

NEUTRAL CITATION NUMBER 2011 EWHC 3933 (COP)
IN THE COURT OF PROTECTION

Case No: BT10C10205

Court 42

Strand
London
WC2A 2LL

Thursday, 27th October 2011

Before:
THE HONOURABLE MR JUSTICE HEDLEY

B E T W E E N:

LONDON BOROUGH OF HARINGEY

and

F G
A G
H G

Transcript from a recording by Ubiquis
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MR MCGUIRE appeared on behalf of the LOCAL AUTHORITY
MRS G appeared IN PERSON

JUDGMENT
(Approved)

MR JUSTICE HEDLEY:

1. These are proceedings within the Court of Protection in relation to a young woman called H G who was born on 28th September 1993, so that she is 18. There are many issues that have arisen in this case, but now the critical welfare issue is whether or not H should be returned home to live with her mother. This is an outcome sought by the mother, but opposed both by the Local Authority and by the Official Solicitor as litigation friend to H.
2. There was a preliminary issue as to H's capacity. This I heard on Monday and Tuesday morning, and concluded that H lacked capacity to litigate, to make decisions about her care and upbringing, to make decisions about her education, to make decisions about contact with family members, to manage her own financial affairs or to enter into legal relations. I gave an extempore judgment on Tuesday, which should be read or considered along with this.
3. It is right to identify at the outset of the judgment four unusual procedural matters which have occurred in this case. The first relates to its litigation history. It began life as proceedings under Part IV of the Children Act 1989. Those were abandoned when it was realised that H would be too old for a care order to be made, which cannot of course be made after a young person's 17th birthday. Proceedings then continued in wardship until this summer when an order of Mrs Justice Baron treated the proceedings as though they were proceedings in the Court of Protection and directed that they should so continue.
4. The court would like to draw attention to a decision of this court in *B v M* [2010] EWHC B31 (Family), which I think is shortly to be reported in the Family Law Reports and indeed in the new Court of Protection series. That case seeks to address the proper procedures when it is considered that the affairs of a minor should more properly be dealt with in the Court of Protection. I do not need to repeat the contents of that case because they are there

to be seen on any reading of it. All parties now accept that the procedures there set out should have been applied in this case.

5. The second matter is that the mother, although represented up until the week before the trial, appeared in person at the trial. What had happened was that no statement by the mother or response to threshold had been filed, and the legal aid certificate became embargoed. There is a dispute as to why that should have happened with the solicitor maintaining that they were without instructions, and the mother maintaining that the solicitors would not make arrangements to see her. Be that as it may, an application was made to me last Thursday, that is to say two working days before the beginning of the trial, for an adjournment of that trial. That application was refused on two grounds: the first was that there would be a long and entirely unhelpful delay before another five-day slot could be found before a High Court Judge, and secondly that in any event H was going to have to leave her present placement before Christmas so that decisions as to her future were inevitably going to have to be made. I was slightly fortified in that conclusion by the mother having declined the offer made by the solicitor to see her pro bono on the Friday to see if the legal aid certificate could be rescued.
6. Now because the mother acted in person, and this is the third unusual feature, this inevitably had an impact on how the trial was conducted. In the end the mother's case emerged with crystal clarity, and indeed I, as it were part of the final submissions, fed it back to her to ensure that I had understood it, and she confirmed that I had. The mother accepted that H lacked capacity to make any of the relevant decisions, and so she took no part in that section of the proceedings other than to indicate that continued agreement. Once that had been disposed of it was agreed by all that she should give evidence first so that everybody knew exactly what her case was, and in the event she was given the last word in the case as well.
7. In the light of her evidence, which will appear in due course, and in the light of the way her

case was put, it seemed to me that there was really no purpose in the court listening to detailed oral evidence over and beyond that given the amount of material available on paper, and the mother's reasons for saying it should be disregarded, and accordingly the only other oral evidence came from the social worker, which was principally concerned with matters the Official Solicitor wanted to raise in relation to the care plan.

8. The fourth unusual procedural matter was that I met with H before the evidence started last Monday. She came here for day one of the hearing, and I saw her in the company of the solicitor instructed by the Official Solicitor and the Official Solicitor's representative. Having seen her I reported in open court the conversation I had had with her, in particular that she was clear she did not want to go home, it was clear that she had bad memories of being at home. I indicated that she was easy to talk to, and fluent in conversation, but of course we all had in mind the evidence of the psychologist, Mr Davis, that that fluency could easily mislead as to capacity. Moreover H listened to Mr Davis's evidence, more than once was in agreement with him, repeated in a way that we could all hear her views about not wanting to go home and her memories of home.
9. Those were, as I say, the unusual procedural features of the case. Now it is necessary to say something, albeit briefly, about H's background. She was born in Northern Cyprus in 1993. Some incident occurred in early childhood which resulted in her suffering brain damage. She was taken to mainland Turkey and treated. It is not clear, and it is unwise to speculate as to precisely what happened, but, although no final diagnosis appears to have been agreed between the medical authorities, the position as of today is reasonably clear. She functions around the chronological age of five in relation to some aspects of her achievements, up to nine in relation to other, but broadly speaking at or about the chronological age of seven. She is wheelchair-bound, and she has no capacity to stand independently. She is entirely dependent on others for her care, and in particular for intimate care of every nature. This is,

all are agreed, a lifelong and irreversible condition. Interestingly however she is entirely fluent in both Turkish and English, and it was interesting that when one or two of the tests upon which the psychological results were based were conducted with an interpreter they appeared to indicate a similar level of functioning.

10. H came to England in February 1995. The mother thinks it was 1996, but it does not matter. Certainly the father had come earlier, and they were coming to join him. The parents separated in 2003, and have lived apart ever since. H was removed into foster care in September 2008, and so far as I can work out, must have been accommodated under an agreement under Part III of the Children Act 1989 as there is no other basis on which the wardship could have operated. At all events she has remained in that foster placement ever since. The mother was evicted from her accommodation in December 2009, and she now resides in the private rented sector. Therefore that is the position that everybody is in as of today, and a short account of how it is they have come to be there.
11. Let me then turn to the case that the mother presented to the court. It is her case that she very much loves H and is devoted to her care and wellbeing, that she has a strong sense of family, and of the obligations of family, and that that sense is reciprocated by H. She accepts that H has indeed been saying, on a relatively regular basis, that she does not want to go home and has unhappy memories of home, but she says this is not to be relied upon for three reasons: the first is that she has made similar complaints about others, and in particular the foster carer, and it is true that on an occasion she did indeed make such complaints, though the evidence suggests that she regretted doing so. The second ground which she said those complaints should not be acted on is that H has been forced to say all these things by other people with a vested interest, and in particular the foster carers and professionals who have been involved in her care, and of course the court must accept on the evidence that H is suggestible. Thirdly she says that not only have these complaints

been forced, but they are, and these are words that she used frequently in the course of her evidence, simply not true.

12. Likewise the mother accepts that there has been a long history of allegations made about her care of H, about conflict in the home, in particular between H and her sisters, and about the question of the mother leaving H alone. She says that these allegations began in 2008. The Local Authority records would seem to suggest that they had begun quite some time before then, but again that may not greatly matter at this stage. The mother says, quite simply, that the allegations, each and every one of them, are not true, and they have been made up as a result of a complaint that she made about the school in April 2008, and as a consequence of that complaint, those involved in the management of the case have made up this long series of allegations.
13. She recognised that two psychological assessments had been conducted, which have concluded that she was unable to care for H. She says that those assessments should be rejected for two reasons essentially: first they are based on false information, and one sees the logic of that in the light of what she has said before, and secondly that the assessments are not independent because they do not reproduce within them her own words. She has either been misquoted, or her words have been summarised and have lost their effect. It is right to say that the mother remains entirely unshaken in each and every one of those beliefs to which I have referred. Her case is that H should return to her now. She recognises that the house that she presently lives in is not suitable for H's needs, and she has presented a document as part of her final submissions which contain 13 demands as to what the Local Authority should do, one of which of course is to provide alternative and suitable accommodation so that H can indeed return. The mother denies that there has ever been serious conflict within her family, by which I mean serious conflict between H and her sisters, or H and her mother. There is no doubt that there was at one stage significant

conflict between H's parents as a result of which there were court proceedings, the relevance of which have long since expired in the context of this case. Now that is the mother's case, how she puts it, and upon which she says the court ought to conclude that H should be returned to her.

14. The Local Authority's proposals, given that H does not have capacity to make the relevant decisions, are really these: in relation to residence and care they recognise that she must move from her present foster carer who offers care to those effectively who are minors, and they propose that she should move to residential accommodation in Woodford, which is some little way away, but a manageable journey. Such accommodation would be shared with three others who were learning disabled but not necessarily physically disabled. The ground floor of the accommodation is entirely accessible and contains a wet room, but it is also recognised that the upstairs of the accommodation is not accessible to H, though it would be to others, and accordingly those who look after them would have to guard against the risks of seclusion or of H being as it were cut off from the communal life of the property.
15. In relation to her education, the Local Authority say that she has been at Haringey Sixth Form College since September 2010, which she seems to enjoy and from which she seems to profit. That facility is available to her until July of 2013, that is to say the end of the year in which she was 19, in accordance with the conventional arrangements for statemented children. They say that thereafter there ought to be explored the possibility of a three-year residential course at Treloar College, and the provisional evidence is that in many ways that is a placement from which H could benefit.
16. In relation to contact, the Local Authority recognise that contact has been significantly restricted. Indeed of late it has been for one hour, once a week, after the end of the college day on Mondays, and that that will have to be expanded both in time, possibly in frequency,

certainly in manoeuvrability in the sense that it should include activity contact of one sort or another. There is a lack of clarity at the moment as to precisely the conditions under which contact should take place. It is almost certain that H would want a carer with her. It is less clear that there needs to be a supervisor with, as it were, authority over the contact regime.

17. In relation to finance, the Local Authority say that an ordinary appointment should be able to be made since H's income is restricted to benefits, and in relation to a tenancy agreement there are provisions for someone to sign on her behalf.
18. Let me turn then to the law that the court is required to apply in this case. Section 1(5) of the Act says this: '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.' That is the foundational principle. That is the purpose in Section 4 of the Act, and of course in this case the court is the decision maker, and the court is accordingly required to comply with the statutory checklist. It seems to me that without reciting the whole of Section 4, the material provisions of Section 4 that apply to this case are as follows: Section 4(2) provides that: 'The person making the determination must consider all the relevant circumstances,' and I interpose to say that the court has in mind the provisions of Section 4(11) which spell that out, and then the subsection goes on: 'And in particular take the following steps,' then one goes to subsection 4: 'He must,' that is the decision maker, '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.' One then goes down to subsection 6: 'He must consider, so far as is reasonably ascertainable (a) the person's past or present wishes and feelings, (b) the beliefs and values that would be likely to influence his decision if he had capacity, (c) the other factors that he would be likely to consider if he were able to do so.' The other provision under Section 4 that needs to be taken into account is Subsection 7(b): 'He must take account, if it is

practical and appropriate to consult them, the views of anyone engaged in caring for the person, or interested in his welfare.’

19. This is a young woman who is over 18 years of age, and she can and does express views, and she can and should contribute to decisions, bearing in mind the cautions of the psychologist in over estimating her capacity. Likewise of course the court must take into account Mrs G’s views, as she is undoubtedly someone interested in her welfare.
20. The task of the court then is to apply that law to the particular circumstances of this case as I have outlined them. It is abundantly obvious that caring for H is a highly demanding and entirely unremitting task in the sense that it is a 24-hour-a-day task that will continue for as long as she lives. Secondly it is clear to me that the mother is seriously committed to H both in terms of her love of H and her sense of responsibility towards her. Thirdly I am satisfied that the mother has a serious sense of family and of the obligations that that imposes on her, and I am equally satisfied that that sense of family is also reciprocated by H and is an important part of her understanding and of her needs in the future. However it seems to me clear that there are a number of things that the mother either cannot or will not accept. The first is the extent of H’s disability and the needs and demands that that actually creates. Secondly her own limitations in terms of being able to meet those needs and demands on an open-ended and indefinite basis. Thirdly the mother is quite unable to accept that H might genuinely have a mind of her own which is in stark disagreement with the mother. Fourthly it seems to me that the mother has not taken on board the realities of the demands that H’s care will make. Certain it is she recognises that her own home is not a practicable home for H, but any perusal of the list of the other 12 demands suggests an air of unreality.
21. The reality in this case is that the mother stands alone against the rest of the world. She alone maintains that H’s views are compelled by others, that the allegations about want of

care in the past are a malicious response to complaints, and that the two psychological assessments, which are in agreement in their outcome, are biased for the reasons that she has given. There is no real point in beating about the bush. It is quite simply a picture that I find utterly impossible to accept. Whilst I acknowledge that the evidence does not permit historic findings of fact, I am entirely satisfied that H's views are essentially her own, and, whilst recognising that she is suggestible from time to time, that they are founded on issues in her own memory, and that those issues relate to matters in her memory pertaining to want of care or conflict within the family, or being left and feeling unsafe about it. It would not be possible to spell out incident by incident what that is all based on, or what it refers to, but that it is firmly rooted in reality I am entirely satisfied. It is apparent to me that the way in which Mrs G has expressed herself in these proceedings and the views that she has advanced led to the inevitable inferences that they are not rooted in reality or practicality, that she could not work collaboratively with others; it has to be on her terms or not at all, and she is not able to develop an independent understanding of H's developing needs and interests.

22. The usual argument in this kind of case is that an incapacitated person should be prevented from doing what that person particularly wants because it is not in their interests to do so. This case is precisely the other way around because Mrs G's case is that H should be compelled to do precisely that which she has repeatedly said she does not want to do, that is to say to go and live with her mother. When I apply the Section 4 test, given my conclusions about H's ability to contribute to decisions, I find that to compel the return home of a young woman of 18 would frankly be unthinkable in circumstances such as this, and I am quite unable to do it.
23. Where then does that leave us? Well I am satisfied that proceedings should now be brought to an end as the key decisions as to capacity and return to the family home have been made,

and H's essential future provision will be the responsibility of the Local Authority. In those circumstances, whilst I recognise that the proposed accommodation is not ideal, it is adequate, and I am satisfied that the social worker understands the issues that make it less than ideal, and in those circumstances it can be said to be in her best interests to move there.

24. Insofar as education is concerned, I accept that there is good sense in her remaining in her present placement until July of 2013, but it seems to me vital that the question of a placement at Treloar is explored quickly so that there is no gap in provision, and indeed so that there is an opportunity to respond to the need for an earlier placement if so advised by Treloar. Although the Official Solicitor will no longer formally be involved in these proceedings because I intend these to be final declarations, he has indicated the desire to be kept informed of the progress of the Treloar application, and the Local Authority have indicated a willingness to comply with that.
25. Insofar as contact is concerned, I wish to stress the importance to H's future welfare of contact with family members. Whatever may be the disadvantages, and whatever may be the drawbacks, it is a fact that they will represent for her the one unchanging point in the relationships that she has during the course of her life, and accordingly I not only welcome but positively encourage the development of contact into something much less restricted than there is at the moment. I can well understand that H will wish the presence of a carer if that indeed is her wish. I would very much hope that formal supervision will only be necessary insofar as it is needed to reassure H until she is settled in to a regime of contact.
26. Insofar as questions of finance and tenancies are concerned, the proposals advanced are sensible, and should be endorsed by a best interest declaration. That is the judgment I propose to give.

End of judgment.
