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Case No: 12084915

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

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In the matter of AG

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- -

Mr James Dixon and Mr James Fraczyk (instructed by direct access) for the appellant DG (AG's mother)
Ms Justine Lattimer (instructed by the local authority) for the local authority
Ms Nageena Khalique QC (instructed by Irwin Mitchell LLP) for the Official Solicitor (AG's litigation friend)

Hearing date: 19 May 2015

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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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SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

This judgment was handed down in open court

Sir James Munby, President of the Court of Protection :

1. This is an appeal from an order of His Honour Judge Rogers, sitting as a nominated judge of the Court of Protection. Judge Rogers was considering the appropriate welfare arrangements for AG, a young woman born in October 1985. His order is dated 3 September 2013.

2. The appeal is brought by AG's mother, DG. Her grounds of appeal are dated 22 September 2013. Her application for permission to appeal was considered on the papers by Parker J on 19 December 2014, who observed that the case was not suitable to be dealt with on paper and directed that it should be listed for hearing. At an oral hearing on 14 January 2015, having heard DG's counsel, I granted permission to appeal on all of her grounds of appeal. The appeal came on for hearing before me on 19 May 2015. DG was represented by Mr James Dixon and Mr James Fraczyk, the local authority by Ms Justine Lattimer, and the Official Solicitor, AG's litigation friend, by Ms Nageena Khalique QC. At the end of the hearing I reserved judgment. I am sorry that it has been so delayed.

The background

3. AG was born, as I have said, in 1985. When she was about five years old she was diagnosed as having a moderate learning disability and autistic spectrum disorder. In 2007 she was diagnosed by a psychiatrist as suffering depression. In 2007 AG took a tenancy of a property I shall refer to as OG, though she continued for a time to live with her mother. Thereafter she continued to live either at OG or with DG. In March 2011 AG made an allegation, though without details, that DG had hit her. In June 2011 DG reported that AG had attacked her. She also reported tensions at home and difficulties in caring for AG. A safeguarding investigation ended in July 2011 with an "inconclusive" determination but with a plan for AG to leave DG's home and return to OG with a 24 hour live-in care package, for which the local authority assumed responsibility in August 2011.

4. During September and October 2011 there were allegations and counter-allegations that AG was being abused physically and emotionally by DG, that the care staff were providing inadequate care to AG, that DG was mismanaging AG's medication, that DG had on two occasions verbally abused a care worker and that AG had on two occasions assaulted a care worker. AG was reported as having said on more than one occasion that she did not want to visit DG. In November 2011 the care provider served notice terminating the care contract. On 16 November 2011 AG moved from OG to a placement at HH. An urgent DOLS authorisation was granted the same day, followed by a standard authorisation on 22 November 2011.

The proceedings

5. On 24 November 2011 the local authority applied to the Court of Protection.

6. The final hearing took place before Judge Rogers over five days in late October / early November 2012. His order dated 2 November 2012 was not appealed. His reasons were set out in a judgment which there is no need for me to refer to in any detail. It suffices for me to set out what Judge Rogers said in the later judgment he delivered on 3 September 2013 (paras 10-16):

"That hearing on 2nd November 2012 was very important for a number of reasons. In the first place it made a number of important declarations. It scrutinised the care plan before the court, which was very controversial. It involved the local authority and the Official Solicitor taking different views as to timescale and the mother of AG (DG) herself taking a different view again.

After that hearing I sanctioned, in broad terms, the local authority's care plan, but, to some extent accelerated the timescale that had then been placed before the court. It involved a very important change in AG's circumstances, away from residential care into semi-independent living and that of course had to be managed with great care, both in terms of preparation for her and in the choice of placement and the preparation for her move.

The matter was due to be resolved in about the middle of 2013 and the time scale has, unfortunately, slipped a little bit, hut the matter was restored before me on 27th March where further declarations were made and one of them at paragraph 4 was: "It is in AG's best interest to move to a supportive living placement in … as soon as reasonably practicable (a target for this being achieved being June 2013)."

The local authority of course was continuing in its duty to manage the case and prepare when the matter came back before me on 27th June, but the timing was important. It was about the end of the proposed timescale, as envisaged, and coincided with the collection of evidence and the decision-making internally of the local authority.

On that occasion DG did not attend before the court. She says (and I have no reason to doubt) that she sent a message saying she was ill, but she was not there or represented.

The recital that proceeds the declarations in the June order reads: "And upon the local authority and the Official Solicitor inviting the court to make a decision as to AG's future residence today in order to allow her transition into supportive accommodation to be progressed', was an important one. I was persuaded (particularly on the application of the local authority, with no active opposition from the Official Solicitor, who was keen for there to be progress although to a large extent he remained neutral as to the detail) that declaration number 3 should be made, namely: "It is in AG's best interest to reside at … and to receive care there in accordance with applicant's care plan until her transfer to supportive living accommodation as set out in paragraph 4 below. 4. It is in AG's best interest to move to a supported living placement at [DC] as soon as

> reasonably practicable. A target for this being achieved being 15th July 2013 and to receive a care package in accordance with her needs as assessed by the local authority, such care package being delivered by the applicant local authority and (an agency I will call) AC.
>
> Notwithstanding that, a further hearing, namely today, was reserved to resolve final matters, particularly in the event that DG attended and opposed any aspect and directions were given and today's hearing was planned."

7. By the date of the final hearing in September 2013 AG had moved to DC.

8. At the hearing on 3 September 2013, Judge Rogers heard evidence from AG's allocated social worker, from an independent social worker, Mr Keith McKinstrie (Mr M), and from DG. So far as material for present purposes the order of 3 September 2013 provided as follows:

> "AND UPON the court noting that the decision maker in respect of AG's contact with her family is the Applicant Local Authority in consultation with amongst others, AG and her family
>
> AND UPON the Court recording that:
>
> (i) it is the intention of the Local Authority to progress the contact between AG and DG (subject to AG's wishes and feelings and provided it remains in her best interests) so as to gradually increase the frequency of contact and decrease the level of supervision of contact. The first stage in that progression is a planned increase in the frequency of contact from fortnightly to weekly from the week beginning 23 September 2013.
>
> (ii) the independent social worker approves the plan of the Local Authority for the progression of contact and considers it to be in AG's best interests, and recommends that a decrease in the level of supervision of contact from 2 supervisors to 1 should also be attempted from the week beginning 23 September 2013.
>
> (ii) the Court approves the plan of the Local Authority outlined at paragraph (i) above for the progression of contact between AG and DG with the amendment recommended by the independent social worker outlined at paragraph (ii) above.
>
> IT IS DECLARED THAT
>
> 1 AG lacks capacity to litigate these proceedings and to make decisions about residence, care, contact and her finances.

> 2 AG lacks capacity to enter into or terminate a tenancy agreement.
>
> 3 It is in AG's best interests to reside at [DC] or such other accommodation as may be identified by the Applicant Local Authority, and to receive a care package in accordance with her needs as assessed by the Applicant Local Authority.
>
> 4 It is in AG's best interests to have contact with DG, NG and TG and other members of her extended family, in accordance with her wishes and feelings. Contact shall be in accordance with the Local Authority's contact plan, which shall be kept under regular review by the Applicant Local Authority.
>
> IT IS ORDERED THAT
>
> 5 For the avoidance of doubt the Applicant Local Authority has authority to enter into and sign a tenancy agreement and/or terminate a tenancy agreement on behalf of AG."

9. I shall return to consider the reasons Judge Rogers gave, as set out in his judgment of 3 September 2013, when considering the various grounds of appeal.

The grounds of appeal

10. DG's grounds of appeal dated 22 September 2013 identify four grounds of appeal. It is said that Judge Rogers: (a) erred in not conducting an adequate assessment of AG's capacity; (b) failed to make findings of fact in relation to the events in 2011 that had triggered the proceedings; (c) made a decision as to where AG should live which by September 2013 was a fait accompli; and (d) acted in breach of Article 8 in directing that DG's contact with AG should be, as it is put, 'heavily' supervised. It is apparent from her counsel's very helpful skeleton arguments, one dated 7 November 2014 and the other dated 14 May 2015, that the major thrust of DG's case relates to ground (b).

11. I deal with the various grounds in turn.

The grounds of appeal: (a) assessment of AG's capacity

12. The order Judge Rogers made on 2 November 2012 included a declaration that AG "lacks the capacity to litigate these proceedings, and to make decisions about residence, care, contact and her finances." In his judgment of 2 November 2012 (para 2) he described the evidence of Dr Peter Carpenter, a psychiatrist, and Mr Roger Luck, a psychologist, as being conclusive. He went on (para 5) to say, and in my judgment, he was entitled to conclude in the light of all the expert and other evidence he had, that capacity was not "in any real sense" in issue "either now or foreseeably in the future." That order, as I have said, was not appealed.

13. The complaint, based on the proposition that capacity can fluctuate and can be dynamic, is that Judge Rogers should have required an updating assessment for the

hearing in September 2013. The question of capacity, after all, as counsel correctly observe, goes to the very root of the jurisdiction of the Court of Protection.

14. In his judgment of 3 September 2013, Judge Rogers dealt with the point as follows (paras 20-22):

> "This final hearing, therefore, has concentrated upon three issues. The first, capacity, I deal with summarily. I am quite satisfied that I dealt with that fully at the main hearing and that the direct declarations which were appropriate have been confirmed from time to time. I simply do not accept Mr Dixon's invitation, in effect to re-open capacity and, if appropriate, to adjourn the proceedings for further assessment. That, it seems to me, would be wrong as a matter of principle, given the findings have already been made, but, also, not warranted on the facts of this case because there is no obvious new material which draws into doubt the evidence which was clear and all one way at those earlier proceedings.
>
> Mr Dixon's submission is that it is desirable when a declaration in terms of capacity is made in a general sense but then a specific issue is to be decided some time later, that capacity should be revisited. As a general proposition the declaration of capacity should be as close to the relevant decision as possible; 1 agree with him in relation to that.
>
> But in this case I am not at all satisfied that any injustice is done in allowing those capacity declarations to remain and for the decision, in effect, to have been taken in June and/or confirmed today. Accordingly, although we have not explored the matter in detail, I am quite satisfied that capacity is already determined and should not he reopened and these declarations, therefore, from November and dealt with in my judgment reviewing the evidence will stand."

15. Ms Lattimer and Ms Khalique submit that DG's attempt before Judge Rogers in September 2013 to re-open the issue of AG's capacity was not merely contrary to the unchallenged opinions of Dr Carpenter and Mr Luck considered by Judge Rogers in November 2012, neither of whose reports had given any support to the proposition that AG might develop capacity, but was, moreover, unsupported by any new evidence and, as Ms Lattimer points out, opposed by AG's litigation friend, the Official Solicitor whose duty it was, and is, to protect AG's interests. As Ms Khalique correctly points out, there was no evidence to suggest that AG's capacity was fluctuating, dynamic or likely to alter in the future. They both submit that Judge Rogers was right to decide as he did in September 2013 and for the reasons he gave.

16. I agree. Mr Dixon accepts in terms, in both skeleton arguments, that there was "no new material" before Judge Rogers in September 2013. This is noteworthy because, as the order I had made on 14 January 2015 indicated, there had been a suggestion during that hearing that there *was* new material. It was for that reason that my order

required the filing of "a succinct summary of the evidential material and submissions placed orally before HHJ Rogers relating to the circumstances and matters relied upon in support of the assertion that the question of AG's capacity needed to be revisited." No such material was produced at the hearing of the appeal. On the contrary, the skeleton argument dated 14 May 2015 "accepted that there was no new material before HHJ Rogers." That, in my judgment, is really the end of the argument.

17. It was asserted, nonetheless, that this does not engage with what counsel say is the "key point" as to capacity being amenable to fluctuation and that there is what was described in the final skeleton argument as "an important point that the capacity assessment ought to be closer in time than here; here the gap being well over a year." Expressed in these abstract terms, the argument is, with all respect, quite unsustainable. The task of a judge sitting in the Court of Protection is to concentrate on the issues that really need to be resolved rather than addressing every conceivable legal or factual issue: see *Re MN (Adult)* [2015] EWCA Civ 411, para 104. Of course, there are cases where expert opinion or observable events will point to the need to keep the question of capacity under appropriate review. This was not such a case. There was here simply nothing, whether in the previous expert reports or in subsequently reported events, to justify, let alone require, Judge Rogers to embark upon a course which he rightly rejected.

18. This ground of appeal fails.

<u>The grounds of appeal: (b) failure to make findings of fact</u>

19. The background to this complaint is best approached by setting out what Judge Rogers had said in his judgment of 2 November 2012 (para 14):

> "The hearing proceeded principally almost exclusively in terms of the discussion of the future position for AG. There were, of course, in the background a number of serious factual allegations which were unresolved and they have not been tried in the course of this hearing. In that passage from the Official Solicitor's statement he records that at the pre-hearing review that issue was canvassed and specifically the local authority decided not to press for a fact finding hearing, notwithstanding DG's particular desire, as she saw it, to clear her name. I supported the local authority's decision in this case and I remain convinced that it was right that we did not devote a disproportionate time and court resources to an investigation of what has gone on in the past. That is not to say it is ignored and of course to some extent it will feature in the background, but I remain firmly of the view that even if some additional factual clarity would have emerged it would not materially have affected my overall approach to the case. I urged the parties, if I may say so, particularly DG, to be realistic about where we are at the present time and to recognise that we must start from that position when we look to the future. I bear in mind, however, that those allegations have been made but are strongly denied by DG and, applying a normal approach to the forensic fact

> finding enquiry, in the absence of the specific findings. I do not hold them in the background as it were by way of a suspicion lurking over DG."

20. The order of 23 July 2012, to which Judge Rogers was there referring, contained these recitals:

> "UPON the [local authority]'s indication that it does not consider it necessary to seek findings of fact against [DG] or any other member of [AG]'s family in order to determine her best interests in terms of residence and contact
>
> AND UPON the court noting that the effect of that indication is that the allegations made against the family have not been proven and therefore that they cannot be the basis for decision-making in respect of [AG]."

21. DG complains that the proceedings have progressed throughout, down to and including the hearing in September 2013, on a flawed basis. It is submitted that in the absence of the original allegations there would never have been any proceedings; that in order to have a proper basis for making the decisions it eventually did, the court should have made factual findings; and that the orders are in truth based on unsubstantiated and tenuous allegations. A number of reasons are identified by Mr Dixon as to why the interests of justice required there to have been a fact finding hearing in this case: (a) DG had always denied the allegations against her; (b) the allegations were serious and DG ought to have had an opportunity to be heard on them and to defend herself – as quintessential principles of natural justice, it is submitted, demanded; (c) the allegations formed the basis of what are described as very far-reaching best interests decisions, significantly restricting both AG's and DG's Article 8 rights and in fact involving a deprivation of AG's liberty; and (d) the allegations, though never proven, continue to have a profoundly stigmatising effect on DG and to hamper her attempts to have contact with AG.

22. Further, it is said by Mr Dixon that, in failing to make findings of fact, Judge Rogers was wrong in law given: (i) the obligation under section 4(2) of the Mental Capacity Act 2005 to consider *all* the relevant circumstances; (ii) the presence in this case of what are said to be a multitude of factors recognised in law as justifying the need for a fact finding hearing; (iii) the fact that the issue of contact was, it is said, inextricably linked with the allegations of abuse; (iv) the inconsistency of the local authority's stance – professing to have no need for a fact finding hearing yet relying upon the allegations; and (v) that the failure to make such findings amounted to a procedural violation of Article 8. DG, it is said, was entitled to a hearing at which she could seek to be exonerated.

23. In support of contention (ii), Mr Dixon placed reliance on the decisions of McFarlane J in *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031, para 24, and in *Re W (Care Proceedings)* [2008] EWHC 1118 (Fam), [2010] 1 FLR 1176, para 72, and the decision of Cobb J in *LBX v TT (By the Official Solicitor as her Litigation Friend), MJ, WT, LT* [2014] EWCOP 24, paras 49-50.

24. In the first of these cases, McFarlane J, as he then was, had to consider whether to direct a fact finding hearing in the context of care proceedings where by that stage no party was seeking any public law order. He identified the relevant authorities before summarising matters thus (para 24):

> "The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:
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> (a) the interests of the child (which are relevant but not paramount);
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> (b) the time that the investigation will take;
>
> (c) the likely cost to public funds;
>
> (d) the evidential result;
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> (e) the necessity or otherwise of the investigation;
>
> (f) the relevance of the potential result of the investigation to the future care plans for the child;
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> (g) the impact of any fact finding process upon the other parties;
>
> (h) the prospects of a fair trial on the issue;
>
> (i) the justice of the case."

25. Proper application of these principles in the circumstances of the present case – and those circumstances were carefully analysed by reference to each of the factors identified by McFarlane J – clearly pointed, Mr Dixon says, to the need for a fact finding hearing. The argument was further bolstered by what the same judge had said in *Re W* (para 72):

> "It is important that the planning in the future for these children … is based upon as correct a view of what happened to R as possible. It is not in the children's interests, or in the interests of justice, or in the interests of the two adults, for the finding to be based on an erroneous basis. It is also in the interests of all of the children that are before this court for the mother's role to be fully understood and investigated."

26. Furthermore, as Mr Dixon pointed out, in *LBX* Cobb J accepted the submission (see paras 39, 49) that, suitably modified, these principles could be appropriately transported from the Family Division to the Court of Protection as providing a useful framework of issues to consider in relation to the necessity of fact finding in the jurisdiction of the Court of Protection.

27. In support of contention (v), Mr Dixon prays in aid *McMichael v United Kingdom* (1995) 20 EHRR 205, paras 87, 91, and *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524, para 23. In the latter case, May LJ said this:

> "… the court will have regard to the decision-making process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by article 8. The process must be such as to secure that the views of those whose rights are in issue are made known and duly taken account of. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the person whose rights are in issue has been involved in the decision making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will be a failure to respect their family life and privacy and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of article 8."

28. In answer to this, the local authority and the Official Solicitor make common cause. Their arguments contain five essential strands.

29. First, as Ms Khalique points out, by reference to the decision of Wall J, as he then was, in *Re S (Adult's Lack of Capacity: Care and Residence)* [2003] EWHC 1909 (Fam), [2003] 2 FLR 1235, para 13, it is important to remember that, unlike in the case of care proceedings in relation to a child, there is no requirement to establish 'threshold' in the case of proceedings in relation to an adult, whether the proceedings are brought in the High Court under the inherent jurisdiction or, as here, in the Court of Protection.

30. Wall J went on to point out (para 15) that the absence of any threshold criteria equivalent to those contained in section 31 of the Children Act 1989, "raises the question as to the extent to which (if at all) it is necessary, for the purposes of exercising the jurisdiction and deciding which course of action is in the best interests of S, to make findings of fact relating in particular to disputed historical issues." His answer was as follows (paras 18, 21):

> "18 … I agree that there must be good reason for local authority intervention in a case such as the present. Equally, if there are disputed issues of fact which go to the question of Mr S's capacity and suitability to care for S, the court may need to resolve them if their resolution is necessary to the decision as to what is in S's best interests. Findings of fact against Mr S on the two issues identified in para [16] would plainly reflect upon his capacity properly to care for S. But it does not follow, in my judgment, that the proceedings must be dismissed simply because the factual basis upon which the local authority instituted them turns out to be mistaken, or because it cannot be

> established on the balance of probabilities. What matters (assuming always that mental incapacity is made out) is which outcome will be in S's best interests. There will plainly be cases which are very fact specific. There will be others in which the principal concern is the future, and the relative suitability of the plans which each party can put forward for both the short and long-term care of the mentally incapable adult. The instant case, in my judgment, is one of the cases in the latter category.
>
> 21 Whilst I acknowledge that in a relatively untried jurisdiction there are dangers in too relaxed an approach to historical issues, I am unable to accept the proposition that the approach to best interests is fettered in any way beyond that which applies to any judicial decision, namely that it has to be evidence based; that it excludes irrelevant material; and that it includes a consideration of all relevant material. In a field as complex as care for the mentally disabled, a high degree of pragmatism seems to me inevitable. But in each case it seems to me that the four essential building blocks are the same. First, is mental incapacity established? Secondly, is there a serious, justiciable issue relating to welfare? Thirdly, what is it? Fourthly, with the welfare of the incapable adult as the court's paramount consideration, what are the balance sheet factors which must be drawn up to decide which course of action is in his or her best interests?"

31. I respectfully agree with that analysis.

32. Accordingly, it is submitted, the analyses of McFarlane J and Cobb J relied upon by Mr Dixon, have to be read in the context of the overarching principles articulated by Wall J, which, it is submitted, fully justified the approach adopted by Judge Rogers in the present case. I agree.

33. Secondly, as both Ms Lattimer and Ms Khalique emphasise, Judge Rogers was careful to spell out, and accurately, both in the order of 23 July 2012 and in the passage from his judgment of 2 November 2012 which I have set out in paragraph 19 above, the legal consequences of there having been no fact finding hearing. It is worth repeating, and emphasising, part of what he said:

> "I bear in mind, however, that those allegations … are strongly denied by DG and, applying a normal approach to the forensic fact finding enquiry, in the absence of the specific findings. I do not hold them in the background as it were by way of a suspicion lurking over DG."

Moreover, there is, they say, nothing whatever to show that this was not in fact the approach adopted by Judge Rogers, both in November 2012 and subsequently in September 2013. Again, I agree.

34. Thirdly, as Ms Lattimer correctly observes, the decision of Judge Rogers not to have a fact finding hearing must be viewed in context – a context in which, not least in the light of DG's own stated position, matters had by July 2012 moved on significantly since November 2011. As Ms Khalique puts it, although the proceedings had been issued against the background of the safeguarding concerns arising out of the various allegations, matters had progressed and the court was faced with a different landscape. Judge Rogers correctly recognised that he was looking at the *present* position and looking to the *future*. Given how matters then stood, the degree of enquiry undertaken by Judge Rogers during the hearing in October / November 2012 was, says Ms Lattimer, entirely sufficient to inform the decisions in respect of *future planning* for AG that the court was tasked with making. A lengthy and costly finding of fact hearing would, she submits, have been entirely disproportionate. I agree.

35. Fourthly, there is, Ms Lattimer submits, and I agree, nothing to suggest that Mr M's analyses and recommendations were adversely influenced by the allegations.

36. Finally, as both Ms Lattimer and Ms Khalique point out, DG never sought to challenge on appeal either the order of 23 July 2013 or the order of 2 November 2012. It is far too late to be taking the point now.

37. In my judgment, Judge Rogers was fully entitled to proceed as he did and for the reasons he gave. I accept Ms Lattimer and Ms Khalique's submissions.

38. This ground of appeal fails.

<u>The grounds of appeal: (c) residence a fait accompli</u>

39. By the time the appeal was being heard, this ground of appeal had rather faded from contention, but it is convenient nonetheless that I deal with it.

40. As noted, by an order dated 27 June 2013, Judge Rogers provided for AG to move to a placement at DC. By the date of the final hearing in September 2013 that decision had been implemented and, moreover, as we will see, in circumstances where Judge Rogers on the latter occasion concluded that any further move would be detrimental to AG. In June 2013 the decision had been acknowledged to be finely balanced. By September 2013, Mr Dixon submits, the playing field was significantly sloped against DG; so, he says, she was denied a fair hearing.

41. The question of AG's placement occupied the central part (paras 23-50) of the judgment Judge Rogers delivered on 3 September 2013. He began by setting out AG's stance (para 24):

> "Mr Dixon in his submissions – very politely but firmly – criticises the approach of the court in taking what he says was a premature decision in June which has left his client in an impossible position, having to face, in effect, a *fait accompli*. I do not accept that. The application was made in good faith and properly by the local authority and not objected to by the Official Solicitor and the material available before me in June, plainly, demonstrated the need for such a decision. It is noteworthy that the objective was to achieve the timescale that

> in the November, earlier, I had thought so important, essentially relying upon the evidence of independent social worker Mr M. I remain of the view that the timescale was important and there was no contrary material from DG."

42. Judge Rogers then carefully rehearsed the evidence of the independent social worker Mr M (paras 24-25) and of the social worker (paras 26-27), the position of the Official Solicitor (para 28) and then, in extended and careful detail (paras 29-38), the evidence of DG, before turning to consider, in equally extended and careful detail (paras 39-47), the evidence from DG and others as to AG's wishes and feelings. I do not propose to go through all this in equal detail.

43. Although describing DG's evidence on various matters as "wholly unrealistic" (para 30), "unsupported … by clear evidence" (para 37) and "partial and blinkered and rightly rejected by the local authority" (para 38), Judge Rogers said that it nonetheless required the "careful scrutiny and analysis" which in my judgment he gave it.

44. In relation to the placement at DC, Judge Rogers said this (paras 41, 47):

> "In my judgment any move is likely to be unsettling, but the move to DC has been achieved, apparently (and I accept the evidence) with some degree of success. DG denies that, but I am afraid I accept the evidence of the social worker on this point that very good progress in terms of settlement and integration into the community is occurring. I accept the evidence that AG herself seems reasonably content and is prepared to describe DC as her own flat.
>
> … But at least there is some indication of her contentment. Even if it does not go that far, it does seem to me to show that her settling-in period is going quite well because there were no obvious adverse indications."

45. He set out his overall conclusions (paras 48-50):

> "Stepping back from all of the material that I have, I am quite satisfied that DC is suitable, both in terms of its actual physical practicalities, but also the area and I reject the geographical divide point, if pushed to its logical conclusion that would be a very sad reflection, it seems to me, upon this case and the community at large. I, therefore, reject DG's overly negative view.
>
> This has the advantage of being close to AG's college. It has the advantage of having a care package already in place. I am sure it can be improved upon and as Mr M correctly indicates the local authority must keep it constantly under review and be flexible. I am satisfied that a mix of carers, with racial backgrounds of various sorts, will be appropriate.

> Put the other way, there is, obviously, in my judgment, no basis for a further move. That would be unfairly unsettling, quite unnecessary and not called for. Putting the matter positively, in my judgment, it is, obviously, in her best interest to remain in that placement."

46. In my judgment there is no basis for any criticism of the course Judge Rogers took, either in June or in September 2013. He gave cogent reasons for concluding that there needed to be a decision in June 2013 and equally cogent reasons explaining and justifying the decision then that AG should move to DC. His reasons for not changing the arrangements in September 2013 were clearly articulated and, as in the case of his earlier decision, securely based on professional and other evidence which he was entitled to accept.

The grounds of appeal: (d) breach of Article 8 in relation to contact

47. Again, the background to this complaint is best approached by setting out what Judge Rogers had said in his judgment of 2 November 2012 (para 93):

> "In terms of DG the first priority is her re-introduction and, of course, any such re-introduction will be difficult and will only be achieved with some level of support and supervision. I hope that AG can learn to understand that her mother loves her and has much to offer her and will be there for her. It may be, as Mr M suggests, that to some extent an entrenched view has been adopted and as a result of the allegations having been made, and they cannot be retracted, that there is a certain awkwardness and difficulty which will have to be overcome. It will be difficult, I do not doubt that, and DG will have to put aside some of her reservations. But contact, if it can be achieved, must be attempted. Of course, again, AG must not be forced. But again it may be there is a nuance of difference between me and Mr M in this. It seems to me that AG must be given quite active encouragement in terms of how she approaches the resumption of a relationship with her mother. There is a fine line, as [counsel for the local authority] submits, between pressure and encouragement. I cannot define that line. It is fact specific, but I hope that the local authority will do all that it possibly can to ensure that a resumption of contact occurs in the short term. If it can and if the family are brought back on board then there is every hope that the move into supported accommodation will be very much more easily achieved. I will hear further submissions about contact but I am anxious not to be prescriptive or defining beyond what I have said."

48. As Ms Lattimer observes, this is not the language of a judge who has been affected by or who is holding the allegations against DG. On the contrary, she submits, this is a judge who has largely put them aside.

49. In his judgment of 3 September 2013, Judge Rogers set out his reasoning as follows (paras 51-55):

> "As far as contact is concerned, I am satisfied that the local authority is committed to its promotion. In a way it somewhat undermines DG's case. She is critical of the local authority, who she regards as unnecessarily adverse to her, but I am sure that the proposals for contact are put forward in good faith.
>
> In fact the issue, as I tried to point out at one stage in what became a rather florid part of DG's evidence, is that the issue is timing. Everyone accepts that it should move on and the local authority has accepted that within the time scale laid down earlier they should take the shorter rather than the longer route and after about eight weeks move to a weekly basis for contact. On any view, therefore, I am only really debating the next three weeks in terms of weekly or fortnightly. I don't know exactly when the next visit will occur. It may even be I am only dealing with one week of controversy. One or two probably.
>
> But the short point is – and, again, it could be said to be common sense, but it was well made by Mr M – that the matter should be taken with some caution to ensure that things are dealt with sensibly. She has a lot on her plate; she has only just moved in and is preparing for college and other matters. It seems to me a very cautious but sensible approach to say that we should not move away from the current arrangements at least for three weeks.
>
> I accept that the reduction from two carers to one carer would make every sense. I don't see the obvious need for two. His view is supported by the Local Authority and the Official Solicitor. I agree with DG that supervision should be light, as unobtrusive as possible, not only to make things comfortable but, as she puts it in rather more important terms, that contact is the main way of their exercising their right to respect for private and family life and to the extent, therefore, that there has to be supervision, it should be sensitive and should, as I say, be supportive and light rather than intrusive.
>
> AG should be given as much choice and autonomy as is compatible with her needs and that is a difficult value judgment and balance to strike. The local authority, accordingly, must be flexible and reactive to her needs and I am satisfied, particularly having heard from the social worker but also having read all the material, that it is aware of that problem. She should be given every support and Mr M's sensible suggestion that her care plan should not only be set out in narrative form, but also should be easily comprehensible in grid or diary type form so that everyone knows where they stand is a

> useful contribution I do not direct that but it is obvious common sense."

50. DG points to what is said to be the very draconian nature of the restrictions on her contact with AG, something which, Mr Dixon says, only goes to emphasise the need for appropriate factual findings. He points to what was said in *Olsson v Sweden* (1988) 11 EHRR 259, para 72, and submits that the Judge's starting point of very minimal (and supervised) contact was disproportionate, as also, he says, are the continuing restrictions.

51. Ms Lattimer and Ms Khalique submit that the approach adopted by Judge Rogers was entirely appropriate, securely founded in the evidence and appropriately directed to the early implementation of a regime of more frequent and less stringently supervised contact. His decision, they say, was neither wrong nor unjust. Whatever interference with family life his approach entailed, was, in all the circumstances, they say, necessary and proportionate. There was, they submit, no breach of anyone's rights under Article 8. They point in support of this contention to the principles articulated by the Court of Appeal in *K v LBX and Others* [2012] EWCA Civ 79, [2012] COPLR 411.

52. I agree with Ms Lattimer and Ms Khalique. Judge Rogers was appropriately sensitive in balancing AG's needs and wishes against DG's understandable and legitimate aspirations. It is clear that Judge Rogers was anxious to move forward quickly in progressing contact, with a view to both increasing its frequency and reducing the level of supervision. His approach, in my judgment, was entirely legitimate and properly respectful of both AG's and DG's Article 8 rights.

53. This ground of appeal also fails.

Conclusion

54. For these reasons each of DG's grounds of appeal fails. Her appeal must be dismissed.

Permission to appeal

55. DG seeks permission to appeal. Since the proposed appeal is a second appeal, I have no jurisdiction to consider the application, which can be made only to the Court of Appeal: see rule 182(2) (now rule 171B(3)) of the Court of Protection Rules 2007. The limited grounds upon which the Court of Appeal may give permission are set out in rule 52.13(2) of the Civil Procedure Rules 1998.

A final observation

56. Ms Khalique submits, and I am inclined to agree, that the local authority acted unlawfully in removing AG from OG in November 2011 and placing her at HH without having first obtained judicial sanction. Local authorities must seek and obtain appropriate judicial authority before moving an incapacitous adult from their home into other accommodation. Local authorities do not themselves have power to do this.

57. Local authorities also need to appreciate and take appropriate steps to minimise the understandable distress and anger caused to someone in DG's position when initial

relief is obtained from the court on the basis of allegations which are not thereafter pursued.