Neutral Citation Number: [2021] EWHC 1037 (Fam)

Case No: FD21P00222 / FD21P00231

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2021

Before :

THE HON. MR JUSTICE COHEN

- -

Between :

A TEACHING HOSPITALS NHS TRUST **Applicant**

- and –

DV (A CHILD) **Respondent**

- -

Miss Emma Sutton (instructed by **Capsticks Solicitors LLP**) for the **Applicant**
Mr Shane Brady (instructed by **Richard Cook Solicitors**) for the **Respondent**

Hearing dates: 19 April 2021

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Approved Judgment

I direct that 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 HON. MR JUSTICE COHEN

This judgment was delivered in private. 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.

The Hon. Mr Justice Cohen :

1. I have before me two applications concerning DV, who was born on 18 December 2003 and is now 17 years and 4 months old. The first is that brought by the relevant NHS Trust.

2. DV has a diagnosis of metastatic pulmonary osteosarcoma which is a form of bone cancer. He requires treatment as soon as possible for a right lung metastasis by way of right lung pulmonary metastasectomy under general anaesthetic. The surgery is intended to be keyhole surgery, but may, if things do not go completely to plan, need to be open surgery.

3. DV agrees that surgery should take place, as do his parents. DV, like his parents, is a practicing Jehovah's Witness of his own election, and he does not consent to the use of blood products under any circumstances, whatever complications may arise during the course of the surgery.

4. This surgery, like almost all surgeries, carries a risk of haemorrhage, and it is in those circumstances that the Trust applies for declarations that it is lawful, and in DV's best interests, that first, he should have the pulmonary metastasectomy under general anaesthetic, and secondly that the treating clinicians will not take steps towards providing him with a transfusion of whole blood, be that red cells, white cells, plasma and platelets, against his wishes. As I have said, DV has made it very clear that there must not be any form of treatment of that nature.

5. The declarations are sought solely under the High Court's inherent jurisdiction and not under the Children Act 1989 as the case involves a young person who has reached the age of 16, and the issue before the court does not concern an aspect of parental responsibility to which a specific issue order under section 8 of that Act would apply (Re JM (A Child) [2015] EWHC 2832 (Fam) at paragraph and Re X (No2) [2021] EWHC 65 (Fam) at paragraph 33).

6. The proceedings are in the Family Division concerning a minor, and as such, rule 27.10 of the Family Procedure Rules 2010 provides that the proceedings should be heard in private unless the court directs otherwise or another enactment directs otherwise. Pursuant to section 12(1)(a)(i) of the Administration of Justice Act 1960, publication of information relating to such private proceedings would amount to contempt of court. Given the importance of transparency in the family courts and the level of public interest in cases such as this, I considered that the case should be heard in open court in part, subject to an appropriate RRO, but in private when DV and his parents gave evidence. The parties agreed, and I have made a RRO prohibiting publication of information which would identify the name and address of the Trust, the hospital, the names of the treating clinicians (to be referred to as Dr A, B, C and D only), and DV's name and the names of his family.

7. Let me give the background chronology, helpfully prepared by Miss Sutton for the Trust, and agreed by Mr Brady on behalf of DV.

8. DV was still 13 years old when he was first diagnosed with osteosarcoma. The primary tumour affected his left leg, but metastatic disease was found in both of his

lungs. He had chemotherapy for a considerable period from May 2017 until April 2018.

9. In 2017, DV received a transfusion on more than one occasion of donated blood due to low blood count and severe anaemia. That has caused him huge distress, and what has now been diagnosed as post-traumatic stress disorder.

10. In 2018, DV says he began to think more and more about whether he himself wanted to become one of Jehovah's Witnesses.

11. On 1 February 2018, DV had an above the knee amputation of his left leg to remove the tumours in the leg, on 28 February he had a bilateral lung metastasectomy, and on 13 August 2018, a right lung metastasectomy. Thus it is, he has already had two operations on his right lung – the lung which is currently affected.

12. Following that second lung procedure, between August 2018 and August 2020, DV appeared to be in remission and in good health. Right in the middle of that period, in August 2019, DV was baptised as a Jehovah's Witness.

13. On 5 February 2021, a CT scan revealed a nodule in keeping with a metastatic relapse of his bone cancer in the right lung, and it is the treatment of that which I now have to consider.

14. Surgery was planned and scheduled to take place on 1 March. Unfortunately it did not take place because the Consultant Anaesthetist only discovered on that day, and I do not say this with any sense of criticism of him, the strength of DV's objections to a blood transfusion. He, the anaesthetist, was not prepared to continue with an operation which, if things went wrong, could not be remedied by a blood transfusion.

15. Intensive meetings have taken place over the course of the month thereafter, and on 1 April 2021, the Trust made an application for declaratory relief due to what it regarded as a finely balanced decision as to what was in DV's best interests, and it is that which now comes before me.

16. The Trust rely on the well-established jurisprudence that when there are finely balanced medical issues, a divergence of medical opinion, or lack of agreement, a court application can and should be made, and I will revert to that issue later on in my judgment.

17. The application has been supported by four statements, by respectively, Dr A (Consultant in Paediatric Oncology & Haemato-Oncology), Dr B (Consultant Paediatric Surgeon with a specialist interest in thoracic surgery), Dr C (Consultant Paediatric Anaesthetist) and Dr D (Principal Clinical Psychologist). I heard from Dr B and Dr C in respect of particular issues which arose in the course of the hearing. In addition, I had a statement which DV himself had made, and I pay tribute to its eloquent drafting, and I have heard from DV in person and from his parents.

18. It is important to stress at an early stage in this judgment that the relationship between the family, namely DV and his parents on the one hand, and the treating team on the other, is good. Matters are discussed between the hospital, DV and his parents and I want to thank DV's parents in particular for the praise that they gave to the treating

team. It was generous and appropriate of them. It is not something that one comes across that often in this sort of work. This case is not in any sense a battle between patient and doctors. Everyone agrees that DV should have the surgery, and have it soon.

19. DV plainly has capacity and everyone agrees about that, including the clinical psychologist. He can understand the relevant information, he can retain it, weigh up the information – above all, the risks on the one hand of having surgery and on the other hand of not having surgery - and the risks of what might happen if he refuses blood products. He has made a considered decision and communicated it clearly.

20. However, in law DV is not an adult; he is a minor (and I prefer the word "minor" to "child"), and therefore, says the Trust, the court has to make a decision in his best interests. It is not a decision that can be left until DV reaches the age of 18, because that might be too late.

21. Miss Sutton, helpfully, drawing on the expert evidence that has been provided, has set out a list of factors for and against the use of blood products being given and it is right that I should go through them, starting with the arguments in favour:

    i) DV's wishes which are clear, constant, firmly expressed, and which have been held for a considerable period of time.

    ii) His age. In law, in 8 months' time, he will be an adult and if he were 8 months older, I would not be hearing this case.

    iii) The root of his wishes. They are founded in deeply-held core religious values. He has thought about the issue carefully, and is loyal to the tenets of his faith.

    iv) The risk of psychological harm if blood products are given against his wishes. He looks back on the transfusions he had in 2017 and sees them as "terrible events" and says "I felt like I had been unfaithful to God", for which he still feels guilt. If blood products were to be given to him, Dr D says she would expect "a high risk of re-traumatisation. It may also undermine the coping strategies he has naturally developed over the years to control his thoughts, feelings and memories and risk taking away his personal agency".

    v) The low risk of haemorrhage, put at about 1%. Of course if there is haemorrhage it could be very serious indeed, but arithmetically this is a low risk.

    vi) That already low risk of haemorrhage is mitigated further to some extent by the positioning of the nodule right at the edge of the lung, which is one of the reasons why keyhole surgery will be undertaken, in itself the least invasive form of surgery; and the methods that will be used by clinicians to minimise risk of bleeding including a) pre-dilution and the aggressive use of intravenous fluid that dilutes blood volume so that each drop of blood has a reduced volume, b) use of tranexamic acid, c) the use of cell salvage to return some of the lost blood, and d) a clinical team assembled to ensure surgery is conducted as effectively as possible.

vii) It would be counterproductive to proceed against DV's wishes because it may make him reluctant to have future surgery if needed.

viii) The sheer practical difficulties of any other course. DV is physically grown up and he will not attend surgery unless he has the reassurance he seeks, and in practical terms, he cannot be forced to go to hospital and neither would the doctors treat him in those circumstances.

ix) The view of DV's parents who support his decision and feel strongly that his views should be respected.

22. On the other hand there are two powerful arguments outlined by Miss Sutton for blood products to be given:

i) Above all, they may be necessary. The risk is not non-existent, and if blood products are not available during the course of surgery and there was excessive haemorrhaging, then the damage that could be caused to DV could be very serious and potentially fatal.

ii) DV wants to survive and he has made it very clear that he wants to live. As I will come onto, DV has made a life of great fulfilment in the difficult circumstances he has been subject to.

23. The treating team agree that the single most important thing is that he has the surgery and to secure that, there must be agreement and certainty that blood products should not be used. I would like to thank the hospital and its staff for its responsible and sensible handling of the case and the assembly of a team who have all guaranteed to honour their word that no blood products will be used. So the clear view of the treating team is that to give DV blood products would be damaging to his welfare and counterproductive in all the ways that I have mentioned.

24. I, like the treating team, am satisfied that DV is a young man who understands all the relevant factors and that he has taken them fully into account.

25. I want to say that DV is plainly a remarkable young man, who has been through the wars, enduring repeated cycles of chemotherapy as well as the amputation of his leg and repeated physiotherapy; yet, he has made himself a career and is doing extremely well in his metal work and engineering. He has the admiration of his colleagues.

26. He has coped with what life has thrown at him and has gained the respect of those who come into contact with him. He has close friends and a very supportive family. He finds great comfort in his faith, and I have read much about him to his credit, not all repeated in this judgment to save his blushes. I am sure I speak for everyone when I wish him the very best of luck in the treatment he will undergo.

27. I accordingly approve of the treatment plan.

28. There is one area of disagreement, and it is not unimportant, which relates to the form of the order. It is said on behalf of DV that court permission is not required, and if I can paraphrase the argument, there is no serious issue upon which the courts

determination is needed as the treating team, DV, and his parents are all of one mind, and there is no substantial decision to be made.

29. DV has the capacity to make his own mind up, and Mr Brady points me to three particular points. First, DV is 17 years and 4 months old, and soon to be 18. Secondly, the risk of an adverse event, a risk he has chosen to take, is very small, only1%. Those I accept are powerful points. The third is that the nature of DV's treatment may only be life extending rather than curative. I do not think that last point is a point of weight. It seems to me not to go to the issues that I have to determine and, in any event, might be based on a false assumption.

30. Thus says Mr Brady, in those circumstances, the court should declare that it is lawful to follow the agreed treatment plan and that DV's wishes are determinative. It is not for the court to make the decision for DV. And finally, says Mr Brady, under section 8 Family Law Act 1969, DV has the power to consent to treatment himself, and having given his consent the treatment is lawful without the need for further authorisation from the court.

31. Against that, Miss Sutton on behalf of the Trust, says that the application has been properly brought before the Court. The clinicians find it a finely balanced decision in circumstances where, firstly, they are acting against their training and instinct by determining in advance that they will not avail themselves of what might be a life-preserving form of treatment, and secondly, they wish the court to make the decision. Thirdly, this is not in any sense a trivial decision, and to see the difficulty, look what happened on 1 March 2021 where the procedure was planned, but did not take place for the reasons given. Fourthly, the court has the power to make the decision about medical treatment which may or may not have the consent of the young person, and even a 17 year old does not have the absolute right to determine what his or her treatment should be, and to provide that, even in these relatively non-contentious circumstances, a minor has the right to decide his treatment overthrows decades of legal authority.

32. I well understand why DV seeks the ruling. It of course makes no difference to this operation, but it may lay the ground for any other operation required before he reaches the age of 18.

33. I have read the passages referred to by Mr Brady in the decisions of the Divisional Court and of Mrs Justice Lieven in the two Tavistock cases (R (Quincy Bell) and A v Tavistock and Portman NHS Trust, and others [2020] EWHC 3274 and AB v CR & Ors [2021] EWHC 741), but at the end of the day I come back to the conventional wisdom of Lady Black in An NHS Trust and others (Respondents) v Y (by his litigation friend, the Official Solicitor) and another (Appellants) [2018] UKSC 46 where at paragraph 125, she says "*If, at the end of the medical process, it is apparent that the way forward is finely balanced, or there is a difference of medical opinion, or a lack of agreement to a proposed course of action from those with an interest in the patients welfare, a court application can and should be made. As the decisions of the European court underline, this possibility of approaching a court in the event of doubts as to the best interests of the patient is an essential part of the protection of human rights*".

34. It seems to me that these words are apposite to this situation.

35. In the event that there does need to be further invasive treatment, the Trust will need to consider whether to return the matter to court, and I know that in those circumstances, they will put great weight on DV's views, but the decision will need to be based on the circumstances then prevailing.

36. I am satisfied that it is for the Court to say that it is in DV's best interests to make the declarations sought. I add only this, that if there were to be any further cause for recourse to court, then I would do my very best to make myself available at short notice to ensure continuity, and I have no doubt that the matter will reach me very quickly.

37. I now have to deal with an application filed by DV on Wednesday last week in which Mr Brady seeks the following declarations:

    i) DV has the requisite decisional capacity to exclusively decide his own medical treatment, including refusing consent to blood transfusions; and

    ii) (a) The common law and section 8 of the Family Law Reform Act 1969 should be read compatibly with Articles 3, 5, 8, 9, and 14 of the European Convention on Human Rights so that DV has the exclusive legal right to give or refuse consent to his medical care, including refusing consent to blood transfusions; or alternatively, (b) Section 8 of the Family Law Reform Act 1969 is incompatible with Articles 3, 5, 8, 9, and 14 of the European Convention on Human Rights to the extent that it fails to recognise, or prohibits, DV from having the exclusive legal right to give or refuse consent to his medical care, including refusing consent to blood transfusions.

38. It is self-evident that this argument cannot be heard today. It would require days of court time, a preliminary directions hearing, appointment of Advocates to the Court, and this case therefore would not be concluded for months.

39. Miss Sutton says, and I agree with her, that what Mr Brady and his instructing solicitors seek, is exactly the same as they sought from Sir James Munby in Re X (No2) [2021] EWHC 65 (Fam). They failed to obtain the declarations from Sir James Munby, and they were refused permission to appeal by Lord Justice Peter Jackson. It is my view that this is an attempt to re-run the same argument. I do not think there is any uncertainty about the law and I see no benefit in a hearing on this particular issue.

40. Secondly, I remind myself that in December DV will be 18 years of age. There is every possibility of this application being valueless except to lawyers by the time it is concluded as DV will then be 18 or very close to it.

41. Thirdly these applications are very resource intensive in terms of court time and in terms of the NHS time and money that is required to deal with them. There may be another case which is more appropriate for these applications to be made, but it is not for this one.

42. I have dealt with the medical issues before me and hope there will not be another one that arises in DV's minority, but I do not think it is an appropriate use of court or other resources that time should be spent on dealing with an issue which in various different ways is likely to be of little benefit to DV. I dismiss the application.