



Neutral Citation: [2022] EWHC 1328 (Fam)

Case No: TBA

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2022

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between:

Royal National Orthopaedic Hospital Trust

Applicant

- and -

ZY

(By His Children's Guardian)

First
Respondent

-and-

YY

Second
Respondent

Mr Anderson (instructed by **Capsticks**) for the **Applicant**
Mr Osborne (solicitor from **Cafcass Legal**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing dates: 24 May 2022

Approved Judgment

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with the welfare of ZY, a child born on 27 October 2014 and is now aged 7 years old. Given the urgency in this matter, it has not been possible to arrange for ZY to be allocated a Cafcass children's guardian, but Mr Osborne appears today from Cafcass legal to assist the court.
2. The mother of ZY is YY. She is not represented and does not appear before the court. At a short hearing yesterday, I directed that she be served by process server at her last known address yesterday afternoon, after the mother had refused to provide an email address for the papers to be sent to her. Personal service was not effected as the process server was unable to gain access to the mother's property and was unwilling to throw confidential documents over a locked gate. However, an email address for the mother having been ascertained, the solicitors for the Trust provided the papers to the mother in electronic form this morning and notified her that this hearing was taking place at 2pm this afternoon. The mother has not attended. Given the urgency of this matter, for reasons I shall come to, I am satisfied that it is appropriate to proceed in the mother's absence.
3. The application before the court is made by the Royal National Orthopaedic Hospital NHS Trust. That application is for a declaration under the inherent jurisdiction of the High Court that it is in ZY's best interests to undergo a biopsy under general anaesthetic to investigate a suspected tumour in his right ankle. The administration of a general anaesthetic is opposed by the mother, albeit she does appear to oppose the taking of a biopsy itself. The biopsy is scheduled for tomorrow.
4. Within this context, the court has before it the witness statements of Dr S (Consultant Anaesthetist) dated 20 May 2022, Dr V (Radiologist) dated 20 May 2022, a letter of Dr P (Consultant Orthopaedic Surgeon) dated 20 May 2022. The court also has the benefit of the minutes of a best interests meeting dated 17 May 2022.

BACKGROUND

5. The background can be stated shortly. ZY was referred to the regional sarcoma service on the 27 April 2022. He has a four year history of an enlarging mass at the front of his right ankle. ZY's case was discussed at a multidisciplinary new patient meeting on the 29 April 2022 and again on the 6 May 2022. ZY's MRI scan dated 22 April 2022 was reported as showing a 4.6 x 4 x 3cm soft tissue tumour situated between the skin of the front of his ankle and the lower end of his tibia. The features were suspicious for it being a malignant soft tissue sarcoma, which is a rare type of tumour.
6. In circumstances where the index of ZY's tumour gives rise to a strong clinical suspicion of malignancy, Dr P considers that there is an urgent need for the tumour to be the subject of a biopsy. Specifically, an image-guided core needle biopsy is required to establish a tissue diagnosis, which will then guide further treatment. That urgency is grounded in the need to establish quickly whether the tumour is malignant and, if so, to commence treatment to maximise the chances of successful treatment by way of chemotherapy, surgery and radiotherapy. Within this context, and having regard to the

NHS treatment protocol, the clinicians are required to ensure that these investigations are carried out within two weeks of referral.

7. In his statement to the court the radiologist, Dr V, states that the benefits of performing a biopsy under a general anaesthetic “far outweigh” the risks in circumstances where:
- i) An ultrasound guided biopsy procedure involves several steps that cause significant distress to young patients. This can reduce compliance and risks a non-diagnostic outcome following the biopsy, necessitating a repeat of the procedure.
 - ii) Undertaking the biopsy procedure under a local anaesthetic involves a cutaneous injection which itself involves a sharp scratch of the needle and burning pain associated with the local anaesthetic. In this context, any adverse experience will also affect the emotional effect of further treatment on the patient, the need for which in this case is likely.
 - iii) The use of a local anaesthetic would mean that the child is conscious whilst a 0.5-1cm incision is made in the skin with a scalpel and a 14G needle is inserted through the incision for at least 3 cm under the skin. Thereafter, the needle biopsy system cuts a 2 cm fragment to obtain a specimen. This stage may be painful, depending on the nature of the lesion. This operation is repeated at least 5 to 6 times to ensure enough molecular / genetic testing material.
 - iv) To be effective, an ultrasound guided biopsy procedure requires the patient to be in a static position to minimise the potential damage to the surrounding structures and ensure that the correct samples are obtained.
 - v) Performing the biopsy without a general anaesthetic, with the associated inability to ensure the patient remains static, will result in a high risk of contaminating surrounding tissues with tumour cells, which could lead to complications and make definitive treatment of a malignant cancer more complex.
 - vi) Given the unknown nature of the tumour and the real possibility it is a rare form of osteosarcoma, it is vital that a biopsy is obtained quickly so as to ensure treatment can commence if the tumour is malignant.
8. Within the foregoing context, the doctors responsible for ZY’s treatment are clear that it is in ZY’s best interests to have a biopsy of his tumour performed under general anaesthetic. Dr P provides the following opinion with respect to a biopsy under general anaesthetic:

“In order to plan treatment, it is essential that we establish a tissue diagnosis and in order to do this, he requires a test called a core needle biopsy. This involves inserting a large, hollow needle several times through the skin, into the tumour and obtaining multiple cores of tissue from it. To carry this out safely it is essential to have a still patient so that the biopsy can be accurately performed. In view of ZY’s age of seven years, we have recommended that this procedure be performed under general anaesthetic. This is standard practice for biopsies in children of this age and would be considered best

practice in any recognised sarcoma centre. In our opinion, it would not be safe to perform this test under local anaesthetic. If ZY were to move during the procedure there would be a high risk of contaminating the surrounding tissues with tumour cells which could make definitive treatment more complex. There would be a strong possibility that the procedure would have to be abandoned, further delaying the diagnosis. It may also be distressing for ZY.”

9. The statement from Dr S, Consultant Anaesthetist, dated 20 May 2022 does not deal in detail with the duration and depth of the general anaesthetic required to effect the biopsy, nor in detail with the risks attendant on a general anaesthetic, both generally and in respect of ZY specifically. However, during the course of the hearing instructions taken by Mr Anderson led to the following additional information being available in this regard:
 - i) The risks of a general anaesthetic for a child of ZY’s age generally are (i) going into spasm, (ii) chest infection and (iii) an allergic reaction. In numerical terms, those risks are negligible, amounting to a risk of 0.5% to 1%.
 - ii) In respect of these risks there is no contraindication in ZY. Whilst he is at higher risk of sickle cell anaemia given his ethnic background, there is no suggestion he suffers from sickle cell anaemia. Further, on 11 May 2022, when ZY was last due to undergo the biopsy, standard pre-assessment testing showed that ZY was fit for that procedure.
 - iii) Administration of the general anaesthetic would be by way of a supraglottal airway device rather than by intubation.
 - iv) The care plan for the biopsy would be for ZY to be accompanied by his mother and a specialist nurse. His mother could stay whilst given the anaesthetic. Once under the general anaesthetic, ZY would then be cared for by the anaesthetic team.
 - v) The procedure will last approximately 30 minutes, after which he would recover in the recovery room under the supervision of the anaesthetist and a specialist nurse.
 - vi) ZY would be discharged on the same day as the procedure.
10. Notwithstanding the position set out above, ZY has now been removed from the medical list on two occasions in circumstances where the mother has refused to provide her consent to ZY being given a general anaesthetic for the purposes of facilitating the biopsy. On 11 May 2022, the risks of performing a biopsy without a general anaesthetic were explained to the mother but she remained steadfast in her opposition to the use of a general anaesthetic. On 17 May 2022, a day before a further appointment for the biopsy to be undertaken, the mother confirmed her objection at the best interests meeting.
11. There is lack of clarity in respect of the mother’s position in terms of the reasons for her objections, although the mother has indicated that she would not accept administration of a general anaesthetic except as a “last resort”. During the course of

the meeting on 17 May 2022, the mother expressed concern that doctors wished to put ZY into “a coma”. She reiterated that she would not consent to a biopsy being undertaken under general anaesthetic until she believed it was the “last resort”. It is unclear what the mother means by the phrase “last resort”.

12. Within this context, in its Position Statement on behalf of ZY, Cafcass legal submits that the medical evidence is compelling and unanimous in indicating that there is a clear benefit to ZY of having the biopsy urgently. Mr Osborne further noted during his oral submissions the general nature and low level of the risks that are attendant on a general anaesthetic and that ZY underwent pre-assessment testing on 11 May 2022, which did not reveal any contraindications to the use of a general anaesthetic.

THE LAW

13. The law to be applied in respect of these difficult applications is itself straightforward. In *Re E and Another (Minors: Blood Transfusion)* [2021] EWCA Civ 1888, following a review of the authorities, the Court of Appeal reiterated as follows:

“[49] These cases, spanning persons of all ages, mandate an assessment from the individual's point of view by which the court seeks to identify his or her best interests in the widest sense. The assessment will be driven by circumstances that will vary widely from case to case.”

14. With respect to the circumstances that will inform the best interests decision, in a number of previous decisions I have set out a list of factors to which the court should have regard when reaching its best interest decision. However, by reference to those decisions, in *Re E and Another (Minors: Blood Transfusion)* the Court of Appeal further reminded judges that the court must focus on the matters relevant in the case before it. Within this context, and acknowledging the starting point being the strong, but rebuttable, presumption that it is in a person's best interests to stay alive, the Court of Appeal observed at [52] that:

“In one sense, an unfettered welfare assessment does not sit easily with presumptions or starting points. But, approached carefully, these are more matters of form than substance. What is important is that the court identifies the factors that really matter in the case before it, gives each of them proper weight, and balances them out to make the choice that is right for the individual at the heart of the decision. If this process is properly carried out so as to arrive at a sound welfare decision, the court will not be acting incompatibly with rights arising under Arts 2, 3 and 8 (and, here, 9) of the European Convention on Human Rights.”

15. Within this context, the best interests of the subject child must be considered in their widest sense, with every consideration capable of bearing on the decision being taken into account and balanced by the court on the facts of the particular case. This means that the court will not be bound to follow the evaluation provided by the medical witnesses in the case, albeit that that evaluation will often carry significant weight. It also means that the weight to be accorded to the wishes and feelings of the child must be considered in accordance with their age and understanding, the Court of Appeal in *Re E and Another (Minors: Blood Transfusion)* pointing out that there is a significant difference between a young child and a child who is Gillick competent with respect to

the treatment proposed. In this case, ZY is 7 years old, with no suggestion that he is Gillick competent with respect to the question of whether his biopsy should take place under a general anaesthetic or not.

DISCUSSION

16. Having considered the evidence before the court, I am satisfied that it is in ZY's best interests for the biopsy of his tumour to be undertaken under a general anaesthetic.
17. I start with the presumption that that it is in ZY's best interests to stay alive. That that is the appropriate starting point in this case is underlined by the fact that, if found to be an usual form of malignant osteosarcoma, ZY's tumour will represent a significant risk to his life. Within that context, I am satisfied that it is in ZY's best interests to take all steps that are reasonable in order to protect his life from the impact of what is potentially an aggressive and fatal disease. In this regard, the medical evidence before the court is clear that an image-guided core needle biopsy offers the best chance of a successful biopsy and a reliable diagnosis, upon which successful treatment of tumour is dependent. It is further clear that it is in ZY's best interests for that step to be undertaken urgently.
18. That it is in ZY's best interests for the image-guided core needle biopsy to take place under a general anaesthetic is equally clear having regard to the risks that are attendant on that approach not being taken. In particular, that not to use a general anaesthetic would significantly increase the potential for pain and distress for ZY during the procedure, would significantly increase the risk of the biopsy not producing diagnostic results with a delay in achieving a diagnosis and correct treatment and, perhaps most seriously, would significantly increase the risk of the biopsy itself resulting in the further distribution of cancerous cells to organs that are not yet affected, leading to further complications and making definitive treatment of a malignant cancer more complex.
19. Within this context, I am satisfied that the risks of not using a general anaesthetic to facilitate the needle biopsy significantly outweigh the risks of doing so. The evidence before the court makes clear that the use of a light general anaesthetic on ZY carries with it no greater risk to him than is ordinarily attendant on the use of a general anaesthetic in a child of ZY's age. Within this context, I am satisfied that those general risks are significantly outweighed by the benefits to ZY of the biopsy being undertaken under a general anaesthetic, namely the increased chance of a successful biopsy being undertaken and a reduction in the risk that the biopsy itself may result in spreading cancerous cells elsewhere in ZY's body.
20. Within this context, I accept the evidence that the most reliable, safest and recommended best practice for a child of 7 is for the biopsy to be undertaken whilst the patient is under general anaesthetic and that the treatment team consider this to be a routine procedure.
21. I have, of course, borne in mind that the mother has voiced a consistent objection to a general anaesthetic being used to effect a biopsy of ZY's tumour. It is the case that the mother does not object to the biopsy being carried out but, rather, to it being carried out under general anaesthetic. However, the rationale for that step is clear on the evidence before the court. In any event, I am satisfied that those objections cannot outweigh the

manifest advantages for ZY's welfare of an effective biopsy being undertaken of his tumour. Further, I bear in mind the observation of Holman J in *NHS Trust v MB and Others* [2006] EWHC 507 (Fam) that:

“It is important to stress that the references to the views and opinions of the parents, their own wishes, however understandable in human terms, are wholly irrelevant to the consideration of the objective best interest of a child, save to the extent in any given case that they may illuminate the quality and value of a child parent relationship.”

22. I am also mindful that I do not have the benefit of having ZY's views in respect of the proposed biopsy. However, once again I am conscious that this matter is urgent in that the longer it takes to obtain a definitive diagnosis in respect of ZY's tumour the more difficult it will be to treat that tumour if it transpires it is malignant, not least because ZY's treating clinicians consider that there is a significant chance that the tumour is a rare form of osteosarcoma. Within this context, and in particular having regard to the fact that ZY is seven years old, I consider that it is not in ZY's best interests to adjourn this matter in order that his views can be canvassed.

CONCLUSION

23. In conclusion, having regard to the totality of the evidence before the court and holding ZY's welfare as my paramount consideration, I am satisfied that it is in ZY's best interests to undergo an image-guided core needle biopsy under a general anaesthetic and I so declare.
24. That is my judgment.