Re FD (inherent jurisdiction: power of arrest) [2016] EWHC 2358

HHJ Bellamy, sitting as a DHCJ

Facts

FD was an 18 year-old woman about whom her local authority had had concerns while she was a child. At the age of 16 she had started a relationship with GH, a man in his twenties who had an extensive criminal record and was a drug-user. FD had told social workers that he had forced her to take heroin, had cut her arms and legs and had taken money from her. The authority was also concerned about her father, AD, who also had a criminal record and was a drug-user. He had a history of exploiting vulnerable adults in order to obtain money and somewhere to live.

At the age of 11 FD had been diagnosed with food-avoidant emotional disorder and been an in-patient at Great Ormond Street for several months. At the age of 17 she had been found to meet the criteria for a mild learning disability and her history was suggestive of a diagnosis of a mixed conduct and emotions disorder, an avoidant/restrictive food intake disorder and a substance use disorder. She was found to lack capacity to decide about contact with GH.

In June 2015, when aged 17, FD was made a ward of court and an injunction was made against GH restraining him from having contact with her.

Shortly before FD reached the age of 18, the authority applied to the Court of Protection for an injunction to the same effect – and against AD also. Such orders were made and powers of arrest attached to them.

FD was, however, found to have capacity to decide about contact with GH and FD. As a consequence the authority applied to the High Court under its inherent jurisdiction, on the basis she was vulnerable and was extremely susceptible to the influence of both GH and FD.

Inherent jurisdiction

The authority again sought injunctions against GH and AD, which were granted on an interim basis. The authority also applied for a power of arrest to be attached to the order against GH, relying on the fact that in Re SA (vulnerable adult with capacity: marriage) [2005] EWHC 2942, Munby J had done so. The decision in that case had been approved by the Court of Appeal in DL [2012] EWCA Civ 253, in which the Court had determined that the inherent jurisdiction continued in respect of vulnerable adults whose circumstances did not bring them within the scope of the Mental Capacity Act 2005 ('MCA') and therefore the Court of Protection ('COP').

Having decided to attach a power of arrest, some days later HHJ Bellamy became aware of the decision of the Court of Appeal in Re G (wardship) (jurisdiction: power of arrest) (1983) 4 FLR 538, in which the Court had held that in wardship proceedings the High Court could not attach a power of arrest that was analogous to that available under the Domestic Violence and Matrimonial Proceedings Act 1976 ('DVMPA'), the precursor to the power of arrest that became available under the Family Law Act 1996 ('FLA').

HHJ Bellamy heard full argument on the point and decided, following Re G, to discharge the power of arrest.

Re G

Ewbank J had ordered the father of the child who was the subject of the wardship proceedings not to remove the child from the care and control of the mother and had attached a power of arrest to that order, by which 'the tipstaff or any constable may arrest without warrant the father if he has reasonable cause for suspecting the father is in breach'. Ewbank J had acknowledged that this was entirely novel, in that the Court could make an order providing for the arrest of a person who had disobeyed a court order in relation to a ward, by means of a bench warrant, but he had not come across an order being made in advance of disobedience.

The Court of Appeal drew the distinction between the High Court's powers to make such an order and its powers to enforce it, which were the ordinary powers the courts have, for example committal to prison on contempt being proved. Where in its view Ewbank J had gone wrong was in delegating to the tipstaff or a constable the power to decide whether there had been a breach of the injunction such that he, as the judge, would then only have the power to decide on what remedy for the breach was appropriate. The Court added that what the judge can do instead is make an ex parte order for committal, which would be a warrant authorising the arrest of the person concerned, i.e. a bench warrant.

Re SA

Munby J had, amongst other things, ordered the parents of the adult concerned not to use violence on her and had attached a power of arrest to that part of the order.

Section 42(2)(a) of the FLA empowers the High Court and the family court to make a non-molestation order if an application for one has been made ('whether in other family proceedings or without any other family proceedings being instituted') by a person who is associated with the

respondent and until 1 July 2007 a power of arrest could be attached to such an order; it can only be attached now to an occupation order. In Re FD HHJ Bellamy concluded that Munby J had in fact had the jurisdiction, under the FLA, to attach such a power to the order he had made (relatives are associated persons).

What HHJ Bellamy did not address, however, is whether Munby J could have made a non-molestation order under the FLA in the proceedings before him, since for the purposes of that Act 'family proceedings' means, by reason of section 63(1) of that Act, any proceedings under the inherent jurisdiction of the High Court *in relation to children* or under the enactments mentioned in section 63(2), including Part IV of the FLA. He probably did not do so because it is reasonably clear that section 42(2)(a) enables such an order to be made even though there are no family proceedings other than those in which the order is sought.

Associated persons

By section 62(3), for the purposes of Part IV of the FLA, a person is associated with another person if —

(a) they are or have been married to each other;

(aa) they are or have been civil partners of each other;

(b) they are cohabitants or former cohabitants;

(c) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;

(d) they are relatives;

(e) they have agreed to marry one another (whether or not that agreement has been terminated);

(eza) they have entered into a civil partnership agreement (as defined by section 73 of the Civil Partnership Act 2004) (whether or not that agreement has been terminated);

(ea) they have or have had an intimate personal relationship with each other which is or was of significant duration.

Questions arising

HHJ Bellamy added that although he had not heard argument on the point it seemed to him that, for the same reasons, the COP had not had the jurisdiction to attach a power of arrest to the order against GH – but is he right about this and can a court order the arrest of those who appear to be in breach of its orders?

1. Can the High Court attach a power of arrest?

The High Court routinely makes location orders, whose purpose is to enable the tipstaff to find children who may have been abducted. The standard form for such an order includes the notice that the Court has directed the tipstaff 'to arrest any person whom he has reasonable cause to believe has been served with the order and has disobeyed' certain specified obligations, including not to remove the child from the jurisdiction. Such a direction includes that the tipstaff must explain the ground for the arrest and must bring the arrested person before the court as soon as practicable and in any event no later than the working day immediately following the arrest. On the face of it, therefore, the High Court does as a matter of practice empower the tipstaff to arrest for reasonable cause rather than only order arrest pursuant to a bench warrant.

2. Can the High Court order an arrest?

It clearly can do so, by means of a bench warrant. Further, section 47(8) of the FLA provides that if it (or the family court) has made a non-molestation order then if at any time the applicant considers the respondent has failed to comply with the order, he can apply to the 'relevant judicial authority', i.e. a judge of the court that made the order, for the issue of a warrant for the arrest of the respondent. By sub-section (9), the judge may not issue such a warrant unless the application is substantiated on oath and he has reasonable grounds for believing the respondent has failed to comply with the order.

3. Can the family court order an arrest?

It clearly can do so, under section 47(8) of the FLA.

4. Can the Court of Protection attach a power of arrest?

By section 47(1) of the MCA, the COP 'has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court'. By section 17(1)(c) of the same Act, its powers in respect of personal welfare extend in particular to making an order prohibiting a named person from having contact with P. If the High Court can attach a power of arrest then there does not appear any reason why the COP cannot do so.

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5. Can the COP order an arrest?

By the same reasoning, as the High Court can do so, by means of a bench warrant, so can the COP. Further, if a non-molestation order has been made under the FLA and if the COP judge is a High Court judge or can sit as a family court judge then he can order an arrest under section 47(9).

Conclusion

Given the efficacy of a power of arrest in protecting a vulnerable adult (whether or not he comes within the MCA) and given that powers of arrest for reasonable cause are attached to location orders, it may be that the High Court will want to revisit the decision in Re FD before too long.

Otherwise the High Court can order an arrest for the breach of a contact order under its inherent jurisdiction or for the breach of a non-molestation order (necessarily by an 'associated person') under the FLA, as can the COP, provided as regards the latter the judge can sit in the family jurisdiction as well.