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Neutral Citation Number: [2020] EWCOP 68

Case No: ME20C00052

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before :

MRS JUSTICE LIEVEN

- -

Between :

A COUNTY COUNCIL

Applicant

and

KK

First Respondent

and

SK

Second Respondent

and

JK
(through her Child's Guardian)

Third Respondent

and

A CLINICAL COMMISSIONING GROUP

Fourth Respondent

- -
- -

Mr Kyle Squire (instructed by **A County Council**) for the **Applicant**
The Second and **Third Respondents** were unrepresented
Ms Philippa Thomas (instructed by **Davis Simmonds and Donaghey Solicitors**) for the **Third Respondent**

The Fourth Respondent was not **present or represented**

Hearing dates: **4 December 2020**

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Approved Judgment

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MRS JUSTICE LIEVEN

This judgment was handed down remotely on 18 December 2020. The judge gives leave for it to be reported in this anonymised form. Pseudonyms have been used for all of the relevant names of people, places and companies.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Lieven DBE :

1. JK is an 18 year old woman who has been subject to a Deprivation of Liberty order since January 2020. The issue before me today is whether that order should now come to an end. I am extremely familiar with the case having had JK before me, remotely, on a number of occasions throughout 2020.

2. I would like at the outset to thank both Ms Thomas, who has appeared throughout these proceedings on behalf of JK, and Mr Squire representing the Local Authority, for all their help and their efforts to reach a good outcome for JK. Ms Thomas has been a strong, but always balanced, supporter for JK.

3. The background, relatively briefly, is that JK was diagnosed with diabetes in 2010 when she was 8 years old. She has had very many problems over the years with managing her diabetes and with her mental health. She has had frequent stays in hospital by reason of the diabetes, eating disorders and wider mental health issues. There has been extensive involvement by her Local Authority and by the Courts. In June 2018 Baker J made interim orders permitting treatment against her wishes and those orders were subsequently extended by Theis J. In August 2018 Theis J made a final order stating that JK lacked capacity in respect of her care and treatment. In October 2018 JK was admitted to a psychiatric unit under s.2 of the Mental Health Act 1983. Sadly, JK then spent over 12 months in a psychiatric hospital. She was discharged to the care of her family but immediately had great difficulty in maintaining her treatment regime for her diabetes and was admitted back to hospital following an episode of diabetic ketoacidosis. There were a series of events in January 2020 when she was reported missing by her parents and did not comply with her treatment.

4. On 25 January 2020 JK was admitted to Intensive Care having had four seizures as a result of not controlling her diabetes. This was a consequence both of her not taking her insulin and of not controlling her diet as advised. On 26 January JK was placed in an induced coma.

5. On 30 January HHJ Scarratt made an order depriving JK of her liberty at the Regional Hospital. She was assessed for being sectioned under the Mental Health Act 1983 but was found not to meet the statutory criteria. On 5 February she was transferred to KC Hospital and resided there under Deprivation of Liberty orders until 5 October 2020. JK first came in front of me on 10 March 2020 and I have had numerous hearings in the case since then. At most of those hearings JK has been present and has spoken to me (remotely) and I feel I have got a reasonably good sense of her. JK is an intelligent and articulate young woman who feels a deep sense of frustration at what has happened to her. In particular, she is frustrated by the fact that her diabetes, combined with other factors, has prevented her from having a more normal childhood and from doing the things that she wants to do. She now wants to get on with her life in as normal a way as possible. JK is very strongly driven, and sometimes drives herself too hard. It is plain, even from relatively short hearings, that JK can become very emotional when stressed.

6. On 3 April Dr Adesida, consultant psychiatrist, concluded that JK lacked capacity to make decisions concerning her treatment and care and that she should be admitted to a residential unit which would meet her medical, mental health and social needs.

7. Whilst at KC Hospital there was some history of JK absconding, particularly in the early months, but she became more accepting of the regime she was required to live under and the restrictions upon her. In the main, given that JK was a 17 year old who was being kept in a hospital ward for months on end and not let out very much, I think she coped quite well with the experience. JK's restrictions at the hospital have been made more difficult by the fact that it has taken place against the backdrop of the Covid-19 pandemic. The Hospital has been understandably concerned to minimise the risk of Covid-19 being spread within the Hospital and therefore has been very concerned that JK does not leave for short periods and meet with other people. This has created a more restrictive regime for her than might otherwise have been necessary.

8. Through the summer, extensive efforts were made by all concerned to find a more appropriate placement for JK so that she could leave the Hospital. She was closely involved in these efforts and in the final decision that she should be discharged to a supported placement run by AV. This is an independent placement where JK is the only person living there but with 24/7 care and support. She is supported on a 1:1 basis and the staff have been trained in diabetes management. There was a transition period but ultimately JK was discharged from hospital and went to live full time at AV on 5 October 2020.

9. JK turned 18 on 22 August 2020. I had continued the case under the inherent jurisdiction for as long as possible because that meant that she still had the benefit of the Guardian Ms Mitchell, and there were no difficulties with legal aid. The Hospital Trust were also very helpful in keeping JK in a children's ward for a period after her birthday to maximise continuity of both care and staff for her.

10. It is a very great credit to JK that despite all these difficulties she obtained a place at a university near where she has been living and has been undertaking a university course since September 2020. JK's ambition is to go into the police and in the short term to become a Special Constable, at least in part because of help that she has received from the police in the past. It is not merely that this is highly admirable in itself, but also JK's focus on this ambition is plainly helpful in motivating her to keep on track and to abide by the restrictions placed upon her.

11. After about three weeks at AV, on 28 October JK was admitted to A&E as a result of high ketone levels and stayed overnight. Both AV and Dr Price, her treating paediatrician, consider that the admission was as a result of JK's mismanagement of her diabetes. I note that although the Deprivation of Liberty order was in place, it was not necessary to force JK to go to hospital, she did so voluntarily. It happened that there was a hearing fixed for 29 October and I therefore saw JK that day. She was exhausted but determined to try to keep up with her university course and her application to be a Special Constable. She was very clear at that hearing that she wanted the proceedings to end and the Deprivation of Liberty order to come to an end. This was in part because she wanted her autonomy, but also more specifically because she has been told that she cannot be made a Special Constable if there is a Deprivation of Liberty order in place.

12. Since 28 October there have been no further incidents and JK has been doing well in her university course. She remains living at AV although she told me that she has become increasingly frustrated with the level of supervision and scrutiny she is under.

13. Whilst at AV, JK had been seeing a psychologist, Dr Terence Nice until 20 November. She has now been discharged from his service by mutual agreement. Dr Nice's discharge letter can be summarised as follows: (a) JK largely engaged well with the therapy and Dr Nice developed a positive therapeutic alliance with her; (b) JK has a 'will of steel' and once set on a course, it is difficult to deflect her from this. This may impose limitations upon her thinking laterally or outside of the box; (c) Dr Nice expressed the view that it is unrealistic to expect JK to achieve autonomy and independence in a short periods of time; (d) the number of sessions that took place were not sufficient to bring about significant changes; (e) it is important for JK to learn to take "baby steps" rather than adopting a negative omnipotence approach.

14. Dr Adesida has filed an addendum capacity assessment. His principal conclusions are: (a) JK has capacity to make decisions about the care and treatment of her diabetes, except when she is under considerable distress and has overwhelming emotions; (b) during those times JK is unable to weigh information about the management of her diabetes condition and during those periods she lacks capacity to manage her diabetes; (c) developing skills to cope with her extreme emotion will help JK to develop her capacity. In particular, Dialectic Behavioural Therapy would be beneficial.

The position of the parties

15. The LA wishes the Deprivation of Liberty order to continue, albeit in a limited form. Mr Squire submits that JK continues to lack capacity when she is under stress and at those times, she is unable to weigh the information about her treatment. He relies on the great risk posed to JK if she does not comply with her insulin and diet regime. Dr Price's medical reports explain that JK's diabetes requires two forms of insulin administration: one injection of long-acting insulin which must be taken daily at the same time each day, and the second is short-acting insulin which must be taken with food, and the dose calculated according to sustenance intake. This is usually required 4-5 times each day. If JK does not have insulin administered as required, she will develop diabetic ketoacidosis. This may lead to JK developing cerebral oedema. If mismanaged, JK is at real and significant risk of death.

16. Dr Price has reported as follows:

> *"If [JK] over injects herself with insulin, the outcome is low blood sugars which can lead to seizures and death. If she doesn't take her insulin as prescribed, she will develop DKA (which she has done on numerous occasions), the outcome of which is also death, if no intervention is sought. There is also the complication of cerebral oedema (which can occur during treatment of DKA), this is a swelling of the brain which leads to coma and death if not treated. Even with treatment the mortality risk is high. [JK] has had cerebral oedema also on several occasions, episodes which required intensive care admission. A patient who doesn't take their insulin will develop DKA within 24 hours and with no intervention is unlikely to survive more than a maximum of 5 days".*

17. The LA also rely on the past history of JK's mismanagement of her diabetes and the pattern of emergency admissions to hospital following emotionally unstable behaviour. This includes the episode over Christmas 2019 when JK was discharged to

the care of her parents and quickly failed to manage her diabetes, absconded and ended up back in hospital. The LA also rely on the more recent episode.

18. On 29 October 2020 I made a Deprivation of Liberty order in the following, inter alia, terms:

> *"It shall be lawful for the Local Authority to deprive the liberty of [JK] (born on 22 August 2002) on the following terms until the conclusion of the hearing listed below and this authorisation is permissive and is to take no more than that which is provided for below, and must at all times be no more than is necessary and proportionate to keep [JK] safe:*
>
> *a. [JK] is to live at [AV] subject to any written agreement agreed between the parties;*
>
> *b. In the event of a medical emergency, [AV] are authorised to transport [JK] to a place of safety, including a hospital, and may use reasonable force to do so;*
>
> *c. In the event of a medical emergency, [the Hospital] may take steps to prevent [JK] leaving the trust for the purpose of medical treatment and may use reasonable force to do so;*
>
> *d. [The Hospital] staff or trained staff at [AV] or in any alternative placement are authorised to administer treatment to [JK] in respect of her diabetes, including the injection of insulin, including without her consent."*

19. The LA now seek a more limited Deprivation of Liberty order. They accept that JK has capacity to decide where she lives and therefore limb (a) is no longer appropriate; and they accept that (d) allows forced medication and is not itself a deprivation of liberty. The effective part of the order that they now seek is parts (b) and (c) allowing the LA (or in practice the staff at AV acting as their agents) to prevent JK leaving the premises and to transport her to hospital.

20. JK has been represented throughout the proceedings by her solicitor Ms Phillipa Thomas. Ms Thomas has been truly exceptional in her commitment to JK and the work she has done on her behalf. She has also been of tremendous assistance to the Court.

21. JK has accepted, albeit somewhat reluctantly at times, the terms of the Deprivation of Liberty orders that have been made up to this point. However, Ms Thomas makes clear in her Position Statement that JK now asks that the Deprivation of Liberty order is ended and that she is given the opportunity to show that she can work with the LA. JK also told me this directly in the clearest possible terms.

22. JK told me that she would wish to leave AV and go home to live with her parents. She does accept that she needs to go on living at AV in the interim but wants to go home for a period over Christmas. She said that she found AV very oppressive because of the level of scrutiny that she feels under. She told me that whatever she eats is written

down and her movements are closely watched. It is not difficult to see that this feels highly intrusive to an 18 year old who is trying to establish their independence.

23. JK's parents have attended many of the hearings and are supportive of JK. They want JK to be able to come home for Christmas, and in principle with her returning to live at home. They are understandably nervous given the events of late 2019/2020. They did not say at the last hearing whether they thought the Deprivation of Liberty order should continue or not, I think they are content for the Court to make the decision.

Conclusions

24. The issues that I have to consider are (a) whether JK lacks capacity in any material respects; (b) whether the order now sought amounts to a deprivation of liberty within the meaning of article 5 ECHR; and (c) if the answer to both of the previous questions is yes, whether it is in her best interests to make the order sought.

25. In *DN v Wakefield MDC v DN* [2019] EWHC 2306 (Fam) Cobb J confirmed that the Court of Protection could make anticipatory orders in cases involving fluctuating capacity, or potential future loss of capacity, if the evidence supported such a finding. I note that DN had a very different diagnosis from JK and a very different presentation in terms of his capacity, see [15]. There is no sense in the judgment in *DN* of an improving trajectory in terms of capacity as is the case with JK. At [51] Cobb J stated that he would make a declaration under section 15 and 16 MCA that DN had capacity as to his care and residence, "*except when presenting in a state of heightened arousal and anxiety ("a meltdown") during which episodes it is declared that he lacks capacity….".* The LA urge me to make a similar type of declaration in the present case.

26. I accept Dr Adesida's evidence that when JK is upset and in a heightened state she loses the ability to weigh up information about her diabetes and her need to eat the right foods and take her insulin. I accept that there is a very negative cycle by which JK gets stressed or unhappy, doesn't manage her diabetes sensibly and then "loses the plot". To that degree I accept that there are times when she may prospectively lose capacity, even though when she appeared before me, and the vast majority of the time, she has capacity in all relevant regards.

27. It is important to note at this stage the great improvements in JK's presentation over the last year. She has coped remarkably well with being in lockdown in a general hospital ward away from family and friends, and with very restricted liberty. I have seen her become calmer and more mature in the period I have been involved in the case. Those improvements and her greater ability to reflect on her experience, and understand others concerns, are shown in Dr Adesida's most recent report.

28. Therefore, although I accept that there are limited periods when JK may in the future lose capacity, she is a very long way from where she was a year ago. The second issue is whether the order sought at [19] above amounts to a deprivation of liberty or is merely a restriction of liberty. In *Storck v Germany* (2005) 43 EHRR 6 the European Court of Human Rights established three broad elements comprising a deprivation of liberty for the purposes of article 5.1 of the ECHR, namely (a) an objective element of confinement to a certain limited place for a not negligible period of time; (b) a subjective element of absence of consent to that confinement; and (c) the confinement

imputable to the state. Only where all three components are present is there a deprivation of liberty which engages article 5 of the ECHR. In *Cheshire West and Chester Council v P (Equality and Human Rights Commission intervening)* [2014] AC 896 the Supreme Court articulated an "acid test" of whether a person who lacks capacity is deprived of their liberty, namely (a) the person is unable to consent to the deprivation of their liberty; (b) the person is subject to continuous supervision and control and (c) the person is not free to leave.

29. I am far from convinced that the restrictions that the LA is now seeking over JK do amount to a deprivation of liberty. The LA is no longer requiring any order that she must reside at AV, she can now come and go as she pleases, and it is accepted that she has capacity in this regard. The only restriction is that for periods when she becomes ill and loses capacity, the LA can restrain her for medication and take her to hospital. Deprivation of liberty can arise during short periods of time, even for a blood test, *X v Austria* 18 DR 154. It can also involve taking the individual from one place to another and the difference between a deprivation of liberty, which does engage article 5, and a restriction of liberty, which does not, is merely one of degree or intensity, *Guzzardi v Italy* (1980) 3 EHRR 333.

30. It is very difficult in an anticipatory order such as this to consider in advance whether what is being contemplated would amount to a deprivation of liberty. The Strasbourg Court necessarily considers the position once the events in issue have arisen and therefore has concrete facts upon which to decide whether there has been a deprivation of liberty which engages article 5. The position here is that the LA wish to have authorisation to take measures which, in their view, would amount to a deprivation of liberty even if in practice they may not do so. It appears to me that in those circumstances the appropriate course is for me to assume that there would be such a deprivation, even if in reality the restraints placed upon JK (if they happen) would be either too fleeting or too consensual to meet the *Storck* tests.

31. The third issue is whether it is in JK's best interests that I make the order sought. I have accepted that to the limited extent set out above JK may at times lose capacity. Pursuant to s.1(5) of the MCA any order I make must be made in JK's best interests. Pursuant to s.1(6) I must have regard to whether the purpose can be achieved in a way that is less restrictive of JK's rights and freedoms of action.

32. I have to apply the best interests test set out in s.4 of the MCA. The most relevant parts of s.4 are as follows:

> *"Section 4 Best interests*
>
> *(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*
>
> *(a) the person's age or appearance, or*
>
> *(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

….

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

…

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).”

33. JK’s wishes and feelings are entirely clear, carefully and strongly articulated and rationally thought out. It is important that she can explain to the Court those wishes and feelings at a point when she has undoubtedly got capacity. That factor alone must lead to the Court giving more weight to those wishes and feelings. It is also important that she has the insight to understand that there are times when she gets highly stressed and has in the past struggled to deal appropriately with her diabetes. JK is entirely clear that she does not wish the Deprivation of Liberty order to continue. Her reasons can be summarised in two parts. Firstly, she very much wants her autonomy and not to feel that she is under the control of the Court. She undoubtedly currently feels considerable stress around the Court proceedings and the sense that the Court is making decisions about her life, which she feels she should make. Further, the effect of the Deprivation of Liberty order is that she feels under constant scrutiny and

supervision, which itself is highly unsettling. Secondly, the existence of the Deprivation of Liberty order makes it impossible for JK to become a Special Constable and ultimately to pursue her ambition of becoming a Police Officer. She feels that the Deprivation of Liberty order is having a highly detrimental impact on her life.

34. In determining what weight to give to JK's wishes and feelings, an important factor is her age. JK is now 18 and thus an adult. She has a right, within the bounds of the MCA, to personal autonomy. A Deprivation of Liberty order, quite apart from engaging article 5 is also a very serious intrusion into her article 8 right to a private life and to personal autonomy. Although such an intrusion can, of course, be justified under article 8(2), those factors need to be balanced in determining whether it is in her best interests to make the order.

35. The LA understandably have a highly protective approach to JK. The LA argue that past history shows that when JK gets stressed she loses the ability to control her diabetes and this puts her life at very serious risk. The medical evidence is clear that if she does not take her insulin she could die, and that very serious complications can come on at great speed. Those risks are manifest, and very significant. However, I refer to the judgment of Mr Justice Munby, as he then was, in *Local Authority X v MM & Anor* [2007] EWHC 2003 (Fam) at [120] and the importance of understanding that those who lack capacity, must, to a proportionate degree, be allowed to take risks and to test out their own capabilities. It is not the function of the Court of Protection to remove all possible risk and protect the individual at the expense of a proportionate balance:

> *"A great judge once said, "all life is an experiment," adding that "every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge" (see Holmes J in Abrams v United States (1919) 250 US 616 at pages 624, 630). The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?"*

36. Over the last 9 months JK has grown in maturity, self-awareness and self-control. She has begun to manage her own life and own her decisions, which was not the case when she was younger. She also has a very strong motivation to stay on course and to achieve her goals. In my judgement, she has reached a stage where she needs to be trusted to make decisions. If the Deprivation of Liberty order stays in place, I think

that this will both cause her great stress, but also undermine her determination to take control of her life. In effect, it will say to her that neither the court nor a wider community trusts her.

37. Having said all of this, I do not underestimate the physical risk to JK of poor management of her diabetes. However, as Ms Thomas has said, the recent evidence suggests that if JK does need to be admitted to hospital as an emergency, she has consented to this happening. There does not need to be an order in place for her to receive emergency treatment if that should prove necessary or for her to be transported quickly to hospital. I am therefore not convinced that the order serves a useful purpose in any event.

38. Further, in my view, the order is by now counter-productive. It undermines JK's desire and motivation to achieve autonomy and thus her progress towards fully capacitous decision making. For these reasons I think the time has come to cease the Deprivation of Liberty order and respect JK's wishes and feelings in that respect.