14 February 2020

PRESS SUMMARY

Re M (Declaration of Death of Child) [2020] EWCA Civ

On appeal from: [2020] EWFC 5(Fam)

JUDGES: Sir Andrew McFarlane, Lord Justice Patten, Lady Justice King,

BACKGROUND TO THE APPEAL

This is an application for permission to appeal with the appeal to follow if permission is granted against orders made by Mrs Justice Lieven on 28 January 2020 by which she declared that the Manchester University NHS Foundation Trust would not be acting unlawfully by making arrangements for Midrar Namiq's mechanical ventilation to be withdrawn.

Midrar was born on 18 September 2019 at full term, there was a prolapse of the umbilical cord meaning that the cord dropped into the birth channel ahead of the baby and became trapped against the baby's body. At birth he had an undetectable heart rate and no respiratory output. His heart was restarted and he was placed on a ventilator.

In accordance with established medical practice, and in accordance with the relevant guidelines, following two "death by neurological criteria" ("DNC") assessments, the treating doctors concluded that by 20:01 on 1 October 2019 irreversible brain stem death had occurred and Midrar was therefore, clinically dead.

A third DNC assessment was undertaken on 4 November 2019 at the request and in the presence of the parents which confirmed the findings of the earlier two tests. On 5 November at the parent's request a further MRI scan showed that, in contrast to an MRI scan six weeks earlier, part of Midrar's brain had degraded to the extent that a significant portion of it had turned to liquid.

On 30 January 2020 following the judgment of Lieven J and with a view to the parents' launching an appeal against the declarations she had made, the parents' expert Professor Wilkinson carried out a wholesale review of the case including examining Midrar and speaking with the parents. Professor Wilkinson confirmed the diagnosis of death and said that "given the profound structural changes in Midrar's brain with liquification of large areas of his brain, it seems vanishingly unlikely to me that any treatment that might be developed within the short to medium term could benefit him."

It was argued on behalf of the parents in support of the application for permission to appeal that the judicial approach should be that found in professional negligence cases (the *Bolan* test) and in particular whether the DNC assessments reflect "an acceptable risk/benefit for the child", "namely in a death case where the loss of consciousness and breathing are irreversible… so that the decision to stop mechanical ventilation must be based on a secure safe and firm based conclusion of irreversibility". It was further argued that regard should be had to medical practice in other countries

in particular the United States where the test is 'whole brain' death rather than 'brain stem death' and that a number of additional confirmatory tests should have been and still should be undertaken. Lord Brennan QC (on behalf of the parents) argued that the case should be retried on a 'bests interests' basis.

This application for permission to appeal concerns three main issues:

(i) Whether Lieven J correctly identifies the issue as being whether Midrar is dead according to established UK criteria and the relevant clinical guidance, and if so whether the ventilator to which he is currently attached can be removed

(ii) Is the question of the best interests of an individual relevant when a person is dead in contrast to medical treatment cases concerning the living where the best interests of the person will determine the outcome,

(iii) Was the judge right in making a reporting restriction order preventing the identification of the treating doctors and staff at the hospital.

JUDGMENT

The Court unanimously refuses permission to appeal.

REASONS FOR THE JUDGMENT

As a matter of law, it is the case that brain stem death is established as the legal criteria in the United Kingdom by the House of Lord's decision in *Bland (Airedale NHS v Bland* [1993] AC 789 at856, 863 & 878E).

It is not open to this court to contemplate a different test and it is not open to the Court of Appeal to embark upon an assessment of whether a different test should replace the long established UK criteria represented in modern times by the 2008 Code of Practice for the diagnosis and confirmation of death ("the 2008 Code") and the UK Royal College of Paediatrics and Child Health guidance of 2015 ("the 2015 Guidance") relating to the use of the 2008 Code for children under two months old.

Tragically the medical evidence demonstrates that this is not a case in which such difference as there is between "brain stem death" and "whole brain death" is relevant. The position is that "awfully, Midrar's body no longer has a brain that is recognisable as such." There is no basis for contemplating that any further tests would result in a different outcome. The tests which had been undertaken in addition to those prescribed by the 2008 Code and the 2015 Guidance (in particular the MRI of 5 November 2019) not only confirm the diagnosis but provide clarity as to the disintegration of the brain.

The factual and medical evidence before the judge was more than sufficient to justify her findings. No other conclusion was open to Lieven J on the evidence. Even had there been room for doubt, that had been removed following Professor Wilkinson's intervention of 30 January. "His opinion, which is 100% on all fours with that of each of the other doctors and with the conclusion of the judge, must remove any basis upon which the diagnosis can be challenged."

In so far as the parents' argue that this case should have been determined on a "best interests" basis such analysis, could not, on the facts of this case, produce any other outcome but for the removal of the ventilator.

The Reporting Restriction Order protects the identity of the medical and caring staff of Midrar. Evidence was available to the judge of allegations made by the father against the treating team and the hospital team generally. Whilst parents no doubt say and do all manner of things in the tragic and difficult circumstances in which they find themselves in such cases, the judge found the allegations to be untruthful and Dr G, in a statement, said they were hurtful and, if repeated publically, would be likely to cause individual employees great distress and place them under further significant psychological pressure over and above that which has been experienced on the ward by those treating Midrar for the past four months.

The manner in which social media may now be deployed to name and pillory an individual is well established and the experience of the clinicians treating child patients in cases which achieve publicity, such as those of Charlie Gard and Alfie Evans, demonstrate the highly adverse impact becoming the focus of a media storm may have on treating clinicians. The need for openness and transparency in these difficult, important and, often, controversial cases is critical but can, in the judgment of the court, be more than adequately met through the court's judgments without the need for identifying those who have cared for Midrar with devotion since September 2019.

Declarations will therefore be made in similar terms as those made by Mr Justice Hayden in *Re A (A Child)* [2015] EWHC 443 (Fam) declaring that Midrar died at 20.01 on 1 October 2019 and that permission is given to the Manchester University NHS Foundation Trust to cease mechanically to ventilate Midrar allowing him dignity in death.

NOTE:
This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document, and will be handed down on Monday 17th February. The full judgment of the Court of Appeal and a copy of this media summary will be made available at www.judiciary.uk