Case No: COP13684602

IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

NCN: [2020] EWCOP 69

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/12/2020

Before :

THE HON. MR JUSTICE COHEN
(In Public)
Between :

Z	**Applicant**
- and -	
(1) UNIVERSITY HOSPITALS PLYMOUTH NHS TRUST	**Respondents**
(2) RS (by his Litigation Friend the Official Solicitor)	
(3) M	
(4) S	
(5) R	

REPORTING RESTRICTIONS APPLY

Charles Foster and Bruno Quintavalle (instructed by **Camerons Solicitors LLP**) for the **Applicant**
Vikram Sachdeva QC (instructed by **Bevan Brittan LLP**) for the **NHS Trust**
Andrew Hockton (instructed by the Official Solicitor) for RS
The Third, Fourth and Fifth Respondents were in attendance but did not participate

Hearing dates: 30 & 31 December 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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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 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. This case concerns RS. There is a transparency order in place and anyone who is minded to talk about or otherwise publicise this case must make themselves familiar with the terms of the transparency order.

2. On 15 December 2020, just over a fortnight ago, the applicant NHS Trust was granted a declaration by me sitting in the Court of Protection that:

   i) It was not in RS's best interests to be given life sustaining medical treatment including nutrition and hydration and that such treatment could be lawfully discontinued;

   ii) It was in his best interests to be given palliative treatment; and

   iii) All care and palliative treatment given shall be provided so as to ensure that he retained the greatest dignity and suffered the least discomfort until such time as his life comes to an end.

   The Trust's application had been supported by RS's wife but opposed by his birth family.

3. Following my decision, on 16 December 2020 nutrition including hydration was withdrawn but was reinstated on 18.12.2020 upon the filing of an application for permission to appeal by RS's niece on behalf of the birth family. On 23 December 2020, the Court of Appeal refused the application for permission to appeal. My decision, which will be put on the Bailii website within next couple of days, was based on the following factors:

   i) RS, a middle aged man, suffered a cardiac arrest on 6 November 2020 during which his heart stopped for at least 45 minutes. The inevitable consequence was severe and irreversible brain damage.

   ii) The medical evidence which was agreed between all parties including the birth family was that RS was then moving from a state of coma to a vegetative state (VS).

   iii) That at best there was a 10-20% chance that he might progress to a minimally conscious state (MCS) minus. That is at the most severe end of MCS.

   iv) RS was not responsive at that time to stimuli of any sort although he did spontaneously open and move his eyes but without fixing or tracking. He showed no characteristic features of discomfort or distress to stimuli which would be painful to a feeling person.

   v) If he did reach MCS minus, RS might be able to acknowledge the presence of another human being but there would be no means of knowing whether that would be a response specific to the person visiting him or just a general response to anyone. Nor would it be possible to know whether the response signified pleasure or distress. Nothing would restore any functionality.

   vi) It was self-evident that RS lacked capacity to make any decision for himself.

vii) The focus of disagreement was on what RS's views would be if he was able to make a decision in his current predicament. His birth family said that his strong Catholic faith would mean that the sanctity of life would triumph over all other considerations. His wife said that from her conversations with him she can say with certainty that he would never have wanted to have been kept alive if he could not be helped and he would not have ever wanted to be a burden. His present state was causing great distress to his wife and their children, as it would be to him if he could feel it or express it.

viii) I accepted RS's wife's evidence of his views, especially against the background of what was a significant estrangement between RS and his birth family to the extent that his only relatives in this country, that is his niece and her family, had not seen him for at least 9 years.

4. As I have mentioned, following my decision nutrition and hydration were withdrawn but then reinstated when the Court of Appeal notice was filed. When that application was dismissed nutrition (which included hydration) was withdrawn again on 24 December 2020; intravenous fluids, saline and glucose solution were instated on 28 December in circumstances which I will come onto.

5. On 24 December 2020 RS's birth family applied to the European Court of Human Rights (ECtHR) for interim relief, having exhausted their avenues in England. I shall continue to use the term birth family and niece interchangeably even though some of the steps taken in the various proceedings have been taken by RS's niece on her own, but I accept that she is acting as the spokesperson of the group which comprises RS's mother, his two sisters and his niece.

6. On 27 December 2020 the birth family sought an urgent hearing which came before Mr Justice Holman the following day as duty judge. He directed that the paragraph of my order of 15 December 2020 authorising the removal of life sustaining treatment should be stayed until the hearing that was fixed before me to take place yesterday. The Judge went on to make various directions as to the filing of evidence and provision of information about the proceedings in the ECtHR. He was particularly concerned about the absence of information about the status of the application before the ECtHR. It is unnecessary for me to go through the other directions that were made.

7. Subsequently RS's niece issued an application which is before me today seeking three specific orders:

i) An order that she be allowed to rely on the report and call in evidence Dr Pullicino;

ii) A declaration that it is lawful and in the best interests of RS to receive CANH;

iii) A declaration that it is lawful and in his best interests for him to be transferred to Poland for further treatment.

8. By the time of the hearing before Holman J the Government of the Republic of Poland had also sought interim relief in the same terms as that sought by the birth family. Both applications were refused by the ECtHR on 24 and 28 December 2020 respectively

although that was not known at the time of the hearing. On 28 December the birth family made a formal substantive application to the ECtHR.

9. It was the niece's application as set out in paragraph 7 above that were heard by me on 30 December 2020 and upon which I now give judgment. The application is resisted by the Trust and by RS's wife and is also not supported by the Official Solicitor (OS) who represents RS.

10. It is agreed that the main issue before me is whether my reliance on the medical evidence which I heard on 9 December 2020 was either misplaced or needs to be reconsidered in the light of the events since that time.

11. First, following my decision, RS was removed from the ventilator. As anticipated by the treating team, RS has proved able to breathe unassisted. Secondly, he has been prescribed antibiotics as it appears that he has or may have pneumonia. Thirdly, following the cessation of nutrition and hydration, RS has been provided with morphine and midazolam (a sedative). The continuous infusion of these was suspended (although RS continues to be prescribed these on an as required basis) when intravenous fluids, saline and glucose solution were instated, with it would appear, an increase in his agitation. Fourthly, there have been repeated assessments by his treatment team including the carrying out of an EEG, to which I will return.

12. I turn now to the events of the last few days. This requires an examination of the role of Dr Pullicino. Dr Pullicino is an experienced neurologist as well as an ordained priest. I decided to admit his report and allow him to give evidence although I had severe misgivings about it and the circumstances of his engagement. But it seemed to me proper that all the evidence in this difficult and very serious case should be heard.

13. I have to say that I found some of Dr Pullicino's evidence unaccountably vague. On a date that he cannot identify, he learned about this case through a variety of routes, the order of which he cannot give. They were:

    i) A discussion he had in the days between 15 – 24 December 2020. He cannot remember where or when or with whom this discussion took place but after pressing he believes that at least one of the participants was PS who works with or for the Christian Legal Centre.

    ii) He received information from what he describes as an American pro-life organisation which publicised, I think, the Court of Appeal decision, but possibly mine, under the headline of RS being a "euthanasia victim".

    iii) He spoke to RS's niece who gave him information about the case. He cannot say when the conversation took place but it must have been no later than 24 December 2020.

    None of these three sources can be regarded as reliably objective.

14. On 25 December 2020 RS's niece attended at the treating hospital accompanied by her mother and brother. They said that they were coming to say their goodbyes and video call RS's mother abroad so she too could say goodbye. Whilst that may have been part of their motive, it is clear that the predominant purpose of the visit was to gather

evidence to provide to Dr Pullicino who was instructed to provide a letter which was subsequently put before Holman J.

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.

16. Dr Pullicino has seen 10 clips which were sent to him by RS's niece and I have seen them, as has Dr W and Dr Bell, the independent expert. The clips were filmed under the instruction of Dr Pullicino who told the family how they should approach RS and what they should do to try and attract a response from him. The video clips total about 3 minutes in all. The longest is 41 seconds. Dr Pullicino said that he watched the family as they made the video clips. It is not clear whether his observations of RS exceeded that period of 3 minutes.

17. Shortly after the visit, Dr Pullicino emailed PS under the unexplained subject "Matter: Press Release" as follows:

I have just facetimed with RS and his daughter [sic: it was in fact his niece]. *He looks to me to be in MCS.*

He does appear to move his eyes preferentially to one side to voice but he would need time to be assessed by the MCS or WHIM.

There is no way he should be left to die.

Fr Patrick"

18. PS replied minutes later:

"Dear Father Patrick

Would you be able to put your comments on the 7 seconds video and about this facetime call in a letter addressed [the solicitors for the family]. The letter should:

1. Introduce you as an experienced neurologist and attach your CV.

2. Explain that you have been asked to interpret the video and participate in this call. You have been informed that RS had suffered a heart attack and a hypoxic injury to brain on 6 November.

3. Give your professional view on RS's current condition and how it is likely to develop.

4. It is OK to rely on what the family says about the fact that he looked a lot worse than this three weeks ago - if that is relevant to your opinion"

5-8….

19. Following that, Dr Pullicino wrote the letter addressed to the niece which was put before Mr Justice Holman. In it he says that the 10 clips which he saw:

"show a clear emotional response to the presence of the family members which you state started when they came in the room and appeared to be exacerbated by contact and speech."

20. He then refers to specific videos and goes on to say as follows, *"Mr S's emotional responses were appropriate to the arrival of his family by their report, and therefore constitute one of the criteria for MCS. The second item was the movement of the eyes in the direction of the caller to two sides and on three occasions that I saw on these videos. These two behaviours would qualify for a diagnosis of MCS if they were repetitively sustained."*

Then later, *"The fact that Mr S appears to be transitioning from VS to MCS within two months gives him a relatively better prognosis.*

In my opinion a proper neurological assessment would require further observation over a period of time."

21. In my judgement the treating team and counsel for the Trust and the OS were rightly critical of Dr Pullicino's report (or letter) and the way that this exercise has been carried out.

22. 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.

23. 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.

24. Dr Pullicino accepts that one off observations can never found a diagnosis of MCS but yet this, at least in part of his evidence, appears to be what he has done.

25. The unqualified nature of his report causes me great concern.

    i) He has read no records of the patient – no medical, nursing, or therapist records or reports.

    ii) He has not seen, at least until shortly before giving evidence, the reports of Dr A (neurologist), Dr W and Dr Bell and even then he saw only one out of at least 6 documents.

    iii) He has not spoken to any member of the treating team.

    iv) He has not seen the MRI, EEGs or any other scans.

v) He has not read the judgments of me or the Court of Appeal or any of the case papers.

vi) He felt it proper to rely on what RS's niece told him about RS's reaction when the family appeared without any independent or other evidence of it – he relied solely on her word.

vii) These exercises that were carried out by the family under Dr Pullicino's instruction were unstructured. As Dr Bell said, the gold standard is to first of all note the patient's condition before a known figure comes into the room. Then the examination should go through successive tiers and he said there were 4 tiers. First, examination with no environmental noise or stimulation to get a baseline. Secondly, that voice should be used calling the patient by his name at different volumes. Thirdly, there should be specific requests, for example to blink or move an eye or a limb or say something. Then fourthly, sensory stimulation – touching, scratching, painful stimulation, grips on places where it would hurt. In each case there should be a progressive increase of stimulation and building up of activities and noises.

26. The absence of any real information about RS or any properly structured examination should cause any expert at the very least to note the limitations on the exercise that he has conducted. Nowhere in Dr Pullicino's report or evidence have any reservations been expressed.

27. When it came to his oral evidence, I did not find Dr Pullicino a satisfactory witness. He was at times disinclined to answer the questions he was asked. He had failed to make any notes of any conversations about the case, whether with PS or the niece, as every expert should do. He kept no records of how often RS did not respond to instructions given by his niece. He seemed unclear as to what reports he had read. He said that he had read the report of either Dr Bell or Dr W but couldn't remember which. He had not seen, although he had little opportunity to do so, the examination conducted by Dr W and Dr Bell with assistance of RS's wife to which I will return. He was untroubled by any of these deficiencies.

28. Dr Pullicino went on to say in evidence this: "This man has a 50% chance of being independent in his own home." This is not what his report had said and seems to me to have no basis beyond a medical publication reporting on a small sample of patients whose condition is not described in the publication and gives no indication of the level of severity of the initial injury which may be very different to that of RS.

29. Dr Pullicino's response to these criticisms is that all he was trying to do was assess the level of awareness which can be measured by his response to a person he knows. I remind myself that RS had not seen his niece or her family for nearly a decade. I am not sure whether Dr Pullicino was aware of that fact. To found his opinion as he did on the basis of what he believes to be an emotional response to someone who may have been almost a stranger seems a huge leap of faith. RS's wife by way of comparison has been his constant companion throughout the period.

30. I do not think I can place any weight on the evidence of Dr Pullicino and I think the criticisms are properly made. I was concerned about the level of his objectivity. Far more reliable are the tests that were carried out by Dr W and Dr Bell with the assistance

of RS's wife and then separately by Dr A again with the assistance of RS's wife on 29 December 2020.

31. Critical though I have been of Dr Pullicino's contribution, I still need to focus on the question that I posed at the start. Has there been a change in RS's condition which makes it unsafe to rely on what I had previously found?

32. Dr Bell conducted a video assessment of RS and interviewed the relevant hospital staff members on 29 December and then conducted a video assessment of RS and his response or reaction to the presence of his wife. Dr Bell obtained the permission of the Trust to record the assessments – a step that RS's niece and/or Dr Pullicino should have taken. Dr Bell felt he observed more frequent and sustained spontaneous eye opening than on 5 December when previously he had remotely examined RS, and there were also more frequent startle responses to relatively minor environmental noise. The eye opening and startle response was not influenced by calling RS by name. As before, there was more eye movement to the left than to the right but it was not consistent or sustained. There was no response to any request for movement whether, for example, to blink or move a muscle and next to no response to nail bed pressure or pincer grip. Dr Bell spoke to the staff nurse responsible for RS's care, Dr W and physiotherapy team members, all remotely. Dr Bell also obtained the agreement of RS's wife to record the assessment.

33. At paragraph 2.22 of his report he says:

"I then observed RS during varying methods of sensory stimulation by his wife assisted by her interpreter friend.

2.22.1. Under initial quiet observation, RS quickly awoke with a short lived startle response to environmental noise but with eyes open there was no obvious repeated or sustained movement of the eyes to the side of the voice on either left or right and no change of facial expression."

2.22.2. "There was no response to a request by RS's wife to move any part of his body, and no response by way of movement or change in facial expression to either stroking his head which he would previously have appreciated or tickling his feet which he previously would have intensely disliked."

2.22.3. "[RS's wife] stated she had not seen evidence of any response at any stage of his critical illness or any evidence of an emotional response to her presence"

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.

35. Dr Bell had looked at the video clips. He says that some showed a facial expression which is commonly associated with discomfort or distress, and I saw that too. Dr Bell does not know the reason for this but he says that it cannot be equated with "a clear emotional response to the presence of family members". In short, he did not interpret the video evidence as indicative of anything other than a VS. Observed features of VS

do include brief eye movements towards people and objects, a startle reflex to loud noise and changes in facial expression without apparent cause.

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.

38. Dr W emphasised rightly the importance of the trajectory of change, something of course which Dr Pullicino had no information about other than what RS's niece had told him. RS had transitioned from coma to VS and that explains his somewhat increased level of activity but he had not approached the criteria for MCS which he defined as follows:

    i) Increased level of arousal

    ii) Much more wakefulness

    iii) Response to sound without stimulation by hand

    iv) Fixated gaze for at least short period

    v) Reliably turning eyes to voice

    vi) Evolving to better motor responses

    But none of those were present.

39. As Dr W had explained when he gave evidence before, patients do have roving eye movements and it is entirely natural for relatives to think that when patients' eyes cross relatives' eyes, the patients are looking at the relatives.

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.

41. He adds that on 29 December 2020 he too observed RS with his wife and he showed no response at all to his wife carrying out the instructions of Dr Bell to try to elicit a response. Bleakly he said, there is no possibility of a satisfactory outcome for RS. In all respects he agrees with Dr Bell. Dr W also strongly endorsed the view that to understand an apparent response to a stimulus it has to be repeated in systematic controlled way with periods of rest in between. A few clips without context of the wider room and without sight of stimuli given are not helpful.

42. Dr A, consultant neurologist, who gave evidence on 9 December 2020, provided a statement but was unwell and not able to give evidence on 30 December. She saw RS separately from her medical colleagues, also on 29 December 2020 and in the presence of his wife. She says that although RS's eyes moved and on occasion he would look in her direction on her calling his name, this was not reliable and he did not appear to fixate on her face. When she moved, his eyes did not track. He demonstrated myoclonic jerks - involuntary movements - but she was not able to ascertain if they were the result of his brain injury or a response to stimulus. There was next to no response to painful stimuli.

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.

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.

46. I turn finally to the application made by the family and by the government of the Republic of Poland to the ECtHR. The ECtHR has not yet decided whether to accept the reference but has refused applications for interim measures to order implementation of life saving treatment and/or transfer of RS to his birth country and/or further medical

examination. That refusal was of the applications made both by the country and the family.

47. It is highly unsatisfactory that RS has been in the position of nutrition and hydration being provided and then turned off as has happened on two occasions so far. It seems to me that notwithstanding my decision, it is appropriate that there should be a continuation of the stay on the implementation of my order made on 15 December 2020 for a very limited time to permit the family and/or Polish government to seek to persuade the ECtHR to make a different order to that made so far.

48. The Trust has offered until 4pm on 7 January 2021 to continue with treatment subject to the continuation of previously agreed DNACPR and other conditions set out in paragraph 34 of Dr W's statement. The OS had suggested a slightly longer time but had had limited opportunity to consider the Trust's proposal. Having now done so, in my judgment the OS is right to accept the Trust's suggestion as appropriate and I therefore continue the stay until 4pm on 7 January 2021.