Neutral Citation Number: [2021] EWCA Civ 22

Case No: B4/2021/0064

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: 13 January 2021

Before :

LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

- -

(1) Z
(2) M
(3) S
(4) R **Applicants**

v

(1) RS
(by his Litigation Friend the Official Solicitor)

Respondents

(2) UNIVERSITY HOSPITALS PLYMOUTH NHS TRUST

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James Bogle (instructed by **Moore Barlow LLP**) for the **Applicants**
Andrew Hockton (instructed by **The Official Solicitor**) for the **1st Respondent**
Vikram Sachdeva QC (instructed by **Bevan Brittan LLP**) for the **2nd Respondent**

Z v UNIVERSITY HOSPITALS PLYMOUTH NHS TRUST (NO 2)

Hearing date : 11 January 2021

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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 10:30am on Wednesday, 13 January 2021

Lord Justice Peter Jackson:

1. This is an application for permission to appeal from a decision of the Court of Protection. An order made on 9 December 2020 and updated since prevents the identification of the subject of the proceedings, RS, or his family members or friends or the treating clinicians.

2. The applicants are members of the RS's birth family, from whom he has to varying degrees been estranged for some years. Z is his niece, M his mother, and S and R his sisters. They seek to appeal from the order of Cohen J ('the Judge') made on 31 December 2020, by which he refused their application for a declaration that it would be in RS's best interests to receive clinically assisted nutrition and hydration (CANH) and confirmed his decision of 15 December 2020 that such treatment was not in RS's best interests. The Judge also refused to order that RS should be transferred to Poland, his country of origin from which he emigrated in 2006, for further treatment. He also refused permission to the birth family to instruct another expert on condition and prognosis.

3. The Judge's first decision is to be found at [2020] EWCOP 70. RS's niece sought permission to appeal, which was refused by this court on 23 December 2020: [2020] EWCA Civ 1772. The Judge's second decision is at [2020] EWCOP 69.

4. On 24 December 2020, the birth family applied to the European Court of Human Rights ("ECtHR") for interim relief and a similar application was made by the Government of the Republic of Poland. These applications were refused by the ECtHR on 24 and 28 December 2020 respectively. On 28 December 2020 the birth family made a substantive application to the ECtHR. On 7 January 2021 this was ruled to be inadmissible and on the same date a second application for interim relief by the birth family was refused.

5. Due to the seriousness and urgency of the matter, this application for permission to appeal with the appeal to follow if permission were granted was heard orally by a two-judge court on the afternoon of 11 January 2021. Having heard submissions from the parties, we dismissed the application for permission to appeal for reasons to be given in writing the next day. The birth family stated its intention to make another application to the ECtHR and we therefore granted a very short stay until 6 pm on 13 January 2021. We did so with reluctance, given the history described below. We now give reasons for our decision, which may be cited.

6. Permission to appeal may be given only where the court considers that the appeal would have a real prospect of success or where there is some other compelling reason for the appeal to be heard: Civil Procedure Rules 52.6. Neither criterion is satisfied in this case. The Judge's decision is sound and lawful and the proposed grounds of appeal are without merit. There is no compelling reason for an appeal to be heard. On the contrary, the history demonstrates why there should be no further obstacle to RS being treated in the manner that has repeatedly been found to be in his best interests by the Court and that is supported by his wife and children, who are his next of kin, by the

medical staff treating him, and by the Official Solicitor and her independent expert witness.

7. The effect of the proceedings upon RS's care and treatment is of particular concern. Following his heart attack on 6 November, he received CANH and ventilation until 16 December, when they were withdrawn following the Judge's first decision. CANH was reinstated on 18 December following the filing of Z's application for permission to appeal and again withdrawn on 24 December after the dismissal of that application by this court. It was again reinstated on 28 December following the filing of the birth family's application and again withdrawn on 7 January upon the expiry of a stay granted by the Judge. Finally, CANH was reinstated on 11 January in response to this application for permission to appeal. It will again be withdrawn on 13 January on the expiry of the short stay granted yesterday by this court. In summary, four weeks ago the continuation of CANH was found not to be in RS's best interests but as a result of the proceedings brought by the birth family, it has had to be reinstated three times.

8. I next describe the events leading to the Judge's second decision. At the end of the hearing at which the first application for permission to appeal was refused, a request was made to RS's wife by the birth family to be allowed to make a farewell visit to RS. That was agreed and on Christmas Day, Z and her mother S and her brother attended the hospital. Unbeknownst to the hospital or to RS's wife, they had previously consulted a neurologist, Dr Pullicino, and they used the visit to film RS for the purpose of obtaining evidence. As described by the Judge:

> "15. It is apparent that during the course of their journey to the hospital, RS's niece spoke to Dr Pullicino and what was to happen at the hospital was agreed between them. When RS's niece and her family attended at the hospital, they were seen by Dr W (consultant intensivist) and a colleague who both happened to be on duty on Christmas Day. Both Dr W and his colleague who was working later into the evening than Dr W said that they were happy to speak to the family if they so wished either on 25 or 26 December 2020. The family chose not to speak to the doctors on either day even though they had held themselves available to answer any questions. Instead the family took various videos."

9. The Judge was understandably dismayed by this behaviour:

> "25. First, I deplore the underhand way in which this evidence was obtained. Amongst other things it is deeply disrespectful to RS's wife that she should have been duped in the way she was as to the purpose of the niece's visit. It is also disrespectful to the treating team who held themselves available to assist in answering questions.
>
> 26. Although I have not heard any detailed argument, it seems to me arguably unlawful and in breach of the rights of both RS and the Trust for the niece to film a visit made to RS without the consent of RS, his next of kin or the hospital authorities."

10. Nevertheless, the Judge heard evidence from Dr Pullicino, who had purported to make a diagnosis on the basis of the short recordings (ten clips totalling less than three minutes). Having done so, he rejected the doctor's evidence and placed no weight upon it for the reasons given at paragraphs 24 to 30 of his judgment. The doctor had reported without any real information or any properly structured examination. The Judge preferred the evidence of the independent expert Dr Bell and of the treating clinicians, given in the light of a recent EEG recording and systematic observation of RS with his wife. He analysed their evidence in detail at paragraphs 32 to 42, his essential conclusions being these:

> "34. Dr Bell reported that the view of Dr W and the multidisciplinary team is that RS is now established in VS with no evidence of progression along the spectrum of PDOC towards a MCS. This was confirmed by an EEG recording made on 29 December confirming a lack of brain activity to various types of stimulation.
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> …
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> 36. Dr Bell had given his opinion based on his examination of 5 December 2020 of a 10-20% percent chance of RS reaching the low point of MCS whereby he might be able to acknowledge the presence of a human being without being able to demonstrate knowing who they were. He said, I am sure rightly, that no proper conclusion, diagnosis or prognosis can be made on video evidence alone. You need the full picture, in this case now enlarged by the new EEG showing an absence of commensurate electrical activity by way of response to stimulation. It confirms the absence of cortical brain processing. The passage of time has reduced the figure of a 10-20% chance of RS reaching MCS minus.
>
> 37 Insofar as RS is showing some signs of more alertness, that is simply the result of the brain swelling subsiding which permits some of the more resilient elements of the brain to function as RS moves from coma to VS. It does not signify any recovery of cognitive function or ability to communicate or show emotion. There is nothing, says Dr Bell, to be said for allowing more time. 8 weeks is sadly quite sufficient to be able to give a prognosis where RS suffered such a severe injury. Very sadly, things have got worse for RS, not better.
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> …
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> 40. Dr W, as the treating clinician, is very concerned at the pain and suffering which the treatment, as opposed to palliative care, may be causing to RS, and that there is evidence of such pain recounted by those who have recovered from less severe injuries than RS's. There is he says no significant change and his views which were less optimistic than Dr Bell's on 9 December 2020 have sadly proved correct.

> …
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> 43. I am left in no doubt that there has been no improvement in RS and no basis at all to change my decision that it is not in his best interests for life sustaining treatment to be given."

11. The decision in relation to transfer to Poland followed in these terms:

> "44. I turn next to the birth family's application for a transfer of RS to Poland. The Vice-Consul of the Embassy listened to the evidence. I have read correspondence from the Polish Ministry of Foreign Affairs and the Polish Ministry of Justice offering to provide transport overseas and treatment and care in RS's country of nationality and birth. I would like to thank the Vice-Consul who addressed the court and expressed the willingness of that country to help in any way.
>
> 45. That said, I unhesitatingly reject the suggestion that RS should be moved overseas. As Dr W says:
>
> i) It would be an extremely risky operation, a journey of many hours, with a significant risk of death in transit.
>
> ii) It would be deeply uncomfortable for RS, far worse than being nursed on a hospital bed.
>
> To that I would add
>
> iii) There is no suggestion that any treatment or care can be provided overseas that could or would not be provided in UK if it were in his best interests.
>
> iv) It is unthinkable that he should be moved against the wishes of his wife and children."

With some misgivings, the Judge granted a stay of his order until 7 January 2021 to allow for the application to the ECtHR to be considered.

12. Although that effectively concluded the proceedings, Charles Foster, counsel then acting for the birth family, having secured the stay, then made another application that is relevant to the application now before us. The note of the hearing reads:

> "CF: Any further expert evidence. This case is still live. It may be that at another point you or another judge may need to look again at patient's condition. Position last time was that medical evidence was agreed. You know that family were not content that Dr B and Dr W. So the family had no benefit of independent medical assessment, and that concerns them very much. Until 7/1, time flows, and it is time for independent assessment on

> behalf of the family. I ask for permission for RS to be examined by an expert instructed on behalf of the family.
>
> VS [for Trust]: We oppose that v surprising suggestion, which only just emerged. Cardiac arrest took place on 6/11. There is no evidence at all that the treating clinicians and Dr B got it wrong. My lord has made findings [about] the 2nd expert which the family has instructed (a Polish dr had a video conference). So that's a third bite of the cherry. We don't see this to be in RS's best interests at any level.
>
> AH [for OS]: We oppose the application. This should not be used as an attempt to reopen matters which have already been determined.
>
> VS: Med note with Polish expert who agreed with the clinicians.
>
> J: There is not in fact any formal application. The answer is no, I am not prepared to grant an order for a further medical report. Reasons:
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> 1. There is already independent evidence from Dr B;
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> 2. No application issued;
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> 3. I found evidence of Dr Bell cogent and no reason to think it is wrong;
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> 4.The position of the Trust was agreed by Polish Dr (Dr S) in late November and agreed by the family until v recently;
>
> 5. OS who represents RS is opposed.
>
> I refuse the application."

13. As described, the application to the ECtHR was ruled inadmissible on 7 January 2021 and no interim relief was granted. The stay therefore expired and CANH was withdrawn. On 8 January the birth family instructed its current solicitors, the third to act for it, and on Sunday 10 January Mr Bogle was instructed at short notice. He made an out of hours application to the duty judge, Singh LJ, at 2.45 am on Monday 11 January. The basis for the application was that the doctor referred to as Dr S in the above note had changed his opinion. A stay of Cohen J's order was granted until the matter could come before the court, which occurred at 2 pm that day.

14. Dr S is a neurosurgical consultant in Poland. He had been consulted by the birth family and on 21 November 2020 he took part in a case conference with Dr W, who made this note:

> "Very constructive conversation. Explained the unit here and experience in managing hypoxic brain injury. Talked through clinical history and progression of examination findings since

> admission. Screen shared to show MRI and CT images. Described EEG and SSEP in detail (not able to share traces as these are only available on electrophysiology system)… We await his report, however his view was in line with our prognostication and he is aware of the family disparity over what they believe to be the patient's wishes."

15. In fact, Dr S produced a three-page report for the birth family on 6 December 2020. In it, he described the global prognosis as "rather poor" and gave as his opinion that "the diagnostic workup has been performed *in extenso* and the data that is crucial for the prognosis has already been provided". However, the birth family did not disclose the report to the court until the without notice out of hours application was made on 11 January 2021, five weeks later. No doubt the reason for that was because the report effectively agreed with the views of the treating doctors and Dr Bell, and in consequence at the first hearing before Cohen J, the medical evidence was unchallenged and the court concerned itself solely with the issue of RS's wishes and feelings.

16. When the informal application was made to the Judge for the family to be allowed to instruct another doctor, no name was specified. It now appears that on 2 January 2021, Z had a video discussion with Dr S in which she showed him the recordings she had made of RS. He then produced a second letter dated 6 January, which was received by Z on 8 January. On 8 January, Dr S contacted the Trust with a request to examine RS. The Trust was unable to agree to this in the light of the court's decision about further examinations. Meanwhile, Dr S's letter of 6 January was not disclosed to the Trust or the Official Solicitor, despite there being ongoing email correspondence about RS's condition, but was instead deployed for the first time in support of the out of hours application.

17. In his second letter Dr S, on the basis only of the account given by Z and the recordings of RS, purported to diagnose an improvement in RS's condition to one of minimal consciousness. It seems that he was unaware of, because he was not given it and did not ask for it, the substantial body of medical evidence and the careful judgments of the court which came to the opposite conclusion.

18. The proposed grounds of appeal now advanced can be summarised as follows:

> 1. The procedure adopted during the hearing failed to comply with the Article 2 procedural requirements for an adequate decision-making process. In particular, the learned judge failed to ensure equality of arms between the parties and/or a sufficient inquiry into the apparent change in RS's condition and prognosis. He relied on the medical evidence of the experts of the Trust and the Official Solicitor but refused permission for the family to instruct its own expert so as to enable that expert to access and consider the documents in the case, examine RS, access the results of RS's tests, or discuss the case with the clinical team. Dr Pullicino had no opportunity to consider any of that material, and as such, the criticism of his evidence is unfair. In the

circumstances, the determination by the learned judge of the substantive issues before him was made prematurely.

2. The learned judge erred in fact in determining that there had been no improvement in RS and no basis to change his earlier decision. At the time of the first hearing the agreed medical evidence was that RS was moving from a state of coma to a vegetative state, but at the second hearing Dr W and Dr Bell considered that RS was established in a vegetative state, while Dr Pullicino considered that he appeared to be transitioning to a minimally conscious state. Whichever evidence is accepted this clearly represents, contrary to the judge's finding, a significant improvement in RS's neurological state and, at a minimum, a full transition from a coma to a vegetative state had now occurred.

3. Given the changed neurological state, the learned judge erred in failing to conduct a new balancing exercise or in not ordering new medical evidence.

4. It is incompatible with Article 2 ECHR to withdraw food and fluids from a person capable, or possibly capable, of feeling pain and of suffering. The ECtHR has only ever found that the withdrawal of life-sustaining food and fluids is compatible with Article 2 in the case of people in a vegetative state and who thus have no awareness, including of pain.

5. The learned judge failed to give sufficient reasons, and/or had no proper evidential foundation, for a finding that a transfer to a Polish hospital proposed by the Polish government was not in RS's best interests in that (i) the finding that the journey would be "deeply uncomfortable for RS" is perverse, in that it is logically incompatible with RS being in a coma or emerging into a vegetative state; (ii) the finding of a significant risk of death in transit has no proper evidential foundation; and (iii) there was no evidence that a move to Poland would be against the wishes of RS's wife and children.

19. As I have said, none of these arguments has any substance. I take them in order.

20. Part 15 of the Court of Protection Rules 2017 provides that the court has the power to control the introduction of expert evidence and is under a duty to restrict expert evidence to what is necessary to assist the court to resolve the issues in the proceedings. A court-sanctioned expert has an overriding duty to the court. Respect for the procedural rules is of particular importance when the proceedings are of gravity. In the present case, the Court made appropriate directions for independent expert evidence by permitting the Official Solicitor to commission advice from Dr Bell, an expert of

acknowledged standing. No suggestion was made that there should be additional expert input commissioned by either side of the family.

21. Proposed Ground 1, which contends that the treatment of Dr Pullicino's evidence was unfair, is unarguable. The evidence, despite being obtained by a deplorable ruse, was fully considered. On examination, it lacked every characteristic of credible expert evidence and it is not surprising that the Judge rejected it as effectively worthless.

22. Following the Judge's decision, there was no appeal from the refusal to permit a further expert instruction. Instead, Z and those advising her re-contacted Dr S. Mr Bogle disavowed the proposition (though it appeared in his skeleton argument) that for proceedings to be fair, every party is entitled to an expert. However, he maintained his submission that the Judge was wrong to refuse Mr Foster's application for the birth family to be allowed to instruct its own expert. That too is a hopeless submission. The court had been prepared to review its earlier decision, including by hearing evidence from Dr Pullicino, an expert of their choosing, notwithstanding the manner in which he came to be involved in the case. Having done so, it had made a final decision. These are not rolling proceedings which a dissatisfied party can continue at will. Far from there being any unfairness in the refusal to permit the instruction of a further unidentified expert, there is in my view a real risk of harm to the protected party and of unfairness to other parties if litigation is conducted in such an unprincipled way. In the present case, there were no substantive continuing proceedings and the Judge was absolutely right to refuse an application that was made immediately after he had given his decision.

23. Proposed Ground 2 is based on a misunderstanding of the Judge's analysis. He was concerned about whether there had been a change in the agreed medical prognosis upon which his previous decision had rested. That prognosis had been for very limited progress from coma to vegetative state, with a best case of a low minimally conscious state. He found, after a thorough review of the updated medical evidence, that there had been no positive change in the prognosis, and indeed that it had become more pessimistic than before. The fact that RS's condition had evolved as anticipated did not change anything.

24. We have taken into account Dr S's letter of 6 January 2021 so that we could understand the arguments being addressed to us. Unfortunately it suffers from many of the same shortcomings as Dr Pullicino's evidence in that it lacks any sound evidence base. That is because Dr S was not instructed as an expert witness, no application having been made for that purpose while the proceedings were in existence. There is no proper basis upon which we could formally admit this evidence on appeal and I would decline to do so.

25. The Judge's conclusion that the medical prognosis had not changed is one that was solidly based on ample evidence. Proposed Ground 2 therefore fails, as does Proposed Ground 3, which is contingent upon it.

26. Proposed Ground 4 is wrong as a matter of a law. The welfare principle applies to all decisions, whatever the diagnosis. Mr Bogle founded his submission that it is

incompatible with Article 2 ECHR to withdraw food and fluids from a person capable of feeling pain and of suffering with reference to statements from *Airedale NHS Trust v Bland* [1993] A.C 789, which of course concerned a person in a vegetative state. However, there is no lack of well-established domestic authority to the effect that CANH can be lawfully withdrawn from persons who are not in a vegetative state. A number of such cases were drawn together by the Supreme Court in *An NHS Trust v Y* [2018] UKSC 46; [2018] 3 WLR 751, examples being *In re M (Adult Patient) (Minimally Conscious State: Withdrawal of Treatment)* [2011] EWHC 2443 (Fam); [2012] 1 WLR 1653; *In re M (Incapacitated Person: Withdrawal of Treatment)* [2017] EWCOP 18; [2018] 1 WLR 465 and *In re Briggs (Incapacitated Person)* [2018] Fam 63.

27. Finally, the conclusion that it would not be in RS's interests to be transferred to Poland is one that the Judge was plainly entitled to reach for the reasons he gave. He was entitled to accept the opinion of Dr W about the likely effect on RS of being moved, indeed there was no evidence to gainsay it. The submission that there was no evidence of the views of RS's wife and children suggests that the birth family has lost sight of the fact that for the past 17 years RS's real life has not been with them but with his own family, now in this country. We are in any event told that the Judge was informed that they would not support such a move, and that position was confirmed to us by the Official Solicitor. Despite the good offices of the Polish authorities, the Judge rightly considered that for RS to be moved was not in his best interests and that to move him against the wishes of his next of kin was unthinkable.

28. For these reasons, I concur in the decision to dismiss this application for permission to appeal. RS's situation has repeatedly received the intensive consideration that the law rightly requires. In particular, the dissenting views of the birth family have received every consideration, but it is the responsibility of the court to ensure that RS's best interests are not prejudiced by continued unfounded challenges to lawful decisions. The variety of measures that have been employed by the birth family cannot be allowed to distract attention from the wishes and feelings of RS himself, as found by the court, or from the situation of his wife and children, who are having to endure proceedings that, coming on top of his loss from their daily lives, must be deeply distressing to them.

Lady Justice King:

29. I agree. It is hard to contemplate the distress which must have been caused to the wife and children of RS by the continuation of these proceedings after this court had dismissed the application for permission to appeal from Cohen J's original decision that it was in RS's best interests for all medical treatment to be withdrawn.

30. Paragraph 4 of that order, dated 15 December 2020, provided as follows:

> "All care and palliative treatment given shall be provided in such a way as to ensure that, as far as practicable, the First Respondent retains the greatest dignity and suffers the least discomfort until such time as his life comes to an end."

It is difficult to imagine a greater assault upon the dignity of this man, who was until a matter of weeks ago a fit and healthy family man, to have had CANH withdrawn and

reinstated on three separate occasions. Each reinstatement has required invasive treatment and the most recent one took place at a time when he was perceived by the medical team to be close to death, a situation that was seen by the birth family to justify an application for a stay in the middle of the night without notice to the Trust or the Official Solicitor.

31. The court will, if appropriate, review an earlier best interests determination. As Francis J put it in *Great Ormond Street Hospital v Yates (No 2)*, [2017] 4 WLR 131 at para.11, such a reconsideration will be undertaken "on the grounds of compelling new evidence" but not on "partially informed or ill-informed opinion". In my judgment the evidence of both Dr Pullicino and Dr S, for the reasons given by Peter Jackson LJ, fell into the latter category.

32. I would therefore respectfully endorse the observation of Peter Jackson LJ that, whilst the dissenting views of the birth family must be given every consideration, "it is the responsibility of the court to ensure that RS's best interests are not prejudiced by continued unfounded challenges to lawful decisions".