Neutral Citation Number: [2020] EWCA Civ 1772

Case No: B4/2020/2131

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
Mr Justice Cohen
13684602

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 December 2020

Before :

LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON
- -

JB **Appellant**

v

UNIVERSITY HOSPITALS PLYMOUTH NHS TRUST (1)

RS
(by his Litigation Friend The Official Solicitor) (2) **Respondents**

- -
- -

David Lock QC and Bruno Quintavalle (instructed by Camerons Solicitors LLP) for the **Appellant**
Vikram Sachdeva QC (instructed by **Bevan Brittan LLP**) for the **1st Respondent**
Andrew Hockton (instructed by **The Official Solicitor**) for the **2nd Respondent**

Hearing date : 23 December 2020
- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 4:15pm on Wednesday, 23 December 2020.

Lord Justice Peter Jackson:

1. This is an application for permission to appeal from a decision of the Court of Protection. Due to the seriousness of the matter it has been heard orally today by a two-judge court and permission is granted for our decision to be cited. An order made on 9 December 2020 prevents the identification of the subject of the proceedings or his family members or friends, but permits the naming of the applicant, the University Hospitals Plymouth NHS Trust.

2. The proceedings concern RS, a man in middle age. On 6 November 2020 he very sadly suffered a heart attack at his West Country home, where he lived with his wife and three children. His brain was deprived of oxygen for at least 45 minutes. Since then he has been in a coma in hospital. On 23 November, the NHS Trust began proceedings. On 15 December, Cohen J determined that it is in RS's best interests not to receive life-sustaining treatment, including artificial ventilation, nutrition and fluids. The result is that RS will die within a few weeks while receiving palliative care to relieve any suffering.

3. The catastrophe that has befallen RS has been compounded by disagreement among members of his family as to his best interests. The disagreement reflects what the Judge described as a deep family rift extending back for a number of years. The family, which originates from abroad, shares a strong Catholic faith. RS's mother and one sister remain in the country of origin, and another sister and her daughter live in the UK. RS married 17 years ago, his wife being a divorcee. He came to live in the UK some years ago and his wife and children followed. Since his marriage, he had much less contact with his family overseas and he became estranged from his family in England, with whom he had had no contact for eight years or more.

4. The Judge's decision was supported by RS's wife and children, by his treating doctors and by the Official Solicitor, who has acted as litigation friend and commissioned independent medical advice. It was opposed by RS's niece JB, speaking on behalf of herself and other family members, including his mother and two sisters. JB now seeks permission to appeal. She is represented today by Mr David Lock QC and Mr Bruno Quintavalle; the NHS Trust by Mr Vikram Sachdeva QC; and the Official Solicitor by Mr Andrew Hockton.

5. The Trust's application came before Cohen J at a remote hearing on 10 and 11 December, when JB was represented by Ms Bridget Dolan QC. The Judge heard oral evidence from the Official Solicitor's expert Dr Dominic Bell (a consultant in intensive care and anaesthesia) and from the treating doctors, Dr W (clinical director, intensive care) and Dr A (consultant neurologist). Their opinions were concordant and undisputed. Enough is already known about RS's medical status to allow for a robust but bleak prognosis. He is in a coma. He may be progressing to a vegetative state. The most optimistic onward prediction is that he may progress to the lower end of a minimally conscious state, with a small (10-20%) chance of being able to acknowledge in the most rudimentary way the presence of another human being. With continued ventilation and ANH his life may continue for five years or longer.

6. The Judge identified the focus of the hearing as being on whether RS had expressed any views which would help to inform the court as to how he would wish to be

treated in his current situation, it being agreed that he had never said anything about the exact circumstances that have arisen. The evidence of family members centred on relevant things that he had said in the past and on his religious faith, his adherence to the tenets of the Catholic religion, and their application in these circumstances.

7. RS's wife said that she would be the last person to want to end treatment if there was the slightest chance he might recover, and she would never want to deprive the children of their father. In her oral evidence she said that he had said that he never wanted to be a burden if he was seriously ill. She also felt that he would not want his children to see him in his current condition but to remember him as an able-bodied person. She recalled him saying that every life is precious and that you must hold onto life, and also that if anything happened to him, he would want all steps to be taken to save him but that if he was beyond saving he did not want to be kept alive. She believed that he would not regard ceasing treatment as removing life.

8. RS's sister KB, speaking for herself and her family, described RS's compassion for his grandmother when she had Alzheimer's, and for his father with cancer. He had been clear that they should be cared for and have a chance of life. He had expressed his disagreement with a widely reported case in England where the decision was to terminate medical treatment for a very small child born with serious abnormalities. He was religiously conservative, opposed to abortion, even for an unborn child likely to be medically compromised, and was opposed to euthanasia. It was painful to him that he and his wife were unable to obtain an annulment of her previous marriage and thus marry in Church and that thereafter he was unable to take Holy Communion. He would not want his life terminated if it could be sustained. The preservation of life would outweigh all other factors in his thinking.

9. On the second day of the hearing, the Judge heard full submissions from the parties and reserved judgment.

10. In his judgment, given on 15 December, the Judge reviewed the undisputed medical evidence. He directed himself as to the law, referring in particular to Sections 1 and 4 of the Mental Capacity Act 2005. A decision made for a person who lacks capacity must be made in his best interests. In identifying what those are, the decision-maker must consider all the relevant circumstances, including the person's individual perspective – his past and present wishes and feelings and the beliefs and values that would be likely to influence his decision if he had capacity. The decision-maker must also take into account the views of anyone interested in the person's welfare as to what would be in his best interests and, in particular about his individual perspective.

11. The Judge referred to the decision in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, which confirms that the starting point is that it is in the best interest of a person to stay alive, but that this is not absolute and that every case must be decided on its own facts. He cited Baroness Hale's well-known statement:

> "39. The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it

> involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be."

12. The Judge gave his decision in these terms:

> "I have considered whether or not I can ascertain RS's wishes. I have reached the view that they can be ascertained from what his wife reports him as having said. I am satisfied that when he said to her, as I accept he did, that he did not want to be kept alive if he could not be saved and that he never wanted to be a burden if seriously ill, he was expressing a wish that he would not want to be kept alive in a state which provides him with no capacity to obtain any pleasure and which is so upsetting to his wife and children.
>
> I place much greater weight on what his wife says because over the last decade and probably the previous decade before that she has known him so much better than anyone else.
>
> I do not accept that his religious beliefs make him unlikely to have said what his wife says that he said, nor do I feel that she was putting any form of impermissible gloss on what he said. Having religious beliefs does not answer the question in this case. The fact of his beliefs does not mean that he would regard his current situation as acceptable or that he would wish to be kept alive whether in a coma, [or a] vegetative state of MCS minus.
>
> I of course give strong weight to the sanctity of life but it is not the deciding factor. I also give much weight to what his views would have been but on their own they too are not conclusive. I have to ask myself what is in RS's best interests in the light of his wishes as I found them to be. I am sure he would have taken into account the views of his family but especially those of his wife and children and the impact that his condition has on them, namely a situation which brings them huge sadness and a memory of RS so very different to that which he would have wished.
>
> I much regret that the court has to make this decision for the family and I regret the stress that it has caused to its members. I fully appreciate that everything people have said to the court has been said out of love for RS and wishing the best for him and an outcome which would meet what they would believe his wishes to be.

> I have had to weigh a range of divergent and competing factors. In this case, and not putting them in order of importance, I have particularly considered:
>
> (1) The prospects of obtaining a life that could bring RS any semblance of pleasure and quite how low those prospects are;
>
> (2) The sanctity of life encompassing with it religious beliefs:
>
> (3) The balance between pleasure and distress and the evidence of Dr Bell that patients with very limited ability to show any emotion more often show distress than pleasure;
>
> (4) The views of others near and dear to him and particular those nearest and dearest to him;
>
> (5) His views so far as I have been able to ascertain them, which is the most important factor of all.
>
> All these weigh in the balance of best interests. What other people might wish for themselves in such cases is completely immaterial. If RS were able to make a decision for himself in his current predicament, I am satisfied that he would not wish his life to be preserved."

The Judge therefore granted the Trust's application.

13. Turning now to the application before this court, by CPR 52.21 an appeal can only succeed if the decision is (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. For permission to appeal to be granted an appeal must have a real prospect of success, or there must be a compelling reason for it to be heard.

14. On behalf of JB, Mr Lock and Mr Quintavalle do not contend that the Judge's decision was wrong, indeed they realistically accept that his conclusion was plainly open to him on the available evidence. Nor do they challenge the medical consensus about RS's prognosis. Their core submission is that the decision was unjust because of serious procedural error in that it was taken with an insufficient degree of inquiry into how RS would have wanted to be treated against the backdrop of the tenets of his Catholic faith. Instead the court moved far too swiftly to the conclusion that this devout Christian man would have wanted something that was in conflict with religious teaching that the end of life is a matter for God and not for Man.

15. Mr Lock argues that the pendulum has swung from earlier cases where these issues were rarely brought before the Courts and, if brought, were examined in what he describes as vast detail after many months of tests and with mountains of expert evidence, as well as intense examination of evidence from those who knew P to understand his perspective. However, this case, he submits, is an example of the pendulum having swung too far the opposite way. He refers to the decision of the Grand Chamber in *Lambert and others v France* [2015] ECHR 545, where no breach of Article 2 of the ECHR was found where there had been:

> "an in-depth examination in the course of which all points of view could be expressed and all aspects were carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies."

In this case, Mr Lock argues that insufficient attention was paid to resolving the tension between RS's lifelong principles and the view that he was being said to hold about continued treatment.

16. The starting point when considering this submission is that any decision of this gravity must be taken with due consideration and that the necessary time and resources must be found to ensure that this is so. At the same time, if life-sustaining treatment is not in a person's best interests it should not be given for longer than is necessary.

17. In this case, the question of what is in RS's best interests has been the subject of intensive consideration. In the first place, the Trust very properly applied to the Court of Protection because of the disagreement among family members, as contemplated by the Supreme Court in *NHS Trust v Y* [2019] AC 978. RS's interests were protected by the Official Solicitor, who in turn commissioned independent medical advice and canvassed and recorded the views of family members in terms that they all confirmed to be accurate.

18. The application was issued promptly once a clear diagnosis had been reached and the birth family members had been aware of RS's condition since 10 November. They received notice of the application on 27 November and JB applied to be joined as a party on 4 December. On the same day, the final hearing was listed for 9 December. The Judge had the advantage of a skeleton argument dated 8 December from Ms Dolan QC, a specialist in the field, and she played a full part in the hearing, questioning the witnesses and calling KB to give her evidence. She registered the concern of her client at the stress caused to the family by the pace of the proceedings but she did not suggest that further time was necessary or that the decision should be deferred.

19. The pace of proceedings of this kind must be suited to the needs of the individual case. Inquiries must never be rushed but they should only be prolonged if they would provide useful information. Here, I am quite satisfied that nothing could have been achieved by postponing a decision. Mr Lock could only suggest two matters that might have been explored. The first is that the position of the Catholic Church might have become clearer, although he did not suggest that expert evidence would have been appropriate. The second is that further time should have been spent on resolving the tension between RS's religious views and the view that he would not want further treatment. Neither of these submissions has any substance. There was no lack of clarity about RS's very strong religious belief in the sanctity of life and the judge clearly gave full weight to that factor. Nor would further time have allowed the Court to reach a fuller conclusion about RS's likely perspective on his current situation. The Judge had a body of evidence to consider and he reached a conclusion about it. Mr Lock was not able to suggest any further practical step that might have taken matters further or led to any different outcome.

20. Mr Lock made subsidiary submissions about two particular aspects of the hearing as being relevant to the question of the fairness of the process. They are expressed in the grounds of appeal in these terms: the Judge breached natural justice and Art. 6 ECHR by prohibiting cross-examination of RS's wife on the grounds that she was distressed and/or by permitting her to communicate additional evidence by a confidential letter to the Judge which was not disclosed to the parties.

21. The first assertion regarding cross-examination was not pursued by Mr Lock before us once he became aware that Ms Dolan had not sought to cross-examine RS's wife, but it leads to the second assertion concerning the letter. The evidence of RS's wife was set out in two attendance notes. The note of the hearing shows that after she had been asked about twenty questions by Mr Sachdeva and the Judge, her friend and informal interpreter (MP) indicated that she was becoming "really distressed". At that point, the Judge said that unless Ms Dolan wanted to ask any questions he would prefer to end the witness's evidence. The following exchange then took place:

> "BD: I didn't want to ask any specific questions or increase distress. What might help the court is when she read OS's first attendance note, did she say there was anything wrong or to add to it. MP can ask this.
>
> J: I think she has dealt with this in second statement and answers she's given to VS today. I think the fairest thing is to say if anything more she wants to say or put in writing through MP as not going to finish this case today. Can I say this MP please – I am very sorry and completely understand why these questions have caused W distress. Please say to her, I am not going to allow any more questions to be asked of her. But if there is anything more that she wants to say to me as the Judge, she can tell you MP and you can translate it into English and it can be put in writing and you can send it to whoever your contact is and I will look at it. But I am very sorry indeed that we have put W into such distress and it's not fair to her or anyone that she can be made to answer more questions. I am going to stop her evidence now. But you will be sent a message with a link from OS saying if she has anything more to say before case finishes then I will hear it. Please do your best to comfort her."

22. After a break, Ms Dolan called RS's sister KB, who answered a dozen questions from her and three clarificatory questions from Mr Sachdeva.

23. It can be seen that, typically for a hearing in these difficult circumstances, there was no adversarial cross-examination of either family member and that, very properly, no objection was taken on JB's behalf to the ending of RS's wife's evidence. The submission, rightly not now pursued, was the Judge decided the key issue in the case on untested evidence. However, as Baker J stated in *Cheshire West and Cheshire Council v P and M* [2011] EWHC 1330 at [52] the processes of the Court of Protection are essentially inquisitorial rather than adversarial. Moreover Rule 14.2 of the Court of Protection Rules 2017 gives the court a wide power to control evidence:

> "The Court may-
>
> (a) control the evidence by giving directions, as to-
>
> (i) the issues on which it requires evidence;
>
> (ii) the nature of the evidence which it requires to decide those issues; and
>
> (iii) the way in which the evidence is to be placed before the court;
>
> (b) use its power under this rule to exclude evidence that would otherwise be admissible;
>
> (c) allow or limit cross-examination;
>
> (d) admit such evidence, whether written or oral, as it thinks fit."

24. It is of course important that key participants are heard and feel that they have been heard but there is no absolute right to cross-examine and in a case of this kind adversarial cross-examination of family members acting in good faith is likely to be of very little value. That general position was reflected in Ms Dolan's closing submissions in this case, which asserted that the facts regarding RS's perspective were not disputed and that the divergence was about the meaning to be attributed to them.

25. The only remaining matter concerns the Judge's invitation to RS's wife to write down anything further she wished to say. At the beginning of the second day of the hearing, this exchange took place:

> "J: I have reviewed written views from W. W has asked that her submissions are not shared particularly with members of family - they do relate to the relationship between her and her husband before marriage. Unless pushed I would like to be able to respect her confidence. It goes purely to his observance of his religion in all its aspects and tenets.
>
> BD: I don't want to intrude any more on her personal information. Some of the submissions I will make to you will be about religious observance. All I can do at this stage is say that if anything in there will influence your decision it would have to be available to the parties. If having heard my submissions, the things you have privately aren't relevant for countering them, then we don't need to know them and we wouldn't want to intrude.
>
> J: I understand that and of course many/most people are not always consistent in the way that they approach these matters.

> BD: but it will be a large part of submission that he was a committed catholic. l think I will trust in you to deal with it in the appropriate way. You quite understand the dilemma we are in and we would not want to add to W's distress.
>
> J: Thank you. I understand why you say what you've said."

26. Counsel then made their closing submissions and the hearing was adjourned for judgment on 15 December.

27. Mr Lock now submits that the reception of the letter amounted to a serious procedural error and a breach of Art 6. Counsel, he submits, had been placed in an impossible situation and it is unclear what reliance if any the Judge placed on the contents of the letter. I disagree. The fair conduct of these agonising hearings is highly case-specific. The professional response of counsel at the time shows that this matter does not bear the significance that is now suggested. Had it been appropriate for Ms Dolan to "push" she would no doubt have done so. The Judge's suggestion was a humane judicial response to a witness's distress and the judgment is founded on evidence well-known to all and, as Mr Lock accepts, contains no hint that the decision was influenced in any way by the contents of the letter. It would, I think, have been better if the Judge had made it clear that any further communication would probably need to be shown to all parties, and if he had afterwards expressly confirmed that he would place no weight upon any matter not disclosed. However, the nature of the communication is clear enough from the exchanges recorded above – namely that RS had made choices in his personal life that were not in complete harmony with his religious obligations. That much was clear from the known history and it cannot plausibly be said to have played any part in the decision in this case.

28. My conclusion is that we have heard no arguable case that the Judge's decision was wrong or unjust. An appeal would have no prospect of success and I would therefore refuse this application for permission to appeal. In doing so, I recognise that all members of RS's family have put forward their honest beliefs about what he would have wanted but it is not in my view surprising that the Judge should have placed particular weight on the understanding of those who have for many years been closest to him. It is to be hoped that at this very difficult time for all the family, disagreement can now be put aside out of respect for this much-loved man.

Lady Justice King:

29. I agree.

30. I would like to express the condolences of the court to Mrs S and the three children. She must, I feel sure, be facing the future not only with grief but trepidation as she comes to terms not only with the loss of her husband, but also finds the strength necessary to provide support to their three children and to help them come to terms with the loss of their father at their painfully young ages.

31. I would also offer the sympathy of the court to the extended family who brought this action and must now, as a consequence of the court's decision, face the loss of their much loved son/brother/uncle.

32. I can only hope that it may be now possible for the additional distress caused to all sides of the family by this litigation to be set aside.
