CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 19807/06
by Oliver Leslie BURKE
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 11 July 2006 as a Chamber composed of:

Mr J. CASADEVALL, *President*,
Sir Nicolas BRATZA,
Mr M. PELLONPÄÄ,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above application lodged on 17 May 2006,

Having deliberated, decides as follows:

THE FACTS

The applicant, a British citizen born in 1960 and living in Lancaster, is represented before the Court by Mr M. Lyons, a solicitor practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant, first diagnosed in 1982, suffers from a congenital degenerative brain condition known as Friedrieich's ataxia. He has gradually lost the use of his legs and is virtually dependent on a wheelchair for mobility. He has uncoordinated movements and his condition also affects his speech but his mental ability is unimpaired. This is a progressive disease and, in time, he will lose the ability to swallow and he will require artificial nutrition and hydration ("ANH"). The medical evidence indicates that the applicant is likely to retain full cognitive faculties even during the end stage of his disease and would be aware of any pain, discomfort and distress resulting from malnutrition and dehydration. During his final days it is expected that he would lose the ability to communicate although not at first an awareness and appreciation of his surroundings and predicament.

The applicant wishes to be fed and provided with appropriate hydration until he dies of natural causes. He does not want ANH to be withdrawn or to die of thirst. He does not want a decision to be taken by doctors that his life is no longer worth living.

The applicant was concerned that the current medical guidance for the medical profession in the United Kingdom would permit the withdrawal of ANH in circumstances which would lead to his suffering, and dying of, starvation and dehydration of which he would be aware throughout. He was concerned that the guidance left too much power in the hands of the doctors and placed no obligation to seek the advice of a court as to whether and when his life should be ended. Instituting judicial review proceedings against the General Medical Council (GMC), he invoked Articles 2, 3, 8 and 14 of the Convention and sought various declarations.

In a judgment dated 30 July 2004, Mr Justice Munby found that he had no difficulty with the bulk of the GMC Guidance (Withholding and Withdrawing Life-prolonging Treatments: Good practice and Decision-making, August 2002). In a limited number of respects, however, he found it was vulnerable to criticism, namely that there was an emphasis on the right of the competent patient to refuse treatment rather than to require treatment; that it failed insufficiently to acknowledge that it was the duty of a doctor who was unable or unwilling to carry out the wishes of his patient to go on providing the treatment until he could find another doctor who

would do so; that it failed insufficiently to acknowledge the heavy presumption in favour of life-prolonging treatment and, for example, permitted withdrawal of ANH from a patient who was not dying but in a very serious condition; and that it failed to spell out the legal requirement to obtain prior judicial sanction for the withdrawal of ANH, where, for example, there was evidence that the patient when competent would have wanted ANH to continue or where it was considered too burdensome when compared to the benefits. He issued a number of declarations, *inter alia*, setting out that the wishes of a patient while competent as to the provision of ANH were determinative of his best interests and that various paragraphs of the Guidance (13, 16, 32, 38, 42, 81 and 82) were unlawful.

By judgment dated 28 July 2005, the Court of Appeal allowed the appeal of the GMC and set aside the declarations. Lord Phillips MR emphasised the caution that should be shown by the courts in grappling with areas of social and ethical controversy in which they had no claim to speak with authority or to proffer answers to hypothetical questions of law which did not strictly arise for decision. He found that the declarations went far beyond the current concerns of the applicant. There was no ground for the applicant to fear that ANH would be withdrawn before the final stages of his disease and the evidence was that during the final stages ANH would cease to be capable of prolonging his life.

> "We have indicated that, where a competent patient indicates his or her wish to be kept alive by the provision of ANH any doctor who deliberately brings that patient's life to an end by discontinuing the supply of ANH will not merely be in breach of duty but guilty of murder. Where life depends upon the continued provision of ANH there can be no question of the supply of ANH being not clinically indicated unless a clinical decision has been taken that the life in question should come to an end. That is not a decision that can be lawfully taken in the case of a competent patient who expresses the wish to remain alive."

As regarded a patient who was competent, he did not agree that the patient's wish to receive ANH had to be determinative, referring to the situation where ANH not only might not prolong life but might hasten death. In such rare circumstances a patient could not require that a doctor administer a treatment which the doctor considered was adverse to his interests.

As regarded patients who had become, or were, incompetent, he approved Mr Justice Munby's statement that there was a very strong presumption in favour of taking all steps which would prolong life and that, save in exceptional circumstances or where the patient was dying, the best interests of the patient would normally require such steps to be taken. However, he considered that the test of whether it was in the best interests of the patient to provide or continue ANH must depend on the circumstances of the case. Where the patient was dying, the goal might properly be to ease the suffering and, where appropriate, to "ease the

passing" rather than to achieve a short prolongation of life. He did not consider that it was possible to attempt to define what was in the best interests of a patient by a single test applicable in all circumstances.

Further, he found no basis for criticism of the Guidance insofar as it advised doctors to consult a clinician and take legal advice before withdrawing ANH in case of any doubt about, for example, the patient's best interests and capacity or potential conflict. In particular there was no obligation on a doctor to seek the court's authorisation to withdraw ANH in the circumstances described.

> "We asked Mr Gordon to explain the nature of the duty to seek the authorisation of the court and he was not able to give us a coherent explanation. So far as the criminal law is concerned, the court has no power to authorise that which would otherwise be unlawful...Nor can the court render unlawful that which otherwise would be lawful... In Bland the House of Lords recommended that as a matter of *good practice*, reference should be made to the Family Court before withdrawing ANH from a patient in PVS, until a body of experience and practice had built up. Plainly there will be occasions in which it will be advisable for a doctor to seek the court's approval before withdrawing ANH in other circumstances, but what justification is there for postulating that he will be under a legal duty so to do?"
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> ... The true position is that the court does not "authorise" treatment which would otherwise be unlawful. The court makes a declaration as to whether or not the proposed treatment, or the withdrawal of treatment, will be lawful. Good practice may require medical practitioners to seek such a declaration where the legality of the proposed treatment is in doubt. This is not, however, something that they are required to do by law."

B. Relevant domestic law and practice

"Withholding and Withdrawing Life-prolonging Treatments: Good Practice in Decision-making" was published by the General Medical Council in August 2002, following a substantial consultation process in the course of which the GMC received advice from a wide range of medical, legal and ethical experts and from representatives of particular religious and other groups, including patients and disabled people. Over twenty pages, it deals not only with artificial nutrition and hydration ("ANH") but life-prolonging treatments generally.

Paragraph 13 provides:

> "Adult competent patients have the right to decide how much weight to attach to the benefits, burdens, risks and the overall acceptability of any treatment. They have the right to refuse treatment even where refusal may result in harm to themselves or in their own death, and doctors are legally bound to respect their decision. Adult patients who have the capacity to make their own decision can express their wishes about future treatment in an advance statement."

Paragraph 16 provides:

> "Applying these principles may result in different decisions in each case, since patients' assessments of the likely benefits and burdens or risks, and what weight or

priority to give to these, will differ according to patients' different values, beliefs and priorities. Doctors must take account of patients' preferences when providing treatment. However, where a patient wishes to have a treatment that – in the doctor's considered view – is not clinically indicated, there is no ethical or legal obligation on the doctor to provide it. ..."

Paragraph 32 provides *inter alia*:

"If you are the consultant or general practitioner in charge of a patient's care, it is your responsibility to make the decision about whether to withhold or withdraw a life-prolonging treatment, taking account of the views of the patient or those close to the patient..."

Paragraph 38 provides *inter alia*:

"Always consult a clinician with relevant experience ...in cases where:

...You are considering withholding or withdrawing artificial nutrition or hydration from a patient who is not imminently dying, although in a serious condition, and whose views cannot be determined (see paragraph 81 below)."

Paragraph 81 provides *inter alia*:

"Where patients have the capacity to decide for themselves, they may consent to, or refuse, any proposed intervention of this kind. In case where patients lack capacity to decide for themselves and their wishes cannot be determined you should take account of the following consideration:

Where there is a reasonable degree of uncertainty about the likely benefits or burdens for the patient of providing either artificial nutrition or hydration, it may be appropriate to provide these for a trial period with a pre-arranged review to allow a clearer assessment to be made.

Where death is imminent, in judging the benefits, burdens or risks, it usually would not be appropriate to start either artificial hydration or nutrition, although artificial hydration provided by the less invasive measures may be appropriate where it is considered that this would be likely to provide symptom relief.

Where death is imminent and artificial hydration and/or hydration are already in use, it may be appropriate to withdraw them if it is considered that the burdens outweigh the possible benefits to the patient.

Where death is not imminent, it usually will be appropriate to provide artificial nutrition or hydration. However, circumstances may arise where you judge that a patient's condition is so severe, and the prognosis so poor that providing artificial nutrition or hydration may cause suffering, or be too burdensome in relation to the possible benefits. In these circumstances, as well as consulting the health care team and those close to the patient, you must seek as second or expert opinion from a senior clinician (who might be from another discipline such as nursing) who has experience of the patient's condition and who is not already directly involved in the patient's care. This will ensure that, in a decision of such sensitivity, the patient's interests have been thoroughly considered, and will provide necessary reassurance to those close to the patient and to the wider public. ..."

Paragraph 82 provides:

"Where significant conflicts arise about whether artificial nutrition or hydration should be provided, either between you and other members of the health care team or

between the team and those close to the patient, and the disagreement cannot be resolved after informal or independent review, you should seek legal advice on whether it is necessary to apply to the court for a ruling."

COMPLAINTS

The applicant complains under Article 2 of the Convention that the Guidance is worded in such a way that doctor is entitled to withdraw ANH if he considers that his suffering is too great or the benefits are not sufficient to outweigh the burden of continued provision, with the consequence that the applicant would suffer a protracted death. The doctor was not under an obligation to seek court approval first. This situation failed to have sufficient regard for the need to protect the applicant's rights.

The applicant complains under Article 3 that the Guidance does not protect him from inhuman and degrading treatment in the form of death from dehydration and malnutrition.

The applicant complains under Article 8 that he is also deprived of protection of a crucial aspect of his personal autonomy in that he cannot make an advance directive in respect of treatment which he wishes to receive at a time when he is unable to communicate or is not competent or otherwise to accord precedence to his wishes.

Finally, the applicant complains under Article 14 that it is discriminatory in that once he loses the ability to communicate his wishes are no longer required to be taken into account and the decision about withdrawal of ANH is left entirely to the doctor.

THE LAW

1. The applicant complains of a lack of protection flowing from the GMC Guidelines which permit a doctor to remove ANH from a patient, who is no longer competent or able to communicate. He invokes Articles 2, 3 and 8 of the Convention. These provide as relevant:

Article 2 of the Convention:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3 of the Convention:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8 of the Convention, as relevant:

"1. Everyone has the right to respect for his private and family life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Court observes that the above-mentioned provisions protect various fundamental aspects of physical integrity. Article 2 § 1, in its first sentence, enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction Those principles apply not only to criminal law enforcement but also in the public-health sphere too and impose positive obligations on the State to make regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, §§ 48-49, ECHR 2002-I). Positive obligations also arise under Article 3 requiring States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment (see *A. v. the United Kingdom*, judgment of 23 September 1998, *Reports* 1998-VI, § 22; *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V). Article 8 covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 22); choices about one's own body in the context of medical treatment and how, in extreme cases, one manages one's death, also fall in principle within its scope (see *Pretty v. the United Kingdom*, no. 2346/02, §§ 61-67, ECHR 2002-III).

The Court notes with deep sympathy the applicant's concerns about the progress of his illness. However, it does not find that he has succeeded in establishing that the applicable domestic law is such that he faces a real or imminent risk that ANH will be withdrawn in circumstances precipitating a painful death by thirst. As emphasised by the Court of Appeal, the Guidelines set out good practice for doctors, without altering the content of domestic law, and it found no indication that they enshrined any unlawful instructions or recommendations. It would quite clearly be murder, it said, to withdraw life-prolonging ANH from a patient who, competent, desired the treatment to continue. Where the patient was incompetent, or had

become incompetent, the Court of Appeal also underlined that as a general rule ANH should continue as long as it prolonged life. There were nonetheless circumstances, for example, where a doctor might find that ANH in fact hastened death and it was thus impossible to lay down any absolute rule as to what the best interests of a patient would require.

Insofar as the applicant argues that there is insufficient protection in that a doctor might reach a decision to withdraw ANH without being under an obligation to obtain the approval of the court, the Court would refer to the Court of Appeal's explanation that the courts do not as such authorise medical actions but merely declare whether a proposed action is lawful. A doctor, fully subject to the sanctions of criminal and civil law, is only therefore recommended to obtain legal advice, in addition to proper supporting medical opinion, where a step is controversial in some way. Any more stringent legal duty would be prescriptively burdensome - doctors, and emergency ward staff in particular, would be constantly in court – and would not necessarily entail any greater protection.

The Court is satisfied that the presumption of domestic law is strongly in favour of prolonging life where possible, which accords with the spirit of the Convention (see also its findings as to the compatibility of domestic law with Article 2 in *Glass v. the United Kingdom*, no. 61827/00, § 75, ECHR 2004-II). It is apparent that, in the situation apprehended by the applicant in the final stages of his illness, a doctor would be obliged to take account of the applicant's previously expressed wishes and those of the persons close to him, as well as the opinions of other medical personnel and, if there was any conflict or doubt as to the applicant's best interests, then to approach a court. This does not, in the Court's view, disclose any lack of due respect for the crucial rights invoked by the applicant. Nor does the Court consider that any issue arises under Articles 2 and 3, or under Article 8, in that the applicant cannot pre-determine the administration of specific treatment in future unknown circumstances.

The Court finds therefore that the applicant cannot claim to be a victim of any failure by the State to protect his rights under Articles 2, 3 or 8 of the Convention. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 §§ 3 and 4 of the Convention.

2. The applicant complains under Article 14 of the Convention that he is treated less favourably on account of his disease than others who need ANH but are not suffering from a disease which causes them to lose competence to influence their treatment.

Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Moreover, the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 37, ECHR 2000-X).

In the present case, the Court notes that neither a competent nor an incompetent patient can require that a doctor give treatment which that doctor considers is not clinically justified and thus no difference of treatment arises in that regard. Insofar as a competent patient is able to participate in the consultation process and an incompetent patient is not, such patients, for self-evident reasons, cannot be regarded as being in a relevantly similar situation. In any event, the Court observes that the views of the applicant as currently held can be taken into account in the future through a living will, or advance statement.

It follows that this part of the application must also be rejected as manifestly ill-founded pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

T.L. EARLY
Registrar

Josep CASADEVALL
President