

Case No: COP 20019348

Neutral Citation Number: [2026] EWCOP 14 (T3)

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 17 February 2026

BEFORE:

**THE VICE-PRESIDENT OF THE COURT OF PROTECTION
MRS JUSTICE THEIS DBE**

BETWEEN:

LESLEY TOWNSEND

Applicant

- and -

EPSOM AND ST HELIER UNIVERSITY HOSPITALS NHS TRUST

Respondent

MR PAVEL STROILOV, Solicitor Advocate (instructed by Andrew Storch Solicitors)
appeared on behalf of the Applicant

MR PARISHIL PATEL KC (instructed by Capsticks LLP) appeared on behalf of the
Respondent

MS CLAIRE WATSON KC (instructed by the Official Solicitor) appeared on behalf of
the Official Solicitor as Advocate to the Court

JUDGMENT
(Approved)

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

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1. MRS JUSTICE THEIS: I am giving this ex tempore judgment at 4.40 pm today because of the urgency of the situation. I would have preferred to have had more time to consider the very detailed arguments that have been put before me, but I have had the opportunity to read all the position statements. I am extremely grateful to all of the legal representatives, who have been able to move with remarkable speed to be able to make sure that the court has had all the information that it needs before starting this hearing.
2. This matter concerns a person called Robert Barnor who is a much-loved father and husband. It is clear from the evidence the court has read, in particular by his daughter, Lesley Townsend, who acts on behalf of the family, the enormous shock there was when he collapsed at home in April 2025 and the very great concern they have all had in relation to the treatment he has had since then. They have visited him almost every day, often for extensive periods of time and, on a human level, the court can have nothing but enormous sympathy for them all in relation to the situation they have found themselves in.
3. As a result of the collapse in April 2025 Mr Barnor sustained extensive brain damage. His condition is described in the medical evidence as a terminal decline of consciousness ('TDOC'), rather than a sudden onset, prolonged disorder of consciousness, with a potential for recovery. The evidence is that the unanimous view now of his treating clinical team is that he has no prospect of regaining consciousness or achieving any recovery that would allow a return to an independent life, or a level of quality of life he could experience. He had a pre-existing chronic kidney disease. During the acute illness that was associated with his collapse and hypoxic ischemic injury, he developed severe acute kidney injury and required renal replacement therapy as a result.
4. Following a prolonged period of treatment, including a trial period off dialysis in August 2025, unfortunately his kidney function did not recover sufficiently and dialysis had to be re-started. That treatment, namely dialysis, requires ongoing vascular access for a number of sessions each week when the treatment is administered. There can be recurrent line infections and other risks in relation to that treatment, set out in the papers. The central line, through which that treatment was administered, became

blocked, and on 30 January 2026 a temporary line was put in and fitted, known as a vascath, which is for short-term use. The evidence demonstrates that a clinical decision was reached on 6 February 2026 that the clinicians were not going to continue that treatment. The reasons for the clinicians reaching that decision are set out in Dr Dixon's statement at paragraph 12. Mr Barnor's current position is that the temporary line, the vascath, has been removed. The main line remains in place, but it is not functioning. It remains in place because it requires surgery to remove it.

5. The relevant chronology can be set out in the following way. The family who were present on 6 February 2026 were informed of the position, as set out in the statements of Mrs Townsend and Dr Dixon. There was some suggestion in Mrs Townsend's statement, which was disputed by the Trust, that the doctors told the family that the only thing they could do about it was to instruct lawyers and obtain a court order which would compel the doctors to provide treatment to him. They said they would provide treatment if compelled by a court order, but not otherwise. That decision having been communicated to the family resulted in the letter from their solicitors, written to the Trust on 6 February 2026, setting out the reasons and rationale why it was said the treatment should continue.
6. The Trust responded with a detailed letter on 11 February 2026, when they set out their rationale as to why they would not continue the dialysis treatment, recognising that by that treatment not continuing, it is likely that Mr Barnor would die relatively shortly. In addition to that letter, the Trust also disclosed three second opinions that they had obtained in the autumn of 2025. Although the evidence is not entirely clear, this was known in general terms by the family. In fact they met one of the doctors, who was a medical consultant based in another London hospital. They had not seen the written reports that resulted from those visits. In addition to those three reports, there was also, I am told, the medical records, consisting of about 5,000 pages. Although there had been some prior disclosure of the medical records, this was something, according to the family, that they had been asking for for some time.
7. The application to the Court of Protection was made by way of a COP1 application late on Friday afternoon, 13 February 2026. There was a communication from the court that if urgent orders were being sought, it would be necessary for an application to be

made to the Out of Hours judge. That application was made. In addition, the Trust wrote a further letter on 13 February 2026 setting out the reasons why they opposed any application being dealt with Out of Hours. The judge who was on duty considered the papers and then communicated to the parties that:

“The proposed application does not satisfy the requirements for an urgent out of hours hearing. The circumstances giving rise to the application are chronic and notice was given of the trust’s clinical decision at least a week ago, on 6 February, which was further confirmed with reasons in a letter on 11 February when treatment was withdrawn. No, or no sufficient, reason has been given for the delay in making the application this afternoon, nor was there any acute change in circumstances justifying the application. If the application is pursued, it may be referred to a judge for directions on Monday.”

8. I asked the court office to enquire of the applicant whether she was pursuing their application first thing yesterday (Monday) morning. I was informed she was and, as a result, I made directions orders listing the matter today, invited the Official Solicitor to act as Litigation Friend for Mr Barnor and also made a Transparency Order. The parties filed all the documents that I have briefly referred to. There is an urgent applications bundle filed on Monday, which included the position statement on behalf of the applicant. There was a statement from Dr Dixon, the treating doctor, filed this morning, and a position statement filed on behalf of the Trust.
9. The Official Solicitor communicated with the court this morning that as the matter had been listed to consider whether leave should be given under section 50 of the Mental Capacity Act 2005 and there was no security for her costs she would not at that stage accept the invitation to act as Mr Barnor’s Litigation Friend. Shortly after that a certificate of suitability of the Litigation Friend was filed. The applicant, Mrs Townsend, indicated in that certificate that she would be willing to act as the Litigation Friend. On being informed of that this morning, I directed that the court communicated with the Official Solicitor that bearing in mind the issues raised in this case, whether she would be willing to act as Advocate to the Court. I am extremely grateful to the Official Solicitor for taking up that offer and instructing Ms Watson KC to be able to attend the hearing at 2.00 pm. The papers were served on her late this morning.

10. The application is made by Mrs Townsend, in effect on behalf of the family. I have had the opportunity to read the position statement dated 13 February 2026 by Mr Stroilov, which sets out in written form the arguments made in relation to being permitted to proceed with this application. In addition, I have the detailed statement from Mrs Townsend dated 17 February 2026, filed this morning. Mr Stroilov lays emphasis in his correspondence with the Trust and in his position statement on the legal framework encapsulated within the duties under article 2 of the European Convention on Human Rights ('ECHR'), and the cases that he refers to, in particular *NHS v Y* [2018] UKSC 46, and *Lambert v France* [2015] ECHR 46043/14. He submits that this is, in reality, a "best interests" decision, in which the family have had no realistic part. He submits the Trust only a few weeks ago, on 30 January 2026, were willing to put in a temporary line to enable the dialysis treatment to be given. He asks the rhetorical question, what has changed? He submits that if the Trust's position is right, it enables them, in effect, to make a unilateral decision based on what he submits is an artificial distinction made by the Trust in relation to what is described as a clinical medical decision and what he submits is in reality a "best interests" decision.
11. He submits there has not been due process, in particular because of the late disclosure of documents and the reports. The evidential position makes clear, he submits, that the presumption in favour of preserving life is a serious matter that the court needs to consider within the context of the article 2 ECHR obligations. He relies on the guidance that was issued by Hayden J, reported at [2020] 1 WLR 641, the Practice Guidance (Court of Protection: Serious Medical Treatment). He relies in particular on paragraphs 8 and 9. At paragraph 8 the Guidance states:

"If, at the conclusion of the medical decision-making process, there remain concerns that the way forward in any case is:

(a) **finely balanced**, or

(b) there **is a difference of medical opinion**, or

I a **lack of agreement** as to a proposed course of action from those with an interest in the person's welfare, or

(d) there is a **potential conflict of interest** on the part of those involved in the decision-making process

....

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.”

In paragraph 9, it says:

“Where any of the matters at paragraph 8 above arise and the decision relates to the provision of life-sustaining treatment an application to the Court of Protection **must** be made.”

Mr Stroilov relies in particular on the reliance there on the obligations under the European Convention of Human Rights.

12. He submits the Trust is relying on a false dichotomy between clinical decision and best interests decisions , and submits that there is no such hard-edged distinction. He submits the court should exercise its discretion under section 50 and should grant leave for the application to be made. If leave is given, he has set out in the draft order in the bundle the interim relief which is sought of the Trust, namely for the continuation, pending a hearing, of essential treatment that the medical decision had been to cease. He submits that if the Trust maintains its position, the court has power to make an injunction requiring the clinicians to provide treatment, having undertaken the necessary balancing exercise. In reaching their clinical decision, he also submits that the Trust has relied on Mr Barnor’s lack of capacity and the prognosis being poor, which supports his submission that this is essentially a “best interests” decision by another name.
13. In relation to the Transparency Order, the court, as is usual in these circumstances, made a Transparency Order on the issue of proceedings. Mr Stroilov seeks for it to be discharged, relying in particular on the provisions of section 12 of the Human Rights Act 1988. He submits there is already information in relation to the issues in this case in the public domain. The evidence from the family is that that is something that Mr Barnor would have wanted. The Trust is already identified and there is no issue about that. In relation to the clinicians, he did not disagree with the position set out in the Supreme Court decision of *Abbasi* [2025] UKSC 15 in paragraphs 66, 82 and 183,

namely that on an interim basis, whilst proceedings are ongoing, it may be appropriate for the court to make a Transparency Order, but he submits that it should only be for a limited period of time as the court would need a separate application and evidence in relation to such an application to extend. He relies on paragraphs 81 and 82, and 138-142, of *Abbasi*.

14. Mr Patel KC, on behalf of the Trust, set out his detailed analysis in the position statement he filed this morning. The cases he refers to are in that position statement and in the authorities bundle that was submitted to the court, also this morning. He submits leave should not be granted in this case because the court does not have jurisdiction to deal with the orders that are sought, for the reasons summarised in the letter dated 11 February and in the statement from the treating clinicians. He submits the evidence demonstrates that the clinicians are unwilling to offer dialysis, including inserting a temporary line for it to take place. He submits Mr Barnor is in no different position from someone with capacity. The Court of Protection acts as a proxy for somebody who lacks capacity, but that does not clothe them with more rights and powers than a person with capacity.
15. In his submission, if a person with capacity was faced with such a similar clinical decision as made in this case, they would not be able to require the clinicians to provide the treatment which the clinicians have formed the clinical view they are not willing to provide. He submits the Court of Protection is not there to provide a person without capacity with greater rights than a person with capacity. He submits this is a treatment decision and no patient can demand that doctors give treatment, subject to any application in judicial review proceedings. If the Court of Protection could do this, it would elevate the person who lacks capacity to a more favourable position than the person with capacity. He submits the Court of Protection is there to determine whether treatment that is proposed or offered should be provided. In the circumstances and the evidence in this case, that treatment is not proposed or offered.
16. Pressed by me in relation to the court's concern regarding the delays relating to the provision to the family of the hospital records and the second opinions, Mr Patel submitted, albeit on only limited instructions, that the internal opinions were not intended to be shared. He submits that steps were being taken to share them in advance

of the evaluative mediation that had started, but that had not taken place due to a lack of communication. He submitted that the reports were on Mr Barnor's medical notes, but Mr Stroilov makes the valid point that those records covering the relevant period were not, as I understand it, disclosed until last Wednesday and will be buried within over 5,000 pages of notes.

17. Again in relation to questions from me, having read the detailed report from one of those who gave a second opinion, I was informed that a treatment escalation plan, which had been recommended in that opinion, dated 8 November 2025, was made and discussed with the family on 15 November 2025. Mr Stroilov made clear on his instructions that was not accepted by the family.
18. Ms Watson, on behalf of the Advocate to the Court, having had the opportunity to read the papers, agrees with comments that I have made during the hearing that there has been some confusion over language in the documents. That is picked up by one of those who provided a second opinion, who stressed the need for there to be complete clarity in relation to the separation between the two matters, namely the clinical medical decision and the decision in relation to best interests.
19. Ms Watson referred everybody to a decision of Macur J (as she then was) in *NK v VW* [2012] Court of Protection Law Reports 105. It is one of the few decisions in relation to the test to apply when considering whether to grant permission to bring an application. It was in different circumstances from those in this case; it was in the context of a dispute in relation to a care home. But Ms Watson draws the court's attention to paragraph 16 of that judgment, which gives some framework within which the court should consider the discretion that it has under section 50 MCA 2005 as to whether to give leave, in addition to the matters set out in section 50(3) MCA 2005, where the court can consider whether the application has any realistic prospects of success, in balancing the factors in the discretion which the court has.
20. Ms Watson submits the court should look at the practice guidance in relation to serious medical treatment cases. She submits, looking at the terms of paragraph 8, that it needs to be looked at in the context of paragraphs 6 and 7. She submits that supports the legal analysis put forward by the Trust in relation to there being separate decisions, namely

there is a medical decision-making process, and it is only after that that, in the light of the guidance and the legal framework under the MCA 2005, that the parties need to consider whether there should be an application to the Court of Protection.

21. Ms Watson associates herself with the comments in relation to delay. Although obviously she has not had sufficient time to be able to see all the information, she accepts that if, particularly in the circumstances of this case, mediation was in the process of taking place, she could not understand, on the face of the information she has seen, the delays in disclosing the second opinions that were being relied on by the Trust. She submits the essential question is, is the treatment that is being sought on behalf of the applicant available? And she says that on the evidence it is not, in the light of the medical decisions that have been made.
22. The provisions in s 50 MCA 2005 are there to enable the court to consider the circumstances set out in subsection (1). There is a list of circumstances where permission is not required. This is not one of those. In subparagraph (3) it says, “In deciding whether to grant permission the court must, in particular, have regard to...” and it lists a number of matters: the applicant’s connection with the person to whom the application relates, the reasons for the application, the benefit to the person to whom the application relates of a proposed order or directions, and whether the benefit can be achieved in any way or not. As I have said, Macur J said that within that discretion, the court needs to consider whether there is any realistic prospect of success in the orders that are being sought as part of the discretionary process.
23. It is right that in this case, on the evidence that I have seen, there has been a very long period of collaboration between the medical practitioners and clinical team and the family, in clearly very difficult circumstances, bearing in mind the very serious position Mr Barnor is in. That accords with, in broad terms, the GMC guidance, namely that there should be discussion and collaboration. As I understand it, looking at Mrs Townsend’s statement, there have been occasions when treatment has been tried, or options have been looked at, as suggested by the family: for example, coming off ventilator treatment for a period of time, and also looking at the period of time there should be to consider whether there are any neurological changes with Mr Barnor.

24. But the point had been reached by 6 February 2026, preceded by some discussions on the 4 February 2026, when the clinical decision was made that there would be no further dialysis after 11 February 2026. It was not reached without any prior warning, because the concerns in relation to dialysis, and the risks inherent with that in the circumstances, had been discussed with the family. But the family, as they are perfectly entitled to do, asked their solicitor to write a letter to the Trust setting out their position in relation to that. The Trust responded in detail on 11 February 2026, setting out why it had reached the decision it had that dialysis was not treatment that it was prepared to offer for the clinical reasons that they gave. That position, on the evidence, has not changed. That, in my judgment, is a medical decision that has been made by the clinicians. I am, in the circumstances of this case, not without enormous sadness and regret on a human level for the impossibly difficult position this family have found themselves in. However, I have to consider the legal position in relation to the framework that governs this court's ability to be able to grant leave, and if to grant leave, to make any decisions.
25. I have concluded that leave should not be given under section 50 MCA 2025 for this application to proceed. I have reached that decision for the following reasons. I acknowledge, and I have raised during the hearing, that there has been confusion in the language used with the family, but the evidential reality is that the medical decision-making process has concluded that dialysis will no longer be offered by the clinical treating team. Secondly, if Mr Barnor had capacity, save for issuing proceedings for judicial review, getting leave for that and seeking orders, a person with capacity would not be able to compel a medical clinician for that treatment to be provided. The Court of Protection, in its position acting as proxy for somebody who lacks capacity, is in no different position when faced with the decision that has been made in this case as a person with capacity would have. There is no option for the Court of Protection to consider and, as a result, the application, in my judgment, has no real prospects of success. In those circumstances, it would not be right for leave to be given under section 50 MCA 2005.
26. In reaching the decision I have it is not without criticism of the way there has been delay in provision of documentation in this case. I acknowledge that I have not had all the relevant information and I make any comments with that caveat. It does seem to

me that in a situation where under the relevant guidelines there is to be collaboration between the treating team and a family in these very difficult situations, there should be transparency in relation to information upon which decisions are being made. I agree with Ms Watson that it is difficult to understand, in a situation where the family had met at least one of the second opinion clinicians who attended the hospital and had been able to discuss RB's position with the family, why they were then not provided with that report.

27. In addition, the observations made by Professor Turner-Stokes, on what I understood to be a paper assessment in relation to the situation, provided very valuable advice and information (to be found between pages 58-60 of the urgent applications bundle) about the need, in situations such as this, for there to be a treatment escalation plan formulated so that there is clarity as to what the position is. There is an issue in this case, on the face of it, as to whether such a treatment escalation plan was provided. It may be that the facts of this case and the delays in provision of documentation may need to be considered in a wider context in looking at how these very difficult situations are managed. It would be helpful for there to be, first, transparency in relation to information upon which decisions are being made; and, secondly, for there to be clarity in relation to the language used and the distinction between what can and cannot be done.
28. In the light of my decision, the proceedings have now been brought to a conclusion, subject to any other applications. Therefore the Transparency Order which was made within those proceedings will be discharged, so it is not necessary for the court to undertake the balancing exercise that was raised by Ms Watson, and those wider issues that are raised in the *Abbasi* decision.
29. For those reasons, that is the conclusion of the court.

(Application refused)

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Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge