Neutral Citation Number: [2020] EWCOP 22

Case No: 1352489T

**COURT OF PROTECTION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2020

**Before** :

**THE HONOURABLE MR JUSTICE HAYDEN**
**VICE PRESIDENT OF THE COURT OF PROTECTION**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **BP** | **Applicant** |
| **- and -** | |
| **Surrey County Council** | **1st Respondent** |
| **- and -** | |
| **RP** | **2nd Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Ms Alison Harvey** (instructed by **Bison Solicitors**) for the **Applicant**
**Mr Scott Storey** (instructed by **Surrey County Council**) for the **Respondent**
**RP** (Litigant in person)

Hearing dates: 17th April 2020

- - - - - - - - - - - - - - - - - - - - -

# 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 HONOURABLE MR JUSTICE HAYDEN

This judgment was delivered following a remote hearing conducted on a video conferencing platform and was attended by the press. 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judgment) in any published version of the judgment the names and addresses of the parties and the protected person must not be published. 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.

## Mr Justice Hayden :

1. Following a remote hearing, conducted on a video conferencing platform which was attended by the press, I handed down judgment in this matter on the 25th March 2020. The case concerns an 83-year-old man (BP) who has a diagnosis of Alzheimer's disease. BP is also deaf but communicates through a "communication board".

2. At the earlier hearing I was unable to accede to an application, made by BP's daughter and litigation friend (FP), for a declaration that it was in his best interests to return home and in to her care. The reasoning underpinning my decision is set out extensively in the earlier judgment and does not require to be repeated here. There were fundamental difficulties with FP's plan. FP had been unable, due to the present health crisis, to identify any package of professional support. BP's lack of understanding of his own health issues occasionally causes him to overestimate his practical abilities and, as such, puts him in physical danger. Plainly FP would not have been able to care for and supervise her father in such circumstances for any length of time. BP's wife, Mrs RP, did not, at that stage, support the plan.

3. The ravages of Alzheimer's disease vary and progress differently with each individual. As I was at pains to emphasise in the earlier judgment, BP retains a significant degree of cognitive functioning. He has clearly and consistently expressed a wish to go home. He is a popular, sociable man who enjoyed many visits from his family before the present COVID-19 health crisis. It is clear from my reasoning in the earlier judgment that I was keen to protect BP's autonomy and that I considered that the deprivation of his liberty in these circumstances required to be kept under constant review.

4. On the 17th April 2020 the case was listed before me to address a number of issues. It is no longer necessary for me to set them out as, on the morning of the hearing, the parties were able to reach an agreement that BP would be able to move to his daughter's care. This will require assessment of BP's needs within his home and some adjustments to his accommodation. I have been told that it has been possible to identify carers who will assist FP. There was some debate as to how long this process would take but it is ultimately a balance between a comprehensive assessment of BP's needs and a recognition that his best interests now lie in a return home as soon as possible.

5. This change of circumstances arises in consequence of events following my judgment. In the early days of April, BP became unwell. He had not been eating, his manner had become flat and unresponsive and he was sleeping much more than usual. He had a high temperature but was not displaying any other symptoms of coronavirus. Eventually, an ambulance was called, BP was examined by the paramedics and anxious consideration was given as to whether he should be admitted to hospital. FP ultimately concluded that her father should stay in the Care Home and be closely monitored rather than be admitted to hospital where, in her assessment, he might be at a greater health risk. My impression is that this broadly followed the advice of the paramedics. The dilemma must have caused FP considerable anguish. However, as I explored at the March hearing, FP knows her father very well indeed and her assessment of the situation proved to be well founded. Within a few days BP's temperature returned to normal and he has remained symptom free. There have been no cases of the coronavirus identified at the Care Home.

6. In the weeks following my judgment FP was able to visit regularly and sit outside the French windows of her father's room, communicating with him as best she could. Fortunately, we have enjoyed beautiful spring weather and even when her father was asleep FP would remain outside so that she would be there when he awoke. The staff at the Care Home told FP that her father derived comfort from her visits, though FP was uncertain about this herself. All agree that BP has struggled to cope with or understand the social distancing policy which it has been necessary to implement. FP said that she believes her father thinks that he is being punished in some way. This, to my mind, reinforces the view of Dr Brett Du Toit that BP has little insight into his own health and his dementia. It is thought that the deprivation of contact with his family has triggered a depression. BP has been prescribed anti-depressant medication. At the earlier hearing BP's wife had not supported the plan to return her husband home. My clear impression of her evidence to me was that she considered that the plan would impose an unsupportable burden on her daughter, absent any professional support package and present risks to P that she considered unacceptable. I had a strong sense that Mrs RP's objections, at that stage, were driven by a concern for both her husband and daughter's welfare.

7. For this hearing FP filed a statement in which she told me that ***"****there has been no communication with BP via electronic means attempted to my knowledge, save for one video call to the GP when BP was feeling unwell"*. The advocates understanding is that neither the Care Home nor the family had tried to instigate video conferencing arrangements given the daily visits at the window. FP has continued to self-isolate in order to protect BP as far as possible. She states, and I accept without reservation, that she only leaves her home in order to visit the Care Home.

8. One further development which requires to be highlighted is the capacity assessment that was to have been undertaken by Dr Babalola. On the 6th April 2020, Dr Babalola indicated that he was not prepared to assess BP's capacity using remote means. The challenges presented by the potential arrangements are self-evident and I entirely understand why Dr Babalola felt uncomfortable. The Care Home was not prepared to accede to Dr Babalola's suggestion that he attend and wear suitably protective clothing. I make no criticism of that decision indeed, it strikes me as entirely appropriate. The Care Home has remained Covid free (in so far as it is possible to be sure) thus, the risk was not to Dr Babalola from the residents but the risk he might have presented to them. In my Guidance, dated 19th March 2020, I addressed some of the concerns identified by the professions and observed the reality that for the time being many, perhaps most, capacity assessments would require to be undertaken remotely. I stated, "there is simply no alternative to this, though its general undesirability is manifest". I further emphasised that with "careful and sensitive expertise" it should be possible to provide sufficient information. I specifically contemplated that video conferencing platforms were likely to play a part in this process as they now do in so many other spheres of life and human interaction. If BP had remained at the home it would have been necessary to instruct a different assessor. I remain of the view that creative use of the limited options available can deliver the information required to determine questions of capacity. It may be that experienced carers well known to P and with whom P is comfortable can play a part in facilitating the assessment. Family members may also play a significant role in the process. I am aware that in many areas of the country innovative and productive approaches of this kind are proving to be extremely effective.

9. One final point requires to be clarified, arising from paragraph 27 of my earlier judgment, which some have interpreted as indicating that I intended to notify the Council of Europe, directly, of my decision. The Local Authority did not interpret the passage in that way (it was in fact a single sentence) but read it to mean, as I had intended, that the government would be notified, in order that they might decide whether to issue a notification of derogation. This is what in fact happened.

10. Both parties submit and, I agree, that only a High Contracting party, which the Court manifestly is not, can derogate from the European Convention on Human Rights (ECHR) see: **Greece v UK (Appl.No.176/56 ECHR; Lawless v Ireland (No.3), Appl.No.332/57 [1961] ECHR 2**.

11. I take this opportunity to identify the appropriate legal framework. Article 15 (3) ECHR provides:

> *"(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."*

12. In ***A et ors v UK*** **Appl. no. 3455/05**, 19 February 2009, the ECHR observed, at paragraph 173:

> *"The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it."*

13. Additionally, in ***Denmark, Norway, Sweden and the Netherlands v. Greece*** **Appl. Nos. 3321/67, 3322/67. 3323/67 and 3344/67** again, it was reiterated that only a High Contracting Party is authorised to derogate.