Case No: C1/2016/0095

[2017] EWCA Civ 2710
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
SIR STEPHEN SILBER,
(SITTING AS A JUDGE OF THE HIGH COURT)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 14 November 2017

Before:

LADY JUSTICE SHARP

- -

Between:

CHADHA

Applicant

- and -

HM SENIOR CORONOR FOR WEST LONDON

Respondent

- -

(DAR Transcript of WordWave International Ltd trading as DTI
8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 704 1424
Web: www.DTIGlobal.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

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MR A UNDERWOOD QC (instructed by Duncan Lewis Solicitors) appeared on behalf of the **Applicant**

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Judgment

LADY JUSTICE SHARP:

1. The claimant in this case, Mr Chadha applies for permission to appeal against the order of Sir Stephen Silber made on 16 December 2016, dismissing his application for permission to apply for judicial review of the decision of the respondent Coroner not to investigate the death of the claimant's wife.

2. The facts of this tragic case can be briefly stated. The claimant's wife, Mrs Chadha, fell at home on 28 June 2011. As a result of her injuries, she was in a persistent vegetative state and remained in hospital for four years before she died on 25 March 2015. The Coroner certified the cause of death to be confirmed at an inquest. The decision to discontinue the investigation was made on 15 April 2015. Regrettably, the wrong cause of death was given. However that issue, though dealt with below, is not relevant for present purposes.

3. The decision under challenge was made on 24 May 2015. The Coroner said:

> "I have no reason to believe the post-mortem is anything other than correct… there are no suspicious circumstances that I can see and the investigation has been discontinued because of a natural cause finding of death and there being on other reason to continue the investigation." (Quote unchecked)

4. Mr Underwood QC now appears for the Claimant, who hitherto has been representing himself, and makes the following submissions in support of the fifth ground of challenge (the only one which is now pursued). He submits that the Coroner was bound to continue the inquest because no reasonable coroner could find that he could discontinue it, having regard to the facts and the proper application of the law, that is, sections 1(2), 4(2) and 6 of the Coroners and Justice Act 2009 (the 2009 Act) to those facts.

5. Mr Underwood points to two forms filled in by staff nurses at the hospital in which Mrs Chadha was a patient, which concerned capacity to consent to placement. In the first of these forms, dated in June 2014, Mrs Chadha was assessed as being unable to consent to treatment; further, in July 2014, the relevant hospital authority sought a deprivation of liberty authority in respect of Mrs Chadha under the Mental Capacity Act 2005.

6. Mr Underwood refers to *P (by his litigation friend, the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19 and *The Queen (on the Application of LF) v HM Senior Coroner for Inner South London & Anor* [2015] EWHC 2990 and to Lady Hale's reference at para 8 of *P* to "thousands of mentally incapacitated people who are regularly deprived of their liberty in hospitals, care homes and elsewhere." He refers further to the following observations of Lord Neuberger at para 49 of *P*:

> "The answer, as it seems to me, lies in those features which have consistently been regarded as "key" in the jurisprudence which started with *HL v United Kingdom* 40 EHRR 761: that the person concerned "was under continuous supervision and control and was not free to leave" (para 91). I would not go so far as Mr Gordon, who argues that the supervision and control is relevant only insofar as it demonstrates that the person is not free to leave. A person might be under constant supervision and control but still be free to leave should he express the desire so to do. Conversely, it is possible to imagine situations in which a person is not free to leave but is not under such continuous supervision and control as to lead to the conclusion that he was deprived of his liberty. Indeed, that could be the explanation for the doubts expressed in *Haidn v Germany"*.

7. Mr Underwood submits it is important to note that *P* is about living arrangements. The key question here he submits is whether this applies to someone in a persistent vegetative state, and whether they are in hospital in circumstances where this can properly be regarded as their living arrangements. It is plain he says, that the question whether there has been a deprivation of liberty in any particular case is fact sensitive and fact specific. A proper fact specific enquiry should have been undertaken in this case, but this did not occur.

8. His submission is that the threshold test for the application of section 1 (2) of the 2009 Act is low and the test is an objective one. In this case there were three reasons to suspect that Mrs Chadha was in 'state detention'. First, tragically, she had been in a persistent vegetative state for four years. This was, therefore, her living state. Second, on the evidence of the forms to which I have referred, two staff nurses regarded the hospital as 'detaining' her. Third, Mr Chadha's unanswered contention was that he had attempted to have his wife removed from the hospital, but the hospital would not agree.

9. Sir Stephen Silber addressed the fifth ground of challenge by the Claimant at paras 59 to 62 of the judgment below as follows:

> "The fifth ground of challenge relied on by the claimant is that the coroner was advised to continue his investigation and hold an inquest because his wife died "while in state detention." He points out that in June 2014 his wife was assessed as being unable to consent to treatment and that in July 2014 the hospital authorities that sought a deprivation of liberty authority under the Mental Capacity Act 2005.
>
> It is true that a request was made for such standard authorisation, but the information given to me was that it was never processed, so there was never an order made which would have amounted to death in state detention. Bearing in mind that section 48(2) of the 2009 Act provides that a person is in state detention if he or she is compulsorily detained by public authority (and of course the words "public authority" were defined by reference to section 6 of the Human Rights Act) I have come to the conclusion there is no basis for saying that

> Mrs Chadha was compulsorily detained at the time of her death. It is true that she had been admitted to hospital in 2011 after a serious injury had left her in a coma. From that time she was not confined by compulsion; she was simply unable to move and was receiving essential medical care. The fact that she did not have capacity to consent to treatment and was being treated on a best interest basis does not mean that she was detained by a public authority".

10. And at para 65 he said this:

> "It held that it was not a deprivation of liberty in a case where a person was unable to move. To my mind, similar reasoning applies here and therefore the argument based on the fact that the claimant's wife died while in state detention has to be rejected. (Quote unchecked)."

11. In so saying, he accepted the submission on behalf of the Coroner which was that whatever the ambit of the concept of "compulsory detention" there was no basis for saying Mrs Chadha was compulsorily detained at the time of her death. She had been admitted to hospital in 2011 after a serious injury which left her in a coma. From that time, she has not been confined to a place by compulsion, she was simply unable to move and was simply in receipt of essential medical care. The fact that she did not have capacity to consent to treatment and was therefore being treated on a "best interests basis" did not mean that she was compulsorily detained by a public authority. It was not clear whether there was in place an authority to deprive Mrs Chadha of liberty at the time of her death. Even if there was however that would not mean that she had, in fact, been deprived of liberty within the meaning of the Mental Capacity Act and Article 4 of the ECHR. She would only be regarded as deprived of liberty if she were "confined in a particular restrictive place" and "not free to leave:" see *P* at paras 22 and 49. In reality, she was not being kept confined, she was simply unable to leave hospital in the time she was taken there after her injury.

12. Simon LJ, gave these reasons for refusing permission to appeal on the papers:

> "The test under section 4(2)(b) of the Coroners and Justice Act 2009 where the coroner has reason to suspect that the deceased… died while in custody or otherwise in state detention. (Quote unchecked)
>
> The contents indicate very strongly that the statutory provisions are concerned with situations which involve the coercive powers of a state where a proper investigation of the death is necessary (see also section 48 and sub-section 2). There is no warrant for extending this to the situation of a patient who is receiving treatment in a persistent vegetative state. Although the two judgments of the court in *R (on the application of LF) v HM Senior Coroner for Inner South London* (2015) EWHC 2990 adopted a different approach to the analysis, both

> members of the court rejected the contention that the decision of the majority in [*P*] was authority for the conclusion that a patient being treated in an ICU was subject to state detention. The decision is strongly persuasive in relation to the facts of the present case and renders any appeal from the clearly reasoned judgment of Sir Stephen Silber as lacking any real prospect of success".

13. I agree with both Simon LJ and of Sir Stephen Silber. Notwithstanding the careful and measured argument advanced by Mr Underwood, there was no legal error in Sir Stephen Silber's approach and there is no real prospect of successfully challenging his decision. The renewed application for permission to appeal against his is therefore refused.