Neutral Citation Number: [1999] EWCA Civ 1914

Case: PTA 1999/6139/4

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION (CROWN OFFICE LIST
(MR JUSTICE SCOTT BAKER)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday 21 July 1999

B e f o r e:

THE MASTER OF THE ROLLS
(LORD WOOLF)
LADY JUSTICE BUTLER-SLOSS
LORD JUSTICE ROBERT WALKER

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T H E  Q U E E N

- v -

PORTSMOUTH HOSPITALS NHS TRUST
(EX PARTE G)

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(Computer Aided Transcript of the Palantype Notes of
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MR R GORDON QC and MS B HEWSON (Instructed by Messrs Leigh Day & Co, London, EC1M 4LB) appeared on behalf of the Appellant
MR J L MUMBY QC (Instructed by Messrs Wansbroughs Willey Hargrave, Winchester SO23 9WP) appeared on behalf of the Respondent

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J U D G M E N T (As approved by the Court)

**LORD WOOLF, MR**: This is an application for permission to appeal which involves difficult and delicate decisions by the court. The applicant, the mother of DG who is to have his thirteenth birthday on 23 July 1999, is appealing against a decision of Scott Baker J that it was not desirable for him to give relief on an application for judicial review. His decision fundamentally involved an exercise of his discretion as to what was the right course for the court to take. The application for judicial review was appropriately heard by Scott Baker J since, not only is he a senior judge of the Queen's Bench Division, he is also a judge who has had considerable experience concerning delicate issues such as this when he was a judge of the Family Division.

The position facing the court on this application for permission to appeal is summarised admirably in the skeleton argument of Mr Gordon, who appears on behalf of Mrs G. He sets out the situation in brief form. I will take the facts from that skeleton, albeit I appreciate that some of the things stated there may be controversial. For the purposes of this judgment I will assume they are correct.

Mr Gordon explains that DG is the mother's youngest child. He is very seriously disabled but, fortunately, not terminally ill. He is dearly loved and cared for most effectively by his mother, Mrs G, and her family. The mother wishes her son to live out his natural life span. Apparently, some United States' studies suggest a less than 50\50 chance of DG being alive for more than a few years. Morphine, which depresses respiratory functions, was administered to DG on 21 October 1998 against the mother's wishes by order of the chief executive officer of the respondent hospital, the Plymouth Hospital Trust, without first obtaining the sanction of the court. The breakdown in mutual trust which this engendered ultimately culminated in violent scenes between doctors and certain family members on the afternoon of 21 October. Mrs G was not involved in those scenes.

During this time other family members took it upon themselves to resuscitate DG. The doctors later told the police that these actions prevented DG from dying. At 18.40 pm an unqualified "Do Not Resuscitate" order was put in DG's medical notes without consulting the mother. Should DG be readmitted again, active treatment should be confined to those measures that relieve suffering. That does not include any resuscitation. The Trust says that this order was in position for the night and has since lapsed.

DG returned home and was treated by his general practitioner, Dr Hughes, successfully. On 23 October an ex parte injunction was made by the Queen's Bench Division preventing some adult members of DG's family from assaulting the respondent (the Trust) hospital staff, or its patients, or interfering with DG's treatment, or entering upon the hospital save on specified conditions. The mother may attend DG while he is an in-patient. Three other defendants may visit him there and all the defendants may attend hospital for treatment for themselves following a medical referral or emergency admissions.

By letter dated 23 November 1998 the respondent hospital told DG's MP that:

> "DG is dying, albeit that this is in the sense of terminally ill rather than immediate."

Despite this letter, and despite predictions by various hospital personnel in July and October last year that DG was dying, DG has not died. That is how the mother sets out the position in summary terms. As I have already indicated, not all she says would be accepted by the other parties to this decision.

A letter dated 5 November 1998 was written by the Trust indicating that its paediatric staff no

longer felt confident that they could give DG the care which he deserves. The letter stated:

> "Unfortunately the Trust believe that all we could offer DG would be to make his remaining time as comfortable as possible and take no active steps to prolong his life. This obviously means withholding or giving treatment with which you may not agree."

When the case came before Scott Baker J, it was substantially common ground that it would not be in DG's interest to be treated by the Trust unless he required emergency treatment. Southampton University Hospital Trust had agreed to treat DG in the future if he developed any problems requiring hospital care.

A representative of the Southampton Trust said in a letter:

> "I feel it is important that any future presenting illness should be discussed in detail with the mother and the appropriate options for treatment considered as would happen with any other child. Decisions in relation to management must be in DG's best interest and made in conjunction with the mother."

I have to look at the situation as it was on the ground at the time the case came before the judge:

(1) the general practitioner, Dr Hughes, had the confidence of the mother;

(2) there was an arrangement reached with the Southampton Hospital Trust which took a view which, as I understand it, was a view with which Mrs G was happy. However, I do recognise that the Southampton Hospital was not as convenient from her point of view as the Portsmouth hospital.

In his judgment, the judge pointed out that the case involves the inter-relationship of the

boundaries of a number of principles. He set those out as follows:

> "1. The sanctity of life.
>
> 2. The non-interference by the courts in areas of clinical judgment in the treatment of patients."

I would add a qualification to the second statement of "non-interference by the courts". This is where this can be avoided in areas of clinical judgment in the treatment of patients.

"3. The refusal of the courts to dictate appropriate treatment to a medical practitioner."

I add a further qualification and say that this is subject to the power which the courts always have to take decisions in relation to the child's best interests. In doing so, the court takes fully into account the attitude of medical practitioners.

> "4. That treatment without consent save in an emergency is trespass to the person [not controversial].
>
> 5. That the courts will interfere to protect the interests of a minor or a person under a disability."

That is a reflection of what I have already said. The judge added:

> "Life and death cases, like the present one, often raise incredibly difficult issues to which there is no right answer. Anyone who doubts the potential difficulties of the issues in this case should read three documents...."

and he indicates what those documents are.

Having considered the position carefully, having considered the arguments which Mr Gordon

advanced to him and setting out the relief which Mr Gordon was seeking, the judge said that his conclusions were:

> "The particular decision complained of in this case is not, in the circumstances of the case, susceptible to judicial review. More particularly, it is not appropriate to grant relief in the present case. First of all, the situation has passed and will not arise again with these Respondents."

Mr Gordon criticises that approach to this extent that the judge used the words "susceptible to judicial review". I do not dissent to Mr Gordon's criticism for reasons I will express. The judge continued:

> "Secondly, it hopefully will not arise again at any other hospital such as Southampton. [Thirdly,] If there is a serious disagreement, the best interests procedure can be involved at short notice and the court will resolve it on the basis of the facts as they are then. They will almost inevitably be different from the facts as they were in October 1998. [Fourthly,] In any event it is unclear precisely what the facts were in October 1998 on the evidence that is before this court. [Fifthly,] Furthermore, if there is a crisis in the future, I am confident that if the matter is brought before the court the Official Solicitor will again provide assistance."

He then gave a sixth reason:

> "Returning to the reasons why I do not think it is appropriate to grant relief, the next reason is that, in my judgment, judicial review is too blunt a tool for the sensitive and ongoing problems of the type thrown up in the present case."

Finally he says:

> "It would be very difficult to frame any declaration in meaningful terms in a hypothetical situation so as not unnecessarily to restrict proper treatment by the doctors in an ongoing and developing matter."

The judge ended with this important statement:

> "Nothing, I would finally say, should be read into this judgment to infer that it is my view that the Trust in this case acted either lawfully or unlawfully."

He was making it clear that he was not purporting to give any decision as to the appropriateness in law of what had happened. In that judgment the judge indicated that he did not think judicial review was a satisfactory procedure to adopt. Judicial review is always regarded as the procedure of last resort. In the family division there are orders which can be made which deal specifically with situations such as that which were before the judge. (i) It is possible for the Family Division to deal with what is called a specific issue under section 8 of the Children Act; (ii) it can make a declaration in the best interest of the child under the procedure referred to by the judge; (iii) it can make a child a ward of court.

There are advantages and disadvantages to each of those procedures. There are advantages in making applications for judicial review. I would emphasise that, particularly in regard to cases involving children, the last thing that the court should be concerned about is whether the right procedure has been used in the particular case. The court always has sufficient powers to make sure that if a party adopts the proactive course then the right course can still be pursued and, if necessary, a judge from one division can sit in the other division to see that the matter is dealt with. The important concern of the court is to ensure that what is in the best interests of the child is determined, so far as the court is able to do so, on the material which is before it.

In doing that, as in this case, the court often has the advantage of the great experience of the official solicitor. No doubt the judge was, and indeed this court is, grateful to the official solicitor for the skeleton argument which he has prepared on this application. That skeleton points out that there could be advantages in making DG a ward of court. If that were to happen,

it would probably require the mother to take action. I can see that she may well not feel that that is necessary or appropriate, but I hope that she will bear in mind the views expressed in the skeleton argument by the official solicitor and take that course if she feels that, having taken his view into account, that that would be helpful. There are ways in which the courts can intervene at short notice.

I now turn to the dilemma which the court faces today in deciding whether or not the court should embark on an appeal in this matter. In his submissions Mr Gordon drew attention to the fact that some statements of the judge could be construed as indicating a view. However, I hope that by drawing attention to his final statement, it makes it clear that he was not intending to do that.

Mr Gordon draws attention to the fact that Mrs G is concerned that a situation might arise where again it would be in DG's interests for him to be treated by the Portsmouth Hospital. Mr Gordon says that in that situation she would naturally be reassured if she had a declaration from the court indicating clearly to the doctors at the Portsmouth Hospital what the courts think they can or cannot appropriately do as a matter of law.

I fully understand why Mrs G feels that she would be comforted by the court taking that action. However, I have no doubt that it would be inappropriate for the court to do so. I say that because the considerations which might arise in relation to DG, and in relation to other children who have disabilities similar to those from which he suffers, are almost infinite. For the court to act in anticipation in this area to try and produce clarity where, alas, there is no clarity at the moment, would, in my judgment, by a task fraught with danger.

There are questions of judgment involved. There can be no doubt that the best course is for a

parent of a child to agree on the course which the doctors are proposing to take, having fully consulted the parent and for the parent to fully understand what is involved. That is the course which should always be adopted in a case of this nature. If that is not possible and there is a conflict, and if the conflict is of a grave nature, the matter must then be brought before the court so the court can decide what is in the best interests of the child concerned. Faced with a particular problem, the courts will answer that problem.

In my judgment that is the desirable way forward. Of course it does involve expense; it involves coming to the courts to obtain a ruling. The courts will do their best to reduce that expense. But the answer which will be given in relation to a particular problem dealing with a particular set of circumstances, is a much better answer than an answer given in advance. The difficulty in this area is that there are conflicting principles involved. The principles of law are clearly established, but how you apply those principles to particular facts is often very difficult to anticipate. It is only when the court is faced with that task that it gives an answer which reflects the view of the court as to what is in the best interests of the child. In doing so it takes into account the natural concerns and the responsibilities of the parent. It also takes into account the views of the doctors, and it considers what is the most desirable answer taking the best advice it can obtain from, among others, the official solicitor. That is the way, in my judgment, that the courts must react in this very sensitive and difficult area.

Accordingly, it is my view that the court should not give permission to appeal in this case. The judge in the court below was perfectly right to adopt the course which he did and it is my view that any other course would be inappropriate.

**LADY JUSTICE BUTLER-SLOSS**: I agree with the judgment of my Lord and that the application for permission to appeal should be refused.

**LORD JUSTICE ROBERT WALKER**: I also agree.

**Order**: Application dismissed. No order as to costs.