

**IN THE COURT OF PROTECTION**

Sessions House,  
Lancaster Road,  
PRESTON  
PR1 2DP

Date: 12 November 2021

**Before :**

**HIS HONOUR JUDGE BURROWS**

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**Between :**

**A LOCAL AUTHORITY**  
**- and -**  
**ZK**  
**(by his litigation friend, the Official Solicitor)**  
**-and-**  
**SB**

**Applicant**  
  
**First**  
**Respondent**  
  
**Second**  
**Respondent**

**(NUMBER 2)**

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**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 Respondent**  
**Arevik Jackson** (instructed by **AWH Solicitors**) for the **Second Respondent**

Hearing date: 15 October 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 judgment brings to an end these long-running proceedings about ZK. This hearing was listed as a pre-trial review/early final hearing. As it happened, the major issue left for the court to decide, ZK's capacity to make the various decisions with which the Court is concerned, had largely been agreed between the parties. The only remaining capacity issue I will deal with briefly below. The other issue was whether it was appropriate for me to reconsider the question of residence. This was an issue I had determined at a previous hearing earlier this year, and is the subject of Re ZK [2021] EWCOP 12.
2. Having heard submissions and considered the updating evidence, I reached the conclusion that these proceedings ought to come to an end now. Although I communicated that decision to the parties at the hearing, I had no time to deliver a reasoned judgment. This is that judgment.

### BACKGROUND

3. In January, I heard evidence over two days concerning ZK's welfare interests. I had to decide whether his best interests were served by him remaining where he was and then moving to Placement 2, enjoying a consistent package of care from the local authority that enabled him to continue to benefit from immersion in British sign-language (BSL), or whether he should return to his mother's home, where the consistency and availability of such a package and support was far from certain. For the reasons I gave in my judgment, I decided that it was vital for his best interests that he remained at the

placement in which he was residing, with a view to moving to another, better placement within a short period of time.

4. One of the main reasons I made that decision was that since he left his mother (SB)'s home, ZK appeared to have benefitted greatly from immersion in BSL. After spending most of his life from the age of 5 unable to comprehend aural language, and for much of that time being treated as someone who would never be able to engage in communication on anything but a very basic level, BSL had made a huge difference to ZK's whole life. He wished to continue to learn to be autonomous. He consistently wanted to do so. The order I made was intended to enable him to do so.
5. In her report of 25 August 2021, Dr O'Rourke, Consultant Clinical Psychologist, confirms this. She says ZK "does have a severe impairment of language function, due to Landau-Kleffner Syndrome. This affects his receptive and expressive ability. In my opinion, this has been exacerbated by a lack of exposure to alternative means of communication i.e. BSL, until recent years". However, "since being exposed to BSL, both in formal lessons and being in a signed environment, his receptive and expressive ability has improved". This is qualified, however, because "his understanding is still limited both by his difficulties in understanding language per se (regardless of the means of communication) and by the paucity of life experience and lack of means to acquire skills and knowledge". Finally: "Whilst his understanding of matters which are learnt through language is always going to be limited, his ability in non-verbal areas is a strength and suggests that he could benefit from being exposed to opportunities to learn practical and visual skills".
6. Unfortunately, the move to a new placement had not happened by the time of this hearing. The new, purpose-built property had been delayed by construction and

certification difficulties. I was told that once the building had received its certificate, it would not be long before ZK could move in.

7. I was asked by those acting for SB and some of his family to consider re-opening the issue of residence and to schedule another final hearing to decide whether ZK's best interests would be served by him moving home.

### CAPACITY

8. It goes without saying that capacity is a fundamental issue for this Court. If, and only if, an adult person lacks the mental capacity to make a decision, can that decision be made for him. Since capacity is decision specific, it must be assessed in relation to each decision. The Court only has jurisdiction to make a best interest decision in relation to those who lack capacity to make that decision for themselves.
9. Since these proceedings began, quite profound decisions about ZK have been made on the basis of the capacity evidence available. There has been little difference of opinion between the parties on the issue. However, it was decided by the parties and the Court, before I was allocated this case, that the complex nature of ZK's condition, and the profound impact of the decisions the Court was being asked to make on his behalf, required a comprehensive independent capacity assessment to be carried out.
10. That expert is Dr O'Rourke. She is not only an experienced Consultant Clinical Psychologist, but she has also worked at the National Mental Health Services for Deaf People in London and Birmingham and was Manager at Deaf Services at Rampton Hospital providing assessment and treatment for deaf and hearing offenders in conditions of maximum security.

11. Dr O'Rourke was asked to provide an assessment of ZK's capacity to make decisions over a number of areas, namely:
  - (a) To litigate in these proceedings;
  - (b) To enter into a marriage or civil partnership;
  - (c) To engage in "sexual relations";
  - (d) To make decisions about residence;
  - (e) To make decisions as to the care he receives;
  - (f) To make decisions "about having contact with others";
  - (g) The use of the internet and social media;
  - (h) To manage his property and affairs.
  
12. The expert was provided with a comprehensive letter of instruction which included proper directions as to the legal test to be applied in reaching her view. She was also sent the bundle at that time, including witness evidence, reports, and the earlier judgment as well as other historical medical records. Having provided her report on 25 August 2021, she was asked further questions, which she answered on 17 September 2021.
  
13. The report is generally clear and thorough. It concludes that ZK lacks capacity to make decisions in all the areas Dr O'Rourke was asked to assess. Although there was agreement with her conclusions between the parties, it is important for me to consider what she said to a limited extent.

14. Firstly, Dr O'Rourke has had to consider the diagnostic part of the test for incapacity under the Mental Capacity Act 2005 (MCA), s. 2(1)- namely "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to a matter **because of an impairment of, or a disturbance in the functioning of the mind or brain**". (emphasis added). In preparing her report, Dr O'Rourke considered records dating back to the early/mid 1990s, when ZK had first started to suffer from a disorder. I note that there are numerous records in Dr O'Rourke's summary that confirm that he suffered seizures at around the time he lost his ability to speak, which his then treating paediatric neurologist, Dr Tomlin, fitted most likely with a diagnosis of "Kleffner-Landau Syndrome" (as he calls it). Another expert, JWT Benson in 1995 refers to "epileptic aphasia" and "seizures proving difficult to control".
15. Dr O'Rourke confirms that ZK suffers from an impairment of or disturbance in the functioning of the mind or brain, and that is most conveniently and accurately described as Landau-Kleffner Syndrome. I agree with her. It seems to me that the disorder has had a significant impact on ZK's development, and that is the fundamental reason why his ability to make decisions is impaired.
16. The expert then considered the functional test in order to assess the extent of that impairment. Over two sessions, and with the assistance of Ms De La Croix, Dr O'Rourke carried out a number of assessments of ZK's ability to understand and make decisions about the various areas of capacity she had to assess. These are in depth and thorough. They seek to enable ZK to understand, consider and made decisions. They seem to me to be highly competent and to further the objective of the MCA.
17. There are three areas I need to comment upon.

18. First, the question of ZK’s capacity to consent to sexual relations (or perhaps “sexual activity” would be a better term). ZK has been in receipt of sex education as part of his package of care for some time. He is said to attend and join in with the talks, but he is “not really taking it in”. Certainly, he was unable to identify which parts of the male and female body are engaged in sexual intercourse. He was unable to understand and therefore consider the issue of pregnancy. He was able to talk about condoms, but “seemed completely unaware of which part of his body this would go on and the reason it would be worn”.
19. Secondly, on the issue of residence. ZK was given two options to consider- Placement 2 and his family home (in line with LBX v K & Others [2013] EWHC 3230 (Fam)). He was able to understand the characteristics of each place, and that he would have access to his family at Placement 2, as well as the support workers using BSL. ZK has no apparent memory difficulties, although he may appear to have when he has not properly understood something. The “most complex aspect” of the assessment is “weighing up”. Dr O’Rourke says: “We attempted ‘weighing up’ as described above and ZK demonstrated he could do this to an extent. In particular, he was ‘weighing’ the fact that his family would be upset if he went to Placement 2 and [MD]<sup>1</sup> would be ‘upset’ if he goes to the family home. He was also able to indicate a greater level of stress in the family home”. This led her to conclude that ZK “almost has capacity in this area” but that his cognitive and developmental limitations mean that he is unable to make a decision for himself where he is “in the middle”. Her use of the term “almost has the capacity” was naturally picked up by the parties and resulted in questions. The expert recognises in her answers that the MCA test is binary. However, and significantly, she

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<sup>1</sup> The managing director of the BSL provider.

identifies what she considers the real issue to be for ZK in the following answer to the question whether she is mistaking lack of capacity with the effects of undue influence (emphasis added):

I am not suggesting that he is currently subject to undue influence or pressure, although he is aware of being in the middle of a dispute about where he should live. My comments reflect that, in order to make a decision, **first one needs to be aware that one is in a position to make a decision.** [ZK] has only recently begun to make very small decisions and assert his needs and is used to others telling him what to do. He does not experience himself as having agency and my concern is any ‘decision’ made by him would be a response to what he perceives others to want, rather than a consideration of what he himself would prefer.

20. It seems to me this is the crux of the matter. ZK is having to learn that he can choose, as well as how to choose. If and when he develops that “skill”, he will almost certainly have capacity to make the decision.
21. This leads on to my third comment, and this relates to the only issue about capacity that is in dispute, that is on the issue of contact. Dr O’Rourke considers the “relevant information” to be “who the individuals are and the nature of the relationship with him, what sort of contact he could have with each person and whether he can consider the position and negative aspects of having contact with each person. With regard to his family, ZK is able to understand this relevant information and is able to express a view of each person. He has done this with me and with [his solicitor] on several occasions”.
22. Having concluded that ZK is able to retain the relevant information, Dr O’Rourke goes on to state that ZK “showed an ability to weigh up fairly simple matters about family members; who he likes and dislikes based on past experience of them. He would be less able to do this with less familiar people or regarding people in general...”. This leads her to conclude that ZK has capacity to make decisions about contact with “members” of his family, but not with others outside that category.



23. At the hearing, counsel for ZK's mother, Ms Jackson submitted that I should make a declaration to the effect that ZK lacked capacity to make decisions around contact with those outside his family, but had capacity in relation to those within his family. At the very least, it would be wrong for me to make a final declaration at this stage without the Court hearing from Dr O'Rourke. Counsel for the local authority, Ms Kelly, appeared to support the latter submission.
24. Leading counsel for ZK, by the Official Solicitor disagreed. In his written argument and orally in Court, Mr Karim, Q.C. submitted that the distinction between "contact with others" and "contact with family members" is difficult to reconcile. He focused on the issue of risk- according to Dr O'Rourke something ZK was unable to assess or appreciate in the general public but was able to do so with members of his family. However, in her answers to questions, Dr O'Rourke states: "In terms of his ability to make decisions regarding others, he is not able to understand information regarding potential risk and therefore lacks capacity in this area, when considered in general terms. This is particularly relevant to his use of social media and the risks this may pose, as discussed in my report". Of this, Mr Karim was critical. If ZK is unable to understand relevant information regarding potential risk *per se*, that applies to his family also. Therefore, on Dr O'Rourke's own logic, ZK lacks capacity to make decisions as to contact with his family. Another relevant factor here has already been mentioned above- namely that ZK does not understand that he has a choice whether he makes a particular decision, or not. This is something he is learning. Until then, however, he lacks the ability to make a decision because he does not think he has that ability in the first place.

25. Having considered this matter I agree with Mr Karim. There is a case which may support the position taken on behalf of SB. In A Local Authority in Yorkshire v SF [2020] EWCOP 15, Mr Justice Cobb declared that SF possessed capacity to decide on contact with her husband but not with others. In that case, according to the expert before that Court, due to the deficits in SF’s “frontal lobe functioning, it is likely that she has difficulty interpreting the subtle verbal and non-verbal cues of others which will have an impact on her ability to process information and appraise the appropriateness and safety and behaviour of others, in order to make a decision about her interactions with them...”. [17]. This made it difficult for SF to appraise her own emotions towards a person. However, when it came to her husband things were different. This was due to the difference between episodic and semantic memory. As Cobb, J. put it [20]:

“...SF’s capacity to make decisions about contact with her husband, in contrast to her lack of capacity to make decisions about contact with third parties/strangers, depended on the use of her *episodic* as opposed to her *semantic* memory. She explained that *episodic* memory is memory for the personally experienced events of a person’s life, with retention of the details of time and situation in which they were acquired. *Semantic* memory, by contrast, is knowledge which is retained irrespective of the circumstances in which it was acquired; it derives (as I understood her evidence) from the ‘feeling’ around the memory rather than the ‘facts’ surrounding the memory. She described it as a “collection of one’s experiences which moulds the way you respond ... drawing on lots of cues in a very unconscious way”.

26. In other words, there was a very firm evidential basis for distinguishing between decision making capacity with “her husband” and “other people” on the basis of the evidence and circumstances in that case. I can see no such justification in this case having considered all the expert’s evidence. ZK is unable to assess risk in relation to anyone. He is also unable to appreciate he can make a decision as to contact with anyone. I see no logical basis for the expert to express her conclusion as she did.

27. Should I adjourn, direct further questions of the expert and (if necessary) for her to attend for questioning at a further hearing? I have decided the answer to that question is “no”. Although the evidence given by experts, particularly those who are single jointly instructed experts carry much weight, the decision on the question of capacity rests with the Court. In my judgment, the expert’s conclusion on this one issue does not follow from its evidential premises. It is unnecessary and would be disproportionate to direct further questions or to list a further hearing. I am also conscious that my finding on the issue of capacity for contact will have no real adverse consequences for family members or ZK since he is already able to have contact with members of his family as he wishes.
28. Consequently, I declare that ZK lacks capacity to make decisions on each of the issues before the Court.
29. It is in his best interests for him to continue to receive instruction and education, particularly in respect of sexual relations and relationships (including marriage/civil partnership). I say this because unlike the other areas of the decision making, whether the decision can be made for ZK, and he can enjoy the consequences of that decision, the same does not apply to sex and marriage. These issues should be kept under close scrutiny.

#### RESIDENCE REVISITED?

30. Shortly before this final hearing, I received some updated materials from the local authority. This was not in accordance with any direction given by the Court, and an application was included for me to grant permission for it to become evidence. The evidence concerned fears on the part of the local authority and carer’s staff that ZK’s family were trying to put pressure on him to move back to his family home. Not

surprisingly at the hearing, Ms Jackson, counsel for SB sought permission to serve evidence in response. She also made a verbal application, foreshadowed in her position statement, that I should reconsider the declarations I made in January on the issue of residence.

31. Ms Jackson referred me to the recent judgment of Mr Justice Poole in An NHS Trust v AF and another [2020] EWCOP 55 which was concerned with the proper approach where “*the court is being asked to make a best interests evaluation only a few months after another court has made a determination of best interests in respect of a similar decision, concerning the same P, and after a full hearing*” (para [22]). She cited the factors Poole, J. considered relevant as being both good in principle and in practice. These are (emphasis added by Ms Jackson):

- (a) There is no strict rule of issue estoppel binding on the court.
- (b) Nevertheless, the court should give effect loyally to a previous judicial finding or decision that is relevant to the determinations it has to make, and should avoid re-opening earlier findings that cannot be undermined by subsequent changes in circumstances. An example would be a finding that P lacked capacity at a particular point in time. Such findings, if not successfully appealed, should generally only be re-opened if new evidence emerges that might reasonably have led the earlier court to reach a different conclusion.
- (c) Where there has been no material change of circumstances subsequent to a previous judgment, no new evidence that calls for a re-opening of the earlier findings, and the earlier evaluation of best interests clearly covers the decision that the new court is being asked to consider, appropriate case management might involve the court summarily determining the new application.

- (d) Determinations of capacity and best interests are sensitive to specific decisions and circumstances, therefore the court will exercise appropriate restraint before making any summary determination.
- (e) if the decision or circumstances that the new court is being asked to consider are not clearly covered by the earlier judgment, or there has been a material change of circumstances or new evidence that calls into question the previous findings, the court should manage the case in a way that is proportionate having regard to the earlier judicial findings and decisions.
- (f) In dealing with the new application proportionately, the court's focus will be on what has changed since the previous ruling, and any new evidence. It should usually avoid re-hearing evidence that has already been given and scrutinised in the earlier proceedings.”

32. The questions the Court of Protection has to deal with are often very complex. The facts before the Court can change over time, sometimes subtly. The main decisions this Court has to make- whether P lacks capacity and what is in P's best interests- are multifactorial and therefore sensitive to such subtle changes. A slight change in P's circumstances can place the best interests assessment in a wholly new light. In the AF judgment, Poole, J. is keen to ensure that the currency of the earlier judgment is maintained so far as it covers any changes in circumstances. He makes it clear that there must be “a material change of circumstances or new evidence that calls into question the previous findings” in order for the Court to reopen a previous judgment. I note that Poole, J was hearing a serious medical treatment case- a category of case in which there is a large scope for circumstances to change rapidly and dramatically- and that he was being asked to consider the previous judgment concerning the same patient, but by a

different judge. However, these principles seem to me to apply to most Court of Protection cases, including this one, with the same judge presiding over a later hearing.

33. Ms Jackson submitted that I ought to reconsider my previous decision for the reasons she outlined in her position statement and elaborated upon in her oral submissions, namely:

- (a) ZK takes pleasure in visiting his family home and spending time with SB and other family members.
- (b) ZK has made remarkable progress for which the family are thankful to the sign language provider.
- (c) The family are in support of ZK continuing to be supported by that provider.
- (d) The family have established a solid working relationship with MD and are '*grateful*' for the support that they have provided to ZK.'
- (e) The family are asking that ZK continues to receive his current level of support from his current carers and the only change sought is to his place of residence – i.e., to move from the crisis accommodation (where he does not wish to reside) to his family home (in accordance with his most recent wishes and feelings).
- (f) The date of completion of Placement 2 remains unknown. The new time estimate provided by the local authority is 6 weeks. It is unclear what this time estimate is based on.
- (g) The family are content for the local authority to continue managing ZK's finances.

34. I accept that the relationship between the family and those caring for ZK has improved. In particular, the working relationship with MD has changed significantly. It is entirely legitimate for Ms Jackson to focus on the failure of Placement 2 to materialise. This is important because ZK has been left in Placement 1, which is sub-optimal, since the last hearing, when he should have moved by now. It follows that ZK may well be better disposed to spending time at his mother's home in these less conflictual times.
35. However, in my judgment in January my focus was on how immersion in BSL had enabled ZK to become more autonomous and happier. I had hoped that the damage caused by conflict in the past would be mended, and the family and the carers would learn to work together. It seems that has happened. It seems ZK has benefitted from it happening. At para [33] of my judgment I was concerned that if an order was made that ZK should return to his home the prospects of maintaining any package of care that may be available would be reduced by the "suspicion and hostility" towards those providing it. However, and importantly, I was concerned about the apparent inability of ZK's family to understand what has happened and is happening to him. That is the product of a long history during which the prospects of ZK ever becoming autonomous have been written off by professionals.
36. I have reached the conclusion that these proceedings should end here and now. This litigation began in 2017, when there was concern that a forced marriage was imminent. The Court of Protection proceedings have been ongoing since February 2018- not far off four years. It is impossible to know what levels of uncertainty and insecurity litigation has had on everyone in this case: on ZK's family, his carers, the professionals involved and, of course, on ZK himself, but it is likely to be considerable. I am also mindful of the effect it has on the deployment of resources- the local authority's, the

family's, the carers' and the Court's. I am reminded of the words of Mr Justice Peter Jackson (as he then was) in Cases A & B (Court of Protection: Delay and Costs) [2014] EWCOP 48 at [12]:

“Just as the meter in a taxi keeps running even when not much is happening, so there is a direct correlation between delay and expense. As noted above, the great majority of the cost of these cases fell on the state. Public money is in short supply, not least in the area of legal aid, and must be focussed on where it is most needed: there are currently cases in the Family Court that cannot be fairly tried for lack of paid legal representation. Likewise, Court of Protection cases like these are of real importance and undoubtedly need proper public funding, but they are almost all capable of being decided quickly and efficiently, as the Rules require.”

I will also quote another part of that judgment that is equally relevant here (at [14]):

“Another common driver of delay and expense is the search for the ideal solution, leading to decent but imperfect outcomes being rejected. People with mental capacity do not expect perfect solutions in life, and the requirement in Section 1(5) of the Mental Capacity Act 2005 that *"An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests."* calls for a sensible decision, not the pursuit of perfection.”

37. It seems to me that these comments by Peter Jackson, J. must also be read with those of Poole, J, when I come to consider whether to re-open a clear determination on best interests, and thereby prolong litigation.
38. My conclusion is that I have already determined best interests on the basis of evidence that remains essentially the same, save that Placement 2 has not yet materialised, but the plan still is that it will, and where the family and ZK's carers are getting on better than they were (which was always part of the hope behind that judgment). In the context of this litigation, its prolonged nature, and the cost it must have had on all those concerned, it is not appropriate, necessary or proportionate for me to prolong matters further.



39. Therefore:
- (a) I dismiss Ms Jackson's application to reconsider best interests, in particular residence;
  - (b) I dismiss the local authority's application to adduce further evidence. I make it clear that although I read that material, I did not take it into account in any way in reaching my decision.
40. That is the end of the judgment. I hope an order can be agreed that incorporates the above.