IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. FD18P00630

Neutral Citation Number [2018] EWHC 3103 (Fam)

Royal Courts of Justice

Hearing: Monday, 1 October 2018

Before:

THE HONOURABLE MRS JUSTICE GWYNNETH KNOWLES

(**In Private**)

B E T W E E N :

HERTFORDSHIRE COUNTY COUNCIL — Applicant

- and -

AB — Respondent

MR P. GREATOREX (instructed by Legal Services) appeared on behalf of the Applicant.

THE RESPONDENT did not attend and was not represented.

A P P R O V E D J U D G M E N T
[1 4 D e c e m b e r 2 0 1 8]

MRS JUSTICE KNOWLES:

1 By application filed on 19 September 2018, Hertfordshire County Council sought an order pursuant to the court's inherent jurisdiction authorising the respondent's deprivation of liberty.

2 The respondent was AB, born on 11 July 1990 and is thus twenty-eight years old. He was not present or represented. He was aware of this application and had received legal advice in respect of this application. AB confirmed that he did not object to it. I have seen a letter from the applicant's solicitor dated 14 September 2018 confirming the same.

3 The Secretary of State for Justice indicated that he did not wish to be joined as a party to this application.

4 Mr Paul Greatorex appeared on behalf of the applicant. I am indebted to him for his written and oral submissions which had the merit of both pragmatism and concision. I have read and considered a bundle of papers and authorities.

5 Publication of this judgment was delayed to allow for the handing down of the decision of the Supreme Court in *Secretary of State for Justice (Respondent) v MM (Appellant)* [2018] UKSC 60. In the light of that decision, some minor amendments have been made to this judgment.

The Legal Issue

6 This application arises out of the decision of the Court of Appeal dated 29 March 2017 in *The Secretary of State for Justice v MM* [2017] EWCA Civ. 194, [2017] 1WLR 4681. *MM* held that the First-tier Tribunal in England, which hears appeals from mental health patients detained under the Mental Health Act 1983 ["the MHA"], had no power to order the conditional discharge of a restricted patient pursuant to s.73 of the MHA on conditions that amounted to a deprivation of liberty, even if the patient consented to those conditions.

7 For the avoidance of doubt, there is no distinction between the First-tier Tribunal and the Mental Health Review Tribunal in Wales which is relevant to an issue in these proceedings.

8 *MM* was a mental health patient who was detained by a criminal court arising out of his conviction for arson. The criminal court imposed a hospital order upon him under s.37 of the MHA and a restriction order under s.41 of the MHA . *MM* had capacity in respect of the question as to whether his liberty should be deprived and had expressed his wish to agree to a lesser form of restriction than detention in hospital.

9 *MM* applied to the First-tier Tribunal for a conditional discharge, which was refused by the Tribunal on 18 May 2015. *MM*'s proposal to the First-tier Tribunal was that he could be managed in the community under a conditional discharge provided that a suitable care plan and package was in place. It was acknowledged that any care plan would involve an objective deprivation of *MM*'s liberty having regard to the principles set out by the *Supreme Court in Cheshire West and Cheshire Council v. P* [2014] AC 896. *MM* argued that any deprivation of his liberty would be lawful if he consented to it.

10 The Upper Tribunal allowed *MM*'s appeal from the First-tier Tribunal and remitted the matter back to the First-tier Tribunal for a new determination. In so doing, the Upper

Tribunal held that a First-tier Tribunal had jurisdiction to impose conditions on a conditional discharge that involved a deprivation of liberty and that a capacitous patient could give valid consent to such conditions.

11 The Secretary of State for Justice successfully appealed the Upper Tribunal's decision to the Court of Appeal. *MM*'s appeal against the Court of Appeal's decision was heard by the Supreme Court on 26 July 2018 and judgment was handed down on 28 November 2018.

12 The Supreme Court dismissed MM's appeal, Lady Hale expressing the conclusion of the majority in paragraph 38 as follows:

"… the MHA does not permit either the Ft T [the First-tier Tribunal] or the Secretary of State to impose conditions amounting to detention or a deprivation of liberty upon a conditionally discharged restricted patient…"

The Supreme Court's decision made no difference to the law as it was at the time of the hearing on 1 October 2018 in that there was no lawful authorisation for any deprivation of AB's liberty at that time.

13. Nothing said either in the judgment of Lady Hale (or in the dissenting judgment of Lord Hughes) shed any light on the issues in this particular case. Paragraphs 25-27 of Lady Hale's judgment, which recorded the submissions made on behalf of MM, came closest but were not directly relevant. In any event, Lady Hales stated in paragraph 27 that these "*are not issues which it would be appropriate for this court to decide at this stage in these proceedings"*.

Background to this Case

14 AB's circumstances were set out in full in a witness statement from an experienced mental health social worker who has known him since August 2014. The salient facts were as follows: AB was arrested in 2006 and charged with two counts of rape and one count of sexual assault of a child. The victim was his half-brother who was aged five at the time of these offences. The sexual abuse had taken place in the home which AB shared with his stepbrother, stepsister, father and stepmother. It was also alleged that AB had sexually abused his ten-year-old stepsister and his younger teenage brother. AB was bailed on the condition he had no unsupervised contact with persons under the age of seventeen.

15 In 2008 AB was convicted and in 2009 the criminal court imposed a hospital order under s.37 together with a restriction order under s.41 of the MHA. It is noteworthy that, whilst awaiting sentence, AB was found to be in breach of his bail conditions. A sixteen-year-old girl with a learning disability, who was the sister of one AB's friends, accused AB of raping her. No charges were brought against AB as it was believed AB and this young girl had had consensual sexual intercourse.

16 Medical assessments of AB prepared for his sentencing revealed that he had an assessed IQ of 71, which amounted to a mild learning disability. I also note that AB's early history described him being a witness to domestic violence between his parents as well as being the victim of physical abuse from his mother's then-partner following the divorce of his parents. He was also the victim of physical and verbal abuse from his stepmother following his father's remarriage.

17 AB was discharged from hospital on 7 June 2016 by the First-tier Tribunal pursuant to s.73 of the MHA on conditions which included a requirement to comply with his care and risk management plan. It was clear that AB had the capacity to understand and consent to his care, support and accommodation arrangements, despite his diagnosis of a mild learning disability. There was nothing in the papers that I read which suggested that he lacked capacity in this regard.

18 Since his discharge AB's compliance with his care and treatment has been good. He has been able to identify factors which would increase his risk of re-offending and has worked hard to maintain a good level of motivation and engagement with those managing him. He says he wants to improve his life as he does not want to go back into hospital. He continues to require twenty-four-hour supervision to prevent re-offending. This supervision is provided by a specialist service which is experienced in supporting adults with forensic histories in community settings.

19 The conditions which amount to a deprivation of AB's liberty are as follows. He is supported - that is supervised - at all times across a twenty-four hour period including when he is visiting his family. All support staff ensure that AB is always supported - that is supervised - and that he always has someone to talk to if he should feel the need and also ensure that AB must be supported to maintain the conditions of his conditional discharge. Those conditions are, firstly, to reside in an accommodation approved by the clinical team; secondly, to be compliant with healthcare appointments; thirdly, to be compliant with his care plan and risk management plan; fourthly, not to have contact, either directly or indirectly, with his victims; and, fifthly, not to have access to legal or illegal pornographic materials.

20 AB consented to these conditions in 2016 and continues to do so. His care and risk management plans are reviewed every three months by the project supervising him and every six months by a multi-disciplinary team of professionals. AB is a registered category 1 sexual offender who also voluntarily wears a tag. He understands that if he does not adhere to his care and risk management plan it would be likely that he would be recalled to hospital very quickly.

21 There remain real risks to others arising from AB's community placement, which are set out in the social worker's statement. The nature of his index offences place children and young people at risk from his behaviour, which has been in the past impulsive and opportunistic, especially when AB is feeling overwhelmed by known personal risk triggers. It was clear from what I have read that, without an extremely high level of monitoring and support, AB's feelings of anxiety and self-isolation could be instrumental in a repetition of his offending behaviours.

22 The most important risk management factor is that AB is directly supported and supervised. AB's multi-disciplinary team supports the care plan on the basis that it is appropriate to authorise his continuous support and supervision in the interests of his wellbeing and so as to reduce the risk of his re-offending. The care plan allows him to live safely in the community with the benefit of protective measures to keep others and AB himself safe from harm.

23 In essence, and I put it very simply, AB's care plan requires him to be supervised at all times, save when he is with his mother on very, very limited occasions. She is then responsible for supervising him during those times.

Rationale for the Application

24 Following the Court of Appeal's decision in *MM*, the applicant Local Authority appeared to have three options available to it as set out by Mr Greatorex in his skeleton argument. The first of these was for the applicant to do nothing and wait for any claim or challenge by AB for judicial review and/or a claim for damages under the Human Rights Act 1998. This was because at the moment the care plan to which AB is subject is precisely the sort of care plan which the Court of Appeal in *MM* had declared was unlawful and to which AB could not consent. The applicant made no admissions in respect of any claim for judicial review and/or damages and did not accept that any such claims would succeed, but recognised that there would be considerable uncertainty in such a situation.

25 The second option available to the applicant was that it could amend the care and risk management plans so that it was clear that AB was not deprived of his liberty. This would inevitably result in a significant reduction in his supervision and control and would be likely to create a real risk that AB would be recalled to compulsory detention in hospital because of either his actual or apprehended behaviour.

26 The third option was for the applicant to seek to regularise the situation by this application to the court. It chose this course and invited the court to authorise the deprivation of liberty inherent in AB's care and risk management plan by use of the inherent jurisdiction.

27 Mr Greatorex submitted that I should approach this application by asking myself two questions: The first of these is: as a matter of principle can the court exercise its inherent jurisdiction in the manner sought by the applicant? Secondly, if it can, should it do so?

The use of the inherent jurisdiction

28 Mr Greatorex told me that he was not aware of any other reported case where there has been a ruling on the use of the inherent jurisdiction to regularise the position of a capacitous detained mental health patient subject to restrictions as part of his conditional discharge which satisfied the objective elements of a deprivation of liberty.

29 Mr Greatorex submitted that there were two possible bases for the exercise of the court's inherent jurisdiction in these particular circumstances. The first was the existing inherent jurisdiction in respect of vulnerable adults whose autonomy has been compromised. This was confirmed in *DL v. A Local Authority* [2012] EWCA Civ. 253, [2013] Fam 1, a case where the lower court had granted injunctive relief to protect an elderly husband and wife from their son's alleged threats and bullying. The Court of Appeal subsequently dismissed an appeal by the son against the injunctive relief granted and sanctioned the use of that relief under the inherent jurisdiction.

30 The Court of Appeal reviewed the extant case law on the use of the inherent jurisdiction to provide relief to vulnerable adults who fell outside the auspices of the Mental Capacity Act 2005 and approved the first instance judgment of Theis J (reported at [2012] 1 FLR 1119) and its pre-cursor, a decision of Munby J (as he then was) in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2006] 1 FLR 867. The Court of Appeal quoted approvingly from paras.76-79 of Munby J's decision at paragraph 22 of its decision as follows:

> *"In the light of these authorities it can be seen that the inherent jurisdiction is no longer correctly to be understood as confined to cases where a vulnerable adult is disabled by mental incapacity from making his own decision about the matter in hand and cases where an adult, although not mentally incapacitated, is unable to*

communicate his decision. The jurisdiction, in my judgment, extends to a wider class of vulnerable adults.

It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent."

31 In paragraphs 53 and 55 of its decision, the Court of Appeal emphasised that like Munby J it was determined not to offer a definition so as to limit or constrict the group of vulnerable adults for whose benefit this jurisdiction might be deployed. The court noted in paragraph 64 of its judgment that:

> *"It was not easy to define and delineate this group of vulnerable adults as, in contrast, it is when the yardstick of vulnerability relates to an impairment or disturbance in the functioning of mind or brain. It was neither wise nor helpful to place a finite limit on those who may or may not attract the court's protection in this regard. The establishment of a statutory scheme to bring the cases in this hinterland before the Court of Protection would represent an almost impossible task, whereas the ability of the common law to develop and adapt its jurisdiction, on a case by case basis, as may be required, may meet this need more readily."*

32 Given the particular circumstances of this case which I have outlined earlier in this judgment, I am satisfied that AB is a vulnerable adult to whom the inherent jurisdiction may be applied. However, I recognise that AB's case is not entirely on all fours with the circumstances set out in *DL*. In *DL* the autonomy of the two vulnerable adults had been compromised by the behaviour of their son. In AB's case, it is difficult to see how his autonomy has been compromised save by reason of the decision of the Court of Appeal in *MM* which explained why AB's consent to the conditions of his care plan was ineffective. In my view the analogy between the circumstances of AB's case and those of *DL* was not so precise that I am satisfied that it would be appropriate to exercise the court's existing inherent jurisdiction in respect of vulnerable adults.

33 Mr Greatorex pointed me to a second basis on which he said it would be lawful for me to extend the inherent jurisdiction to cover cases such as AB's case, namely the decision of the Court of Appeal in *Anderson v Spencer* [2018] EWCA Civ. 100, [2018] 2 FLR 547. In that decision, the Court of Appeal held that the inherent jurisdiction could be extended in the particular circumstances of that case.

34 In *Anderson v. Spencer*, the Court of Appeal considered whether Peter Jackson J (as he then was) had been right to direct that DNA should be extracted from a sample provided by a dead man in order to ascertain whether a person was or not the dead man's biological son. Paragraphs 43 to 46 of *Anderson v. Spencer* set out the court's reasoning as to the use of the inherent jurisdiction in what might be described as "novel circumstances" as follows:

> *"43 …the judge rejected the argument that the powers of the High Court had effectively been frozen at the date of the legislation [I note that the legislation*

referred to is the Mental Capacity Act 2005]. I unhesitatingly agree. Had that been the case, the inherent jurisdiction would, from that time on, have been limited to those categories already identified prior to the SCA 1981 coming into force and the inherent jurisdiction could not (for example) have been called upon to fill the gap left following the Mental Capacity Act 2005 in relation to vulnerable adults who had retained capacity.

44. Mr Mylonas' 'lawless void' and 'unprincipled extension' arguments can be conveniently dealt with together. In my judgment the judge was acutely conscious of the dangers of an indiscriminate use of the inherent jurisdiction as a means primarily to achieving what a court may view as a 'fair' outcome. The judge directed himself by saying that, whilst the inherent jurisdiction is a valuable asset, caution is required and:

> *'60 The court is bound to be cautious, weighing up whether the existence of a remedy is imperative or merely desirable, and seeking to discern the wider consequences of any development of the law.'*

45. Such an approach is, in my judgment, entirely at one with the observation of Hayden J in Redbridge.

46. I accept the submission of Mr Kemp that in order for an extension of the jurisdiction to be principled, it is unnecessary for it to slot into a previously recognised category. To do so would constrain the legitimate use of Lord Donaldson's 'great safety net.' That does not, however, give a judge open season to expand the use of the inherent jurisdiction and this judge was sensible of the need to avoid any unprincipled extension of the jurisdiction saying:

> *'71(1):…there is a legislative void, both in relation to post-mortem paternity testing and in relation to paternity testing using extracted DNA. I accept that in an area of this kind, policy considerations arise which would be better regulated by Parliament than by individual decisions of the court. In one sense, this speaks for judicial reticence. However, there is no indication that Parliament has turned its attention to the situation that arises in the present case, or that it is likely to do so at any early date. That gives rise to the possibility of an indefinite period during which individuals would be left without a remedy.'"*

35 Mr Greatorex submitted in his skeleton argument that the extension of the inherent jurisdiction, sought by the applicant to encompass the circumstances of AB's case, was entirely consistent with all of the applicable principles expressed in *Anderson* in that, firstly, it was clear that there was no legislative provision governing this situation in that the Mental Health Act provided no remedy; secondly, that it was in the interests of justice; and, thirdly, that there were sound and strong public policy justifications.

36 Mr Greatorex submitted that, even if I found that the situation was not within the ambit of the *DL* authority (to which I have already referred), it was very closely analogous to it given that the Court of Appeal's decision in *MM* envisaged that the difficulties experienced in respect of the lawfulness of AB's care and risk management plan could be resolved in the case of an incapacitated restricted patient by making an application to the Court of Protection (see paragraph 35 of that decision).

37 Mr Greatorex submitted it would be wrong for there to be no such possibility in respect of capacitous restricted patients and in fact referred me to paragraph 33 of *MM* which implied very strongly that an application such as this was indeed the solution. In paragraph 33 of *MM*, the Court of Appeal noted that:

> *"No application was made to the UT in these proceedings to exercise any power of the High Court or the limited statutory jurisdiction of the UT in judicial review and no application was made that invoked the jurisdiction of the Court of Protection. Accordingly, the UT cannot on appeal exercise any of those powers without a party making an application to it to invoke one of those jurisdictions or the Tribunal giving notice of its intention to consider the same and asking for submissions."*

38 I accept the arguments advanced by Mr Greatorex in respect of the extension of the inherent jurisdiction to encompass the particular circumstances of AB's case. AB is presently subject to a care and risk management plan, which on the basis of the Court of Appeal's decision in *MM* and upheld by the Supreme Court, is unlawful.

39 In circumstances where AB is subject to a plan which has been very carefully designed for his particular benefit and also to protect members of the public, the choice for him if that plan is ruled unlawful is stark; indeed, that choice amounts to either consenting to his return to confinement in hospital or indeed a consent to a relaxation of the restrictions in that care plan so that they would no longer amount to a deprivation of his liberty. That would, in my view, place AB in an invidious position. He would not receive the support which he clearly needs and which all the professionals involved in his care consider that he needs which would keep him safe and, indeed, importantly, keep members of the general public safe from his behaviour.

40 In those circumstances, where the Court of Appeal has said that AB's consent to a deprivation of liberty is not lawful, the applicant invited me, both in AB's interests and in the interests of the general public as a whole, to authorise the extension of the inherent jurisdiction so as to regularise that care plan and to do so (a) by declaring that it involved a deprivation of liberty and (b) by providing for a regular court review of that plan.

41 It seems to me that, in these particular circumstances this is precisely the use to which the inherent jurisdiction should be put, exercised cautiously and in the manner prescribed by Peter Jackson J (as he then was). Having given the matter a great deal of careful thought, having decided that I am able to do so.

<u>Is the use of the inherent jurisdiction appropriate in this case?</u>

42 Mr Greatorex submitted (i) that the application was not opposed and (ii) granting it would be a better course than not doing so. His case was that the most that could be said in relation to this application and against it was the possibility that it would be unnecessary because, for example, the Supreme Court's decision might rule that the Court of Appeal was wrong and that AB was able to consent to conditions which amounted to an objective deprivation of his liberty. The uncertainty generated by the *MM* litigation in Mr Greatorex's submission, did not justify the court refusing to exercise its jurisdiction in respect of this particular application. There was, he submitted, no other reason not to grant the relief sought by the applicant.

43 In considering whether I should use the inherent jurisdiction to bridge the gap (if I can call it that) in this particular case, it seemed to me that I should stand back and consider very carefully in the round all the circumstances of this case together with the law to which Mr

Greatorex has referred me. I should exercise the inherent jurisdiction in these circumstances most circumspectly. I do so in this particular case for reasons which I have already averted to and I do so only to fill the legislative void created by the Court of Appeal's decision in *MM.*

44 It may well be that my decision is inevitably of short life, but I am persuaded by the Court of Appeal's suggestion made in paragraph 33 of *MM* that recourse might properly be had to the exercise of the High Court's powers as a means of providing lawful authorisation for conditions of discharge amounting to a deprivation of liberty for a capacitous patient such as AB.

45 For all the reasons that I have set out in my judgment, I have decided it is appropriate for me to exercise the inherent jurisdiction in respect of AB and, accordingly, I make the order as drafted by Mr Greatorex. That order authorises the deprivation of liberty which arises from the terms of AB's community care plan, dated 24 April 2018, for a period of twelve months from the date of my order.

46 It also provides that, if there are changes to the terms of the conditional discharge which increase the restrictions upon AB, then the applicant is to make an application to the court in respect of these. It further provides for the applicant to make an application to the court no less than one month before the expiry of the authorisation. Any review hearing should be conducted on consideration of the papers unless an oral hearing is requested or the court, on review, decides that an oral hearing is required.

47 I grant permission to the applicant to disclose a copy of the order and my decision to the Secretary of State, to the First-tier Tribunal, to the relevant care provider and to the community mental health team.
