Neutral Citation Number: [2020] EWCOP 60

Case No: 13677496

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2020

Before :

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

- -

Between :

Michelle Davies **(by her litigation friend John Davies)**	**Applicant**
- and -	
(1) WIGAN COUNCIL **(2) NHS WIGAN CLINICAL COMMISSIONING GROUP**	**Respondent**

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Ms Lorraine Cavanagh QC (instructed by **Irwin Mitchell**) for the **Applicant**
Ms Victoria Butler-Cole QC (instructed by **Local Authority** and **NHS Wigan Clinical Commissioning Group**) for the **Respondent**

Hearing dates: 23rd November 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.

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THE HONOURABLE MR JUSTICE HAYDEN

This judgment was delivered following a remote hearing conducted on a video conferencing platform and was attended by members of the public and the press.

Mr Justice Hayden :

1. This is a challenge, pursuant to s.21A of the Mental Capacity Act 2005 (MCA), to the standard authorisation which was put in place for Mrs Michelle Davies at the BL Lodge. Though Mrs Davies was residing there at the time the application was made, that is no longer the position (see below). The authorisation had been in place since the 29th January 2020. The court has yet to send an order confirming who should be served with this application, which was issued on 5th November 2020. The application was accompanied by 2 statements, one from Michelle Davies' husband, Dr. John Davies and the other from her son, Mr Kane Davies. Two further statements have subsequently been filed by Dr. Davies.

2. In the course of a pandemic, it is inevitable that the needs of the individual will sometimes be displaced by the even greater obligation to protect the wider public. The burden that falls upon individuals, in consequence of this tension, is not and cannot be distributed evenly. In what has now become known as lockdown 2, each of us is once again facing considerable restrictions, to various degrees, on our individual liberty. There are few circumstances where that burden falls more heavily, and with greater risk to mental health and wellbeing, than upon those who are accommodated in care homes. As this difficult period has progressed, so too has our realisation of its evolving impact.

3. For those in care homes, perhaps more than any other, deprivation of contact with loved ones has the potential to corrode quality of life to such a degree that, it may become difficult to evaluate where the balance of harm lies, as between a risk of exposure to an insidious and life threatening virus and compromising the most basic quality of life. Into this equation of competing interests must be factored the moral imperative to protect a group as well as an individual. These countervailing interests each require consideration. This cannot be regarded as an either-or situation. The fact that the interests of an individual and those of the wider group are difficult to reconcile, perhaps frequently irreconcilable, does not absolve the care home, or the state more generally, from engaging in the effort to do so. The strength of the obligation to protect the rights of the individual, particularly the vulnerable and mentally incapacitated, is not in any way diminished by the pandemic health crisis; it is, if anything, enhanced.

4. As has been emphasised in the course of submissions by Ms Cavanagh QC, on behalf of the applicant Mrs Michelle Davies, (acting by her litigation friend, her husband Dr. John Davies), and Ms Butler-Cole QC, acting on behalf of the respondent Local Authority and Clinical Commissioning Group, those in care homes should not be regarded as an homogenous group with identical needs. Their characters, personalities, individual needs, which are as various as the needs of the rest of us, all require to be considered. I have no doubt that those who work in care homes, who I have frequently heard in evidence over the last 9 months, are acutely aware of this and will regard this statement as trite and obvious. As I have had occasion to note in other cases, in the course of this challenging year, carers have so frequently taken on the role of substitute family. This has been, almost universally, met with fulsome and heartfelt gratitude by the families themselves. The carers' sensitivity, kindness, and simple humanity, has for many of the residents in care homes, rendered the unbearable endurable. The objective of any plans or policies devised in care homes should always be to harness the skills and strengths of the carers so as most

effectively to promote the best interests of the individual resident. My emphasis here is on the individual.

5. Mrs Michelle Davies is 58 years of age. That age, I think, can properly be regarded as still quite young in 2020. In any event, it is certainly young by comparison with the average age in the care home population. Mrs Davies was 17 years of age when she met her husband John. They were married on 2nd April 1983. It is a relationship of 40 years and manifestly a full and happy one. They have a son, Kane who is now 33 years of age and very close to both his parents. Mrs Davies, as has been outlined to me by Ms Cavanagh and Dr. Davies, has been a very public spirited individual, with a developed sense of public duty. Mrs Davies has been described as someone who would go out of her way to help other people. For years she has collected for Barnardo's and has been involved in fundraising for her son's school, alongside her work as a clerk at Children and Family Services, Wigan County Council. In that role, she provided invaluable support to enable children to have contact with parents that would not otherwise have been possible. Life was not all about hard work for Mrs Davies. She is a woman who plainly has known how to enjoy herself to the full. I am told that she has travelled to 87 different countries, during the course of her marriage, and perhaps even more remarkably she has managed to enjoy 22 separate cruises. She has a great interest in music and dance, and she enjoyed Latin, ballroom and salsa dancing with her husband. I hope that something of that enjoyment of music, at least, has remained.

6. Into this full and happy life, grounded in this successful marriage, came tragedy. On 14th December 2018, Mrs Davies suddenly and, without any physical warning, suffered a significant subarachnoid haemorrhage, secondary to an aneurysm in her brain. A week later this was followed by a stroke. Magnetic Resonance Imaging (MRI) scans revealed extensive softening and diminishment of the brain parenchyma i.e. significant brain damage.

7. Mrs Davies had been perfectly healthy, she enjoyed her privacy but also had a large group of friends. The shock of what has happened continues to reverberate in this family and in her wider social circle. Mrs Davies is now able to feed herself, but she sometimes needs assistance when doing so, or, at least, supervision. Medications are managed by her carers and all manual handling of her is undertaken by 2 staff, due to her inability to mobilise independently. She was in hospital for 11 months. Every day Dr. Davies visited her, frequently with his son, sometimes with Mrs Davies' parents who are in their eighties.

8. At the conclusion of this period Mrs Davies moved to a specialist brain injury neurorehabilitation unit, the BL Lodge. The key objectives in the unit were to maximise her independence and to achieve the greatest possible *'functionality in the various domains'* of the brain. Dr. John Davies spent at least 3 hours a day at his wife's side and sometimes as many as 6 hours. When at the unit, Dr. Davies spent time taking his wife outside, stimulating her senses, promoting in the most tender and affectionate way the wider objectives of the care plan. He would undertake passive movement of her limbs, supervise feeding and medication, talk to her constantly. They watched television together and Dr. Davies tried to engage her with the world around her. Two, often three times per week Kane would visit his mother, doing very much the same thing as his father. On Saturdays, Mrs Davies' parents would visit.

9. Ms Cavanagh told me, in the course of opening this case, that Mrs Davies had been a very popular lady before her stroke. The extent of that is clear from the fact that so many months on her friends still come very regularly to visit her. These are securely rooted longstanding friendships. Such was the commitment and consistency of the visits that Dr. Davies had to effectively draw up a schedule which co-ordinated visiting times and, as he has told me, permitted proper time for his wife to rest. All this must have been a great boost to the rehabilitation process.

10. The tragedy of the stroke was followed by further tragedy in March this year when the pandemic health crisis struck a largely unsuspecting world. It changed life beyond recognition for this couple. Dr. Davies had seen the storm clouds gathering and had gone out to acquire a 'smart phone' which was to become the couple's only channel of communication between 17th March and 6th July 2020.

11. This couple who had been so close since their teenage years fell back, like the rest of us, onto video conferencing platforms and WhatsApp. Manifestly, this was an acutely difficult time for both. More than that, it has been a period of almost unendurable pain. They managed between 17th March and early April to arrange video contact by smartphone every single day. Carers had only to assist in ensuring the connection was made and Mrs Davies was able to manage after that. The couple was faced with a change of policy at the unit in April 2020, which sought, no doubt for practical and pragmatic reasons, to reduce calls to twice per week. Dr. Davies was gladiatorial on his wife's behalf, he simply would not yield to that limited degree of contact. He could not see why that restriction was necessary or proportionate, nor did he consider that it met, in any way, his wife's welfare needs. He was, I am quite sure, entirely correct. He managed through his persuasion and advocacy - he is an articulate man - to secure the restoration of contact (by smartphone) for 3 or 4 times per week for a period of 30 minutes. I bear in mind that I have not yet heard evidence from BL Lodge and, accordingly, have confined my summary to an outline structure. From April the couple pressed on until July which appeared to bring with it the hope of less restricted arrangements.

12. Between 6th and 31st July, visits were allowed, by Government regulation, for one household (which John Davies and Kane Davies are) to have 2 x 30 minute socially distanced visits at 2metres apart and with masks worn. It is impossible not to have been moved by Dr. Davies' account of that first meeting. He was, he told me, *"very anxious"*, concerned that the wearing of masks and social distancing might be confusing to his wife, perhaps causing her to suffer greater distress than happiness. It transpired he was wrong. He told me how, upon their reunion, his wife positively beamed. His description was so graphic that he brought her smile into this courtroom. A member of staff remained present for the visit and the couple dared to hope that the future might be a little easier. Sadly, as we all know, that was dashed quickly, particularly in Greater Manchester, where the care home was based. Just before their third visit, the arrangement was, of necessity, rescinded as that area of the country began, once again, to respond to the rapid reproduction rate of this persistent and insidious virus. Contact reverted to video calls set at 4 occasions for 30 minutes per week. There was no window contact.

13. As the months went by, Dr. Davies began to be apprehensive and anxious about the impact that their estrangement was having on his wife's mental health. Events took a yet further desperate turn when Michelle Davies contracted the Covid-19 virus.

Despite the health challenges that she faces and that I have outlined above, she responded well to the virus, perhaps because she had always been so active and energetic. There is no history of respiratory problems. It is entirely unnecessary to record how distressed Dr. Davies and his son were at this time. It will be obvious from all I have said above.

14. In mid-October 2020, the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020 (SI 2020/1105), were brought into force. Schedule 2 specifies the areas to which the regulations apply. Schedule 1, Tier 3 restrictions Part 1, section 5(3) provided:

> ***"Exceptions in relation to indoor gatherings***
> *5.—(1) These are the exceptions relating only to indoor gatherings.*
> ***Exception 2: visiting persons receiving treatment etc***
> *(3) Exception 2 is that the person concerned ("P") is visiting a person ("V") receiving treatment in a hospital or staying in a hospice or care home, or is accompanying V to a medical appointment and P is—*
> *(a) a member of V's household,*
> *(b) a close family member of V, or*
> *(c) a friend of V."*

15. On the 15th October 2020, in response to a good deal of confusion on the part of a variety of professionals as to what the Regulations actually required, I published an open letter, hoping to bring some clarity for practitioners and more widely. In the letter I noted:

> "This provision **permits** contact with relatives **'staying'** in Care homes, under the same arrangements presently assessed as Covid-19 compliant. It will undoubtedly be the case that the actual arrangements will have to be tailored to the particular individual and the circumstances within the home, during the course of what we have now recognised to be the second wave of the pandemic. What is important to emphasise is that these arrangements have been identified within the Regulations made by the Secretary of State and are therefore lawful."

16. On 5th November 2020, Dr. Davies issued this application. On the same day, in anticipation of a second period of "lockdown", The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020 came into force, for a period of 20 days. Regulations 5 and 6 mirrored the previous Regulations, (as set out above). On the 5th November Guidance was issued by the Department of Health and Social Care.

17. On the 6th November 2020, in an attempt to forestall further confusion, I published a second open letter, in which I also sent out a link to the guidance. I stated:

> "I am very happy to say that there is now full recognition by the Department of Health and Social Care that these provisions permit contact with relatives staying in Care homes…

> It is recognised that receiving visitors is an important part of care home life and that maintaining some opportunities for visiting to take place is **critical for supporting the health and wellbeing of residents and their relationships with friends and family.** The guidance sets out measures that can be put in place to provide COVID-secure opportunities for families to meet using visiting arrangements such as substantial screens, visiting pods, and window visits. Emphasis is correctly, in my view, placed on the importance of Care Home providers, families and local professionals **working together** to find the right balance between the benefits of visiting on wellbeing and quality of life, and the risk of transmission of COVID-19 to social care staff and vulnerable residents as we enter national restrictions.
>
> Care homes vary very widely each is unique in its physical layout, surrounding environment and facilities. Residents vary in their needs, health and current wellbeing. Providers will usually be best placed to decide how to organise visits in their own setting in a way that meets the needs of their residents individually and collectively. The individual resident, their views, their needs and wellbeing are an important focus of decisions around visiting."

18. On 16th November 2020, Mrs Davies was moved to a new care home. At that care home, she was accommodated in a ground floor room which has enabled her to have window contact with her husband, her son, her friends and her parents. On the first day, with the window inches ajar, it is recorded that Dr. Davies battled the elements for 90 minutes. He recognises that Mrs Davies is sometimes confused as to the reasons for the restrictions on their contact, but he tells me, and I accept, that his wife has found the contact comforting. He told me that she frequently blows kisses to him and Kane and they both respond.

19. A couple of days ago, Dr. Davies stood outside the window in driving rain, sheltering under an umbrella. In the course of conversation something amused Mrs Davies and the couple were seen laughing together. It was a poignant moment in which humour triumphed in the face of persistent adversity. Mrs Davies, as a new arrival at the home, has had to be quarantined. That has brought yet further challenges. Over the course of the last week there have been a number of incidents. Last Saturday, on being visited by friends, Mrs Davies was observed through the window, to have slipped from her chair on to the floor. She requires to be belted into the chair, and for some reason that had not been communicated to those responsible for her care that day. The friends contacted Dr. Davies who was greatly distressed. He contacted the care home immediately and the problem was addressed. All this indicates to me that, in addition to the more obvious benefits of contact, Dr. Davies also has a role in passing on to those presently caring for his wife, much of what has been learnt in her previous care unit.

20. Even more recently, Dr. Davies noticed that his wife had been left alone to eat, even though it is necessary for her to be monitored. Part of this troubling recent history may be rooted in the restrictions required by the quarantine period. It may be that

wider social integration will render her less vulnerable. I have not heard from BL Lodge today and so refrain from any further comment. Mr Davies has drawn to my attention that his wife has been provided with an alarm to use when she requires assistance. He tells me, and again I accept, that she does not, in fact, possess the cognitive ability to use it. All this signals to me the wider importance of Dr. Davies' contact. He is the conduit through which much of what has been learned in the earlier unit can be passed on to the care home.

21. For reasons that are complex and which I need not dwell on, the care home has, at the moment, concluded that it is only able to facilitate window contact twice per week. This is, as I have been told, in part a consequence of the configuration of the building and no doubt also due to the pressures on staff, as they phlegmatically face this second challenging period.

22. As I have emphasised, Mrs Davies' needs, in respect of contact, must be regarded as unique to her, for the all the reasons I have set out above. The scope of contact must be evaluated on an individual and not a generic basis. Her identified needs will then have to be assessed in the context of the realistically available options.

23. I caused Ms Butler-Cole to ask for the care home to be contacted to see, if in the interim, when Mrs Davies is released from quarantine and until this case can next come before the court, 'window contact' can be maintained on a daily basis. I was encouraged by the swift response, which I am bound to say was what I expected and which I consider reflects the cooperative spirit that I have seen frequently, in similar contexts, over the past months.

24. As has been discussed at this hearing, today has seen some very promising news, concerning the likely efficacy and availability of vaccines. We are not there yet, the vaccinations have not yet been authorised, but the prospects are encouraging. All this, taken together with the developments and advances in the Covid-19 testing process, has the real potential truly to change the entire scope and ambit of contact in care homes. Whilst we may now be glimpsing the promised land, we are not yet entering it. Perhaps it also requires to be remembered that, in the Biblical story, not everybody who saw it was permitted to enter. For the time being considerable challenges remain. Ms Cavanagh has persuaded me to authorise a structure of investigations that should produce a clearer picture of the contact options.

25. I emphasise that I do not want these enquires to be confined by what is presently available. Any plan should reflect the need for frequent and vigilant review and should proactively contemplate the various alternatives that may soon emerge. With some diffidence, in this ex tempore judgment, I indicate that, in the Court's assessment, the time has come for care homes to position themselves in the vanguard of the developing opportunities. In other words, they should move to the front line and be careful not to lag behind when identifying the emerging options. There are many reasons why this must be the case, not least the fact that (whilst this may not apply to Mrs Davies), for many in the care home system, time is simply not on their side.

26. Before this hearing began, I heard from Ms Cavanagh and Dr. Davies as to why it was thought Mrs Davies would like her name to be in the public domain rather than anonymised. Dr. Davies told me that his wife's sense of public duty, as demonstrated by her work and charitable pursuits, has been an important facet of her personality

and code by which she has lived. He told me that she would have wanted to do all that she could to ensure that the litigation, brought on her behalf, achieved wider benefit to others. He considered she would have recognised that she was more likely to achieve that by being identified as Michelle Davies rather than by being anonymised.

27. It is not necessary here to review the framework of the applicable law. It is however helpful to consider the following passage in **Re (C) v the Secretary of State for Justice [2016] UKSC 2,** Lady Hale went back to basic principles in respect of open justice stating:

> "The principle of open justice is one of the most precious in our law. It is there to reassure the public and the parties that our courts are indeed doing justice according to law. In fact, there are two aspects to this principle. The first is that justice should be done in open court, so that the people interested in the case, the wider public and the media can know what is going on. The court should not hear and take into account evidence and arguments that they have not heard or seen. The second is that the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge. The rationale for the second rule is not quite the same as the rationale for the first, as we shall see. This case is about the second rule. There is a long-standing practice that certain classes of people, principally children and mental patients, should not be named in proceedings about their care, treatment and property. The first issue before us is whether there should be a presumption of anonymity in civil proceedings, or certain kinds of civil proceedings, in the High Court relating to a patient detained in a psychiatric hospital, or otherwise subject to compulsory powers, under the Mental Health Act 1983 ("the 1983 Act"). The second issue is whether there should be an anonymity order on the facts of this particular case."

28. The Court's approach in balancing the competing interests, protected by Articles 8 and 10 ECHR, in which neither is to be given priority, is well established. In the context of the reporting of Court of Protection and family proceedings, see **M v Press Association [2016] COPLR 592, [8-18] [31]; V v Associated Newspapers Ltd [2016] EWCOP 2; Re A (Reporting Restriction Order) [2012] 1 FLR 239 [22]-[39]; Re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 553 and Re J (A Child) [2013] EWHC 2694 (Fam) at [20]-[24]**. In M v Press Association, at paragraph 17, I highlighted the applicable practice guidance to be that given by Lord Neuberger, Master of the Rolls (as he then was), '**PRACTICE GUIDANCE: INTERIM NON-DISCLOSURE ORDERS' [2012] 1 WLR 1003.** Having regard to these principles, I consider that Dr. Davies' assessment of his wife's views on this issue is likely to be accurate. Whilst I do not find that to be, of itself determinative, it weighs sufficiently strongly to indicate that the balance of competing interests weighs against anonymity.

29. Dr. Davies has been a compelling and eloquent advocate on his wife's behalf. He has the advantage of an experienced and impressively prepared legal team. Ms Butler-Cole has been able, in a way which exemplifies best practice, to forge a constructive

and pragmatic way forward, keeping Mrs Davies' interests at the centre of this challenging process.