



Neutral Citation Number: [2021] EWCOP 6

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

Case No: COP13684602

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2021

Before :

THE HON. MR JUSTICE COHEN

Between :

UNIVERSITY HOSPITALS PLYMOUTH NHS TRUST

Applicant

- and -

**(1)RS (By his Litigation Friend, the
Official Solicitor)**

Respondents

**(2)Z
(3)M
(4)S
(5)R**

Mr V. Sachdeva QC, Mr S. Olleson (instructed by **Bevan Brittan LLP**) for the **Applicant**
Ms K Gollop QC (instructed by the **Official Solicitor**) for **RS**
Mr J Bogle (instructed by **Moore Barlow LLP**) for the **Respondents (2-5)**

Hearing date: 18 January 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE COHEN

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family together with the treating health and social care professionals must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cohen :

1. On 15th of December last year, I made declarations relating to RS. There are three that are particularly relevant. In my order of that date, they appear as follows:

“2. It is not in his best interests for the First Respondent to be given life sustaining medical treatment (including nutrition and hydration by artificial means) and such treatment may be lawfully discontinued.

3. It is in the First Respondent’s best interests to be given, and the responsible medical practitioners, nurses and health care staff may lawfully provide, such palliative treatment and medical nursing care under medical supervision as may be appropriate, including hydration if it is to be given with the purpose of palliation.

4. 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.”

2. The facts are fully set out in my judgment of that date which is on BAILII and readily available to see and I do not intend to repeat them in this judgment.

3. The birth family of RS, not supported by the Health Trust, the Official Solicitor or RS’s wife, sought permission to appeal to the Court of Appeal. Permission was refused. On 30th December, I heard a further application by the birth family for me to reverse my decision and I gave judgment the following day. I found that, contrary to the submissions of the birth family, that very sadly RS was more ill than he was when I had dealt with the case a fortnight earlier and was not recovering as the birth family sought to argue. The Court of Appeal once again refused permission to appeal.

4. The birth family and the Government of the Republic of Poland applied for interim relief from the European Court of Human Rights (‘ECtHR’) and have been refused such relief. A substantive application was also submitted to the ECtHR by RS’s birth family which was deemed inadmissible.

5. As a result of the various applications that have been made by the birth family to the Court of Appeal and to the ECtHR there have been no less than 3 occasions when RS’s nutrition and hydration have been removed and reinstated. I think that it is apposite at this stage to repeat paragraphs 29 and 30 of the Court of Appeal’s judgment given on 11th January. Lady Justice King said this:

“29. 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.”

6. The case comes to me today in slightly unusual circumstances. The only formal application before me is one from the Trust. But it is in effect an application that has been prompted by the birth family. I say that for these reasons:
 - i) The birth family seek that RS should be visited by the Polish Consul General in hospital and I am told that, I think 2 members of the Embassy, have travelled this afternoon to see him.
 - ii) They wish that Dr S whose evidence has been commented on by the Court of Appeal, and that judgment too can be read on BAILII, should be permitted to conduct a remote assessment from Poland on RS.
 - iii) Armed with his report, the Polish Government, can, if felt appropriate, approach the British Government to seek that the rights of RS, a Polish citizen be protected.
 - iv) So as to ensure that RS is still alive when that approach is made, there should be a stay of my order and that feeding and hydration should be reinstated for a fourth time unless the hospital voluntarily agrees to that course.
7. I am told that RS is now very ill. The Trust say he may only have hours to live, perhaps a few days at most. His wife has made it clear that, as of today, with RS in the state he is in, she cannot support the visit that the Consul General proposes to make or the further examination which it is asked that Dr S should carry out.
8. There is therefore every possibility of a scene at the hospital which would be distressing and disruptive unless the court intervenes.
9. The Trust seeks an order that it is not in RS’s best interests to receive a visit from the Polish Consulate or to undergo an examination by Dr S or as part of such examination that medical records should be disclosed for that purpose.
10. Mr Sachdeva QC, who appears with Mr Olleson on behalf of the Trust, says that all I have to do is to apply a best interests test, that Article 36 of the Vienna Convention, to which I return, has no impact on the case, and that the test would inevitably result in the same conclusion as I have reached at previous hearings. Nothing has changed.
11. Mr Bogle on behalf of the birth family says that I should:
 - i) Declare that it is not unlawful for the Trust, and indeed in the best interests of RS, to allow the Consul General to visit and for him to enable Dr S to carry out a remote assessment;

- ii) In the meantime, the Trust should reinstate the provision of nutrition and hydration and that too is not contrary to his best interests; and
 - iii) If the hospital does not accept that they should do so, I should grant a stay.
12. The Official Solicitor says she has no reason whatsoever to think that the Trust is not properly looking after RS and opposes the orders or declarations that the birth family say that I should make.
13. The position seems to me to be quite clear. First, the Court has twice determined what RS's best interests are and I have read out the declarations that have been made. The Court of Appeal has on each occasion refused permission to appeal.
14. The ECtHR has declined to make any order or accept a reference. No application is made either by the birth family or by the Government of the Republic of Poland to the Court for me to make any order, and effectively, the Court process would appear to be at an end. There is no reason to suppose that RS is receiving anything other than optimal care and no reason to think that his interests are not being properly safeguarded in every way.
15. But Mr Bogle, on behalf of the family, mounts a different and new argument to the ones that I have had to consider before, namely the impact of the Vienna Convention on Consular Relations 1963, which he says requires me to take the course the birth family seek. He takes me to Article 36 which provides:
- “1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:*
- (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;”*
16. Consular Functions are defined in Article 5 of the Convention and include in particular:
- “(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;*
- ...
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;*
- ...
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons.”*

17. It is accepted by Mr Bogle that Article 36 is not incorporated into the law of the United Kingdom and that the rights referred to in Article 36(1) must be exercised in conformity with domestic law. The right to visit is in respect of those in prison, custody and detention, which quite plainly does not extend to those in hospital. The idea that the Consul General is under a duty or has the right to check the treatment of every citizen of his country in a NHS hospital would clearly be unsustainable.
18. I have to look at this application in accordance with RS's best interests. I am satisfied that it would plainly not be his wish to see the Polish Consul; obviously he is no position to express his views on this himself, but I found that in the state he was in on 15th December he would not wish to be kept alive in his then predicament, and it has only worsened since then.
19. Is it in RS's best interests that the visit should take place, when, if not the sole, at least the primary purpose of the visit is to obtain a remote assessment from Dr S? Dr S has had an involvement in this case. I do not think he could be described properly as an entirely independent participant; but the exercise that he wishes to carry out inevitably will suffer from the disadvantages, even if not to the same extent, that I was so critical of in respect of Dr Pullicino.
20. A remote assessment done in the circumstances of this proposed visit, without having spoken to the treating staff, seen the records, notes and scans, and interviewed those who are involved would carry little weight. And, I look at that against the background of the evidence that I have received from those who have been treating RS now for over 2 months. I have no reason at all to doubt the evidence that I have received from them.
21. To force this visit upon his unwilling wife with the attendant stay, whether described that way or not, is in my judgment the very opposite of what he would want and the opposite of what would be in his best interests. In my judgment, the hospital would be acting in his best interests not to accede to that. In reaching that decision, I do not accept that I am impeding the Republic of Poland or the Consul General in the execution of or complying with his Vienna Convention rights/obligations in any way.
22. I therefore decline to make the declarations that are sought by Mr Bogle on behalf of the birth family and I accede to the application made on behalf of the Trust.