Neutral Citation Number: [2021] EWHC 2046 (Admin)

Case No: CO/1654/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2021

Before :

MR JUSTICE MOSTYN

- -

Between :

SM	**Claimant**
- and -	
(1) The Court of Protection	
(2) The London Borough of Enfield	**Defendants**

- -
- -

The applicant acts in person

- -

Approved Judgment

I certify pursuant to the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 that in other proceedings this judgment may be cited and/or included in a bundle of authorities.

Mr Justice Mostyn:

1. By her application in Form N461 the claimant seeks permission to challenge the following decision:

> 'COP decision on Best Interest on long term placement. Date of decision: 12th March 2021'

The application is undated but was made on or about 4 May 2021.

2. On 12 March 2021 HHJ Hilder made an order in the Court of Protection in relation to the claimant's daughter, RM, who is nearly 24 years old. Para 3 of that order provided:

> 'After 31 August 2021 RM shall reside and receive care in the long-term at 41DPA, this being in her best interests. (For the avoidance of doubt, SM's application for an order that RM's placement at 41 DPA should be interim only is refused).'

Para 16 of that order stated that permission to appeal para 3 was refused.

3. As was her right, the claimant applied to a Court of Protection Tier 3 judge for permission to appeal. On 12 April 2021 Keehan J refused the application, holding:

> 'I have read the Notice of Appeal, the Skeleton Argument of the Applicant and the accompanying documents, including the position statements prepared for the hearing on 12.03.21 before HHJ Hilder.
>
> Permission to appeal the provisions of paragraph 3 of the order of 12.03.21 is refused.
>
> There is no reasonable prospect of the proposed appeal succeeding on the basis that there is no reasonable prospect of establishing that the decision of HHJ Hilder to approve a long term placement of RM was wrong.
>
> I consider the proposed appeal to be totally without merit.'

4. The claimant has no further right of appeal. Permission to appeal having been refused, she has no right to appeal that decision to the Court of Appeal: see s.54(4) of the Access to Justice Act 1999.

5. Therefore, the claimant has issued this application for judicial review. It is a proxy for a prohibited appeal against the decision of Keehan J, and as such is likely to be an abuse.

6. The application gives rise to the core question: is a decision of the Court of Protection ('COP') refusing permission to appeal susceptible to judicial review? If the answer is yes then the reviewable decision is that of Keehan J and not that of HHJ Hilder. The claimant is now out of time for challenging the decision of Keehan J.

7. The core question requires consideration of the decisions of the Divisional Court, the Court of Appeal and the Supreme Court in *R (Cart) v Upper Tribunal (Public Law Project intervening)* [2012] 1 AC 663, SC; [2011] QB 120, CA and DC.

8. In *Cart* the question was whether a decision of the Upper Tribunal (UT) refusing permission to appeal a decision of the First-tier Tribunal (FTT) was susceptible to judicial review.

9. The Tribunals, Courts and Enforcement Act 2007 established the UT. Section 3(5) provides:

> 'The Upper Tribunal is to be a superior court of record.'

Section 25 provides:

> **'Supplementary powers of Upper Tribunal**
>
> (1) In relation to the matters mentioned in subsection (2), the Upper Tribunal:
>
> (a) has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority as the High Court, and
>
> (b) has, in Scotland, the same powers, rights, privileges and authority as the Court of Session.
>
> (2) The matters are -
>
> (a) the attendance and examination of witnesses,
>
> (b) the production and inspection of documents, and
>
> (c) all other matters incidental to the Upper Tribunal's functions.'

10. In the Divisional Court Laws LJ explained in a judgment of the utmost erudition that designation as "a superior court of record" did not of itself render the UT immune from judicial review. In the Supreme Court at [37] Baroness Hale stated that the contrary argument was "killed stone dead" by that judgment.

11. Section 25 was not referred to in the Divisional Court or the Supreme Court. In the Court of Appeal at [16] Sedley LJ stated:

> 'The problem with section 25 is that it is equally explicable as a badge of status and as a recognition that, but for the express provision it makes, the UT would lack the inherent powers enjoyed by the High Court.'

12. The High Court powers granted to the UT by s.25 are essentially procedural. They do not reincarnate the High Court under a different name. On the contrary, as Sedley LJ explained at [19]:

> '…the UT is not an avatar of the High Court at all: far from standing in the High Court's shoes, as Mr Fordham puts it in his written submission, the shoes the UT stands in are those of the tribunals it has replaced.'

13. In the Supreme Court at [37] Baroness Hale agreed that the judicial review jurisdiction of the High Court over unappealable decisions of the UT had not been ousted. She said:

> 'The way in which the argument has developed through the proceedings which are now collected before us enables us to be clear on three points. First, there is nothing in the 2007 Act which purports to oust or exclude judicial review of the unappealable decisions of the Upper Tribunal. Clear words would be needed to do this and they are not there. The argument that making the Upper Tribunal a superior court of record was sufficient to do this was killed stone dead by Laws LJ and has not been resurrected. Second, it would be completely inconsistent with the new structure introduced by the 2007 Act to distinguish between the scope of judicial review in the various jurisdictions which have now been gathered together in that new structure. The duties of the Senior President, set out in section 1(2), clearly contemplate that the jurisdictions will retain their specialist expertise, so that one size does not necessarily fit all; but the relationships of its component parts with one another and with the ordinary courts are common to all. So too must be the principles adopted by the High Court in deciding the scope of judicial review. Third, the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law—that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise. Both tribunals and the courts are there to do Parliament's bidding. But we all make mistakes. No-one is infallible. The question is, what machinery is necessary and proportionate to keep such mistakes to a minimum? In particular, should there be any jurisdiction in which mistakes of law are, either in theory or in practice, immune from scrutiny in the higher courts?'

14. The Supreme Court went on to rule that the test for challenge in judicial review proceedings should be the same as that for a second-tier appeal under s.55 of the Access to Justice Act 1999: see [55] per Baroness Hale and [130] per Lord Dyson. Section 55 provides:

> 'Where an appeal is made to the county court, the family court or the High Court in relation to any matter, and on hearing the appeal the court makes a decision in relation to that matter, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that:

> (a) the appeal would raise an important point of principle or practice, or
>
> (b) there is some other compelling reason for the Court of Appeal to hear it.'

15. This has led to the introduction of CPR 54.7A. This rule only applies where the UT has refused permission to appeal against a decision of the FTT. It does not, therefore, apply in this case, or, for that matter, in respect of an unappealable refusal of permission to appeal from a decision made in the Family Court or the County Court.

16. CPR 54.7A(7) provides:

> 'The court will give permission to proceed only if it considers –
>
> (a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and
>
> (b) that either –
>
> (i) the claim raises an important point of principle or practice;
>
> or
>
> (ii) there is some other compelling reason to hear it.'

And para (8) provides

> 'If the application for permission is refused on paper without an oral hearing, rule 54.12(3) (request for reconsideration at a hearing) does not apply.'

17. Although the Supreme Court clearly intended that the number of challenges capable of being made in such judicial review proceedings would be very small, the law of unintended consequences has led to very many such applications being made. Anyone who sits doing paper applications in the Administrative Court will know that perhaps up to one day a week is spent doing "Cart" applications, almost all of which are hopeless.

18. Consequently, the report[1] of the Independent Review of Administrative Law Panel, chaired by Lord Faulks QC, has recommended that the Cart jurisdiction be abolished: see paras 3.35 – 3.46. It recorded the remarkable statistic that of 5,502 Cart applications in the eight year period from 2012 – 2019, only 12 were ultimately successful.

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1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf

19. The government has accepted this recommendation and it is anticipated that it will be contained in the forthcoming Judicial Review Bill. Although the report of the panel dwelt on applications against unappealable decisions of the UT, its reasoning must apply equally to a Cart-type application seeking to challenge an unappealable refusal of permission to appeal by an appeal judge in the County Court or Family Court. If the Cart jurisdiction is to be abolished, then in my opinion it should be completely abolished.

20. This takes me back to the core question in this case. Does the Cart jurisdiction extend to the Court of Protection? Can I grant permission to the claimant to seek judicial review of Keehan J's refusal to grant permission to appeal?

21. The history of the genesis of the Mental Capacity Act 2005 is well known. It originates with the Law Commission report *Mental Capacity* (Law Com No. 231, 28 February 1995). That recommended the creation of a new court to administer a substantial array of existing common law and statutory powers together with new powers. The most significant common law powers in question were those exercised by the High Court to authorise proposed medical treatment: see, for example, *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

22. The Act came into force on 1 October 2007.

23. Meanwhile, the European Court of Human Rights in *HL v United Kingdom* (2004) 40 EHRR 761 held that the habeas corpus and judicial review proceedings brought in that case did not afford the speedy access to the court demanded by Article 5 of the European Convention on Human Rights. Therefore, the recently enacted Mental Capacity Act 2005 had to be amended by the Mental Health Act 2007 to insert sections 4A and 4B, which strictly regulated orders that had the effect of depriving a person of their liberty. Again, the amended statute replaced inherent prerogative powers exercised by the High Court.

24. The draft bill appended to the Law Commission report provided in clause 46(1):

> 'There shall be a superior court of record known as the Court of Protection and the office of the Supreme Court called by that name shall cease to exist.'

Clause 50(1) provided:

> '**Supplementary powers and effect of orders etc**
>
> In relation to the attendance of witnesses, the production and inspection of documents, the enforcement of its orders and directions and all other matters incidental to its jurisdiction the Court of Protection shall have the like powers, rights, privileges and authority as the High Court.'

25. It can be seen that these words are very similar to those in the 2007 Act considered by the Supreme Court in *Cart*.

26. However, Parliament did not follow the Law Commission language exactly. While s.45(1) provided that "there is to be a superior court of record known as the Court of Protection", s.47 provided:

> **'General powers and effect of orders etc.**
>
> (1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.'

27. In my judgment the variation of the Law Commission's language is highly significant. When defining the scope of the new court's jurisdiction Parliament spoke of "general powers" rather than supplementary powers. Further, those powers were not confined to procedural matters such as attendance of witnesses and the production of documents, nor were they confined to matters of enforcement, nor were they confined merely to matters incidental to the court's jurisdiction. Rather, the new Court of Protection was granted exactly the same powers, rights, privileges and authority as the High Court. There is no opacity of language in s.47(1). *Pace* Baroness Hale's para [37] the words are completely clear.

28. In *R v Cripps, Ex p Muldoon* [1984] QB 68 the Divisional Court had to decide whether an election court was a superior court of record and not amenable to judicial review, or an inferior court. Robert Goff LJ stated at 87:

> '…it is necessary to look at all the relevant features of the tribunal in question including its constitution, jurisdiction and powers and its relationship with the High Court in order to decide whether the tribunal should properly be regarded as inferior to the High Court, so that its activities may appropriately be the subject of judicial review by the High Court. As we have already indicated, in considering that question the fact (if it be the case) that the tribunal is presided over by a High Court judge is a relevant factor, though not conclusive against the tribunal being classified as an inferior court; just as relevant are the powers of the tribunal and its relationship with the High Court which can ordinarily be ascertained from the statute under which the tribunal is set up.'

29. In my judgment, the position of the Court of Protection is far removed from that of the Upper Tribunal as considered in *Cart*. As Sedley LJ noted, the Upper Tribunal was standing in the shoes of the Child Support Commissioners. Clearly, the Commissioners were properly to be regarded as a tribunal inferior to the High Court. Therefore, an unappealable decision by the Commissioners would be susceptible to judicial review. Obviously, judicial review would only be granted in highly exceptional circumstances, for example where it could be shown that the decision in question was legally incorrect or was irrational or perverse.

30. In contrast, the constitution, jurisdiction and powers of the Court of Protection clearly indicate that it is to be regarded as being of equal status, and in no sense inferior, to the High Court. This is what s.47(1) literally says. But the argument goes further than that. Critically, from 2007 the Court of Protection would exercise the High Court's

inherent powers over incapacitated adults, as explained below. The exercise of those powers by the High Court before 2007 was, obviously, immune from judicial review.

31. That Parliament clearly intended that the new court should be an avatar or alter ego of the High Court was hardly surprising, given that the new court was going to do some (but not all) of the previous work of the High Court in this field. It is true that the Law Commission had said in para 2.18 of its report that outside the guardianship scheme in the Mental Health Act 1983 there was no lawful power to protect an incapacitated person's well-being. Equivalently, the House of Lords had said that there was no adult welfare jurisdiction in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 and had ruled that an issue about the proposed care of a incapacitous adult should be resolved by declaratory relief as to the (un)lawfulness of the proposed course of action judged by reference to the common law doctrine of necessity. This might suggest that there was not much High Court work for the new court to take over. That would be a wrong conclusion.

32. By virtue of two ground-breaking decisions, *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38, and *In re S (Adult Patient: Sterilisation)* [2001] Fam 15, the High Court was found to have the power to make positive orders grounded on the incapacitated adult's best interests. As Sir James Munby has recently explained in a typically erudite exposition of that development:

> 'These two decisions of the Court of Appeal finally enabled the judges of the Family Division to throw off what, it had become increasingly apparent, were the shackles imposed by the House of Lords and to develop a completely new jurisdiction.'[2]

33. That completely new jurisdiction was thriving by the time that the 2005 Act came into force in 2007. And inasmuch as it related to incapacitous adults, it was that jurisdiction which was taken over by the Court of Protection. It is to be noted that the jurisdiction to make a best interests decision remained with the High Court over certain persons not falling within the remit of the 2005 Act, such as Gillick competent children, 16 and 17 year olds, and (to some extent) capacitous, but vulnerable, adults: see *NHS Trust v X (In the matter of X (A Child) (No 2))* [2021] EWHC 65 (Fam) for a recent exposition of the retained High Court jurisdiction over such persons.

34. Therefore, before the passage of the 2005 Act, the order of HHJ Hillier would have been made by the High Court exercising its inherent powers.

35. This is a key differential to the position in *Cart*. My answer to the core question is that in contrast to the position of the UT, the Court of Protection cannot be regarded as a court inferior to the High Court, and therefore its unappealable decisions cannot be the subject of judicial review by the High Court. I reach this clear conclusion having regard to (a) the terms of s.47 of the 2005 Act, (b) the scope and nature of the work in this field taken over by the Court of Protection, and (c) the scope and nature of the work in this field retained by the High Court.

[2] *Whither the inherent jurisdiction? How did we get here? Where are we now? Where are we going? Part I* – [2021] Fam Law 215.

36. In contrast, I do not think the answer is nearly so clear cut where a decision refusing permission to appeal is made in the Family Court.

37. The Family Court was created by s.17 of the Crime and Courts Act 2013. This inserted s.31A into the Matrimonial and Family Proceedings Act 1984. This provided that the Family Court would come into existence and that it would be a court of record. Schedule 10 to the 2013 Act inserted s.31E into the 1984 Act. This stated:

> **'Family court has High Court and county court powers**
>
> (1) In any proceedings in the family court, the court may make any order:
>
> (a) which could be made by the High Court if the proceedings were in the High Court, or
>
> (b) which could be made by the county court if the proceedings were in the county court.'

38. This is phrased much less expansively than s.47 of the Mental Capacity Act 2005. The words do not seek to vest the Family Court with all of the powers, rights, privileges and authority of the High Court. Rather, the Family Court was merely given limited additional High Court powers to make incidental or supplemental orders to give effect to its decisions: see *President's Guidance: Jurisdiction of the Family Court - allocation of cases within the Family Court to High Court judge level and transfer of cases from the Family Court to the High Court (24 May 2021)*. This states at para 15:

> '[Section 31E(1)(a)] does not permit the Family Court to exercise original or substantive jurisdiction in respect of those exceptional matters, including applications under the inherent jurisdiction of the High Court, that must be commenced and heard in the High Court. It does, however, permit the use of the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to decisions within the jurisdiction of the Family Court.'

Further, the Family Court principally subsumed the family jurisdiction of the County Courts, although it was intended also to embrace some, but by no means all, of the family jurisdiction of the High Court: see the President's Guidance at paras 14 and 17.

39. Accordingly, it seems to me that the Family Court is probably to be regarded as inferior to the High Court. Therefore, a decision by an appeal judge within the Family Court refusing permission to appeal is seemingly covered by the reasoning of the Supreme Court and is susceptible to a judicial review challenge under the second-tier appeal test, although a definitive decision must be awaited.

40. The Supreme Court confirmed that an unappealable decision by the County Court would be susceptible to judicial review. Again, the test would be the second-tier appeal standard set out in s.55 of the 1999 Act. The previous test propounded in *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 was disapproved: see [94] per Lord Phillips and [105] per Lord Clarke.

41. I revert to the case before me. If I am wrong in my answer to the core question, the application nonetheless falls to be dismissed both for a procedural reason and on the merits.

42. On this footing the only possible decision that can be challenged is that of Keehan J, refusing permission to appeal on 12 April 2021. The judicial review permission application had to be made at the latest within three months of the decision: see CPR 54.5(1)(b). The application which was made does not address this decision. The claimant has made no application challenging that decision within the prescribed three-month limitation period. Therefore for this reason the application is refused.

43. The second reason is this: under s.55 of the 1999 Act the claimant has to advance an arguable case (a) that both the decision of Keehan J refusing permission to appeal and the decision of HHJ Hilder against which permission to appeal was sought are wrong in law; and (b) that either the claim raises an important point of principle or practice or there is some other compelling reason to hear it.

44. The second appeal test in s.55(1) of the Access to Justice Act 1999 is very stringent. It is a particularly high hurdle (*Alexander v Alexander* [2011] EWCA Civ 1019). Even if the prospects of success are very high that will not necessarily carry the applicant over the hurdle (*Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60 at [24(2)]).

45. Given that the only basis of challenge is an error of law it follows that the second part of the test requires that the claimant must show that the alleged error of law is arguably highly material and very serious.

46. The claimant provides no grounds demonstrating satisfaction of this stringent test; she does not even refer to it.

47. Her complaints about the decision of HHJ Hilder amount to no more than a disagreement with its merits.

48. Having read the papers carefully I have reached exactly the same decision as Keehan J.

49. The application is therefore dismissed.

50. I am of the view that the application is totally without merit. Accordingly, CPR 54.12(7) applies. The claimant may not request that the decision to refuse permission to apply for judicial review be reconsidered at a hearing.

51. That is my judgment.
