



Neutral Citation Number: [2024] EWCOP 44 (T3)

Case No: 14258984

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/08/2024

Before :

MS JUSTICE HENKE

Between :

North Central London Integrated Care Board

Applicant

- and -

(1) AA

Respondent

(by his Litigation Friend, the Official Solicitor)

(2) MA

(3) IA

Re: AA (Costs)

Ms Victoria Butler-Cole KC (instructed by **Hill Dickinson LLP**) for the **Applicant**
Miss Katie Gollop KC (instructed by the **Official Solicitor**) for the **First Respondent**
Ms Kate Mather (instructed under the **Direct Access Scheme**) for the **Second and Third Respondents**

AFTER CONSIDERATION ON THE PAPERS

Approved Judgment

This judgment was handed down remotely at 2pm on 29 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS JUSTICE HENKE

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 incapacitated person and members of their 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.

Ms Justice Henke :

1. This short judgment is given in relation to an application for costs against the ICB made by the parents of AA in case number 14258984, reported as [2024] EWCOP 39 (T3). The application by AA's parents is for the costs of the hearings on 12 and 13 June 2024.
2. On 29 July 2024, I awarded AA's parents the costs they sought. I did so on the erroneous basis that the ICB did not oppose that application. I had come to that conclusion because I had not received any submissions on their behalf. The sending out of my order exposed the error. Counsel for the ICB had actually submitted a skeleton argument opposing AA's parents' application for costs which had not been forwarded to me. Thus, I am asked on behalf of the ICB to set aside the order made on a false premise and to reconsider the application. Given that the error in this case was the error of the court, I consider that I have no option but to set aside my original order which was made on a false premise. Having done so, I must go on to re-consider the application. This is my re-consideration of the issue of costs between AA's parents and the ICB. It is made in the light of the written submissions I have now received on behalf of AA's parents and those on behalf of the ICB.
3. On behalf of AA's parents, the submission is that the ICB should pay their costs. It is stated that "*the kernel of [their] application is stark - such costs were wholly unnecessarily incurred as the ICB was to pursue and implement its plan, whatever the court decided*". It is said that such costs were pointlessly incurred. In addition, it is submitted that:
 1. *The application was brought late and too late for AA to have the intended benefit of the proceedings.*
 2. *The lateness of the application led, exceptionally, to no relief being granted.*
 3. *Lateness also led to very rushed proceedings, multiple hearings at very short notice, and avoidable cost.*
 4. *The ICB should have had a clear understanding, before issuing proceedings, that in the event that AA could not be moved from the hospital, Prof Turner Stokes and her team would provide AA with Guideline treatment (calm coma and withdrawal of CANH) with or without a COP or High Court declaration."*
4. The ICB resist the application for the following reasons:
 - 1) The ICB issued their application at a point when there were two options for AA's continued care and treatment - transfer to a nursing home under a palliative care plan or withdrawal of treatment in hospital. By 10 June 2024 there were no alternative options, the only clinically appropriate way forward was to provide end-of-life palliative care. The reality of AA's clinical situation overtook events.

- 2) The ICB had hoped that given AA's short life expectancy the case would be dealt with swiftly.
 - 3) The ICB was not responsible for any delay in bringing this case to court. It was not responsible for AA's care and treatment in hospital - it became involved when there was an option of care outside the hospital which it would have commissioned. Once the ICB was aware of a need for an application there was no delay in bringing that application before the court.
 - 4) There was nothing improper in the ICB's amended application for a declaration of lawfulness. Whilst the court declined to make that declaration, the court did not criticise the clinicians or find their intended actions unlawful or in breach of AA's human rights.
 - 5) AA's parents' response to the application was to seek an adjournment to obtain representation and seek to obtain, if they could be found, a number of experts to give evidence before this court.
5. I have reminded myself of the relevant law. The hearings on 12 and 13 June 2024 concerned both the ICB's application under the Inherent Jurisdiction and the possibility of further orders under the Mental Capacity Act 2005, as contended for by the other parties. Under the Mental Capacity Act, CPR 19.3 and 19.5 apply. In relation to the application under the Inherent Jurisdiction, the Senior Courts Act 1981 and the CPR applies. Before making my decision, I have read CPR 1998 r.44.2 and Mr Justice Cobb's decision in *T & Anor v L & Ors (Inherent Jurisdiction: Costs)* [2021] EWHC 2147 (Fam).
6. I have also re-read my substantive judgment. Within my initial judgment I made criticisms about the delay in bringing the case before the court. I have reminded myself that the application I dealt with was made the Friday before a Bank Holiday weekend. The case came into the out-of-hours and urgent applications list during vacation. That it was so listed is entirely due to when the application was issued. A number of hearings were required to ensure proper case management and enable proper and considered reaction to AA's clinical evolution. I note that a one-day hearing was carved out of an extremely busy list to enable the issues to be fully ventilated and evidence to be heard. I consider that (i) given the need to ensure fairness to all the parties in this case and (ii) the significant and urgent demands of other cases upon the court's time, the fact that the application was case managed and heard within two weeks of issue cannot be properly criticised. I do not consider the parents' wish to contest the application to be unreasonable. Whilst from a clinical perspective their reaction might seem unreasonable, I consider that their position in the hearings before me was a very human reaction to a tragic situation and was on that level understandable and to be expected. I remain of the view that delay in this case arose prior to issue. Given the evolving clinical picture in relation to AA, such delay was, to say the least, regrettable. However, I accept that the criticism that the Court has made both about delay in initiating proceedings and the conduct of the Trust in this case cannot be levied against the ICB. They are a separate entity. The Trust did not appear before me. The ICB was not responsible for

AA's care and treatment in the hospital. They only became involved when there was an option for care outside the hospital which it would have commissioned. The ICB's role in the case is relevant to my decision-making because I must consider it when determining the issue of costs. I must also look at the litigation conduct of both parties. I have done so. For the reasons I have given earlier in this paragraph, I do not consider that either parties' litigation conduct has been reprehensible or outwith the band of reasonableness afforded to litigants. Further, I factor in that neither party has been successful in whole or in part in relation to the litigation which was before me. I accept the submission on behalf of the ICB that in this case and sadly clinical events overtook the proceedings.

7. Accordingly, in the circumstances of this case, I have decided that the appropriate costs order is for there to be no order for costs between the ICB and AA's parents.