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Neutral Citation Number: [2020] EWCOP 14

Case No: 13447267

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2020

Before:

THE HONOURABLE MR JUSTICE COBB

Between:

TD

Applicant

BS

- and -

KD

Respondents

QD

(By the Official Solicitor as his Litigation Friend)

Re QD (Habitual Residence) (No.2)

Miss April Plant (instructed by **Hatch Brenner**) for the **Applicants, TD & BS**
Miss Anita Guha (instructed by direct access) for the **First Respondent, KD**
Mr David Rees QC (instructed by **Bindmans LLP** on behalf of the Official Solicitor) for the
Second Respondent, QD

Hearing date: 20 March 2020

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.

.....
THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public. 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 QD 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.

The Honourable Mr Justice Cobb:

1. This application concerns QD, a man in his 60s who suffers from Dementia in Alzheimer's disease, connected with an atypical form of Parkinson's disease. He is the subject of the judgment which I gave on 19 December 2019, reported as *Re QD (Habitual Residence)* [2019] EWCOP 56. This judgment, which I reserved for a short time following a hearing conducted by telephone in accordance with the Guidance (19.3.2020) issued by the Vice President of the Court of Protection in light of the current coronavirus (Covid-19) pandemic, should be read with that earlier judgment, for an appreciation of the relevant background.
2. I do not propose to rehearse the facts here: they are, I believe, amply summarised at [16]-[26] of the earlier judgment.
3. These proceedings were initiated in this court on 4 September 2019, very shortly after QD's arrival in this country. Proceedings had already been issued in Spain by KD in July 2019; a decree in those proceedings was issued on 24 September 2019, but there has been no further activity in the Spanish Court since that time.
4. It will be noted that in December 2019, I decided that:
 - i) QD lacks capacity to make decisions about his residence, and his care and support needs, within the definitions of the *Mental Capacity Act 2005*. The parties also accept that, in those circumstances, it is highly likely that he lacks capacity to conduct these proceedings ([27] [2019] EWCOP 56);
 - ii) QD's move from Spain to England was a wrongful act ([29]) perpetrated by his adult children (the Applicants);
 - iii) QD remains habitually resident in Spain. This court must therefore decline primary jurisdiction in accordance with the provisions of *Schedule 3* of the *MCA 2005*, and should yield to the jurisdiction of the Spanish Court ([28] *ibid.*);
 - iv) That it would not be appropriate for me to assume jurisdiction based on 'urgency' (per *Schedule 3, para.7(1)(c) MCA 2005*); exercise of jurisdiction based on *para.7(1)(c)* would be justified in my view only where substantive orders are necessary in order to avert an *immediate threat* to life or safety, or where there is an immediate need for further or other protection (emphasis now added). I then found that "[w]hile it is important that decisions are made in QD's interests as soon as possible, I do not find that there is an 'urgency' about the need for substantive orders" ([30] *ibid.*);
 - v) That it would not be appropriate for me to deploy the inherent jurisdiction here as a means for making substantive orders in relation to QD; there is a comprehensive and robust statutory scheme available in the *MCA 2005*, which covers (in *section 63* and *Schedule 3*) this very issue. To apply the inherent jurisdiction here would be to subvert the predictable and clear framework of the statute in an unprincipled way ([31] *ibid.*);

- vi) I could exercise the limited jurisdiction available to me pursuant to *Schedule 3, paragraph 7(1)(d)*, to make a 'protective measures' order which provides for QD to remain at and be cared for at The Pines and to continue the authorisation of the deprivation of his liberty there only until such time as the national authorities in Spain have determined what should happen next. I resolved that it was “for the Spanish administrative or judicial authorities to determine the next step, which may of course be to confer jurisdiction on the English courts to make the relevant decision(s)” ([32]).
5. Following that decision, a Spanish lawyer (Ms Mayte Garcia) was instructed to advise on the process by which the Spanish Court could accept jurisdiction. She has given advice in two reports, and has separately answered (by e-mail) questions of the parties. In both reports and in her separate answers, she has made clear that the Spanish proceedings cannot progress whilst QD remains in England.
6. Thus, regrettably, it appears that something of a legal ‘deadlock’ has arisen; I have found that the English Court does not have primary jurisdiction in respect of QD, as he is not habitually resident here; this does not of itself give rise to an immediate obligation to return QD to Spain. There is, currently, no order of the Spanish Court directing the return of QD which is capable of recognition and enforcement by the Court of Protection under *MCA 2005 Schedule 3, paras 19 and 22*. It appears that the Spanish Court will not be able to exercise its primary jurisdiction to decide where QD should live (and whether he should return to Spain) unless QD is returned to Spain; the decision of *whether* he should be returned, *how* he should be returned, and *when* he should be returned, would primarily fall (unless it comes within *Schedule 3, para.7(1)*) to be to be considered by the Spanish Court.
7. When this legal ‘deadlock’ was first appreciated, I directed further enquiries:
 - i) First, at a hearing in January 2020, I directed the preparation of a medical report focused on the question of whether QD is fit to travel abroad so that he could place himself within the jurisdiction of the Spanish Court;
 - ii) Second, at the time of a further hearing in February 2020, the International Family Justice Office was approached here in London to explore whether the international network judges would be in a position to offer some assistance in relation to a co-ordination of our jurisdictions;
 - iii) Third, at the hearing in February 2020 referred to at (ii) above, I directed the preparation of a further legal opinion from the Spanish expert, to advise whether there is a ‘workaround’ of the apparently strict obligation that QD should be physically relocated to Spain in order for the court there to accept jurisdiction.
8. As to [7](i) above, Dr. Danbury prepared that report and confirmed, in essence, that QD could travel, and that there is not likely to be any appreciable impact on QD’s physical health of moving to another care home whether in the UK or Spain. I confirmed at the last directions hearing (on 21 February) that if required I would

conduct an attenuated best interests' assessment¹ under *Schedule 3 para.7(1)(c)/(d)* in order to establish whether QD should indeed return to Spain.

9. As to [7](ii), Moylan LJ advised that the IFJO would be willing to help in principle, subject to the point that although the *Hague Convention on the International Protection of Adults 2000* provides a formal mechanism for such a procedure (*Art 8* and *MCA 2005 Sch. 3 para 8(3)*), Spain is not a signatory to the *2000 Convention* and the *2000 Convention* is not in force in England and Wales. The IFJO felt that further advice from the Spanish lawyer should be obtained before it could offer any further offer of help.
10. As to [7](iii) above, Ms Garcia advised (11 March 2020) as follows:
 - i) The Spanish court located in Orihuela would be the competent court on Spain;
 - ii) It would be possible for a judicial agent in England to effect personal service of the Spanish court process on QD or his litigation friend; alternatively, the documentation could be served by registered post on QD or his litigation friend; the Spanish Court would be content with either process;
 - iii) QD would need to be directly examined by the Spanish Judge; this is “a procedure that cannot be dispensed of in any way in this proceeding” (my emphasis by underlining);
 - iv) The Spanish Court would require QD to be medically examined in Spain (emphasis added) by a psychiatric doctor appointed by the Spanish Court;
 - v) While the Spanish Court would take account of any reports obtained in this country, these reports would not of themselves avoid the need for the medical examinations required by the Spanish Judge undertaken by a medical expert in Spain, appointed by the Spanish court on the issue of capacity. She adds (in relation to the points summarised at (iii) and (iv) above):

“Even more important than the need for the expert's medical examination report, the Spanish judge will not make any ruling on the adult whose capacity is being considered until he has personally verified the current situation of the adult [QD]. Please note that it is quite unlikely that the Spanish judge will move to another jurisdiction, in this case, to England to perform a personal and direct examination of [QD]”
 - vi) Before the court in Spain can assume jurisdiction, the physical presence of QD in Spain is required; “the Judge corresponding to the city where he/she has the habitual residence will assume the case; physical presence is required”. She adds:

“Therefore, it is most likely that the Spanish judge in Orihuela will close the case or decline the Spanish jurisdiction when he is informed by the English court that

¹ Consistent with my obligation in *section 1(5) MCA 2005*.

other proceedings have been initiated in UK concerning [QD]'s lack of capacity. To all purposes, the Spanish court will lose jurisdiction over this matter as [QD] is not physically present in Spain, which is a necessary requirement to remain jurisdiction on this matter”.

- vii) The Spanish Civil Procedure requires (per *article 759*) that: “no resolution on the lack of capacity of a person will be made without a prior report of a medical expert, ordered by the court”. The non-execution of this medical report would result in the annulment of the proceedings. I am advised that “these reports are mandatory”, so that failure to comply with them means the nullity of the process.
11. Then, of course, the coronavirus (Covid-19) pandemic swept through Europe. The upshot is that any order (whether emanating from this Court or from Spain) is incapable of practical implementation now or in the near future. On 15 March 2020, the FCO advised against all but essential travel to Spain; two days later, the FCO advised against all but essential international travel generally. There is indeed limited opportunity for international air travel between the two countries. The Spanish Government declared a State of Emergency on 14 March 2020. In the UK there is a mandate for social distancing, to protect in particular those most at risk from the virus who are the elderly and those with pre-existing health problems (QD has such a condition). The UK Government has published specific guidance for residential care providers to minimise the risk of virus transmission in care homes, and, at the time of writing, it has announced that it will shortly be asking those over 70 to self-isolate for 12 weeks.
12. It is accepted by all parties that even if it were theoretically possible to order a return at the present time, to implement this is impractical, and to do so would clearly expose QD to an unacceptable risk of infection.
13. The Applicants invite me simply to adjourn the case until the pandemic has passed, and a meaningful (albeit attenuated) best interests’ decision can be made. They appropriately concede that it would not be right for them to argue that QD is acquiring habitual residence in England during this period in which his continued residence here is enforced by reason of the pandemic.
14. KD argues that I should find, under *Schedule 3 para.7(1)(c)* that it is now “urgent” that QD should be returned to Spain, albeit that that order should be stayed pending the conclusion of the pandemic. KD has in the meantime confirmed that if QD returns to Spain, she would arrange for him to be resident for the time being in a care home (‘Vista Al Mar’ – a pseudonym). It is not clear whether dementia care is available at Vista Al Mar. KD has apparently applied to withdraw the criminal denunciation against the Applicants which she had lodged before the Spanish court. She has offered a range of undertakings to effect QD’s smooth and appropriate return: including, (i) not to support a prosecution of the Applicants; (ii) to take steps necessary to secure a hearing in the Court of First Instance No.2 in Orihuela in respect of her petition for a declaration of incapacity; and (iii) not to remove QD from Vista Al Mar without advance permission of the Spanish Court.

15. The Official Solicitor describes the decision at this stage as finely balanced; she marginally prefers that I should direct that an ‘in principle’ best interests decision, and specifically that I decide now that it is in QD’s best interests that he be ‘urgently’ returned to Spain (using my powers under *Schedule 3 para.7(1)(c)*). She is concerned that unless QD is returned to Spain, to enable the Spanish court to make the decision about QD’s long-term residence, the Applicants’ wrongful act will *de facto* be regularised by default. She further accepts that the direction should be stayed pending the conclusion of the pandemic. The Official Solicitor contends that the need for the issue of QD’s long-term residence to be determined, coupled with the fact that the Spanish Court cannot act until QD is physically present in that jurisdiction, “could supply” the requisite degree of statutory “urgency”.
16. I should say that Miss Guha and Mr Rees QC on behalf of the respondents have presented a powerful argument not only that I should undertake a ‘best interests’ decision but that there are powerful reasons why I should conclude that it is in QD’s best interests that he should be returned ‘urgently’ to Spain. Quite apart from any other consideration, this would (a) enable the courts of his state of habitual residence to determine issues of his long-term care and residence and (b) make it easier for KD to visit QD regularly (even though it would make contact with BS more difficult). Both have had to accept, however, that there would need to be a further ‘welfare’-type hearing once the pandemic has passed, in order to assess at the very least the practicalities involved in effecting the proposed return.
17. In spite of its limited practical effect at this stage, I felt that I should pause to reflect on the decision, particularly given the quality of the submissions made on all sides. While tempted to try to break the jurisdictional ‘deadlock’ at the moment, by making an ‘in principle’ best interests’ decision, I have (somewhat reluctantly) reached the conclusion that I should simply adjourn the decision, and re-list this application for further review in three or four months’ time. I have so decided for the following reason:
 - i) I cannot in all conscience exercise a jurisdiction (“exercise its functions under this Act”: *Schedule 3 MCA 2005*) based on ‘urgency’ under *Schedule 3 para.7(1)(c)*, while at the same time adjourning the implementation of the order for an indefinite period, which is likely to be many months; I have already decided (see [4](iv) above) that ‘urgency’ means “an immediate need” for the substantive order; there would be an unacceptable dissonance between these outcomes;
 - ii) A point which did not arise at the hearing, but which has occurred to me while considering this judgment: I would like the parties to consider whether they feel that Ms Garcia has sufficiently covered the provision raised in *Schedule 3, para.11 MCA 2005*: “In exercising jurisdiction under this *Schedule*, the court may, if it thinks that the matter has a substantial connection with a country other than England and Wales, apply the law of that other country” (my emphasis by underlining); in this regard, while I am advised that the Spanish Court would *generally* deploy its comprehensive legal framework with clearly prescribed ‘best interests’ criteria, *specifically*, how would the Spanish Court consider the issue of whether QD should return? If the parties, or any of them, considers that Ms Garcia has not addressed this *specific* question, she should/could be asked a supplementary question focused on this point;

- iii) Even if I were to make an ‘in principle’ decision now, such a decision would have to be subject to a further welfare review/enquiry of some kind as/when the pandemic has passed, in order that I could then be satisfied that QD remains fit for travel abroad, and that this would not be contrary to his best interests; this approach corresponds with that taken by Hedley J in relation to a related point arising under *MCA 2005 Sch. 3 para 12*² in the case of *Re MN* [2010] EWHC 1926 (Fam) at paras [35] to [36] (“It has to be said, however, that were the current stay to remain in place for an appreciable period, this court may well need an updated assessment from [the expert advising on welfare]”);
- iv) It is agreed that there is, in any event, a need for some further evidence from KD about the arrangements for QD in Spain; there is no confirmed space for QD at Vista Al Mar; it is not confirmed that the staff there will cater for the needs of a person with dementia. She has agreed to furnish this further information in writing. Even if this information were available now (which it is not), given the likely delay in resolving this issue, it is likely that updated/contemporary evidence on these points would have been required in any event;
- v) The Applicants have conceded that they cannot and will not take advantage of QD’s continued presence here in this country to mount a case down the line that his habitual residence is changing or has changed; I would not in any event be minded to reach such a conclusion on the facts given the extraordinary prevailing circumstances.

18. Therefore, the order generated from today’s hearing should reflect the following:

- i) Recitals which indicate:
 - a) The reason for the ineffective hearing;
 - b) That it is noted that KD has withdrawn the ‘denouncement’ in Spain;
 - c) That the Applicants concede that the continued presence of QD in this jurisdiction is not to be treated, as a matter of fact, as contributing to a conclusion that he is acquiring or has acquired a habitual residence in this country;
- ii) Adjournment of the main application to a date to be fixed for further review in 3-4 months;
- iii) KD to file evidence in relation to Vista Al Mar; whether there is a place there, and what the provision is for dementia care;
- iv) The provision for an update report from Dr. Danbury on QD’s ability to travel.

19. I have been asked, somewhat as a footnote to the central issue, to consider briefly the associated proceedings in relation to the effectiveness of the lasting power of attorney

² “Where a protective measure is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country”

granted by QD in favour of the applicants. I have not been asked to give any specific directions at this stage. I nonetheless repeat my encouragement to the parties that they mediate this issue, and an appointment is (subject to the current difficulties) arranged for next month. It is noted for completeness that it appears that the Public Guardian: (a) considers that QD lacked capacity to create the P&A LPA on 10 July 2018 and considers that its registration should be cancelled; (b) he considers that QD lacked capacity to create the HW LPA on 29 March 2019 and has refused to register this power.

20. That is my judgment.