Neutral Citation Number: [2023] EWCA Civ 1324

Case No: CA-2023-002188

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice Peel
FD23P00452

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2023

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

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Between:

DEAN GREGORY	**Defendant/ Appellant**
- and -	
(1) NOTTINGHAM UNIVERSITY HOSPITALS NHS FOUNDATION TRUST **(2) INDI GREGORY (By her CAFCASS Guardian, Kathleen Cull-Fitzpatrick)** **(3) CLAIRE STANIFORTH**	**Applicant/ Respondents**

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Bruno Quintavalle (instructed by **Andrew Storch Solicitors**) for the **Appellant**
Emma Sutton KC (instructed by **Browne Jacobson LLP**) for the **First Respondent**
Katie Scott (instructed by **CAFCASS**) for the **Second Respondent**
The Third Respondent did not attend and was not represented

Hearing date: 10 November 2023

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Approved Judgment

This judgment was handed down remotely at 5.15pm on 10 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. Indi's father Mr Gregory again seeks permission to appeal from an order of Peel J, on this occasion an order made yesterday after a hearing on Wednesday 7 November.

2. The judge decided that the removal of invasive mechanical ventilation, known as extubation, that he had previously authorised, should take place at a hospice. That was the recommendation of the treating clinicians and had previously been accepted by Indi's parents. After extubation, Indi will receive compassionate care as advised by the clinicians, and if there is more than one clinically appropriate option, the parents will be able to choose between them. If Indi stabilises after extubation, going home may become a clinically appropriate option.

3. The parents' case at the hearing was that Indi should be extubated at home, something that the clinicians had considered might just have been possible at the beginning of October but by the time of the hearing this week was no longer considered to be practicable because of the increasing complexity of her condition.

4. The background is of course that Indi has been on full life support since 6 September 2023. She is critically ill, intubated, ventilated, and sedated. She suffers from significant pain and distress several times a day, caused by multiple treatments including invasive ventilation, suctioning, use of IV lines, blood tests and the like. She displays no purposeful interaction with the world around her. For the past two months the treating clinicians have held the view that continued treatment was painful, hopeless and contrary to her best interests. Proceedings were issued by the Trust seeking the court's approval for a care plan under which invasive treatment would be withdrawn and replaced by palliative care. The parents were opposed to this, but the judge accepted the united medical evidence and approved the plan in his order of 16 October.

5. Since that time a raft of legal actions have been taken by or on behalf of the parents. Appeals from the judge's order were brought without success to this court on 23 October and to the European Court of Human Rights on 26 October. The judge was then asked to reopen his decision and hear more medical evidence, and to approve Indi's transfer to a hospital in Italy. On 31 October, a hearing took place and on 2 November he declined each of these applications. Another application for permission to appeal was refused by this court as recently as last Saturday, 4 November.

6. This week, three further issues have arisen (and there may be others of which this court is unaware). The first, which is the subject of this application, is the disagreement about where extubation should take place. The second, which I mention now although it is not before this court, is an initiative taken by an Italian consular official in the United Kingdom, who on Tuesday purported to issue a decree appointing a guardian for Indi and authorising her removal to Italy for treatment, contrary to the judge's welfare decision. On Thursday 9 November the official wrote to the High Court requesting that that he be authorised to exercise jurisdiction over Indi. This request was said to be made under Art. 9(1) of the 1996 Hague Convention for the Protection of Children, which permits such a request where the requesting authority considers that they are better able to assess the child's best interests than the authorities in the state where the child is habitually resident. The only basis upon which such a request could even theoretically be made in Indi's case is that she was

granted Italian citizenship last Monday. Before us and before the judge, the father accepted that decisions about Indi's welfare are to be made by our courts; in any case, the argument that the Italian authorities are better able than the English court to determine Indi's best interests is in our view wholly misconceived and a request of this nature is clearly contrary to the spirit of this important international convention.

7. I shall refer to the third matter later in this judgment.

8. Returning to the present application, the judge noted that there had been a difference of view about what the care plan meant: whether it gave the parents the final say over whether compassionate care should be delivered in a hospice, at the hospital or at home, or whether the parents would have the choice between options that were considered clinically appropriate.

9. The sequence of events surrounding this disagreement is as follows. On 26 October the parents were informed that a transfer home was no longer a viable option. Extubation was due to take place the following day, but it was extended to 12 noon on 30 October at the request of the parents to meet their wish for it to take place after a hospice transfer. In the meantime, encouraged by Dr Ross Russell, a suitably qualified expert advising them, the parents visited the hospice. However, the parents then changed their mind on 29 October following the securing by their solicitors of an offer to treat Indi in Rome, and on the morning of 30 October, the father filed the application to reopen that led to the matter returning to court on the following day. Then, on 1 November, before receiving the judge's decision, the parents wrote to the clinicians saying that they would like the care plan to be implemented at home, rather than in the hospice. On 3 November, the father repeated his request for a transfer home. The request was twice considered by the Trust's multi-disciplinary clinical team, but not considered to be viable. Between 2 and 4 November, the matter was again subject to an attempted appeal. On Sunday 5 November a demonstration was held outside the hospital. On Monday 6 November, following the refusal of the second application to this court, the Trust explained its position to the parents. On 6 and 7 November, the matter was restored to the judge to make the decision now under challenge.

10. The judge had before him a joint witness statement from two treating clinicians and a statement from the father. He treated it as an application by the trust to implement or vary its care plan and described it as the resolution of a misunderstanding arising from the original order. He considered that the decision needed to be taken urgently because of the number of delays and his findings about the high level of pain and suffering being experienced by Indi. He rejected a submission on the part of the father that there should be an adjournment for a few days to allow for further exploration of the evidence on the basis that this was not necessary.

11. The judge accepted the clinicians' evidence, which he set out in some detail at paragraph 25. In summary, the medical challenges faced by Indi were so extensive that extubation at home, which might just have been possible on 9 October, was no longer practically possible. The process of extubation and care had become so delicate that it was in Indi's interests for it to be delivered in the hospice. He considered the father's evidence, which rested on an understanding that the aftercare that could be given at home would be the same as that given in a hospice, but he found that this was clearly not the case. In conclusion, the judge found that it would

be too dangerous for Indi to go home for extubation, for the reasons more fully set out in paragraph 27. She needed clinical treatment of the highest quality, carried out in a safe and sustainable setting. That would not be available at home, and a transfer home carried an unacceptable risk of things going wrong with increased suffering for Indi.

12. Indi's father now seeks permission to appeal. On his behalf it is said that:

    1) The judge should not have changed the terms of the care plan without considering whether there were proper grounds on which his earlier decision could be reopened.

    2) The judge should not have granted the Trust's application when it had made little or no effort to engage with the parents about the arrangements for extubation or to get further information about the viability of a home care package.

    3) The decision to alter the care plan was unfair and was reached without due process, with the father not having an adequate opportunity to make his own inquiries.

    4) The judge misdirected himself about the requirements of good medical practice.

13. Before coming to consider these arguments, it must be observed that there is, to say the least, a sense of unreality surrounding this latest application. Before us the parents are seeking an order leading to an outcome that Indi should be extubated at home, but in reality they (or those who they have entrusted with their legal representation) are taking steps to prevent the court's decision from being carried into effect at all. I have already mentioned the issue of a transfer of the proceedings to Italy. Although the father's statement before the judge stated that the parents fully understood that the court has already declined the proposal of a transfer to Rome and that the decisions of the UK courts would have to be followed, it would appear that the parents continue to seek an outcome whereby extubation does not take place and that, far from returning home, Indi should be transferred abroad for operative treatment.

14. Then, it transpired that during the midday break in the hearing of this appeal, Mr Pavel Stroilov, a trainee solicitor instructing Mr Quintavalle, who was in the same room as him during his submissions this morning, had sent a letter and a witness statement to the judge in an apparent attempt to persuade him to reopen his welfare decision. Mr Quintavalle was asked a number of questions by the court about this, but I am not yet clear what he knew about this further initiative before he addressed us this morning, or what control is being exercised over the trainee solicitor's actions in this case. I do not propose to say more about that now, but we will take whatever action seems appropriate in due course.

15. Against this background, I address the application on the basis that was presented to the judge. Mr Quintavalle's core submission, encapsulated in ground 3, was that the process by which this issue had been determined was unfair because on 6 and 7 November Mr Gregory did not know the case that he had to meet or the opportunity to get his own evidence about the issue of the location of extubation. The joint witness statement from the clinicians that the Trust presented arrived two hours before the hearing and introduced yet another disadvantage suffered by Indi, namely the

withdrawal symptoms that she would be likely to suffer after extubation. Accordingly, the father had no chance to make an informed decision about where extubation should happen. This was a breach of his common law rights. The court should have adjourned for a few days to allow for a fair consideration of the issue.

16. The picture painted by this submission is of the parents being placed at an unfair disadvantage by the actions of the Trust. I do not accept that at all. The Trust, it seems to me, has had proper sympathy and understanding for the parents' position and has made every effort to accommodate their wishes during this extremely unfortunate period of weeks, whilst at the same time remembering that their overriding duty is towards Indi. The fact that numerous dates for the extubation have come and gone is the result of the parents exercising their legal rights to the very fullest extent, at least. That has created real problems in planning for a complex and sensitive medical situation. Fairness is context-specific, and in this case the issue about the location of extubation was one element in a much larger picture. In order to accommodate the father's request, the judge would have to have adjourn a decision yet again against a background where he found that he had ample information upon which to make the decision and where delay was contrary to Indi's best interests "as every passing day brings more pain and suffering" and that there was no time for "the luxury of an adjournment": paragraph 22. The suggestion that more time should have been allowed for the father to seek yet further advice also ignores the fact that Dr Ross Russell, the parents' own expert, had favoured hospice treatment. In my view, the judge was clearly right to make the decision when he did. He certainly cannot be said to have been wrong. There is nothing in this, the main, ground of appeal.

17. As to Ground 1, it is argued that the judge failed to apply the test for reopening an earlier determination of best interests, namely that it was for the parents to elect where extubation should take place. Reliance is placed on *An NHS Trust v AF and SJ* [2020] EWCOP 55 at para. [22], which cautions against re-opening earlier findings that cannot be undermined by subsequent changes in circumstances. Mr Quintavalle argues that there was no proper basis for revisiting the original care plan. The judge rejected that argument and I am in no doubt that he was right to do so. He was not revisiting earlier findings but resolving an issue about the implementation of his substantive order by reference to Indi's best interests at the present time. All parties before us accepted that the care plan was intended to be 'a living document'. In any case the deterioration in Indi's situation clearly constituted a change of circumstances.

18. Ground two was not pursued with any conviction. It was said that the trust had behaved in such a way that it should not be granted any form of relief: this is simply unrealistic in the situation that faced the court and it anyway fails on the facts.

19. Finally, Ground 4 argues with reference to *R (Burke) v General Medical Council* (CA) [2006] QB 273, para 50. That the father had a right to a second opinion before the judge reached a decision. I reject that for the same reason as I reject Ground 3.

20. The grounds of appeal were responded to concisely and compellingly by Ms Sutton for the Trust and Ms Scott for Indi.

21. We have held an oral hearing in this case because of its urgency and significance. On examination it can be seen that the grounds of appeal are entirely without merit.

22. Before leaving this matter, I would add the following. Although this is a legal decision, it is taken with a full awareness of the deeply sensitive question that lies at the heart of the proceedings. Indi's Guardian, who firmly opposes this application because of the continuing distress to Indi caused by the delays, rightly acknowledges that her parents love her fiercely and that it is impossible for us to fully comprehend their current circumstances. Nevertheless, I wish to express my profound concern about the approach that has developed in this litigation. The judge has throughout approached the assessment of Indi's welfare in a fair and sensible way and has reached decisions, of which the latest is but one, that were based on strong evidence that had been carefully tested. In the 25 days since his decision of October, a period during which good arrangements could have been made for Indi's benefit, there have been no fewer than six court hearings, each of them requiring very significant preparation and distraction of attention from Indi herself. As Ms Sutton says, a fair hearing has to be fair to everyone, and I would add, most of all to Indi. The increasing demands and changing positions of the parents have been extremely challenging for the clinicians, who have not only to look after Indi but twelve other critically ill children on the ward. The highest professional standards are rightly expected of lawyers practising in this extremely sensitive area. The court will not tolerate manipulative litigation tactics designed to frustrate orders that have been made after anxious consideration in the interests of children, interests that are always central to these grave decisions.

23. I would dismiss this application.

Lord Justice Moylan:

24. I agree.

Lady Justice King:

25. I also agree.
