Neutral Citation Number: [2021] EWCOP 26

Case No: COP 12521181

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2021

Before :

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

- -

Between :

A LOCAL AUTHORITY	**Applicant**
- and -	
C	**1st Respondent**
(By his litigation friend, AB)	
- and -	
A CLINICAL COMMISSIONING GROUP	**2nd Respondent**
- and -	
SECRETARY OF STATE FOR JUSTICE	**3rd Respondent**

- -
- -

Mr Neil Allen (instructed by **A Local Authority**) for the **Applicant**
Ms Victoria Butler-Cole QC and Mr Ben McCormack (instructed by **O' Donnells Solicitors**) for the **1st Respondent**
Miss Aisling Campbell (instructed by **Hill Dickinson LLP)** for the **2nd Respondent**
Ms Fiona Paterson (instructed by **Government Legal Department)** for the **3rd Respondent**

Hearing dates: 26th April 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN, VICE PRESIDENT OF THE COURT OF PROTECTION

This judgment was delivered at a hearing conducted on a video conferencing platform with members of the public attending. 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 C and members of his family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Hayden :

1. This afternoon I have handed down judgment in the case of: **A Local Authority v C, a CCG and the Secretary of State for Justice [2021] EWCOP 25.**

2. The Local Authority, the Applicant (C, by his litigation friend) and the Secretary of State all agree that there should be a stay on the release of the judgment into the public domain, to permit C the opportunity to speak with the professionals who support him and have the decision explained to him in a manner which will help him fully to understand the nature and extent of the judgment. It has been agreed that this should happen over the next few days and that the judgment should be released into the public domain at 12 noon, Thursday, 29th April 2021.

3. Ms Paterson, on behalf of the Secretary of State, indicated that her client wished to seek permission to appeal the judgment. In pursuit of her application she has presented grounds of appeal which contend that I fell into interpretive error. The central thrust of the grounds is that my interpretation of the words *"intentionally causes or incites"* in S.39 (1)(a), fails to give the words their natural meaning. Interestingly, it was also contended that my interpretation of the relevant section would be in effect to give the court's *"imprimatur"* to prostitution which it is contended would be *"contrary to public policy"*.

4. **Permission to appeal test – first appeals:**

> 52.6
> (1) Except where rule 52.7 applies, permission to appeal may be given only where—
> (a) the court considers that the appeal would have a real prospect of success; or
> (b) there is some other compelling reason for the appeal to be heard.
> (2) An order giving permission under this rule or under rule 52.7 may—
> (a) limit the issues to be heard; and
> (b) be made subject to conditions.
> (Rule 3.1(3) also provides that the court may make an order subject to conditions.)
> (Rule 25.15 provides for the court to order security for costs of an appeal.)

5. Applications of this kind are inevitably dynamic. Though it had not been foreshadowed in her written documents, Ms Paterson focused her oral submissions on the criteria in the Civil Procedure Rules (CPR), at 52.6(1) (b). She contended that this case fell withing the category of "compelling reason for the appeal to be heard". Ms Paterson sought to rely on: **Smith v Cosworth Casting Processes Ltd [1997] WLR 1538**, in particular the observations of the Court of Appeal:

> *"There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court*

> *may take the view that the case raises an issue where the law requires clarifying."*

6. The editors of the White Book suggest the above passage creates a "theoretical difficulty". They suggest that if the law requires "clarifying" then by definition the appeal does "have a real prospect of success". For my part, I cannot follow the logic of this, nor indeed can Ms Paterson. There is no obvious nexus between "prospects of success" and any "public interest" in the appellate court examining an issue.

7. Ms Paterson submits that the judgment addresses some *"extremely sensitive, far reaching issues which have direct impact not merely on C in this case but across a range of people with mental health disorders and in a variety of situations"*. This she says is to be regarded as a *'landmark'* judgment which resonates across a range of people living in a variety of circumstances. Certainly, I contemplated, albeit from a different perspective, the wider range of people for whom the interpretation of s. 39 1(a) required clarification:

> *"60. Ms Paterson submits "it would be incongruous and illogical if another interpretation could be attached to s. 39 SOA, given the similarity of the wording to that in ss 10 and 17 SOA." Such an approach, to my mind, requires a wholesale departure from the primary principles of statutory construction (discussed above). It also delivers an outcome which is, as I have said, regressive. Additionally, it must be noted that it would deliver an unworkable result and thus could not be what Parliament intended. In circumstances where an established or married couple, as often happens, are assisted by carers to spend "private time" together, the carer would, on Ms Paterson's construction, be guilty of a criminal offence. These arrangements are routinely and sensitively put in place and, where required, approved by the Court."*

8. The subject matter of my judgment, Ms Paterson suggests, falls within a small and discrete category of cases which have such far reaching social implications that they should be authoritatively examined by an appellate tribunal.

9. Ms Butler-Cole QC, on C's behalf, suggests that there is, at this stage, nothing for the Court of Appeal to *"bite on"*. She submits that I have not arrived at a decision that is unique to P and that as such, I fall foul of the conclusions analysed by Black LJ in **Re X [2015] EWCA Civ 599**, at paragraph 31. Lady Justice Black, as she then was, addressed the jurisdictional parameters conferred by section 53 of the Mental Capacity Act 2005:

> *"31. I start with the parties' proposed answer to the jurisdiction question, namely section 53 of the MCA 2005. This sets out the rights of appeal in cases under the Act. It provides:*
>
> > *"(1) Subject to any provisions of this section, an appeal lies to the Court of Appeal from any decision of the court."*
>
> *One need look no further than this, argued the parties, because a "decision" is not synonymous with a "judgment or order" and the President's rulings in his judgments were "decisions" of the Court of*

> *Protection, attracting an appeal to the Court of Appeal. This submission necessarily involved an implicit assertion, I think, that the President himself had jurisdiction to rule as he did, on the basis that judges sitting in the Court of Protection are not restricted to making conventional orders but can make "decisions" and that is what he was doing."*

Black LJ continues, at paragraph 39:

> *"39. Elsewhere in Rule 89, "decision" is used in what may be a slightly different way. For example, Rule 89(5) provides that where an application is made in accordance with Rule 89, the court may "affirm, set aside or vary any order made". The court's determination under Rule 89(5) is then referred to in Rule 89(7) and (8) as "a decision made under paragraph (5)", although in Rule 89(9) a decision under paragraph (5) seems to be aligned again with an order, the provision beginning:*
> *"(9) Any order made without a hearing or without notice to any person, other than one made under paragraph (5)….. "*
>
> *40. The appeal provisions of the Rules are no doubt particularly worthy of examination, having been made under section 53 itself. Again they reveal a mixture of language."*

Later she observes, at paragraph 42:

> *"42. Having surveyed the Act and the Rules as a whole, I cannot accept that those responsible for drafting section 53(1) intended the word "decision" to have the special, wider meaning for which the parties contended, and in particular to confer appeal jurisdiction in a case such as the present. The general context of applications under the MCA 2005 does not support this any more than does the wording of the Act and the Rules. The purpose of the Act is to allow decisions to be taken for individuals. It proceeds upon the basis that there is an individual who lacks capacity, "P". It is P and certain others associated with him who can apply without permission to the court for the exercise of its powers under the Act (section 50(1)). Anyone else must seek permission to apply and the court determining that application must have particular regard to the position of the person to whom the application relates (section 50(2) and (3)). There are applicants and respondents in the proceedings just as there are in other forms of litigation. In that context, in my view,* ***"decision" cannot mean just any decision made by the Court of Protection; it must mean a decision taken in a lis involving P or in some way about P.*** *If the meaning of the word was intended to be broader than that, distancing the role of the Court of Protection so far from the normal role of courts as to enable the judges of that court to decide points of law and practice on a hypothetical basis, that would, in my view, need to have been clearly indicated in the Act and/or the Rules. I can detect no such clear indication."*

10. Ms Butler-Cole QC contends that my interpretation of s. 39 is neither a decision *"involving P"* nor *"in some way about P"*. She submits that there might be a

jurisdictional remedy, were I to make a declaration pursuant to s. 15 MCA 2005 that the (as yet hypothetical) care plan proposed for C was *"lawful for the purposes of s. 39 SOA 2003*", absent any decision about best interests. I do not consider that Black LJ was, on a proper construction, considering circumstances that are in any way aligned with what I am engaged in in this case. Indeed, it strikes me that in any area of the law if a judge is asked to rule on an issue of statutory construction it is both logical and practical to deal with that as a preliminary issue, recognising that it may be the subject of an appeal. It then serves to 'clear the decks' to consider the particular facts of the case in focus.

11. It seems to me that my interpretation of s. 39 is directly relevant to P as well as to others. It affords him a gateway opportunity for a care plan to be prepared and subsequently considered which may or may not ultimately be assessed as being in his best interests. He is therefore directly *"involved"*. The fact that a great many others might also be affected, is entirely irrelevant. Though all the advocates in **Re X** had considered that Sir James Munby (P) had made procedural *"decisions"* in the context of voluminous and administratively burdensome applications for deprivations of liberty, these were ultimately his own views on the procedures that should be followed. This Black LJ considered, fell short of *"a decision"*, with the meaning of section 53. As she emphasised, judges of the Court of Protection, like any other judge, are not permitted to decide points of law and practice on a hypothetical basis. Though Black LJ hardly needs any encomium from me, I respectfully agree. Here however the statutory interpretation of s. 39 is not academic it is an essential preliminary to a decision for C in an immensely important sphere of his life. I am therefore entirely satisfied that there is a decision to be appealed.

12. It is also important to note that during the course of submissions, in the substantive hearing, consideration was given as to whether Keehan J had already determined the issue I was being invited to look at, in: **Lincolnshire County Council v AB [2019] EWCOP 43**. For the reasons given in my judgment I do not consider that to be the case but I can see that there is room for argument that there might be two contradictory views on the scope and reach of s. 39 SOA 2003 within the Division.

13. Not without some hesitation, I have concluded that the tension between general policy considerations, identified on behalf of the Secretary of State, in relation to sex workers and my interpretation of the language of s. 39, falls within that small and discrete category of cases contemplated by rule 52.6(1) (b). In the circumstances and for the above reasons only, I am prepared to grant permission to appeal.