

JERSEY / JUDGMENT

AB v AG (Capacity) [2020]

JCA 147B (30 July 2020)

[2020] JCA 147B

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

Court of Appeal 30 July 2020 Before : George Bompas, Q. C. Sir Michael Birt, Q. C. Lord Anderson KBE., Q. C. Between AB Appellant And Her Majesty's Attorney General Respondent The Appellant in person. Advocate J. A. E. Kerley for the Attorney General. IN THE MATTER OF AN APPLICATION TO APPOINT A DELEGATE OF X AND IN THE MATTER OF ARTICLE 24 OF CAPACITY AND SELF-DETERMINATION (JERSEY) LAW 2016 This is the judgment of the Court.

Anderson ja: 1. X, is a young man with autism and learning difficulties. He requires constant care, which is provided by Autism Jersey, to meet his living needs. His father AB and mother CD, are separated and have unfortunately been unable to agree either on an appropriate place for X to live or on the appropriate person or persons to be appointed as his delegate to manage his property and affairs. The Royal Court was accordingly called upon to make two decisions in 2019, the second of which it is sought to challenge on this appeal. History of these proceedings 2. In the Royal Court's decision of 26 th April 2019 ("the April decision"), TJ Le Cocq Esq (Deputy Bailiff) with Jurats Olsen and Averty resolved the issue of X's future accommodation, as a matter of some urgency since the lease on the property where X was living was coming to an end and the landlord was unwilling to extend it. It was common ground that X lacked capacity to make the decision for himself, as defined in Article 4 of the Capacity and Self-Determination (Jersey) Law 2016 ("the 2016 Law"), and the Royal Court so concluded under Article 24(1) of the 2016 Law. Having heard from AB and CD and from X's social worker E, and having reviewed a number of reports, including from occupational therapists and from Autism Jersey, the Royal Court further decided under Article 24(2) of the 2016 Law that X's best interests would be served by him securing accommodation in a property that had been favoured by CD, rather than an alternative property that had been identified and was favoured by AB. The Royal Court authorised CD as X's delegate for the limited purpose of securing the lease on the former property, and she subsequently entered into a three-year lease on his behalf. 3. In a later decision of 7 th October 2019 ("the October decision"), the Royal Court (JA Clyde-Smith OBE, Commissioner, and Jurats Olsen and Pitman) had to adjudicate on applications under Article 25(1)(e) of the 2016 Law by mother CD to be the sole delegate in relation to X's property and affairs, and by father AB to be his delegate for that purpose jointly with CD. 4. It was once again common ground in October that X lacked the capacity to make his own decisions in relation to his property and affairs, and the Court so found. The Court considered that the joint appointment of a delegate in the circumstances of the case would be likely to lead to undue delay (which by Article 35(4) of the

2016 Law is to be avoided), and appointed CD as the sole delegate in relation to X's property and affairs. 5. By Article 24(3) of the 2016 Law, the Royal Court was required to ensure that the scope and duration of the appointment were no greater than reasonably necessary having regard to all relevant circumstances. As to scope, the powers granted to CD in her capacity as delegate in relation to X's property and affairs fall within the range allowed by Article 28 of the 2016 Law. As described in the October decision at [9]-[10], they concern the management of X's assets (which consisted at the time of c. £9,000 held in a joint account in the names of AB and CD, together with weekly income support of £101), and the power to renew or enter into leases of less than nine years for any property in which X may reside or intend to reside. As to duration, the appointment was expressed to be on a "whole life" basis. 6. Neither parent applied to the Royal Court at any stage for the appointment of a delegate in relation to X's health and welfare. The powers which may be entrusted to such a delegate include, in particular, the power to decide where a person lacking capacity may live, with whom they may associate, and whether to give or refuse consent to health treatment (Article 27 of the 2016 Law). It remains the case that no such delegate has been appointed. 7. The Royal Court emphasised in both its judgments that it made no criticism of AB. The April decision applauded his efforts in seeking to identify suitable accommodation for his son. The October decision considered it clear that both parents had X's best interests at heart, and directed CD to keep AB informed as to X's property and affairs. 8. AB twice sought and obtained extensions of time for his appeal against the October decision of the Royal Court. On 1 st November, a single judge granted an extension until 18 th November. On 11 th November a further extension was granted until 25 th November. A third request for an extension was refused: but by filing his appeal on 25 th November 2019, AB ensured that he was within time for appealing against the October decision. 9. After lodging his appeal, AB made an application that Birt JA should recuse himself from sitting as one of the judges on this appeal, which was then due to be heard in March 2020. Birt JA rejected the recusal application in a judgment of 28 th February 2020: AB v AG (Capacity)

[2020] JRC 038A. The March hearing was cancelled because of the Covid-19 outbreak, and this appeal re-listed for July. The ruling of Birt JA on recusal was upheld by a full Court of Appeal (McNeill, Montgomery and Mountfield JJA) on 29 th May: AB v AG (Capacity)

[2020] JCA 094 . Leave to appeal that judgment to the Privy Council was refused by the same composition of the Court on 6 th July: AB v AG

[2020] JCA 131 . Scope of this appeal 10. AB's appeal is directed to the October decision, and as such was brought within the applicable time limit as twice extended. It appeared from the Notice of Appeal that AB might have been seeking to put the April decision in issue also, on the basis that: "the foregoing inextricably-linked interim hearing (to appoint [a] delegate and select a property arising from the same application made by [AB] to become delegate ... should, for the purposes of this appeal, be regarded as a continuation of the same hearing albeit the Court composition differs". AB acknowledged however that he had chosen to make no application either to the Royal Court or to the Court of Appeal to extend time to appeal against the April decision. Had such an application been before us

under Rule 16(1) of the Appeal Rules it would certainly have faced an uphill struggle, given the time that has elapsed since April 2019 and the fact that a three-year lease on the property where X now lives was entered into in reliance upon the Royal Court's decision.

11. The April decision was part of the context for the October decision, and to that extent we take it into account. We emphasise however that the only decision under appeal is the decision of 7 October to designate CD under Article 24(2)(b) of the 2016 Law as X's sole delegate in relation to his property and affairs. Grounds of appeal 12. We have carefully considered each of AB's grounds of appeal, as set out in his Notice of Appeal and developed by him at the hearing before us and in a subsequent email. They are not easily summarised but so far as they relate to the October decision, amount in essence to the following contentions: a. Substance of the decision: The Royal Court should have exercised its "inherent *parens patriae* provision for health and welfare", mindful that "[X] deserves to have his father looking out for him and able to protect his interests even if his mother does not always agree". Its decision did not extend to the appointment of a health and welfare delegate, paid insufficient regard to the option of appointing multiple delegates, and left a vulnerable, profoundly disabled adult, who "needs all the support he can get", without appropriate safeguarding . b. Bias: There was a real danger that Commissioner Clyde-Smith, who had been the subject of a complaint by [AB] in an unrelated matter, was biased against [AB] and should have recused himself; reference was made to favouritism towards "a fellow Advocate", lack of an open mind , and a danger of "active in-group bias". Reliance was placed on Article 6 of the European Convention on Human Rights ("ECHR"), as given effect by the Human Rights (Jersey) Law 2000 . It was at one time suggested that the Court of Appeal was itself less than impartial or truly fair, though the rejection of [AB's] recusal application in relation to Birt JA appears fatal to that argument and it was not pressed on us at the hearing. c. Unfair hearing: The Royal Court allowed less time to counsel than had originally been allocated, overlooking the complexity of an issue which required more time to cover, and failed fully to consider [X's] rights to a fair hearing, albeit in his absence. This was once again said to be contrary to Article 6 of the ECHR. 13. AB additionally placed before us a quantity of material concerning planning and health and safety matters at the property where X lives. He expressed particular concern about what he believed, given X's condition, to be an insufficiently high rail or banister above the stairwell. As the Royal Court noted in the October decision at [3], matters of this nature had previously been raised with the Health and Safety Inspector, who investigated and closed the matter, and with the Safeguarding Board, which confirmed that it had no concerns. Such matters were not before the Royal Court in October, as it correctly remarked, and therefore form no part of this appeal. We observe only that as confirmed by Advocate Kerley, who appeared before us for the Attorney General as *partie publique* , the appointment of CD as X's delegate for the limited purposes set out above presents no obstacle either to AB communicating health and safety concerns to the relevant authorities (as indeed he told us he has continued to do since the October decision), or to those authorities investigating them should that be warranted. Bias / unfair hearing 14. We first consider the submissions that the Royal Court displayed

real or apparent bias against AB, and that its procedures fell short of what was required for a fair trial. 15. Both AB and CD appeared without legal representation at the hearing on 7 th October 2019. Advocate Kerley appeared for the Attorney General as *partie publique* , and set out for the Court the options that were before it in relation to the appointment of a delegate for X's property and affairs. 16. We have reviewed the incomplete transcript of the hearing of 7 th October with which AB has provided us, mindful that courts should make such allowances for a litigant in person as may be required in the interests of justice. We find no failure in that regard. The applicant was given sufficient notice of the hearing and sufficient time to file his evidence. The hearing was completed well within its 3-hour listing; both AB and CD had the time needed to make such points as were relevant to the Court's determination, and AB did so without complaint. So far as we can judge from the transcript, the hearing proceeded in a fair, courteous and efficient manner. 17. Had AB believed that his previous complaint about Commissioner Clyde-Smith was liable to prejudice the Commissioner against him, the proper course would have been to ask the Commissioner to recuse himself before hearing the case, as indeed AB was to do in relation to Birt JA. No such application was made. But in any event, the fact that a litigant has previously complained about a particular judge cannot, without more, disqualify that judge from hearing a case involving that litigant. We detect no sign in the judgment, or from those parts of the transcript that AB placed before us, that the Court displayed a closed mind, or that any real or apparent bias was displayed by Commissioner Clyde-Smith or by the court as a whole. 18. In short, we have no reason to believe that the Royal Court was actually or apparently biased, or that it approached the issue before it in anything other than a fair-minded, responsible and procedurally fair manner. Substance of the decision 19. In reviewing the exercise by the Royal Court of a discretion, the role of this Court is a limited but important one. In *Abdul Rahman v Chase Bank (CI) Trust Company Limited*

[1984] JJ 127, the Court of Appeal stated that it would interfere in such cases only where: (i) the Royal Court misdirected itself with regard to the principles in accordance with which the discretion has been exercised; or (ii) the Royal Court, in exercising its discretion, has taken into account matters which ought not to have been taken into account or has failed to take into account matters which ought to have been taken into account; or (iii) the decision is plainly wrong; or (iv) there has been a change of circumstances after the Royal Court made its order that would justify acceding to an application to vary it. As was remarked in *HRCKY v Hard Rock Limited*

[2019] JCA 123 , the latter ground for interfering would naturally apply only if the case continues, and therefore is relevant where, for example, interim injunctions have been imposed pending trial. 20. AB criticises the Royal Court for starting from the position that X's best interests would be served by having a single delegate, and that a joint appointment in this case was likely to lead to undue delay (which as it pointed out, is to be avoided pursuant to Article 35(4) of the 2016 Law). We reject this criticism. The Royal Court was plainly alive to the option of a joint appointment under Article 34(4) of the 2016 Law, and to the

desirability, which it underlined at the end of the October decision, of both parties remaining involved in X's life. 21. During the hearing, the Commissioner asked both AB and CD about the feasibility of a joint appointment. CD said she would like both parents to be involved in X's affairs but expressed concern that if they failed to agree, as had happened earlier in the year over the property issue, it would "cause [X] issues". AB thought the difficulties were not insurmountable but accepted that occasional decisions might need the "casting vote " of a third person. The Royal Court had the opportunity to observe AB and CD and to assess the likelihood of a joint appointment proving workable in practice. Jurat Olsen had also been party to the April decision, in which the Royal Court remarked that it was a pity that agreement could not be reached between the two parents. In those circumstances, it is not open to us as a court of review to find that material matters were left out of account or that the decision of the Royal Court was plainly wrong. 22. AB further submits that the Royal Court should have exercised its inherent *parens patriae* jurisdiction in the interests of X's welfare. There are circumstances in which the courts do retain an inherent jurisdiction to protect the interests of children and vulnerable adults: *A v A* and another (Children:- Habitual Residence) (Reunite International Child Abduction Centre and others intervening)

[2013] UKSC 60 , per Baroness Hale at [63]; *E v F*

[2015] JRC 221 at [12], and we note that the general jurisdiction of the Court is expressly preserved by Article 24(9) of the 2016 Law. However, the power of the Court to make declarations and decisions and to appoint delegates is intended to function primarily, and for good reason, on application by an interested person under Article 25. That scheme explicitly prioritises the best interests of a person lacking capacity (Articles 3(1)(c), 6, 24). The Royal Court determined the issue that AB and CD asked it to determine, in terms that we are able neither to second-guess nor to fault. It is not to be criticised for not taking the initiative to appoint a health and welfare delegate when there was, understandably, no application before it to do so. 23. We refer, finally, to the fact that the appointment was expressed by the Royal Court to be on a whole-life basis. No specific objection was taken to that in the Notice of Appeal, though this aspect of the case finds an echo in AB's observation at the hearing before us that "Unless the Court takes action, the situation will continue in perpetuity" . As this is not before us as a ground of appeal, we need only say that the apparent finality of a whole-life appointment may be mitigated in practice by the power vested in the Royal Court under Articles 24(5) and (6) of the 2016 Law to revoke the appointment of a delegate in the circumstances there specified. It is not to be thought that a situation would be bound to continue in perpetuity if it were no longer in the best interests of a person lacking capacity.

Conclusion

24. We are unable to accept AB's final submission in relation to his grievances that this Court should "consider escalating them to Judicial Review and, failing that, Doléance or referral to a higher authority in order to prevent an injustice". Our function is limited to determining his appeal against the Royal Court's decision of 7 th October 2019. For the reasons we have given, that appeal is rejected. Authorities Capacity and Self-Determination (Jersey) Law 2016. AB v AG (Capacity)

[2020] JRC 038A. AB v AG (Capacity)

[2020] JCA 094 . AB v AG

[2020] JCA 131 . Human Rights (Jersey) Law 2000. Abdul Rahman v Chase Bank (CI) Trust Company Limited

[1984] JJ 127. HRCKY v Hard Rock Limited

[2019] JCA 123 . A v A and another (Children:- Habitual Residence) (Reunite International Child Abduction Centre and others intervening)

[2013] UKSC 60 . E v F

[2015] JRC 221 . Page Last Updated: 07 Oct 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2020/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/ab-v-ag-capacity-2020-jca-147b-30-july-2020>

Prepared on 24 October 2026 · Esheria