Neutral Citation Number: [2023] EWCA Civ 885

Case No: CA 2022 002053

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
HHJ Sephton KC
[2022] EWHC 2440 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2023

Before:

LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE KING
and
LORD JUSTICE LEWIS

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Between:

R (On the Application of JJ)	**Claimant/ Appellant**
- and -	
Spectrum Community Health CIC	**Defendant/ Respondent**
-and-	
The Royal College of Physicians	**Intervener**

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Aswini Weereratne KC and Leonie Hirst (instructed by **SL5 Legal/Tuckers Solicitors**) for the **Appellant**
Leon Glenister (instructed by **Hill Dickinson LLP**) for the **Respondent**
Alex Ruck Keene KC (Hon) (instructed by **DAC Beachcroft LLP**) for the **Intervenor** **(written submissions only)**

Hearing date: 28 June 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 25 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice King:

1. This is an appeal from a decision of HHJ Sephton KC ('the judge') on 5 October 2022 to dismiss the appellant's ('JJ') claim for judicial review in respect of the respondent's ('Spectrum') refusal to feed him, a quadriplegic prisoner, certain foods of his choice. Spectrum decline to give JJ snacks in the form of boiled sweets, biscuits and crisps ('boiled sweets') in the interests of safety and in circumstances where to do so would, they believe, risk exposing their staff to criminal or regulatory proceedings should JJ come to harm as a consequence of eating foods which are not within his prescribed soft diet ('Level 6 diet').

2. The issue before the court is whether a medical professional is acting lawfully in restricting the foods which are to be offered to a patient because, in their medical opinion, to do so would expose the patient to a high risk of choking and aspiration which might lead to his death.

3. Put the other way around, is a patient entitled to demand medical treatment which is not clinically indicated and therefore not offered to him by the doctor?

4. The judge, when refusing permission to appeal, observed that 'medical professionals could not be compelled to administer treatment that they believed to be adverse to the patient's clinical needs and the law requires me to respect their opinions ("medical autonomy"); and that a court should not make a declaration that purports to decide an issue of criminal liability for future events'.

5. The judge accordingly declined to make the declarations, which had been sought in the following terms:

    i) A declaration that the Defendant's refusal to allow the Claimant to choose his diet is unlawful.

    ii) A declaration that it is lawful for the Defendant's staff to give effect to the Claimant's food choices.

6. In my judgement, the judge was right to dismiss the judicial review for the reasons he gave in his judgment and accordingly I would dismiss the appeal for the reasons set out below.

Background

7. JJ is serving a lengthy determinate sentence of imprisonment, the custodial period of which will end on 28 May 2027. He is cared for in the Healthcare Wing at HMP Liverpool by the staff of Spectrum, a community interest company which provides NHS-funded healthcare services to prisoners. Spectrum is registered with the Care Quality Commission ("CQC") and is regulated by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the CQC Regulations").

8. As a result of a rare genetic condition, X-linked hypophosphatemia ("XLH"), JJ is quadriplegic and without teeth. While his cognitive and communication skills are unimpaired, his physical capacity is limited to pushing a button with one finger. Since 2016 he has been bed-bound and wholly dependent on care staff for all his personal cares and for feeding. He is nursed in a supine position.

9. As a consequence of JJ's condition, eating food poses a risk of death or serious injury by choking or aspiration. Some foods pose a more significant risk than others. Until 2021, JJ ate a mixed diet of soft and non-soft foods. Meals would be sent to his cell and he would decide whether he was capable of eating them. He would regularly supplement his diet with snacks bought from the prison canteen, including non-soft foods such as boiled sweets.

10. JJ has experienced several episodes of choking during his time in custody: in 2016 (on his medication), in 2018 (for unspecified reasons), in 2019 (possibly on phlegm), and in 2020 (on soft food).

11. The care team expressed concern that JJ's consumption of boiled sweets gave rise to a risk of choking and aspiration and, although JJ said he was prepared to accept responsibility for his decision to eat them, the staff remained uncomfortable about the issue. In May 2021, arrangements were made for JJ to undergo a Speech and Language Therapy ("SALT") assessment. The following material findings were recorded in the SALT report:

> "[JJ] reports that he has difficulties swallowing more solid foods and that is why he will often refuse the food that is sent to him. He reported that he needs 'soft and mushy' foods to be able to manage them well… He is having hard boiled sweets which he feels he can manage but are considered high risk… [he] is in a full supine position and this is his position when eating/drinking… [he] is at high risk of aspiration and choking due to his supine position… Whilst…he has not experienced any choking episodes he is at high risk of this in the future. [He] appears to understand the consequences of this and accepts the risk."

12. The therapist recommended that JJ finish his current supply of hard-boiled sweets and then be restricted to a Level 6 diet of soft and bite-sized food.

13. In accordance with the SALT recommendation, from early June 2021 Spectrum's staff began denying JJ any foods which did not fall within a Level 6 diet. JJ responded by refusing all food in protest. Since June 2021, he has consumed only fluids, including nutritional "Ensure" drinks, save for a brief period in May 2022 when he ate cake, custard, and ice cream without incident whilst he was temporarily nursed in a hospice.

14. JJ wishes to exercise choice over his diet. It is common ground that he has the mental capacity to make a decision to eat the boiled sweets which fall outside his Level 6 Diet. Reintroducing even Level 6 foods would, however, after many months of JJ being on 'hunger strike', now involve implementing a careful programme to minimise the risks associated with 're-feeding syndrome', a potentially fatal change to electrolyte levels which can occur when food is reintroduced after a period of food refusal or malnourishment.

15. On 24 November 2021, a SALT review was carried out. JJ was told that there would have to be a reassessment before there could be any change in SALT's recommendations as to what foods it was safe for him to eat. That reassessment could only be carried out following the successful introduction of a careful recommencement

diet and would also incorporate a physiotherapy assessment to support his posture and to see if JJ could be elevated more than he currently was. JJ said that for him to start the process, he would want a letter stating that it is his choice and that he and the staff could at any point choose to ignore the recommendations of the reassessment. JJ's approach was, and is, that he could exercise his basic freedom of choice to decide what he will eat, being fully aware of the risks.

16. Unsurprisingly, Spectrum declined to comply with JJ's condition that he should be provided with such a letter and without the letter JJ chose not to engage with the process which would have allowed the reassessment to take place. In his written evidence, JJ confirmed his position, saying that he was willing to go through a re-feeding process but only if, afterwards, he could exercise his 'basic freedom of choice to decide what [he] will eat, being fully aware of any risks.'

17. On 22 December 2021, JJ signed an Advance Decision to Refuse Treatment. In this, JJ confirmed that food refusal was to apply even when his life is at risk and that he does not wish to be ventilated or to have cardiopulmonary resuscitation (CPR). It follows that in the event that JJ choked or aspirated as a consequence of eating a boiled sweet which, as he is quadriplegic, would have been put into his mouth by a carer, neither that carer nor any other medical professional on the ward would be able to intervene to give JJ lifesaving CPR.

18. In a letter dated 23 May 2022, Spectrum rehearsed the fact that the SALT specialists had said that JJ should not be given boiled sweets and that JJ wanted to be fed them contrary to their advice. Were JJ to die as a result of eating boiled sweets 'or anything other than a 'level 6' soft diet', the letter said, 'the relevant individual could be at risk of both criminal proceedings and disciplinary proceedings'. The letter concludes by saying that whilst JJ is free to articulate his choice in the matter, 'it is not an option available to him'.

19. In July 2022, JJ brought a claim for judicial review, contending that Spectrum's refusal to feed him foods of his choice was irrational, discriminatory, in breach of his common law right of autonomy and his Article 8 right to physical and psychological integrity.

20. A witness statement dated 21 July 2022 was filed by Dr Joanne Thomas, the associate medical director of Spectrum. In her statement, Dr Thomas asked that, in the event that the court concluded that Spectrum were 'obliged to provide [JJ] with solid food stuffs', the implementation would be delayed in order for them to undertake the necessary assessment to reduce so far as practicable the risks to JJ. Dr Thomas went on to say: 'I would stress that whatever we do he will, in my professional opinion, be at considerable risk of dying if he is provided with solid foodstuffs. However, reintroducing such foods in an unplanned way will substantially increase the risk of JJ dying as a result of the food he chooses to eat.'

21. Spectrum adopted a neutral position, saying that it would 'not actively oppose' the claim and would instruct its staff to act in accordance with the decision of the judge.

22. The judge dismissed the claim on 30 September 2022, concluding that Spectrum's feeding policy was rational, necessary, and proportionate given the clinical risks posed by reintroducing non-soft foods into JJ's diet.

23. The judge refused permission to appeal on 5 October 2022. On 17 February 2023, Stuart-Smith LJ granted permission to appeal on the basis that there were compelling reasons for the appeal to be heard.

24. On 16 May 2023, Master Bancroft-Rimmer granted the Royal College of Physicians permission to intervene by way of short written submissions.

The Judge's judgment

25. The judge's judgment is reported as *R (on the application of JJ) v Spectrum Community Health CIC* [2022] EWHC 2440 (Admin). I intend to refer only to those parts of the judgment as are necessary in order to determine the appeal and a reader should therefore refer to the judgment for the judge's more detailed analysis.

26. The judge succinctly identified the issue to be determined in the first paragraph of his judgment as:

> "… The claimant, who is of full age and capacity, wishes to eat the food of his choice, even though he appreciates that doing so may carry with it elevated risk. The issue in this case is whether the defendant's refusal to feed the claimant the food he wishes to eat is unlawful."

27. In order to determine the issue, the judge resolved three evidential issues:

28. First, he rejected the submission made on JJ's behalf that the SALT assessment was undermined by his record of eating sweets without incident prior to May 2021 because:

   (a) The risk could subsist without having materialised in the past;

   (b) The assessor took account of JJ's eating record, and it was not for a judge to second-guess her professional view of its significance;

   (c) The assessor had observed JJ's swallowing action even if not his eating capabilities and

   (d) The risks had increased following the disuse of JJ's swallowing action during his hunger strike.

29. Secondly, the evidence concerning the consumption of non-soft foods at the hospice was insufficiently clear or reliable to dislodge the SALT assessment.

30. Thirdly, while Spectrum had not evidenced its assertion that liability might result from JJ's death, it was plain as a matter of logic that such an incident would not only be harrowing for staff, but would inevitably and properly prompt an Article 2 investigation which may lead to criminal or regulatory consequences.

31. The judge took the view that, if JJ was given food that choked him or caused him to develop re-feeding syndrome without his having first been referred for a refeeding programme assisted by a dietician, physiotherapist and a speech and language therapist, 'it is not at all fanciful to postulate that the defendant and the member of staff may be subject to criminal and or regulatory action if the claimant were to suffer serious or fatal

injury as a consequence. I do not accept that the prospect of a prosecution for manslaughter is negligible.' The judge went on to say that notwithstanding any evidence of JJ having consented to eating the food in question, a jury might find that feeding the claimant 'in the teeth of the advice' of the SALT assessment was 'so reprehensible as to justify a criminal sanction'. Nor did the judge accept that Spectrum would be likely to be immune from prosecution under regulation 12 of the CQC Regulations. He concluded that the risk of prosecution or regulatory action would however be lesser if there had been a successful re-feeding programme, but it remained a live risk.

32. The judge concluded that it was not appropriate for the court to make such a determination. He said that 'it would be quite improper of this court to seek to tie the hands of a future criminal court by making a declaration that purports to have effect notwithstanding what circumstances might surround the harm that comes to the claimant'. He went on to say that the facts of this case demonstrate the wisdom of the authorities that counsel a civil court against making declarations regarding criminal liability. The judge correctly regarded himself as bound by those authorities and said that there were no exceptional circumstances in the present case that might 'derogate from the rule that the court should not grant such a declaration.'.

33. The authorities the judge had in mind were *Imperial Tobacco Ltd v AG* [1981] AC 718, at 742*; R (Bus and Coach Association Ltd v SST* [2019] EWHC 3319 para.[47]. I would only add that in addition, the Lord Chief Justice, Lord Burnett said recently in *Secretary of State for Justice v a Local Authority & C (by his litigation friend AB)* [2021] EWCA Civ 1527 that:

> "30. By virtue of section 15 of the 2005 Act, the Court of Protection appears to have power to make declarations about the lawfulness of specific provisions in a care plan. The use of that power to declare lawful conduct which has the potential to be criminal should be confined to cases where the circumstances are exceptional and the reasons cogent."

Those observations apply equally to the present situation.

34. Having made his findings of fact both as to the risk posed to JJ by eating boiled sweets and the potential risk to JJ's staff of prosecution in the event that JJ died, the judge moved on to consider the issue of autonomy.

35. The judge surveyed the common law principles of autonomy and in summary concluded:

    i) Autonomy and the right of self-determination do not entitle a patient to insist on receiving a particular treatment regardless of the nature of the treatment.

    ii) If a medical practitioner concludes that a course of treatment is not clinically indicated, he is not required and is therefore under no legal obligation to provide it to the patient, neither can a patient demand a treatment which a medical professional considers to be adverse to his clinical needs.

iii) A medical professional who has concluded that a treatment is adverse to the patient's needs is not required to find another medical professional who will administer that treatment.

iv) A civil court should not make declarations about criminal liability save in the most exceptional circumstances: *R (Bus and Coach Association) v Secretary of State for Transport* [2019] EWHC 3319 at para.[47].

36. The judge rejected the argument that JJ's history did not justify a conclusion that there is a significant risk to JJ's life or health and that the SALT assessments did not provide a rational basis for its decision and Spectrum's perception of the risk of criminal or regulatory enforcement was irrational.

37. So far as Article 8 was concerned, the judge found it to be engaged, that there had been interference in those rights by virtue of JJ being denied his choice of food but that the decision was in accordance with the law and proportionate.

Context of the Appeal

38. Before moving on to consider the grounds of appeal, a number of issues should be addressed:

i) This appeal is an appeal from a decision about medical treatment or care made at first instance. It is not about prison or prisoners' rights (see Prison Rules 1999/728 rule 24(1) Food: 'no prisoner shall be allowed, except as authorised by a health care professional to have any food other than that ordinarily provided.') As with all prisoners, therefore, JJ only has such choice of foods as are provided by the prison authorities.

ii) The provision of food is treatment or care for the purposes of medical treatment decisions. Where, as here, the patient is unable to feed themselves, all foods such as boiled sweets are part of treatment or care: *Airedale NHS Trust v Bland* [1993] AC 789 at p 858G.

iii) This appeal raises no new points of law. The law in relation to both the common law and Article 8 of the European Convention on Human Rights ('ECHR') is well established and the arguments put forward on behalf of JJ relate to the proper interpretation of that law. I therefore refer only to those authorities that in my view address what I regard as the well-established legal position in relation to a patient's autonomy in respect of their choice of medical treatment.

The Grounds of Appeal:

39. There are two grounds of appeal:

(1) 'Autonomy: The Judge's conclusion that the applicant's autonomy could lawfully be overridden by [Spectrum] was, in the circumstances of [JJ''s] case, not supported by the evidence and was contrary to established authority on the scope and extent of autonomy as a fundamental principle of common law'.

(2) 'Article 8 ECHR: The Judge erred in concluding that [Spectrum's] interference with [JJ's] Article 8 ECHR rights was in accordance with the law and

proportionate, and hence justified under Article 8(2) ECHR'.

40. There is no appeal against the judge's conclusions on rationality or discrimination.

Ground 1: Autonomy

41. Ground 1 contains two elements: (i) that the decision was not supported by the evidence and (ii) that the decision was contrary to established authority as to the scope and extent of autonomy at common law.

The Evidence: Findings of Fact

42. An appellate court will only rarely interfere with findings of fact made at first instance. In *R (DB) v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, Lord Kerr said at para.[78-80]: 'The case for reticence on the part of the appellate court, whilst perhaps not as strong in a case where no oral evidence has been given, remains cogent'. In the present case, no medical evidence, whether challenging the evidence filed on behalf of Spectrum or at all, was filed on behalf of JJ.

43. Ms Weereratne KC on behalf of JJ submitted that the judge had overstated the risk to JJ, saying that the evidence of Dr Thomas went beyond the assessment in the SALT assessments. In my judgement, such a submission cannot be sustained. Dr Thomas' evidence was based on her expert conclusion taking into account all the circumstances, including the SALT assessment. The judge was not only right to accept her evidence that 'whatever we do [JJ] will in my professional opinion be at considerable risk of dying if he is provided with solid foodstuffs', but it would arguably have been perverse not to do so in the light of the SALT evidence and absent any evidence to the contrary.

The Evidence: Risk of prosecution or regulatory proceedings:

44. Mr Glenister on behalf of Spectrum took the court to the relevant regulatory provisions. The backdrop is provided by the General Medical Council guidance for 'Good Medical Practice' which lays emphasis not only on skills and clinical performance but, at 'Domain 3', stresses the importance of establishing a partnership with patients, listening to patients, taking account of their views and providing them with the information they need.

45. Guidance in relation to issues around eating is provided by the Royal College of Speech and Language Therapists *'Eating and drinking with acknowledged risks'* and by the Royal College of Physicians *'Supporting people who have eating and drinking difficulties'*. This latter guidance was referred to by the Intervener who, helpfully, drew the attention of the Court to the guidance found at 'Box 2' in relation to 'Risk Feeding' decisions. I note from reading this guidance that 'in any 'risk feeding' decision, there needs to be a calibration between being risk averse, and placing carers in an impossible position in the name of patient autonomy'. This is a statement which is particularly apposite in the present case.

46. The judge was concerned with the CQC Regulations and in particular regulation 12 which, so far as it is relevant, provides:

> "1. Care and treatment must be provided in a safe way for service users.

> 2. Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include—
>
> > (a) assessing the risks to the health and safety of service users of receiving the care or treatment;
> >
> > (b) doing all that is reasonably practicable to mitigate any such risks;"

47. In my judgement, Spectrum have, to date, complied with the regulatory requirements in so far as they are able to do absent the further co-operation of JJ which would be necessary in order to carry out any further assessment. They have mitigated those risks by providing a Level 6 diet and by declining to provide JJ with boiled sweets and other hard food stuffs.

48. Ms Weereratne submitted that the approach of Spectrum was too risk averse. They should, she says, be providing JJ with the foods of his choice as the fact that he has capacity and understands the risks serve to provide Spectrum with a 'protective element from prosecution'.

49. Under CQC regulation 22 (2), Spectrum could be prosecuted where a breach of regulation 12 has resulted in a patient being exposed to 'avoidable harm or significant risk of such harm occurring'. As the judge found, under regulation 12, Spectrum must provide safe care and treatment. There is no 'consent defence' under the CQC Regulations which permits a healthcare provider to provide care which it considers carries unacceptable risk. I agree with the judge that it is not fanciful to regard Spectrum as being at risk of prosecution under regulation 22(2) for being in contravention of regulation 12 if JJ choked and died having been given boiled sweets by Spectrum in circumstances where they had commissioned and understood the contents of the SALT assessment.

50. There is also the potential for Spectrum and its staff to be vulnerable to prosecution under the Health and Safety at Work etc Act 1974.

51. In support of his submission that the judge had equally been right in finding that the risk of criminal prosecution was not fanciful, Mr Glenister took the Court to *R v Adomako* [1994] UKHL 6 where the required elements to satisfy the legal test for gross negligence manslaughter were endorsed and defined by the House of Lords. Lord Mackay said in his speech that:

> "The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."

52. Lord Mackay went on to say that he was of the view that it was perfectly appropriate for the word 'reckless' to be used in a case of involuntary manslaughter. As the judge found, any prosecution of Spectrum of a member of its staff would be against the backdrop of them having given JJ boiled sweets knowing that in doing so there was a considerable risk of choking and death.

53. In my judgement, the judge's decision that JJ's 'autonomy could lawfully be overridden' by Spectrum was 'supported by the evidence' both in relation to the risk of harm to JJ and in relation to the risk of prosecution or regulatory action to the staff of Spectrum in the event that they fed JJ boiled sweets. Regardless of any prosecution or regulatory action, the death of JJ would inevitably lead to a coroner's investigation and inquest which in itself would be both stressful and distressing for the carers involved.

Common law: Choice.

54. Having concluded that the findings of the judge were supported by the evidence, I turn to the main issue in the case namely whether the judge's conclusion that Spectrum were entitled in law to override JJ's decision was as stated in Ground 1: 'contrary to established authority on the scope and extent of autonomy as a fundamental principle of common law'.

55. Ms Weereratne's core submission was that this is a case about choice and that the court could not and should not have overridden JJ's choice as to what food he eats in circumstances where he is of full capacity and understands and accepts the risk he faces of choking to death if he eats boiled sweets.

56. It is trite law that any person with capacity has the right to choose which medical treatment proposed to him by a treating medical practitioner to receive or to refuse. The question on this appeal is whether, when a patient wishes to choose treatment that is not clinically recommended and therefore not offered, that patient can nevertheless require the clinician to provide the treatment in question.

57. In my judgement, the law is clear: a clinician cannot be so compelled. A patient may only choose between the treatment options that are available to him, although as between those available options he or she may choose one which the clinician believes to be the least appropriate or even positively ill advised.

58. The right to choose between available alternative medical treatments was confirmed in *Montgomery v Lanarkshire Health Board* [2015] AC 1430 *(Montgomery).* At p1463 B-C, Lord Kerr said:

> "…An adult person of sound mind is entitled to decide which, if any of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is thereafter under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment and of any reasonable alternative or variant treatments."

59. Ms Weereratne relied upon the fact that Lord Kerr had said at [45] that 'the doctor is not in a position to take the 'right' decision as a matter of clinical judgment' and that it is important to avoid 'medical paternalism'. That is undoubtedly the case, but it does not answer the question as to whether a patient can demand treatment which is not on offer.

60. The judgments in *McCulloch & Others v Forth Valley Health Board* [2023] UKSC 26 *(McCulloch)* were handed down after the hearing of the appeal and each party has been

given the opportunity to make brief written submissions in respect of the same. *Mcculloch* was a clinical negligence case in which the Supreme Court considered what legal test should be applied to the assessment of whether alternative treatment is reasonable and requires to be discussed with a patient against the backdrop of the *Montgomery* line of cases. Whilst that case was concerned with alleged negligence on the part of a cardiologist, of relevance to Ms Weeteratne's submission that the case is about 'choice' was the observation made in the judgment of Lords Hamblen and Burrows at para.[59] that:

> "In line with the distinction in *Montgomery* at para 83… between the excise of professional skill and judgment and the court-imposed duty of care to inform, *the determination of what are reasonable alternative treatments clearly falls within the former and ought not to be undermined by a legal test that overrides professional judgment. In other words, deciding what are the reasonable alternative treatments is an exercise of professional skill and judgment* That is why, as submitted by Una Doherty KC, counsel of the respondent, it is appropriate to refer synonymously to reasonable alternative treatments or to "clinically appropriate" or "clinically suitable" alternative treatments. *My emphasis*"

61. Their Lordships continued at [62] to say that:

> "…. Viewed through the lens of a reasonable alternative treatment, the approach we favour is therefore consistent with saying that, in *Montgomery*, not only should the pursuer have been informed of the risk of vaginal delivery but she should also have been informed of the reasonable alternative of a caesarean section."

62. *McCulloch* whilst of no material relevance to the issues before the Court in this appeal, nevertheless confirms that the determination of what are reasonable treatments to offer is a matter of professional skill and judgment on the part of the doctor offering those treatments.

63. As well as the right to choose as between available treatment options, there is also a right to refuse medical treatment. The Court was taken to a number of cases including *Re T* [1992] 3 WLR 782 (refusal of a blood transfusion); *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP); and *Re B v NHS Hospital Trust* [2002] EWHC 429 (withdrawal of life support) (*'Re B').*

64. Ms Weereratne laid heavy emphasis on *Re B.* In that case, there was a 1% chance that the patient with whom the court was concerned could be weaned off a ventilator. The patient had however decided that she wished the ventilator to be switched off and be allowed to die. The clinicians were reluctant to do so and wished to attempt the weaning process. It was in those circumstances that the matter came before the court.

65. Ms Weereratne submitted that this was an example of a doctor being obliged to carry out treatment (that is to say, the turning off of the ventilator) which he did not wish to provide. This meant, she said, that the withdrawal of life support via the ventilator was

treatment which was 'off the table' so far as the doctors were concerned as withdrawal was not a treatment option they were offering. Even though, so far as the doctors were concerned, withdrawal of life sustaining treatment was 'off the table', Ms Weereratne argued that it was nevertheless established as an option from which the patient could choose. It follows, she submitted, that *Re B* is authority for the fact that a doctor can be required to carry out treatment, even though he or she does not regard it as an appropriate treatment option.

66. With respect to Ms Weereratne, I can see no basis for such a submission. The patient in *Re B* was actively receiving treatment which was keeping her alive, namely ventilation, which, as Lewis LJ observed, involves significant bodily intrusion and which B now wished to come to an end and she now wished to refuse further treatment. The case was therefore about a patient with capacity choosing to bring her treatment to an end and was not about doctors being required to give treatment against their better judgment.

67. In my judgement, the withdrawal of treatment cases relied upon by Ms Weereratne are of no assistance here and deal with a wholly different situation from that of JJ which is concerned with the provision of treatment and not the withdrawal of treatment.

68. The common law authorities so far considered therefore establish (i) that a patient with capacity can choose between various treatment options, which choices have to be respected by the clinicians even if the treatment chosen is not the one that was recommended by the treating team and (ii) a patient with capacity can refuse medical treatment. That then leaves the question as to whether, as advocated by Ms Weereratne, there is a common law right of autonomy which allows a patient to demand, and obliges a clinician to provide, medical treatment that is not offered to that patient by their doctors.

69. In my judgement, the answer is an unequivocal 'No'. The answer to the question was provided by the then Master of the Rolls Lord Philips in *Regina (Burke) v General Medical Council (Official Solicitor and other intervening)* [2005] EWCA Civ 1003; [2006] QB 273 *('Burke').* Lord Philips, having analysed the first instance judgment of Munby J which was the subject of the appeal, summed up the position as follows:

> "[50] The GMC is concerned that these passages suggest that a doctor is obliged, if the patient so requires, to provide treatment to a patient, or to procure another doctor to provide such treatment, even though the doctor believes that the treatment is not clinically indicated. No such general proposition should be deduced from Munby J's judgment, nor do we believe that he intended to advance any such general proposition. So far as the general position is concerned, we would endorse the following simple propositions advanced by the GMC:
>
> i) The doctor, exercising his professional clinical judgment, decides what treatment options are clinically indicated (i.e. will provide overall clinical benefit) for his patient.

> ii) He then offers those treatment options to the patient in the course of which he explains to him/her the risks, benefits, side effects, etc involved in each of the treatment options.
>
> iii) The patient then decides whether he wishes to accept any of those treatment options and, if so, which one. In the vast majority of cases he will, of course, decide which treatment option he considers to be in his best interests and, in doing so, he will or may take into account other, non-clinical, factors. However, he can, if he wishes, decide to accept (or refuse) the treatment option on the basis of reasons which are irrational or for no reasons at all.
>
> iv) If he chooses one of the treatment options offered to him, the doctor will then proceed to provide it.
>
> v) *If, however, he refuses all of the treatment options offered to him and instead informs the doctor that he wants a form of treatment which the doctor has not offered him, the doctor will, no doubt, discuss that form of treatment with him (assuming that it is a form of treatment known to him) but if the doctor concludes that this treatment is not clinically indicated he is not required (i.e. he is under no legal obligation) to provide it to the patient although he should offer to arrange a second opinion."*
>
> (my emphasis).

70. Ms Weereratne described *Burke* as a 'rather strange' case in which much of the decision related to the duty to preserve life. When invited by the Court to respond to para.[50] of Lord Philips' judgment, she said that the provision of boiled sweets to JJ was 'not off the table' and therefore para.[50(v)] does not apply to the present case. *Burke*, she submitted, had no application to JJ's situation as Spectrum had said that they would feed the boiled sweets to JJ if ordered to do so. Further, she said that she would rely on the *Montgomery* principle to override the clinical judgment of the clinician on the basis that, as JJ is prepared to take the risk of choking and dying, the provision of boiled sweets is lawful given that Spectrum would be complying with JJ's properly informed food choices.

71. The reference to Spectrum being willing to provide JJ with boiled sweets if a declaration was made that to do so was lawful stems from the 'neutral' position taken by Spectrum at first instance, although their position is rather more nuanced on appeal. Spectrum's position is that they have declined to give JJ the boiled sweets he desires since May 2021 as to do so would, in their clinical judgment, amount to unsafe care and present a considerable risk of death in the event that he choked. Spectrum has however at all times been clear that it would comply with any order or declaration made by the court and it follows that in the event that a declaration was made in the terms or similar terms to that which is sought by JJ, they would provide the boiled sweets that JJ wants, it having been determined by the court that it was unlawful for them not to do so.

72. A party to proceedings confirming that they will comply with a court order or the terms of a declaration does not, in my view, serve to convert Spectrum's position from that of a refusal to give JJ boiled sweets because it is unsafe to do so and is therefore 'off the table' as a treatment option which can be chosen by JJ, to being one of merely 'ill advised' and an option capable of being chosen by JJ in line with the *Montgomery* principles. Neither, contrary to Ms Weereratne's submission does the fact that Spectrum have taken the precaution of identifying staff who would be willing to carry out a court order to give JJ boiled sweets in the event that a declaration were made, serve to create an option which JJ can choose.

73. In my judgement, the answer to Ground 1 of the appeal is found in para.[50(v)] of *Burke.* Where, as here, Spectrum has concluded, in the light of the SALT assessments and the evidence of Dr Thomas, that the treatment sought by JJ is not clinically indicated, then they are not legally obliged to provide it and the judge was right to find that to be the case.

Ground 2: Article 8

74. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

75. It is common ground that JJ's Article 8 right to respect for private life is engaged and that Spectrum's refusal to provide him with boiled sweets is an interference with that right. That leaves consideration as to whether the conduct of Spectrum was in 'accordance with the law', was for a permitted reason under article 8 and whether it satisfied the test of proportionality.

76. Ms Weereratne submits that the interference is not 'in accordance with the law' and says that the common law authorities (including *Burke*) do not satisfy the test in *Silver & others v United Kingdom* (1983) 5 EHRR 347 that the law must be 'clear, foreseeable and adequately accessible'. In this case, she says, there is no statutory basis for interference and the common law framework which underpins the position taken by Spectrum is neither clear nor sufficiently foreseeable to comply with the requirements of Article 8. Although, she says, given the myriad of situations to be covered, it would be challenging to draft such legislation, nevertheless only legislation or formal governmental policy would satisfy the test and provide sufficient clarity.

77. It is well established that the common law suffices for the purposes of the 'accordance with the law' requirement of Article 8(2). See, for example, *The Sunday Times v the United Kingdom (1979) 2EHRR 245 (the Sunday Times')* at para.47 which, although decided in the context of Article 10(2), applies equally to Article 8(2):

> "The Court observes that the word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law. Accordingly the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation' and *Chappell v United Kingdom* (1989) EHRR 1989 at para.[52] 'law' includes unwritten or common law'."

78. The judgment in *The Sunday Times* deals also with the issue of clarity in the following way:

> "49. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

79. In my judgement, the analysis of Lord Philips at para.[50] in *Burke* clearly contains "sufficient precision to enable the citizen to regulate his conduct", even if it is not absolutely prescriptive in all situations. In any event, the provisions of the CCQ regulations provide regulations dealing with the situation in which care and treatment are provided.

80. Ms Weereratne also submitted, in relation to Article 8, that (i) the judge erred in his approach to proportionality by failing to consider less intrusive measures, in particular by moving JJ from a supine position and (ii) that the interference was not necessary to protect the professional autonomy of the clinicians in circumstances where Spectrum had indicated that it would feed JJ if the court declared it was lawful to do so.

81. In my judgement, neither of these go to the issue of proportionality on the facts. First, the issue of JJ being fed in a less supine position was not before the judge. Not only did he not have any evidence in relation to the issue, but, as recorded at paras.[15-16] above, JJ had declined to have the physiotherapy assessment on offer which was specifically aimed at discovering if he could be nursed in a more elevated position.

82. Secondly, as I have already noted, the fact of Spectrum indicating to the Court that it will comply with a declaration does not render the interference unnecessary. Absent such a declaration, Spectrum in the exercise of their professional autonomy, remain of the view that it is unsafe and inappropriate to give JJ boiled sweets and, absent a declaration that it is unlawful for them not to do so, they will not offer them to him.

83. The judge conducted an exemplary and concise proportionality analysis. He found at para.[70] that the course adopted by Spectrum was taken for the protection of health. He went on at para.[71] to find that there was a 'real risk' that Spectrum or its staff

might face prosecution or regulatory action if they complied with JJ's food choices and he died or sustained serious injury and further that the court would not force a medical professional to administer treatment it believes is contra indicated. In other words, the judge said 'the court will not interfere with [Spectrum's] personal autonomy.' The course taken by Spectrum was, the judge said, 'taken for the protection of the rights and freedoms of others, namely the defendant and its staff'.

84. Having accepted that the circumstances of the case are such as to merit the protection of Article 8, the judge concluded that the countervailing concerns of Spectrum 'amply justify the defendant's interference with the claimant's right to choose'.

Concluding Observations

85. JJ filed a witness statement in the proceedings. In it he describes how he has little or no quality of life. He is completely bed-bound, lying on his back for 24 hours a day, and is unable to do anything for himself other than call for help or control a television. He concludes his statement by saying that he has lost almost everything in his life and 'being able to eat what I want represents my last shred of humanity and dignity. I want to be able to cling on to it for as long as I can'.

86. One can fully understand the dire situation in which JJ finds himself and a view that says that if JJ understands and is happy to take the risk of choking for the modest pleasure of eating a boiled sweet, then that is a matter for him. It may be that in certain different medical circumstances the balance would come down in JJ's favour but not, in my view, in this case. JJ cannot feed himself. He cannot obtain boiled sweets from the prison shop, unwrap them and put them in his own mouth. The provision of boiled sweets in circumstances where JJ cannot even put a sweet into his mouth is different; it is treatment or care carrying with it the considerable risk that on any given day, giving JJ that boiled sweet may cause him to choke to death and in circumstances where JJs advance decision would prevent all but the most basic life-saving intervention on the part of the person who had given him the boiled sweet.

87. In my judgement the judge was right having considered the well-established authorities, to conclude that it was lawful for Spectrum to refuse to provide JJ with boiled sweets in those circumstances, and that had they done so and JJ had choked to death or suffered serious harm as a consequence of aspiration, they were at a more than fanciful risk of prosecution under regulation 12 CQC or in the criminal courts for gross negligence manslaughter.

88. I would therefore dismiss the appeal on both the common law and the Article 8 ECHR grounds.

Lord Justice Lewis:

89. I agree.

Lord Burnett of Maldon:

90. I also agree.