Neutral Citation Number: [2014] EWCA Civ 33

Case No: C1/2013/0045

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MRS JUSTICE DAVIES DBE
[2012] EWHC 3670 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2014

Before:
MASTER OF THE ROLLS
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE RYDER

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Between:

THE QUEEN ON THE APPLICATION OF DAVID TRACEY (Personally and on behalf of the Estate of Janet Tracey (Deceased))	**Appellant**
- and -	
1) CAMBRIDGE UNIVERSITY HOSPITALS NHS FOUNDATION TRUST	**First Respondent**
2) SECRETARY OF STATE FOR HEALTH	**Second Respondent**
-and-	
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

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Mr Philip Havers QC, Mr Jeremy Hyam & Ms Kate Beattie (instructed by **Leigh Day & Co**) for the **Appellant**
Lord Faulks QC & Mr Simon Murray (instructed by **Kennedys Law LLP**) for the **First Respondent**
Mr Vikram Sachdeva (instructed by **The Treasury Solicitor**) for the **Second Respondent**
Mr David Wolfe QC (instructed by **Equality and Human Rights Commission**) for the **Intervener**

Hearing dates: 15th & 16th January 2014

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Approved Judgment

Lord Justice Longmore:

1. This is an appeal from an order of Nicola Davies J that there be no further hearing of Mr David Tracey's application for judicial review after she had conducted a fact-finding hearing ordered by Ouseley J; Eady J had initially granted Mr Tracey's application for permission. The application was brought against the NHS Trust responsible for Addenbrooke's Hospital ("the Hospital") in Cambridge and the Secretary of State for Health in relation to the Hospital's oversight of the placing of Do Not Attempt Cardio-Pulmonary Resuscitation ("DNACPR") Notices on the notes of Mr Tracey's wife, Janet Tracey, who was admitted to the hospital on 19th February 2011 and died on 7th March at the age of 63. We have decided that the judge's order that there should be no further hearing of Mr Tracey's application was not, in the circumstances, justified and have also decided that the application should be retained in this court. The less, therefore, that we say about the merits of the application, the better. It is, however, necessary to recapitulate in outline the facts found by the judge.

Factual Outline

2. On 5th February 2011 Mrs Tracey, who worked as a care home manager in a home for the elderly, was diagnosed with lung cancer with an estimated time to live of about 9 months. Her oncologist offered Mrs Tracey chemotherapy and the opportunity to participate in a clinical trial of drugs which might prevent recurrence. She accepted this offer. On 19th February, however, she sustained a serious cervical fracture after a major road accident. She was admitted to Ward A4 at the Hospital but on the following day was transferred to the Neuro Critical Care Unit, under the care of Mr Peter Kirkpatrick a consultant Neurosurgeon, because she had severe chronic respiratory problems which caused her to struggle with breathing. She was placed on a ventilator and investigations showed that she had malignant effusions on her lungs. The predominant cause of her breathing difficulties was her advanced lung cancer but the difficulties were exacerbated by pneumonia which had developed as a result of the accident. She could only make communication with the hospital staff and her own family by writing on a notepad or by whispering. She did not respond to treatment for her chest infection; this fact and her advanced cancer had a significant impact on her clinical condition.

3. On 23rd and 25th February efforts were made to wean Mrs Tracey from her ventilator but these attempts at extubation were unsuccessful and reintubation had to be effected. On Saturday 26th February her treatment was reviewed by a Consultant Anaesthetist Intensive Care Specialist, Dr Lavinio. He believed Mrs Tracey would derive little benefit from continued ventilation and thought that, if she were to be extubated, reintubation might well not be in her best interests in the event of respiratory arrest; the same considerations might apply to cardiac arrest and this led him to the conclusion that it might not be in her best interest to resuscitate her in the event of any such cardiac or respiratory arrest. He spoke to one of Mrs Tracey's daughters, Alison Noeland, who said that it was her mother's wish to receive "full active treatment" but he thought it wise to request further input from the oncology team and on 27th February Dr Hugo Ford, the Consultant Oncologist, was asked to

review Mrs Tracey's condition. He thought Mrs Tracey would never be fit enough to receive chemotherapy since her life expectancy was only a few months and her condition was made worse by reason of her chest infection and pneumonia which were not responding to treatment and by reason of the fact that she was immobile as a result of her cervical fracture. Both Dr Lavinio and Dr Ford felt it was inappropriate for Mrs Tracey to remain on full time ventilation and that at some stage it would be necessary to withdraw ventilatory support; the question would then arise as to what would happen if Mrs Tracey suffered respiratory or cardiac arrest. If she were to be resuscitated, she would have to be ventilated immediately afterwards; if a decision had been made not to reintubate, there would be no point in resuscitation.

4. As a result of her discussion with the doctors, Mrs Noeland appreciated that her mother was to be taken off the ventilator and would not be reintubated if extubation was unsuccessful. She went to ring the other family members since she thought her mother would die that night. She said there was no discussion about resuscitation. Dr Lavinio's note of that day said (among other things):-

> "Do not reintubate
>
> DNR" [Do not resuscitate]

and he filled in a DNACPR notice on the same day recording that the decision had been discussed with a "daughter" and Dr Ford.

5. In the event Mrs Tracey was successfully weaned from the ventilation and the next day (28th February) was able to sit up in bed, eat and drink. By evening she was feeling better and able to talk a little.

6. There must in fact have been some discussion with Mrs Noeland about non-resuscitation because, following her mother's improvement, she returned home to Norway and looked up the phrase DNR on the internet. She was, she said, horrified at what she found and registered her objections with a nurse who informed Mr Kirkpatrick's Specialist Registrar, Dr Alavi, who informed Mr Kirkpatrick. As a result the DNR Notice was removed and cancelled on 2nd March by Dr Alavi but Mr Kirkpatrick felt that a meeting with the family should take place. Meanwhile Mrs Tracey's condition had improved a little so that her breathing was easier, although she had a chest drain in her chest. She was transferred to Ward A5, where the Palliative Care Team became involved in her care. The Specialist Registrar was Dr Summers and the Clinical Nurse Specialist was Susan Sharpe. At about this time Mr Tracey visited his wife who told him she was being "badgered" about making a decision about resuscitation; she wanted any further discussion to be with her and her husband or one of her children present. On the night of 3rd-4th March Mrs Tracey's health began to deteriorate; this was noted by Dr Natasha Simons a Neurosurgical and Neuro-Critical SHO. Mr Kirkpatrick did attend a meeting at which two of Mrs Tracey's other daughters, Kate and Claire, were present but not Mr Tracey. There was conflicting evidence about this meeting.

7. On 5th March Dr Simons noted that Mrs Tracey was continuing to deteriorate and she felt it important to make her as comfortable as possible. She said that Mrs Tracey did not wish to discuss resuscitation. She spoke to Kate on the telephone and apologised for the first DNACPR notice. Later on Alison, Claire and Mr Tracey came to the hospital. Dr Simons' evidence was that they all agreed that a DNACPR notice should be completed and placed on Mrs Tracey's notes and that there should be an Integrated Care Pathway (ICP) for the now dying patient to ease her pain and distress. After discussion with the Palliative Care Team and the Neurosurgeons, Dr Simons then filled out a second DNACPR Notice stating (inter alia) that Mrs Tracey did not want to discuss resuscitation but that it had been discussed with Kate, Alison and Claire. Mr Kirkpatrick was not available to sign it, so it was signed by a Specialist Registrar in Neurosurgery, Dr Koh. He read the relevant case notes and discussed the matter on the telephone with Mr Kirkpatrick, who had been expecting to be asked to approve it as a result of his conversation with Kate the day before. Mrs Tracey's condition worsened throughout 6th March and she died at 10.38 on 7th March. No one suggested resuscitation at that time and none was given.

8. The above is no more than a short synopsis of the judge's careful analysis of the evidence and findings made after a seven day hearing with a number of witnesses giving evidence. In relation to the first DNACPR Notice the judge accepted Dr Lavinio's evidence that he believed Alison had agreed to the imposition of such a notice but rejected his evidence that he spoke to Mrs Tracey about resuscitation before he signed that Notice. It is nevertheless probable in the light of Mrs Tracey's reaction before the second Notice was placed in her notes, that if he had raised the matter with her, she would not have wanted to discuss it, at least without a member of her family being present. In relation to the second Notice the judge found in terms that Mrs Tracey did not wish to discuss it herself nor did her daughters wish to discuss it with her but all members of the family, who were present or available, understood and agreed that that Notice was the appropriate course.

Subsequent Judgment

9. Having made those findings the judge then considered whether a further substantive hearing of the original judicial review application should take place. Mr Tracey accepted that the hospital had a DNR policy but complained that it was not communicated to his wife or the family in such a way that enabled them to challenge the imposition of the DNR notice or, at least, to seek a second opinion. He also contended that the policy was defective because it was confusing as to whether the final decision rested with the clinician or that the final decision rested with the patient or (if incapable) her family. He also said that he was entitled to a declaration that Dr Lavinio's failure to consult with Mrs Tracey before signing the first DNR notice was a breach of her Article 8 rights.

10. The judge held that this latter point was academic, because the imposition of the first Notice had not caused any harm before it was revoked and perhaps because (in the light of her findings in relation to the second notice) Mrs Tracey would, if asked, have declined to discuss the matter. As to the other complaints she concluded that the court

was not equipped, even after the 7 day factual hearing, to determine them. As she put it:-

> "The determinations sought by the claimant would involve the court grappling with issues of policy and clinical decision-making upon the basis of limited evidence such that the court would not have a full appreciation of all relevant considerations, still less the implications resulting from such determinations.

She may have had in mind the Hospital's contention that the court just did not have any independent expert evidence of the type which (in her view) would be necessary if the court were to embark on considerations of the proposed issues in relation to a "difficult and sensitive area of law, medicine and procedure". She accordingly decided that the public interest would not be served by embarking on a "wide-ranging inquiry" based upon the limited findings of causal fact which she had made. She accordingly ordered that there should not be such a hearing.

11. It is impossible not to have considerable sympathy with the judge faced as she was with a 67 paragraph "Grounds of Claim" seeking by way of remedy five separate declarations ranging over Articles 2, 3 and 8 of the European Convention of Human Rights and appearing to require the court to conduct a wide ranging inquiry into the process by which hospital doctors decide whether to resuscitate dying patients. Moreover the Grounds of Claim appeared not to recognise the proposition of law, settled at the highest level of authority, that neither a patient nor her family can require a doctor to administer treatment which that doctor does not consider to be clinically indicated, see R (Burke v General Medical Council [2006] QB 273 paras 50-55 per Lord Phillips of Worth Matravers MR and Aintree University Hospitals NHS Trust v James [2013] 3 W.L.R. 1299 para 18 per Baroness Hale of Richmond DPSC. By the time the matter came before this court, however, Mr Philip Havers QC for Mr Tracey and Mrs Tracey's estate was able to make much more focused submissions solely by reference to Article 8 of the Convention and it is those submissions which persuaded me that it is appropriate for the judicial review application to continue in a more limited form than originally envisaged.

The Submissions

12. Mr Havers submitted that every decision to place a DNACPR notice on a patient's notes engaged Article 8 of the Convention which provides:-

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

This was because any medical decision relating to the end of a patient's life necessarily related to his or her private life. He accepted that there was jurisprudence, in relation to Article 2 of the Convention (the right to life), that that Article would only be engaged by failure of process or systemic failures on the part of a hospital and

would not be engaged by one-off or "casual" acts by hospital staff, see Powell v UK [2000] 30 EHRR CD 362, Savage v South Essex NHS Trust [2009] 1 A.C. 681 at paras 45 and 57-58 per Lord Rodger of Earlsferry and para 91 per Baroness Hale of Richmond and Rabone v Pennine Care NHS Trust [2012] 2 A.C. 72 at paras 19 and 119 per Lord Dyson and Lord Mance JJSC. But he submitted that this distinction could not or should not be applied to Article 8. He then said that Mrs Tracey's Article 8 rights were infringed by Dr Lavinio's failure to consult Mrs Tracey in relation to the first DNACPR notice and by the failure of the hospital to explain their policy in relation to DNACPR to Mrs Tracey before putting it into effect. He also said that such policy and explanation should contain a provision that the patient could obtain a second opinion if the patient did not agree to a DNACPR notice being placed on her notes. These arguments were not "academic" because the first notice had remained on her notes for 3 days before being cancelled on 2nd March 2011 and had distressed Mrs Tracey when she discovered it was there.

13. Mr Havers further explained that his case against the Secretary of State for Health was that he should promulgate a national policy in relation to DNACPR notices rather than leave it to the British Medical Association ("the BMA") to make recommendations and to encourage each NHS Trust to have its own policy. He pointed to the 42 page Integrated Adult Policy in relation to DNACPR issued by NHS Scotland which included in Appendix III a Patient Information Leaflet which could be given to patients to study and submitted (I think) that it was a breach of Article 8 (and therefore unlawful) for the English Secretary of State not to have promulgated a similar policy.

14. Lord Faulks QC for the Hospital submitted that Article 8 could never be engaged by the placing of DNACPR notices precisely because a patient could not demand a treatment which the relevant doctor thought was not clinically indicated. There could not be a legal obligation to consult about a treatment which the doctor could not be required to administer. He emphasised the judge's finding that all the many doctors treating Mrs Tracey thought resuscitation was inappropriate and said that such a decision could not and did not engage Article 8 of the Convention. There was thus no legal obligation on a doctor to consult his patient about a DNACPR notice although it would, of course, be good practice to do so. He further submitted that this case was an inappropriate vehicle for issues of this sort to be decided when the first DNACPR Notice had been cancelled and the family had (however reluctantly) agreed to a second notice being placed on Mrs Tracey's notes 3 days later.

15. Mr Sachdeva for the Secretary of State submitted that it was not unlawful for there to be no national policy. It was enough to encourage Hospital Trusts to have regard to BMA recommendations which were frequently revised and updated. He also submitted that there was no connection between the facts as found and any failure on the part of the Secretary of State to have a policy. There was thus no rationale for the continuance of the judicial review application as against the Secretary of State.

Conclusion

16. Powerful as the submissions of Lord Faulks and Mr Sachdeva no doubt are, I do not consider that Mr Havers's submissions can be dismissed out of hand at this stage. The judicial review application, as now presented, should therefore go forward to a hearing. In the light of the very considerable public resources already expended, I also consider that it should be retained in this court since there is a great danger that any decision at first instance would itself be appealed.

17. It does not appear that the judge thought that the points in relation to explanation or consultation with the patient or the right to a second opinion were themselves unarguable. She thought that in the light of her findings of fact they were "academic" and that any failure to follow policy or have the right policy did not cause Mrs Tracey's death. I do not agree that the case can be disposed of in this way. It is not academic because there can be no doubt that (as Mr Havers submitted) Mrs Tracey was distressed when she learnt that the first notice had been placed on her notes. Part of that distress was because she thought that her family had either asked for it to be so placed or had, at least, agreed to it. When that became plain, it distressed the family as well. In these circumstances, the judgment's reference to the absence of causation is, with respect, misplaced since there were consequences of the first notice. If those consequences had been "trifling", the judge might have been correct to say the case should go no further but it cannot be right to call the distress suffered by Mrs Tracey and her family as "trifling". The points on consultation and a second opinion are, moreover, matters of some general importance.

18. The judge's fear of a wide ranging inquiry which might need expert evidence is likewise misplaced now that Mr Havers has confined his case in the way I have sought to explain. The question whether the absence of explanation or consultation or the failure to offer a second opinion means that the placing of the first DNACPR Notice was unlawful as being an unjustified breach of Article 8 of the Convention is, of course, a question of law on which expert evidence would be neither admissible or appropriate.

19. Mr Havers has argued that the Hospital's policy, the relevant provisions of which were set out at paragraph 14 of the first judgment, was misleading and/or contradictory. I did not, for my part, altogether understand why this was so, but I would not wish here and now to rule out any argument to that effect.

20. Nor do I think it right to order no further hearing of the claim against the Secretary of State that it is unlawful not to have a national policy in relation to DNACPR notices promulgated by him. It is a claim for which permission to apply for a judicial review was granted by Eady J. Nothing emerged during the fact-finding hearing (at which the Secretary of State was not, in any event, represented) which impinged upon the strength or weakness of that claim. Mr Sachdeva may be right to say that there is not much connection between any potential unlawful conduct on the part of the Hospital and the Secretary of State's failure to have a national policy. But if the court were to conclude, for example, that Dr Lavinio's failure to consult Mrs Tracey about resuscitation meant that the Hospital Trust was in breach of Article 8, it could be said that that failure might show there should be some national policy promulgated by the

Secretary of State. The assertion is, at any rate, not so unarguable as to warrant being struck out.

21. Having reached these conclusions, it seems only sensible despite Lord Faulks' reference to MD (Afghanistan) v Secretary of State for the Home Department [2012] 1 W.L.R. 2422 to retain the matter in this court with, if possible, the same constitution, a large amount of groundwork having been covered, as all counsel (other than Lord Faulks) accepted.

22. I would, therefore, allow this appeal, set aside the judge's order that there be no further hearing and allow the judicial review application to proceed.

Lord Justice Ryder:

23. I agree.

Master of the Rolls:

24. I also agree.