



Neutral Citation Number: [2021] EWHC 3044 (Admin)

Case No: CO/1555/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/11/2021

Before :

ANDREW THOMAS QC SITTING AS DEPUTY HIGH COURT JUDGE

Between :

THE QUEEN

Claimant

(ON THE APPLICATION OF BL)

- and -

LONDON BOROUGH OF ISLINGTON

Defendant

The Claimant appeared in person
Siân McGibbon (instructed by **Islington LBC Legal Services**) for the **Defendant**

Hearing dates: 11/11/2021

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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DEPUTY HIGH COURT JUDGE THOMAS

Summary of Decision

1. For the reasons set out below, I am satisfied that the Claimant has capacity to conduct this claim. Any difficulties which the Claimant may have arising from her disability can be overcome by making appropriate adjustments to assist her understanding of the proceedings.

Anonymity

2. Of the Court's own motion, I order that the Claimant's name should not be disclosed without the permission of the Court, pursuant to Rule 39.2(4) of the Civil Procedure Rules.
3. The reason for making this order is that the case concerns confidential information relating to the Claimant's medical condition and disability. There is a related case in which the Claimant's address has already been protected.
4. I am satisfied on the evidence that non-disclosure is necessary to secure the proper administration of justice and in order to protect the interests of the Claimant. There shall be no publication of the Claimant's name or address, nor any other particulars which may lead to her identification as a party to this claim.
5. This restriction will continue until further order but it may be reviewed by the Court on application by any person who wishes to set aside or vary this part of my order. Any request for reconsideration must be made in writing on not less than 7 days written notice to the parties and stating reasons in support.

Background

6. This is a reserved judgment following a hearing on 11th November 2021. The Claimant acted in person and the Defendant was represented by Miss Siân McGibbon of Counsel. I am grateful to both for their helpful and constructive submissions. I reserved my decision so that further information could be obtained.
7. This case involves a claim for Judicial Review of the Defendant's decision not to award her 'medical points' under its Housing Allocation Scheme. The original decision was taken on 23rd September 2020. The Claimant appealed under the Defendant's internal process but the decision was upheld. The claim is a challenge to the Review Decision dated 4th March 2021.
8. The background to the claim involves the Claimant's long-term medical conditions. She has been diagnosed with Autistic Spectrum Disorder, Emotionally Unstable Personality Disorder, Anxiety and Depression. These have a significant impact on her activities of daily living. The Claimant has filed a number of documents which confirm her medical history, including copies of medical notes and reports.
9. Separately, the Claimant also has an ongoing claim in the County Court against a former landlord. The history of that case is relevant to the procedural history of the present claim.

The Capacity Issue

10. The present application relates to the Claimant's capacity to conduct the claim. For these purposes it is not necessary for me to reach any view on the merits of the underlying claim for Judicial Review and it would be wrong to conflate the issues.
11. The issue of capacity was first raised by the Defendant within its Summary Grounds of Defence. It was entirely right and proper for the Defendant to raise the issue given its knowledge of the Claimant's medical history and also its understanding of what had happened in the previous County Court case.
12. Within these proceedings, the issue of capacity has been addressed by three previous Orders from this Court. It is relevant to note that all of those were decisions on the papers.
13. The present application has resulted an in-person hearing. I have had the advantage of receiving information which was not available to the Judges who considered the case on the papers. Through no fault of any party, those decisions were taken on the basis of mistaken information.
14. I have also had the advantage of hearing from the Claimant herself. That has informed my decision on the issue of capacity, including whether adjustments to assist the Claimant's understanding may help overcome her impairment for the purpose of these proceedings.

Relevant Procedural History

15. The brief procedural history is as follows.
 - (1) The claim was issued on 29th April 2021. The Claimant issued the claim as a litigant in person.
 - (2) On 20th May 2021, the Defendant filed its Acknowledgement of Service and Summary Grounds of Defence.

The Summary Grounds referred to the earlier County Court case. The defendant stated that the claim against the landlord had been struck out in March 2019 because the Court had determined that the Claimant lacked capacity. That statement was correct, but unbeknown to the Defendant the Claimant had appealed that decision.

The Defendant also provided a copy of a medical report which had concluded that the Claimant lacked capacity to conduct litigation. This was a pro-forma document dated 18th December 2019 which had been completed by the Claimant's General Practitioner.

The Defendant is not party to the County Court case and was doing its best to assist the Court. However, it emerged during the course of the Claimant's oral submissions that she had in fact successfully appealed the strike out order and it had therefore been set aside.

Following the hearing today, the County Court has provided a copy of HHJ Hellman's Order dated 18th May 2020 from the County Court hearing in which he allowed the appeal.

The Order contains a short summary of the reasons why HHJ Hellman was satisfied that the Claimant does have capacity to conduct the case. He makes observations regarding the assistance which the Claimant will require. He allocated the case to the Small Claims Track.

The Claimant informed me today that the trial of that claim is due to take place on 26th November 2021. She is continuing to conduct the case as a litigant in person.

- (3) On 1st June 2021, the present claim for Judicial Review was considered on the papers by Dan Squires QC sitting as a Deputy High Court Judge. As a result of the issues raised in the Summary Grounds of Defence, he made an Order directing the parties to file and serve any evidence they had relevant to the issue of the Claimant's capacity to conduct litigation. No further information was supplied other than an email which stated that the GP had not had contact with the Claimant since his previous report.
 - (4) On 13th July 2021, Peter Marquand QC sitting as a Deputy High Court Judge made an Order staying the claim for Judicial Review. He directed the Claimant either to file further medical evidence to show that she has capacity to conduct this litigation or alternatively to nominate a person to act as her litigation friend. He ordered that if neither of those things was done within six months, this claim would be struck out without further order.
 - (5) On 15th July 2021, the Claimant made an application to set aside the Order of 13th July 2021. The application asked the Court to make 'reasonable adjustments' to allow her to continue to participate in the proceedings.
 - (6) The application to set aside was considered on the papers by HHJ Gore QC on 3rd August 2021. He dismissed the application. He stated that the case could not move forwards unless there was evidence that the Claimant has the capacity to conduct legal proceedings.
 - (7) On 5th October 2021, the Claimant wrote to the Court asking for reconsideration of HHJ Gore's decision. The oral hearing before me was the result of that request.
16. As stated above, until this hearing the Orders made by the Administrative Court have all been based on the understanding that the County Court had found that the Claimant lacked capacity to conduct Court proceedings. It transpires that the contrary is true. The decision of the County Court is not binding on this Court, not least because a decision on capacity is always situation-specific. It is necessary for me to consider the issue taking into account the nature and complexity of the present case.

The GP Medical Report

17. The only medical report which directly considers the issue of the Claimant's capacity to conduct litigation is the GP report dated 18th December 2019, which followed a

consultation the previous day. It was prepared for the purposes of the County Court case.

18. The report states that the Claimant has a diagnosis of Severe Autistic Spectrum Disorder and Emotionally Unstable Personality Disorder. These are impairments of mind. It states that these have been present since childhood and her condition is unlikely to change in the foreseeable future.
19. In the opinion of the GP, the Claimant is unlikely to understand the purpose or process of the legal action, why there is a court hearing, what is required of her in Court and what the role of the court members are. The author did not separately address the issue of whether the Claimant is able to use or weigh such information.

Capacity to Conduct the Proceedings - The Law

20. Rule 21.1 of the Civil Procedure Rules states that a party who lacks capacity to conduct the proceedings is a 'protected party'. Rule 21.2 provides that a protected party must have a litigation friend to conduct the proceedings on their behalf. Rule 21.3(3) provides that once a determination has been made that a party lacks capacity, no party may take any further step in the proceedings without the permission of the court until the protected party has a litigation friend.
21. In her application, the Claimant explained the difficulties which she has had in obtaining legal representation. For the avoidance of doubt, the role of a litigation friend is different from the role of a legal representative. A litigation friend is someone who assists a party who lacks capacity by taking decisions concerning the conduct of legal proceedings, and also assisting that party to understand the process and to prepare their case. Having discussed this with the Claimant during the hearing, I am satisfied that she understands the distinction. The practical difficulty which she would encounter is that there is no relative or other trusted person who might volunteer to act as her litigation friend, hence her need for professional legal advice.
22. Capacity, or lack of capacity, must be determined in accordance with Sections 1 to 3 of the Mental Capacity Act 2005 which state as follows:

"The principles

- (1) The following principles apply for the purposes of this Act.*
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.*
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*

...

People who lack capacity

- (1) *For the purposes of this Act, 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 the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*
- (2) *It does not matter whether the impairment or disturbance is permanent or temporary.*
- (3) *A lack of capacity cannot be established merely by reference to—*
 - (a) *a 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 his capacity.*
- (4) *In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*

...

Inability to make decisions

- (1) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*
 - (a) *to understand the information relevant to the decision,*
 - (b) *to retain that information,*
 - (c) *to use or weigh that information as part of the process of making the decision, or*
 - (d) *to communicate his decision (whether by talking, using sign language or any other means).*
- (2) *A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).*
- (3) *The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*
- (4) *The information relevant to a decision includes information about the reasonably foreseeable consequences of—*

(a) deciding one way or another, or

(b) failing to make the decision.”

23. The Claimant states that she wants to be allowed to continue to conduct the proceedings without a litigation friend and asks the Court to make ‘reasonable adjustments’ to allow her to participate in the proceedings. She submits that she should not be deprived of an equal right of access to justice because of her disability. She says that the nature of her disability makes it difficult for her to maintain relationships and to work with others. The Claimant says that this makes it even more difficult for her to identify anyone as a potential litigation friend. This places her at an additional disadvantage compared with others who have different forms of disability and the advantages of social support networks.

Decision on Capacity

24. Taking into account all of the material before the Court, including my own assessment of the Claimant’s understanding and ability, I am satisfied that she has capacity to conduct the present claim.
25. I have carefully considered the opinion of the Claimant’s GP, as set out in his report of 18th December 2019. Insofar as it deals with purely medical issues, I accept the report. However, in my judgment there is other material which the Court is able to take into account in reaching a different overall conclusion on capacity.
26. The GP report does not address appropriate adjustments. The Judges and staff of the Administrative Court have considerable experience in dealing with vulnerable participants, including cases where they act as litigants in person. The Court is familiar with the need to make adjustments to ensure that proceedings are taken at a pace which a vulnerable participant is able to follow and to explain information to ensure their understanding.
27. In this case, the Defendant is a local authority whose staff are familiar with the Claimant and already involved in providing her with support services. Their staff are experienced in communicating information in a manner which is adjusted to meet the needs of vulnerable service users. They are represented in these proceedings by Counsel who has been able to assist the Claimant to understand today’s proceedings.
28. Addressing the specific concerns raised by the Claimant’s GP, I am satisfied on the evidence of her written and oral submissions that the Claimant understands the purpose of these proceedings, namely that they concern a challenge to a decision on her priority for housing allocation. She knew that the hearing before me was her application to set aside a previous order of the Court. Although she sometimes required assistance to maintain focus, the Claimant was able to respond to all of my questions by providing relevant answers and giving relevant information. She had no difficulty in identifying the different participants in the Court room. I also note that the Claimant is educated to degree level. Although English is not her first language, she is both articulate and able to follow the proceedings when others are speaking.

29. The Claimant has rightly identified that the key issue is that the Court must take all practicable measures to ensure her access to justice. Given the difficulties in identifying a litigation friend, it is highly likely that the practical consequence of refusing her application would be that the proceedings would be stayed without any decision being made on the merits of the claim. In any event, the Court should not intervene to deprive the Claimant of her autonomy to take decisions unless it is necessary to do so.
30. In reaching my conclusions in this case, I consider the following principles under the 2005 Act to be particularly significant.
 - a) The Claimant must be presumed to have mental capacity unless the contrary is shown. (Section 1(2)).
 - b) The Claimant should not be taken to be unable to make a decision unless all practicable steps to help her to do so have been taken without success. I have already noted the ability of the Court to make such adjustments. (Section 1(3)).
 - c) The Claimant is not to be treated as unable to make a decision merely because she makes an unwise decision. (Section 1(4)).
 - d) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances, for example by using simple language. (Section 3(2)).
31. In the circumstances, I am satisfied that the Claimant has the necessary capacity. The application is allowed and the Order of Peter Marquand QC dated 13th July 2021 is set aside in its entirety.
32. I make no criticism of either party for the fact that it has taken until today's hearing for full information concerning the County Court case to emerge. However, in all the circumstances I consider it appropriate to make no order for costs on the Claimant's application.

Next Steps

33. As explained to the Claimant at the hearing, the next step will be for a Judge to consider on the papers whether her claim contains an arguable ground for judicial review which has a reasonable prospect of success. If so, the judge will give permission for the claim to proceed to a full hearing and will give further directions about other documents which the Claimant will need to file with the Court.
34. If the Judge does not give permission on the papers, the Claimant may have the opportunity to request that the application is re-considered at a further court hearing. If that arises, the Claimant should consider carefully any reasons given for refusing permission before deciding whether to renew her application. Any such request must be made within 7 days of receiving the decision on permission. That would not arise if the claim was held to be totally without merit.
35. I have not commented on the merits of the claim. However, I should repeat my warning to the Claimant that by issuing and continuing a claim for Judicial Review she is at risk

of having to pay the Defendant's legal costs. Whether or not permission is granted on the papers, she should consider carefully the financial risk of continuing her claim.

36. In the light of the decision today confirming her capacity to conduct her claim, the Claimant may wish to go back to the solicitors with whom she has made contact to find out whether they might now be willing to act for her in these proceedings. Alternatively, the Claimant may want to consider whether she may be able to get free legal advice or representation through an appropriate support organisation.
37. Finally, I noted during the hearing that the Summary Grounds of Defence contains an application for costs but does not specify the amount. This requirement is set out in Paragraph 24.4.2 of the Administrative Court Guide (see also: R (Ewing) v Office of the Deputy Prime Minister [2005] EWCA Civ 1583 at para 47). If the Defendant wishes the Judge considering permission to consider such an application, a schedule of costs limited to the preparation of the Acknowledgement of Service and Summary Grounds should be filed within 7 days.