Neutral Citation Number: [2020] EWCOP 3 (Fam)

Case No: 13552982

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2020

Before :

THE HONOURABLE MR JUSTICE HAYDEN

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Between :

QJ	**Applicant**
- and -	
A Local Authority	**Respondent**

- -
- -

Mr Oliver Lewis (instructed by Butler & Co Solicitors) for the **Applicant**
Ms Victoria Butler-Cole QC (instructed by the local authority) for the **Respondent**

Hearing date: 21 January 2020

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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

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 children 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.

Mr Justice Hayden :

1. On 10th January 2020, an application was made pursuant to s. 21A of the Mental Capacity Act 2005. ('The Act') The application is made on behalf of QJ, who is 87 years of age. He is represented via his litigation friend, Mr James Manning, who attends at court today. The application invites the Court to consider the best interests of QJ pursuant to Sch. A1 of the Act in relation to a standard authorisation, made by the first respondent local authority on 14th November 2019, which had the effect of depriving QJ of his liberty by requiring him to live and be cared for in a care home.

2. QJ has a diagnosis of vascular dementia. The medical records show that CT scans reveal him to have experienced a number of small strokes. He is both physically frail and unable to mobilise himself at all without assistance. He has been resident at the care home since September 2019. Before that, he lived in a different residential care home some distance away.

3. At some point in or around September 2019, it emerged that QJ was the subject of a police investigation which concerned allegations (sometimes referred to as 'historic') of sexual abuse. I have been told by Mr Lewis, counsel who appears on behalf of QJ today, that some of the detail of that investigation became known within the care home, and because of that it became necessary for him to change accommodation.

4. QJ, it should be recorded, has consistently indicated that he does not wish to be in this, or indeed any other, care home. Some five weeks ago, QJ decided that he would refuse food. Whether that was a gradual process or not is unclear, but the recollection of his litigation friend, advanced through Mr Lewis this morning, is that it was a clear decision after which QJ did not eat at all again. QJ has not eaten anything at all since 16th December 2019. I should state that the care home manager reports that from the end of October QJ's diet had considerably reduced.

5. On 20th December 2019, a member of the Local Authority's Complex Intervention and Treatment ('CIT') team informed the litigation friend that she had been given permission by the police to tell him that QJ was being investigated in relation to allegations of historic child sexual abuse. It was reported on the same day, that QJ was losing weight dramatically. The recordings show that in September 2019 he weighed 63kg with a BMI of 22. By December, he was weighing 53.8kg with a BMI of 20. It is further reported:

   > *"As a result of refusing to eat, [QJ] is now much weaker and his care needs are increasing. When he arrived at [the care home] his care needs were described as him requiring support to maintain activities of daily living including personal care, medication and nutritional intake, and support to engage in social interaction and activities. He now wears pads as can be incontinent, whereas before he was continent. His transfers are supported by carers as he lacks energy and is unsafe. He is refusing food and not interacting with staff or other residents."*

   It was noted that he was more receptive to attention to his personal care.

6. Mr Lewis identifies the issues in unambiguous terms. He states in his position statement, *"[QJ] has effectively been on hunger strike for a month. His loss of weight*

and general frailty makes this a very urgent case." For this reason, an application came before Tier 3 (High Court) of the Court of Protection.

7. The identified issue today is, essentially, whether QJ can make decisions concerning his nutrition and hydration. There were other identified issues: a) his capacity to conduct proceedings; b) his continuing capacity to make decisions concerning his residence. It was proposed that there should be a detailed capacity assessment.

8. This morning events intervened and Mr Lewis informed me that shortly before the case was to be heard, QJ had suffered a significant bleed. His legal team had been informed by the care home that they thought that QJ was dying. There are two Treatment Escalation Plans ('TEPs'), as they are called, filed within the papers in this application. One is dated 22nd October 2019, and the most recent dated 20th December 2019. Unfortunately, there have been some amendments to the October TEP document which, it appears, in fact reflect the later assessment. The December TEP records that QJ had decided that he would not want any treatment at all apart from palliative care. When he expressed those views, nursing staff were present for the discussion. Specifically, QJ is recorded as not being for intravenous fluids, antibiotics, (intravenous or oral), artificial feeding, or defibrillation. All of that seemed to reveal a consistent picture of a man who no longer wanted to live. For the avoidance of doubt, these aspects of treatment were addressed by the doctor in tick box format. He considered, correctly in my view, that they were encompassed by QJ's expressed general position.

9. We adjourned the case for 45 minutes in order that QJ could be seen by his GP, Dr E. Mr Lewis recounted to me what his GP had said. He reported that the bleed was not "a massive bleed" and that the blood loss was not "huge". It was confirmed that QJ was drinking between half a litre and a litre of water per day. He was not eating anything. Dr E expressed the view that if QJ continues to drink fluids to this limited extent, he might have a life expectancy of between three and five weeks.

10. Notwithstanding that QJ had been assessed as having lacked capacity for decisions relating to his day to day care and residence, Dr E thought that QJ had capacity to make decisions in relation to his medical treatment. Indeed, he indicated that, in his view, QJ was more effectively capacitous than might appear on first impression. Dr E took the view that QJ had decided that he did not want to take food and that it would be entirely wrong to force-feed him. As Mr Lewis put it, the doctor considered that QJ *"should just be allowed to die as he seemed to wish."* Again, all this seemed to point in one consistent direction.

11. There was another piece of evidence that arose from a visit by Mr Lewis' solicitor, Ms Bulmer, to QJ on 9th January 2020 in which she sought to take his instructions. When she asked him if he was happy to talk with her, he responded, *"it's up to you how you choose to waste your time."* She persisted, properly, and explained the role of the Court of Protection. She appeared to be able to engage QJ in a dialogue, albeit that his responses were essentially monosyllabic and frequently, just a nod.

12. Ms Bulmer asked QJ whether he wanted to leave the care home. He nodded yes, as he had done throughout. She asked him whether he wanted to live elsewhere. He stated "yes". The attendance note records that QJ pointed to the window or the door. Ms Bulmer rephrased the question and QJ stated "home" while pointing to the window. She asked him about his refusal to eat. She explored whether he appreciated that he

would die if he continued to refuse food. Although the answers to the other questions had been clear, if blunt, in respect of this question he merely shrugged his shoulders and looked down to the floor. She asked him if he knew where he was and the answer to that question was rather more ambivalent, in part she observes in her note as a result of the institutional nature of the place he is living in. She asked him about the specific food he likes to eat and he responded, but he also said, *"if I like what is put in front of me, I'll eat it."* There is a chasm between what he says and what he does because he has, as I have mentioned, taken no food at all for five weeks.

13. When the doctor had left this morning, the litigation friend, in the presence of Ms Bulmer and Mr Lewis, spoke on the telephone to QJ again. He asked him, *"Would you like treatment that is intended to keep you alive?"* He nodded *"yes"*. The same question essentially and entirely properly was rephrased, *"Would you like nothing so that you could die?"* The answer was *"no"*. He was asked, *"Would you like to start eating?"* He responded in the terms he had used in Ms Bulmer's earlier meeting, *"if I like what is put in front of me, I'll eat it"*. He was asked if would like to be put on a drip to receive nourishment and he nodded. This was an entirely unanticipated turn of events, completely inconsistent with both his articulated wishes and feelings and his own conduct. He took everybody, without exception, by surprise.

14. It required to be teased out carefully, but ultimately Mr Lewis and Ms Butler-Cole QC, who appears on behalf of the Local Authority, settled on an agreed way forward. Firstly, that a suitably qualified psychiatrist should report looking at questions of capacity, and secondly, that a statement should be obtained from the GP setting out both his understanding of QJ's capacity and his recollection of the evolution of QJ's thought processes in relation to medical treatment. In particular, the following were identified as requiring to be addressed:

(a) Does QJ have capacity to decide on whether to receive nutrition and hydration?
   1. Orally;
   2. Artificially.

(b) Does QJ have capacity to decide more generally on medical treatment?

(c) Does QJ have capacity to decide on admission to hospital?

15. Though the only evidence currently available suggests that QJ has capacity in relation to the question of nutrition, his remarkable and unanticipated volte-face this morning undermines this and raises inevitable questions. Given the challenges he has faced regarding capacity to decide on residence and care, the cumulative picture leads me to conclude that there are reasonable grounds for concluding that he may not have capacity in relation to this issue. For this reason, I agree with counsel that the way forward is as set out above and I have accordingly listed the case before me on 27th January.

16. A further ancillary issue has arisen. If it were determined that QJ had capacity to decide whether to receive nutrition, irrespective of which decision he made (i.e. either to take nutrition or to refuse it), does the case, in those circumstances, need to come back before the Court? Ms Butler-Cole took me to the Guidance of this Court: '**Applications relating to medical treatment**' issued 20th January 2020 and in particular to paragraph 8 which is headed '**Situations where consideration should be given to bringing an application to court**'. In that paragraph, the following is stated:

> *"If, at the conclusion of the medical decision-making process, there remain concerns that the way forward in any case is:*
>
> ***finely balanced**, […]*
>
> *Then it is highly probable that an application to the Court of Protection is appropriate. In such an event consideration **must** always be given as to whether an application to the Court of Protection is required."*

17. Ms Butler-Cole considers that this may very well be a "finely balanced decision" which in and of itself might well have required an application to the court. But she submits, and I agree, that where there is already an extant application in relation to the central issue, then the matter should only be concluded within the proceedings of the Court and not subsequently left to clinical decisions. As I have said, I agree with that submission.