given in 2021. In my judgment Marcin Ostrowski's certificate under AISA 2000 s 37 did not establish that it was against SF's best interests to seek her views in 2021.

28. There can be little doubt that SF was not in fact heard in relation to the protective measure (the SGO), but the relevant question is whether she had an opportunity to be heard. An adult may be unable or unwilling to take up the opportunity to be heard, but the requirement is that the opportunity is afforded to them. If they cannot express a view themselves, or could not do so to the court, then steps might be taken, as envisaged by COPR r1.2, and under AISA by means of appointing a safeguarder or advocate, to allow their voice to be heard. An adult who has a guardian, an advocate, and/or legal representation, as was the case in *PA, PB and PC* (above), will clearly have had an opportunity to be heard. SF did not have any such assistance. As COPR r1.2(e) indicates, there may be other means of securing the adult an opportunity to be heard, but in the present case there is no evidence that any attempts were made to ask SF her views about residence, care, freedom of movement, restraint, or decision-making about her life.

29. In my judgment therefore, no opportunity was provided to SF to be heard in the case in which the protective measure was made. Furthermore, having regard to the wide powers granted to the guardians, including authorisation of the deprivation of SF's liberty, and the application of those powers to any future community placement, and given the duration of the order (proposed to be indefinite and made for seven years), the failure to give SF an opportunity to be heard did amount to a breach of natural justice. I am sure that all those involved sought to protect SF's best interests and that SF's parents were properly assessed as being suitable guardians. I do not doubt that SF lacked capacity at that time to make decisions about her personal welfare. However, there was no opportunity for her wishes, feelings, and views to be communicated to the court and no provision made for her interests to be represented. There were no safeguards for the protection of her Art 5(1) rights. Natural justice required that in a case where SF's liberty was being put into the hands of others for a period of seven years, she should have had an opportunity to be heard and/or an opportunity to be represented. SF's access to the court should not have been dependent on her taking the initiative. Effective access should have been secured for her. As it is, there were no measures taken to ensure that her Art 5(1) rights were upheld.

30. Experienced Counsel have not referred me to any other MCA 2005 Sch 3 case concerning a protective measure made in Scotland. What is striking is the contrast between the facts of the present case and those in the number of first instance decisions

to which I have been referred, in which the HSE of Ireland has been the applicant, including *PA, PB, and PC,* and *Moorgate* (both above) in which the adult concerned was represented at the hearings in Ireland and there was continuing judicial oversight. This not an observation that the system for authorising deprivation of liberty under a guardianship order in Scotland is defective in any way, but only a comparison of the particular facts of the reported cases that came from Ireland, and the case before me.

31. Aware of the high bar that should be met before finding that the processes of a court in another jurisdiction breached natural justice, I accept the submissions made on behalf of the Official Solicitor and Sunderland City Council. The case in which the measure was taken was not urgent, SF was not given an opportunity to be heard, and that omission amounted to a breach of natural justice. Therefore, the court has a discretion to disapply MCA 2005 Sch 3 para 19 in relation to the SGO, and to refuse recognition of it in England and Wales. I shall return to the exercise of my discretion later in this judgment.

32. In relation to MCA 2005 Sch 3 para 19(4), I need to consider whether recognition of the protective measure would be manifestly contrary to public policy (19(4)(a)) or would be inconsistent with a mandatory provision of the law of England and Wales (19(4)(b)). I shall consider the second question first. The Human Rights Act 1998 (HRA 1998) gives effect to the rights and freedoms guaranteed under the European Convention on Human Rights, such that under HRA 1998 s6 it is unlawful for a public authority to act in a way which is incompatible with a Convention right. A public authority includes a court or tribunal. Article 5(4) of the Convention provides that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." In *Winterwerp* (above) it was confirmed that this provision requires "review of lawfulness to be available at reasonable intervals" [55]. In the present case the SGO was made for seven years. There is no mechanism within the SGO for reviews within that period. Although SF now has the Official Solicitor acting on her behalf within these proceedings, that provision has been triggered first by the application by Sunderland City Council and now by the application by Aberdeenshire Council for recognition of the SGO. Neither were a party to the SGO application. If SF had a right to apply for a review of the guardianship order, there was no mechanism provided to give effect to that right. As a person of "unsound mind" steps should have been taken to secure the effective exercise of her art 5(4) rights but no provisions were made. In the absence of any representation for SF or any scheduled review, it was likely that the guardianship order would remain in place, without review, for seven years. This was so even when it was known at the time when the SGO was made that SF was considered fit for discharge from her hospital detention. Significant changes in her living conditions were anticipated but no review was provided for when those changes took place. The period of seven years is far longer than the maximum one year period in the MCA 2005 for the authorisation of a deprivation of liberty pursuant to Sch A1, para 29(1). The standard term of guardianship under the Scottish system is three years.

33. It is not for me, a judge in the jurisdiction of England and Wales, to lay down a maximum period for a Scottish Guardianship Order. In any event, what is a reasonable period would depend on the circumstances of the case. But, in this case, given the considerable powers the guardians were being granted, the likely change in living

arrangements, and SF's vulnerabilities and her inability to trigger a review herself, and the absence of any representation to do so on her behalf, seven years without ensuring an effective review of the guardianship order was manifestly beyond a period that could be considered to be reasonable.

34. In my judgement, recognition of the SGO would be contrary to a mandatory provision of the law of England and Wales in that it would breach Art 5(4) of the ECHR and therefore be unlawful under the HRA 1998 s6. By the same reasoning, the absence of any opportunity for SF to be heard in the proceedings in which the SGO was made, was contrary to Art 5(1)(e) ECHR and therefore would have been unlawful under HRA 1998 s6.

35. Not only would recognition be contrary to mandatory provisions of the law of England and Wales, but those breaches of law would relate to fundamental human rights, not only under Art 5, but also under Arts 6 and 8. I have already found that the failure to provide SF with an opportunity to be heard was a breach of natural justice. In the premises, and on the same grounds, it appears to me that it must follow that it would be contrary to public policy to recognise the SGO and that therefore MCA 2005 Sch 3 para. 19(4)(b) is established.

36. The Official Solicitor submits, and I agree, that it is difficult to contemplate a scenario in which the Court of Protection determines that either of the grounds in sub-paragraphs 19(3) or 19(4) were made out, and goes on to recognise the order anyway. Here, I have found that the SGO was made in breach of natural justice and that recognition of it would be manifestly contrary to public policy. Whilst respecting the importance of comity and recognising the differences in the legal framework and jurisprudence as between Scotland, and England and Wales, the failure to uphold SF's fundamental human rights in this particular case means that I should exercise my discretion to refuse recognition of the SGO made in June 2021.

37. I have been very mindful of the guidance of Baker J in *Re PA, PB, and PC* (above), that Parliament has authorised a system of recognition and enforcement of foreign orders and that it is not my role to refuse recognition purely on the grounds that certain procedures or substantive provisions in Scotland are different from those in England and Wales. As noted, no party sought to challenge the Scottish guardianship system itself. However, on the particular facts of this case, important aspects of the SGO and the procedure under which it was made were contrary to SF's fundamental human rights such that recognition should be refused. Schedule 3 provides an opportunity for the courts of this jurisdiction to carry out a limited review of protective measures made in another jurisdiction. It is not a "rubber stamp" exercise, as this case demonstrates.

38. The next steps will have to be carefully worked out. Recent evidence provided to the court appears to show that SF may now be more engaged in outings with staff and interactions within the community, and better able to understand her guardianship and decisions about her residence. Further consideration may need to be given to her habitual residence. In any event, the court does have jurisdiction to make temporary orders even if SF's habitual residence remains in Scotland. Decisions may be made by one or more party to bring SF's case back before the court in Scotland. For now, within these proceedings, the issues identified at paragraph 3(iii) and (iv) of this judgment cannot be resolved. The parties are invited to agree suggested directions for the determination of those issues.