



Neutral Citation Number: [2022] EWCOP 40

Case No: COP 13710982

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2022

Before :

MRS JUSTICE LIEVEN

Between :

XX

(by his Accredited Legal Representative, Stephen Cardinal)

Applicant

and

WEST NORTHAMPTONSHIRE COUNCIL

First Respondent

and

AA

Second Respondent

Mr John McKendrick (instructed by **Irwin Mitchell**) for the **Applicant**
Mr Nazeer Chowdhury (instructed by **West Northamptonshire Council**) for the **First Respondent**
Mr Hamilton Daley for the **Second Respondent**

Hearing dates: **22 July 2022**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. 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 the children and members of their 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.

Mrs Justice Lieven DBE :

1. I am going to read out the judgment but it will be appropriate to order a transcript afterwards.
2. This application concerns XX, an 89 year old man who is currently living in a care home and is originally from Jamaica. The application was brought under s.21A of Mental Capacity Act 2005 ('MCA'). XX is accepted by all parties to lack capacity for purposes of the MCA and is represented by Mr Cardinal as his Accredited Legal Representative.
3. XX was represented by Mr McKendrick QC, the Local Authority ('LA') were represented by Nazeer Chowdhury and the second respondent AA, who is XX's niece, was represented by Mr Daley.
4. The issue before me today is whether it is in XX's best interests to travel to Jamaica for his last years. In brief summary, the background is that XX is 89 years old, he is originally from Jamaica but came to the UK to live and work in the 1960s. He lived for many years with his wife until she moved into a nursing home in 2013 and passed away in 2016. XX has lived at his current care home since December 2020 following discharge from hospital after he was admitted to hospital following collapsing. He has been diagnosed with Alzheimer's. XX was made subject to Standard Authorisation on 28 January 2021, which has been extended. The most recent Standard Authorisation came into force in November 2021 and is due to expire in November 2022. The application was made under s.21A of the MCA.
5. I note at the outset that sadly this case is another illustration of the human cost of delays that have built up in family court and Court of Protection both before and during the pandemic. The application in this case was made on 28 January 2021 and various case management directions have been made since March 2021, but the case has only now come on for determination of the issue of whether XX should move to Jamaica in July 2022 as I truncated the time estimate and fitted it into my list. In normal course this would not have been possible. It is common to refer to the impact of delay in Children Act cases but the serious impact on Ps in Court of Protection proceedings such as XX, whose condition has deteriorated during the lifetime of these proceedings, is also of great importance.
6. In terms of XX's background, as I said, he moved to the UK in the 1960s for work, but he has considerable extended family in Jamaica including 2 living sisters and a large number of nieces and nephews. AA is one of them and is nominated by the family to lead the case for why XX should return to Jamaica.
7. XX and his wife had no children but AA in her witness statement explains how XX was viewed as the head of the family by being the eldest boy. XX has two step-sons in the UK, children of his wife, and at least one, although there may be more, step-granddaughters, B. He also has a step-daughter in law, C.
8. B holds Lasting Power of Attorney ('LPA') in respect of XX's property and affairs. It is said that the Office of the Public Guardian ('OPG') believe that XX did not have capacity to execute an LPA for property and affairs at the time he did so in favour of B,

but the OPG is said not to be opposed to B being appointed as deputy for property and affairs.

9. Prior to admission to hospital, XX lived in his own home with the assistance of Mrs D who used to look after his late wife and then provided care to XX in his own home. Ms D has filed a witness statement in these proceedings. It appears there is a history of XX having being confused and vulnerable since around 2018 and he had a collapse in 2020 and after period in hospital moved to his current care home.
10. In the period since 2005 the evidence suggests that XX has only returned to Jamaica on 2/3 occasions. He did return after his wife died in 2016 and there is evidence from his family that he discussed at that time moving to Jamaica. Importantly in my view he did register with the Jamaican Returning Residents Association. Mr Daley told me that the Returning Residents Association is a form of community group for Jamaicans who worked abroad and have returned in their later years. It has a social and welfare function.
11. At around the same time, he paid tax on a property he inherited. Mr Daley relied on this as evidence of intention to return to Jamaica. Mr Chowdhury submits that it is just as possible that he paid that in order to secure the property for future inheritance.
12. There is uncontested evidence that when XX was in Jamaica he talked about living there and returning to stay there. There is also some evidence, although not a matter possible or necessary to make findings on, that he came back in part at least because he felt responsible for one of his stepsons.
13. XX was placed at his current care home by the Local Authority in December 2020. Certainly at that stage, his Jamaican family were not involved or consulted on that placement. He has been living at that home ever since. Throughout the period, XX has had a diagnosis of dementia. The evidence shows that for a period when he moved there, he was very unsettled, and could be aggressive to staff and other residents. However, in November 2021 he was physically unwell with chest problems and was admitted for a period to hospital. Since he came out of hospital in late 2021, he has been more frail, but less agitated and rarely aggressive.
14. In the course of these proceedings, a report under s.49 MCA was ordered and produced by Dr Pantula who is a consultant in Old Age Psychiatry. She interviewed both XX and a staff nurse at his current care home. The interview only lasted 20 minutes as XX became distressed. I don't intend any criticism for the shortness of that interview, but it does show the difficult circumstances of the interview.
15. Dr Pantula's report, which is very thorough and helpful, sets out that XX needed considerable encouragement but once he had been persuaded, he was willing to talk. Her report makes clear that during their meeting, he did not understand about his family in Jamaica, said he did not know where he was or know anything about his family. Clearly during that interview he was confused. Dr Pantula refers to physical deterioration since December 2021 and health problems. She refers to the fact he needs help to mobilise in the morning and help to persuade him to.
16. Dr Pantula asked the care staff about XX's response to visitors and she said family call almost daily, he doesn't seem to know who they are, his daughter-in-law visits, brings

in Jamaican food, XX never expressed a wish to move or go to Jamaica, family phones regularly but often does not know who they are. Dr Pantula does go on to say in that report that although his mood was flat when she spoke to him, the previous assessments refer to him being jovial and laughing, reggae improves his mood and he dances in response to music in the care home. Her conclusion is that she cannot see why XX would not be able to settle in Jamaica and that the evidence suggests he enjoys activities closer to his culture and that may have an overall benefit. She does say it is possible that it will be difficult to re-adjust in Jamaica as he would be disorientated.

17. In respect of clinical recommendations, she says that if XX gets the same standard of care, she cannot see why it is not appropriate for XX to travel but acknowledges significant difficulties during travel. She also said unfamiliar surroundings can all increase agitation. But overall, she takes the view that physically XX could travel as long as properly mitigated and planned and proper consideration given to his frailty in the plan.
18. I have very extensive evidence from the family in Jamaica as to why they think XX wanted to return and that sets out their closeness to him and the care that they intend to provide. AA sets out a detailed care package that includes both family care and professional care as and when needed. The plan is that XX would live in a house belonging to his sister which is a five bedroom property, that other members of the family would live in the house to provide 24/7 care and supervision. There is a care plan which I commend AA for very much, sets out details of how XX's care would be managed on a day to day basis and what support would be given to him.
19. The evidence also sets out in some detail the long-term relations between XX and his Jamaican family. This includes how XX's role in the family worked and how he had, in the past, attended family events in Jamaica including AA's wedding in 1998 and that over the years they have all spoke frequently. She records how evidence from the family is that he would frequently say he would come back to Jamaica in his later years.
20. I note at this point that it is clear from AA and Mrs D that there has been considerable tension between XX's birth family and his wife's family in England. I also note that although B and C have not given witness statements, the Social Worker has asked their views. They have shown great commitment to XX and have visited him regularly, brought in Jamaican food and done what they can. It is of some importance that B said in 2020 that until shortly before 2020 she had not known very little about XX's family in Jamaica, which perhaps shows that historically XX's wife's family have been little engaged in XX's life itself.
21. In terms of travelling, all parties agree now he is too frail to travel on normal flight and therefore an air ambulance would be required. The Jamaican family have put together a package to get XX to Jamaica which would cost in the region of £100k. I note that XX's capital appears to be in region of £150k. This is not a case where, in my view, money is the critical feature as it could be said to cut both ways. One of the points raised by Mr Daley is that the cost of him staying at his current care home is around £40k a year and that will be used up fairly quickly, but if he goes back to Jamaica, care is cheaper and there is more family support. There is enough money for his travel to be paid for and for there to be a pot of capital remaining for paid care in Jamaica.

22. I accept in respect of the journey there is undoubtedly some risk in terms of possible deterioration during the journey, and confusion when he gets there. But I note Dr Pantula's views that those risks can be mitigated, and I note XX's GP's view, Dr Naik, who thinks that he is physically fit enough to travel.

Submissions

23. Mr McKendrick on behalf of Mr Cardinal accepts that this matter is finely balanced but has come down on the side of submitting XX should remain at his current care home. I note at this point, Mr Cardinal is an Accredited Legal Representative and not a social worker or family member, but it is important to make clear that he has considered the matter very diligently and taken his responsibility seriously. The case was put in a sensitive and balanced way by Mr McKendrick. Mr McKendrick emphasised the evidence of mixed intentions and that XX took no further steps to return to Jamaica after 2016. Mr McKendrick points out that the evidence suggests XX is content at his current care home and there is limited evidence at the moment of his wishes and feelings being to move. Mr McKendrick suggests that given XX's situation and advanced dementia, only limited weight can be put on his wishes and feelings. His submissions are that there is insufficient benefit from travel to justify taking that course.
24. The LA takes, in my view, a surprisingly firm stance that he should stay at his current care home. Mr Chowdhury relies on the evidence of the social worker, and Mr Chowdhury emphasises that there are potential care risks in the plan in Jamaica in terms of the night time needs and the lack of training and skilled carers. Further, the LA is concerned that if XX pays for travel to Jamaica there may then be insufficient funds for professional care. The LA also refers to risk on the flight and point to the fact that XX does have regular visits in the care home from Mrs D and from B and C.
25. Mr Daley on behalf of AA and, although they are not parties, the rest of XX's family, relies on the clear evidence that in 2016 XX was expressing a wish to travel to Jamaica and that this therefore amounts to clear evidence of wishes before he lost capacity. Mr Daley points to the strong benefits of cultural and emotional needs of returning to be surrounded by loving family. XX speaks to the family very regularly and gets pleasure from that. I note that although the nurse said he does not recognise family, there is evidence that he has 15/20 minute phone calls with them, and although he does not know precisely who they are, he does seem to know that they are family. Mr Daley sets out that XX will be surrounded not just by family but by music, culture and religion that is plainly important to him. Mr Daley relies upon the case of *Re UR* [2021] EWCOP 10.

The Law

26. The application is made under s.21A MCA but nobody disputes that I am entitled to go on to consider other matters. There is no issue in this case that I have jurisdiction to consider XX's best interests because he has lost capacity for any relevant decision and the lack of capacity is both overwhelmingly clear from the evidence but also not contested. I therefore have to consider the best interests tests under s.4 of the MCA:

"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.

(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).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) “Relevant circumstances” are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.”

27. A case in some ways similar to this was considered by Mr Justice Hayden in *Re UR*, a case that concerned a lady from Poland and whether she should return to Poland. I note from the factual section that UR was much more capable of expressing her wishes and feelings up to the time of the hearing than XX and accept that is a material distinction in the case. There is in the Judgment a consideration of the caselaw on best interests and that caselaw is well known and not necessary for me to repeat. The most relevant parts are [25]-[27] where Hayden J said that caselaw has emphasised an overly paternalistic approach, drawn towards an outcome more protective of the adult:

“25. The case law has emphasised the danger of an overly paternalistic approach, see PH v A Local Authority, Z Ltd and R [2011] EWHC 1704 (Fam) and CC v KK [2012] EWHC 2136 (COP). In cases concerning vulnerable adults, there is an ever-present risk that professionals may feel drawn towards an outcome that is more protective of the adult. The point was articulated most strikingly in the well-known judgment of Munby J, as he then was, in Re MM (An Adult) [2007] EWHC 2003 (Fam). It bears repetition not least because it captures the point so powerfully:

'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 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 brought 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?'

26. *This 'protectionist culture' has been consistently deprecated by the judges of the Court of Protection. In Re GC [2008] EWHC 3402 (Fam), Hedley J was considering the discharge of an elderly man from hospital to the home where he had lived for many years:*

'GC is a man in the 83rd year of his life and my concern is to ask myself: how will he most comfortably and happily spend the last years that are available to him? Next it seems to me that for the elderly there is often an importance in place which is not generally recognised by others; not only the physical place but also the relational structure that is associated with a place ...'

27. *The above passage has particular resonance for the application made in this case. In Westminster City Council v Manuela Sykes [2014] EWHC B9 (COP) District Judge Eldergill made the following thoughtful and insightful observations:*

'several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress', and that 'although there is a significant risk that a home care package at home will 'fail', there is also a significant risk that institutional care will 'fail' in this sense (that it, produces an outcome that is less than ideal and does not resolve all significant existing concerns)'

20. *Article 8 ECHR is also a relevant factor:*

Article 8

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

28. There is however at [77] a passage from DJ Eldergill in the case of Westminster City Council v Manuela Sykes [2014] EWHC B9 (COP) which is relevant and important to read.

Conclusions

29. I accept this is not an easy decision and there are factors on both sides. I note the delay that has happened means that factors in favour of XX moving have somewhat diminished and his ability to gain from being in Jamaica has also diminished. However, I have reached the conclusion that it is still in his best interests to move to Jamaica. I should note that Mr Chowdhury suggested that I should not move to the best interests decision today because I needed further evidence on cost and ability to fly, but I have reached the view that the principle should be decided first and then we can consider what orders needs to be made to expedite the move.
30. The reasons I have come to the conclusion are firstly around XX's wishes and feelings. The evidence is that when XX had capacity he did wish and intend to move to Jamaica for his final years once he had dealt with his affairs in the UK. The evidence that indicates that is the joining of the Returning Residence Association, payment of tax and conversations with family members. I have little doubt that if he was capable of being asked now, he would say he wanted to live in Jamaica.
31. I accept that there is some risk from travel but both Dr Naik and Dr Pantula feel these can be mitigated. I accept he receives appropriate care at his current care home and he may have limited recognition of his family. However, in my view he may appear more confused and unwilling to talk to strangers than he is with his family. He talks regularly to them on the phone and perhaps does recognise and understand connection with them and enjoys those conversations. I do not think, as was suggested by Mr McKendrick and Mr Chowdhury, that simply suggesting that family members come to England from Jamaica for holidays would meet the benefits he would get from moving to Jamaica. Both his sisters are very elderly and, in any event, there is an entire difference in short holiday visits and having your family live around you. This is not least because it might well take XX a little time to relax and enjoy people visiting him.
32. There are also in my view intangible benefits that lie in the nature of human feeling and experience for XX to spend those last years with a loving family around him rather than being cared for by strangers in a care home. It is a benefit hard to explain or quantify. However good staff in a care home are, they are not the same as being cared for by a loving family for whom the individual is special and has particular connections. What most people would want is to be with their family around them for their later days.
33. It is plain from AA and the other family evidence that XX is a loved family member, not least by their making this application and putting together with so much effort the care package and evidence.
34. There are also other intangible benefits that still matter to any human being despite having lost capacity and perhaps having limited understanding of the outside world. The benefit of being in the place of his childhood, with the smells of that place, with

the food of his childhood and also surrounded by religion of his family that was certainly important to him in the past. Those things matter in ways that are hard to articulate, and possibly matter even more to someone approaching their last days.

35. I accept some physical risk to XX in making the move. However, in my view, as explained in *Re UR*, the benefits of having both his family around him and the place where he wanted to be outweigh the risk
36. I will make a finding that it is in XX's best interests to travel to Jamaica.