Neutral Citation Number [2021] EWCOP 12

Case No: 13210022

IN THE COURT OF PROTECTION

Sessions House,
Lancaster Road,
PRESTON
PR1 2DP

Date: 27 January 2021

Before :

HIS HONOUR JUDGE BURROWS
Sitting as a nominated judge of the Court of Protection

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Between :

A LOCAL AUTHORITY	**Applicant**
- and -	
ZK	**First Respondent**
(by his litigation friend, the Official Solicitor)	
-and-	
SB	**Second Respondent**
-and-	
HM	**Third Respondent**

- -
- -

Arianna Kelly (instructed by **Local Authority Solicitor**) for the **Applicant**
Sam Karim, Q.C. (instructed by **Simpson Millar LLP on behalf of the Official Solicitor**) for the **First Repondent**
Arevik Jackson (instructed by **AWH Solicitors**) for the **Second Respondent**
The Third Respondent was unrepresented.

Hearing dates: 18 and 19 January 2021

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APPROVED JUDGMENT

This judgment was delivered in public. 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 ZK and members of his 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.

His Honour Judge Burrows:

INTRODUCTION

1. This case is about ZK. He is a 37 year old man who until September 2020 lived with his mother at a house in a town in the North of England.

2. He suffers from Landau-Kleffner Syndrome. According to the ICD-10 Classification of Mental and Behavioural Disorders it is also known as Acquired Aphasia with epilepsy.

3. The syndrome is characterised by:

> "…the child, having previously made normal progress in language development, loses both receptive and expressive language skills but retains general intelligence. Onset of the disorder is accompanied by paroxysmal abnormalities on the EEG….and in the majority of cases also by epileptic seizures. Typically the onset is between the ages of 3 and 7 year but the disorder can arise earlier or later in childhood…..
>
> …..It is highly characteristic that the impediment of receptive language is profound, with difficulties in auditory comprehension often being the first manifestation of the condition. Some children become mute, some are restricted to jargon-like sounds, and some show milder deficits in word fluency and output often accompanied by misarticulations…..".

4. From the evidence, it seems this happened quite suddenly to ZK when he was about 5. This must have been shocking for him. But it must have been devastating for his parents and close relatives. It must have been particularly so if the level of advice and information they were being given is similar to that

expressed by a General Practitioner asked for his opinion on ZK as recently as March 2017:

> "I wish to confirm that [ZK] is mentally retarded, deaf, dumb, unable to speak and unable to express his feelings due to Landau Kleffner Syndrome…"

JUDICIAL VISIT

5. On 8 January 2021, at his request and in advance of this hearing, I had a remote meeting by way of judicial visit with ZK, along with his solicitor, carers from the sign-language provider (SLP) and his intermediary, Ms De La Croix. ZK is not deaf but he is unable to understand aural language. He is certainly not unable to express his feelings. With the benefits of learning a non-aural language, ZK has developed a curiosity and inquisitiveness which is matched by his appetite to communicate with others including, on that occasion, me. He seemed to me to derive great pleasure from communicating and to enjoy the company of those who were with him.

6. ZK's communication was, on the face of it, hard work for him. It consists of a combination of methods: he signed (using British Sign Language- BSL); he used a pen on paper to write messages- he is literate. He occasionally referred to the screen of his mobile phone, where he would display a relevant image. All of this was relayed to me by his intermediary and a signer. When I met him I wondered how frustrating it must be to have to go through all that just to communicate. On reflection, however, I realise that for someone who for many years, before he was introduced to sign-language, was unable to communicate very effectively at all, this process is intensely liberating.

7. Having discussed a number of subjects with ZK for around 30 minutes I was, and remain, entirely unconvinced that the term "mentally retarded", ignoring its offensiveness, applies to him.

THESE PROCEEDINGS

8. In 2017 concerns arose over whether ZK was to be married. This prompted a Forced Marriage Protection Order application.

9. Proceedings in this Court followed with interim declarations sought and obtained over his capacity to consent to sexual relations and to enter into a contract of marriage.

10. It was during the proceedings that an intermediary was first approached to assist in establishing whether ZK would be able to give evidence in Court. Ms De La Croix has written a number of reports since 2018 to assist the Court and others who need to communicate with ZK. These reports, taken as a whole, represent an impartial record of ZK's development during that time.

11. On 17 August 2018, she stated: "[ZK] uses very basic sign language to communicate" [I16]. On 12 September 2018, she said that he was able to write down the order of his educational establishments and the names of many of the members of his family. He was able to sign that he "went to college and learnt how to use the computer". It became very clear to Ms De La Croix, who is herself profoundly deaf, that ZK was not deaf: [I41]. There then followed a somewhat cumbersome assessment concerning his capacity to consent to marriage and sexual relations.

12. In a report dated 12 August 2019, Ms De La Croix was able to point to "a slight improvement in his BSL skills" in the year that had passed. He was more able to express how he feels. He seemed to be more able to understand the relationship of marriage. He showed the intermediary a picture of himself dressed up next to a female. She asked whether he was married to the lady and he answered: "No, no, don't know, maybe in the future". However, at that time [I49] she reported he had "no sign language fluency; he has poor placement and poor understanding of directional verbs. He is an idiosyncratic sign language user; this means that the signs he uses are created by him and are not standard BSL signs which makes it more difficult to understand him….". She went on: "It is in my opinion that [ZK] is able to continue to make progress in language development. However, this will be a very slow process because of his language delay and lack of social communication/interaction opportunities. There have been interruptions in his support package for communicating and integrating into community life".

13. By the time of the report of 20 December 2020 [G404] the "big improvement in [ZK]'s communication skills" was immediately obvious to Ms De La Croix. This view was shared by everyone who knows ZK and has known him for some time, except his family. In evidence given by HM, ZK's nephew, he was unable to see the improvement in his uncle's ability to communicate, his engagement with others or his happiness. I do not think HM was being wilfully blind or churlish in what he said. I am quite sure that he and the rest of ZK's core family genuinely believe him to be unchanging, entirely incapable of anything but the most basic communication, and that he will remain the same in the future.

14. By September 2020, ZK was consistently expressing a wish to leave the home he shared with his mother. He expressed the wish to leave quickly. He did not wish his mother or family to have notice of his move. The Local Authority conducted a best interests meeting on 11 September 2020, having assessed ZK as lacking the capacity to make the decision. The decision was to move him out. In his evidence, HM described the shock and sadness it caused to the family when, on the day of the "removal", ZK just did not return from his community activities. I can understand that, and I can also see how that has caused ill-feeling towards the local authority and SLP, and its personification, the Managing Director, (MD).

15. However, I am not satisfied on the basis of the evidence I have read and heard that the removal was improper, either in the fact that it happened at all, or the in the way it happened. There is clear evidence that ZK wanted to move from his mother's house and into a supported arrangement of some sort. He was assessed as being incapable of making that decision and a best interests decision was made. Consultation with, and notification to, the family would have been ideal as well as compliant with the provisions (and philosophy) of the MCA. However, there were good reasons why that could not and did not happen in this case.

16. That being said, the relationship between the family and the statutory agencies/SLP has been damaged. It needs to be repaired- a subject I will return to below.

17. The separation after removal was sanctioned by HHJ Singleton, Q.C., who carefully considered the evidence on capacity and best interests, as well as the arguments of the parties when doing so.

18. The matter comes before me to determine whether it is in ZK's best interests to remain away from his family home and, indeed, to move to a new placement, or for him to return to his family home and their care. I would add that the issue of capacity, which is not simple in this case, is to be considered by a jointly instructed expert and the Court will determine the matter at a future hearing. There have been a number of declarations of incapacity on the various decision-making areas on the present evidence. Although capacity is a foundational matter which goes to the heart of the jurisdiction of this Court, I have not been asked to consider the issue at this stage pending the report of the joint expert. That is the right approach in this case. I proceed on the basis that the statutory presumption of capacity is displaced by the present evidence and that I have the jurisdiction to make best interests declarations on ZK's behalf, subject to the provisions of the MCA. The issue of capacity will be considered again once the expert reports. Capacity is a subject in this case that requires serious consideration and scrutiny in view of ZK's progress.

BEST INTERESTS: THE EVIDENCE

19. At the present time, ZK resides at Placement 1. He receives a package of care which consists of 12 hours a day (every day) from SLP. The rest of the day is what is described as "background" care, i.e. there is always someone present to assist ZK if he needs it. He is able to enjoy activities in the community, engaging with other people who are able to communicate using BSL. In the home, he also

benefits from immersion in BSL, which has enabled him to develop skills around the house. ZK is particularly talented with his use of information technology, and he enjoys this immensely. When I spoke to him his major complaint about Placement 1 was that its WiFi was not working, although I understand it has subsequently been fixed.

20. The proposal is that he shall move to Placement 2 in a month or so, and there he will have his own place to live and will be immersed in his new language.

21. At the present time, ZK is able to communicate with his family unimpeded using his phone. There are practical restrictions on face to face contact, but they are the result of the COVID-19 pandemic rather than anything else. There is a contact schedule in place that is designed to ensure that family contact is not used inappropriately in order to pressurise ZK into making choices he does not wish to make. For instance, it was not denied that on occasions the family had sent him footage of his mother crying- the narrative being that she cries persistently since he left and he ought to return. Another alleged example was the day before the hearing, when it was claimed that, during contact, disparaging remarks had been made against an uncle who has kept in touch with ZK but who appears not be in favour with the mainstream of the family.

22. ZK is under continuous supervision and control and is not free to leave the placement or the control of those providing him with care. Using the *Cheshire West* definition, he is deprived of his liberty. That being said, even if he were to reside at home with a package of care provided mostly or entirely by his family, he would also be deprived of his liberty there.

23. The family's own option is for ZK to return home and to be looked after by members of his family, with HM taking the role of primary carer. The family's position suffers from being unclear, not well thought through, and lacking in the specifics needed for a care plan. That criticism is not intended to be damning. The family are ordinary people wanting to do what they think is best for their relative. The Court would not expect their expression of love and care to be couched in the language of social work. However, on a number of occasions prior to the hearing, opportunity was given for HM to engage with social care professionals with a view to creating a robust and workable care plan. He expressed the wish not to be subject to a carer's assessment. Up until the hearing, the position was that SLP should not be involved in ZK's care and certainly not in the family home. That later changed to them being involved in his care outside the home, but only if the MD was not involved in his care at all. Finally, I think, the position was that input in the home would be accepted if it was in accordance with ZK's own wishes.

24. ZK's wishes and feelings have been the subject of some dispute. On the basis of the evidence I have read and heard, it seems to me that there have been occasions when ZK has said to members of his family that he would wish to go home. I have seen footage of him holding up a paper note saying "help" in a video call to his family. On other occasions, outlined in the evidence, he has said to those caring for him that he wishes to stay independent at Placement 1, moving on to Placement 2 when possible. He has been very consistent in that latter view throughout the many attendances upon him by his Solicitor. He was also clear in his view when I spoke to him on 8 January 2021. On that occasion, his views were translated to me by the independent intermediary.

BEST INTERESTS: THE LAW

25. Where, because of his lack of mental capacity, a person is unable to make a decision that has to be made, that decision must be made for him in his best interests. That requires the decision maker, in this case the court, to consider the matters outlined in s. 4 of the MCA. I must consider "all the relevant circumstances" (s.4(2)), and, in particular:

> (3) ……..—
>
> (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.
>
> (5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
>
> (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,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

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

26. I received detailed and expert argument on these issues both in written and oral form during the hearing. In essence, the argument put forward by Ms Kelly for the Local Authority is straightforward. ZK is doing extremely well where he is, doing what he is, and he wants to remain there. To deny him that wish and send him back to his family would be a serious blow to his confidence and self-esteem, as well as a serious restriction on him continuing to do what he wishes to do. The Official Solicitor, on ZK's behalf supports the Local Authority.

27. On behalf of the family, and I include HM in that category even though he is a litigant in person, Ms Jackson makes the following points.

28. First, she emphasises what she describes as the illegality of ZK's removal. As I have already said, I simply do not accept that ZK was unlawfully removed from his family. An assessment was made of his capacity to make that decision and he was found to be lacking. The Local Authority, with statutory responsibility for ZK's social care then had to decide what was in his best interests. ZK's clearly expressed wishes and feelings were given considerable weight alongside the other factors outlined in the evidence. They then had to decide whether and if so, how they would put into effect what they decided was in his best interests- namely, to leave his mother's home. In the circumstances as I see them, from the evidence, their actions were entirely in keeping with the MCA. There was

an element of subterfuge because that was what was demanded by ZK himself. It was regrettable. It caused and continues to cause rancour. However, it was not unlawful.

29. Where Ms Jackson is right is where she identifies the removal as being the cause of a lack of trust on the part of the family towards the statutory body and SLP. However, the law here is clear. Where a decision has to be made about care arrangements for a person who is unable to make a choice for himself, that decision must be made in **his** best interests. It is plain to me that, objectively viewed, ZK benefits hugely from his engagement with SLP. It is also clear to me that he enjoys that engagement. It would be a significant blow to him if he were suddenly spending considerably less time with the carers and support workers than he presently does. This is not just about recreation or even learning a language. To ZK it is obvious that BSL is the way in which he has been able to engage with and participate in the world. His inquisitiveness, humour and the way he behaves underline the sheer excitement he derives from the world. That should come as no surprise since that was promptly removed from him by his disorder when he was a young child, the MD drew the analogy with a 3-year-old, learning about the world and endlessly asking "why? why? why?" to every new puzzle that experience brings. That seems to me to be an accurate and useful comparison.

30. Ms Jackson submitted that the question I should ask myself in this case when deciding on residence is: why not home? She referred me to FP v GM & A Health Board [2011] EWHC 2778 (COP) at paragraphs [20] and [25] in support. That case was about an elderly man with dementia who was in hospital. The

issue before the Court was whether he should go home or to an EMI Nursing Home. Mr Justice Hedley considered how Article 8 of the European Convention was relevant to the interpretation of the role of the Court of Protection when making best interests decisions about residence. A person is entitled to family life unless the deprivation of family life can be justified under Article 8(2). In that case, the person at the centre wanted to go home. Hedley, J. thought the starting point in that case was "why should [P] not go home?" As I read the judgment, what Hedley, J was doing was to formulate the question he had to answer in that case, on its facts, in a simple and straightforward way. In this case, the situation is very different. ZK has been enabled to leave his family home, at his own request in order to have a more independent life, and he expresses clear wishes to remain where he is. To formulate the question as Ms Jackson suggests serves no practical purpose. To regard it as a legal presumption in this case would be entirely wrong. With regard to Article 8 of the convention, ZK has a right not an obligation to have a family life.

RESIDENCE: CONCLUSIONS

31. When considering this case, I am mindful that the best interests test, rather like the welfare checklist in Children Act cases, requires the decision maker to look at all relevant factors and give appropriate weight to those that are most significant. In this case, I am unable to shift the focus of my considerations of ZK's best interests from the fact that his wishes and feelings seem so clear and consistent. Or, put another way- using Ms Jackson's terminology "why not let him do what he wants?"

32. Mr Karim, Q.C. refers me to Article 8 of the European Convention as well as the UNCRPD and the need to maximise individual autonomy. He is right. The whole purpose of the MCA is to enable those whose capacity is absent, seriously inhibited, or just emerging to be a participant in making decisions for themselves as much as possible. In this case, ZK is learning how to communicate with the wider world. He seems to like what he sees. He now has the linguistic tools to comprehend things, to ask questions, to express his views, to reflect, to ruminate, to agree and disagree and to make light of things. He is learning how to be autonomous.

33. It is my firm view that if ZK were to be ordered to return home to whatever package of care could be put together for him at his family home at the present time, it would not serve his best interests. There is suspicion and hostility towards the local authority and SLP. I am quite sure that the family does not really comprehend what has happened to ZK, and the extent of his actual and potential abilities. Within a home environment, overseen by family members, the care plan involving SLP (or any equivalent body) would soon turn to conflict.

34. That is not to say that a future move home should be ruled out. Indeed, as ZK's communication skills develop and his sense of autonomy develops with them, there could come a time when he will be able to make that decision for himself. However, that is a little way down the line. Much more work between the family and the various agencies is needed before that can be a realistic option which can then be put to ZK.

35. I declare it to be in ZK's best interests to remain in Placement 1, and to move to Placement 2 when it is ready and there to receive a package of care which accords with his assessed needs. For the avoidance of any doubt, those assessed needs include the need for communication via BSL.

CONTACT

36. Contact is presently subject to a plan. I will say little about it, save for this. ZK already has, in effect, limitless contact with his family. They have more limited access to him. That access should be regulated by what he wants- his wishes and feelings. There must be regular reviews of the contact plan in light of his wishes and feelings.

PARTIES & EXPERTS

37. HM is a party. He is a litigant in person. His position as to ZK's best interests is precisely the same as his grandmother (ZK's mother) and the rest of the family. There is an issue as to the funding of the report that has been directed in this case, whether it should be split three ways or four ways. I have given HM the opportunity to provide me with evidence that he has too little income and capital to be asked to contribute to the cost of the report. He has tried to do this with a level of satisfaction. Under oath in the witness box he explained he is formally unemployed (having lost his job due to the COVID-19 crisis), but works for his uncle for about £35 a shift a couple of nights a week. He told me he has no savings or property.

38. I am prepared to accept that as evidence that he is unable to contribute to the costs of an expert report and the cost should therefore be divided three ways, rather than four.

39. Having said that, I see no reason why he needs to be a party at all. He is simply another person putting forward the same arguments as his grandmother. I am minded to discharge him as a party, but direct that he be provided with documents in the case, that he be invited to attend future hearings, and to contribute his views on his uncles best interests by email in advance of the hearing as he has done until now.

CONCLUSION

40. Therefore, I shall grant the application made by the local authority and supported by the Official Solicitor. A date will need to be fixed for the final consideration of capacity once the expert report is available.

41. That completes the judgment and I invite the parties to agree an order.