GUP v EUP [2024] EWCOP 3

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GUP – the facts

- EUP – woman in her 80s with history of strokes.
- Underwent stenting of the left internal carotid artery (ICA). Poor neurological recovery including further strokes.
- While on ICU an NG tube inserted. Discharged to stroke ward with NG tube in place.
- Tube became displaced and was removed. Despite extensive attempts to insert another NG tube, it proved impossible.

GUP – the facts cont.

- No safe and reliable feeding route could be secured. The Court accepted that there were '*no options for tube insertion in the stomach (a gastrostomy) because of extreme risks with insertion, risk of skin breakdown at the site, distress incurred during insertion and post insertion monitoring. These risks extend similarly to the provision of total parenteral nutrition (TPN)….. [and] no options related to repeated NGT insertion.*'

GUP – the judgment

- Court concluded that since insertion of the stent EUP had '*little or no interaction with her environment and is unable to non-verbally communicate her wishes ……the extent of the brain damage and the broad neurological clinical picture provides no foundation for any hope that EUP will survive or recover in any meaningful way.'*

- Court held it was not in EUP's best interests to be provided with either nutrition or hydration.

GUP – the judgment cont

- Application had been brought by EUP's son – a LIP – in the COP

- The Court expressed concern about the approach of the Trust – which was to put in place the palliative care plan (despite the wish of the family for CANH to be provided) but not bring the matter to the Court.

GUP – the judgment

Para 48:

The likely reasoning behind this is that the Trust considered that there was no ethical route to provide nutrition to EUP. The family disagreed and saw this as passivity, with profound consequences. They perceived an important decision having been taken, even though the decision was to take no action. They considered that the Court ought to be able to review that decision making process and identify its own evaluation of where EUP's best interests lay. I agree with the family. A decision not to provide nutrition is every bit as serious as a decision to withdraw nutrition. Where there is conflict, these cases must be resolved by the court

GUP – the judgment cont

Para 50:

Where there is conflict in these serious medical treatment cases, it is in everybody's best interests, but most importantly P's, to bring an application to court. That will be most efficiently achieved where it is driven by the Trust's application. There are many and obvious reasons why it is also to the Trust's advantage to have their treatment plans, in cases such as this, scrutinised by the court.

Issues with GUP

- The OS had argued that the obligation on the Trust to bring an application arose from the Guidance promulgated by Hayden J when he was VP of the COP entitled '**Applications relating to medical treatment**' [2020] EWCOP 2

Issues with GUP

Paras 8 & 9 of that Guidance provide as follows:

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

(c) a lack of agreement as to a proposed course of action from those with an interest in the person's welfare, ……

*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.*

Issues with GUP cont.

*9. 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. This is to be regarded as an inalienable facet of the individual's rights, guaranteed by the European Convention on Human Rights ('ECHR'). For the avoidance of any doubt, this specifically includes the withdrawal or withholding of clinically assisted nutrition and hydration.*

Issues with GUP

There are problems with this approach:

- In particular it ignores the fact that the Guidance refers not to disputes about clinical appropriateness, but best interest decisions. Thus as '*at the end of the medical decision making*' in GUP, the provision of nutrition was not an option that was clinically available to EUP, it was therefore not an option that could have been picked by the Court on a best interests evaluation. Therefore, the Guidance simply did not apply.

Issues with GUP

Remember **Burke v General Medical Council** [2005] EWCA Civ 1003 [2006] QB 273

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.

Issues with GUP

The fact that GUP disagreed with the decision of the Trust not to offer nutrition to EUP does not turn the decision into a best interests one. Nor does the fact that the patient lacks capacity to consent or refuse the treatment.

Further, the approach of Hayden J appears is in direct contradiction to that taken by the Court of Appeal in **AVS v A NHS Foundation Trust & Anor** [2011] EWCA Civ 7 and the Supreme Court in **N v A CCG** [2017] UKSC 22.

Issues with GUP

Can an obligation to bring applications before the Court be found in human rights jurisprudence? Does article 2 ECHR require such applications to be made?

- Does the procedural obligation require the Trust to bring an application before the Court?

- Would such an obligation be workable?

Where are we now?

- Is there an obligation on a Trust to bring a case before the COP for a BI evaluation where there is only one clinically indicated treatment option, because there is a dispute about this with the family?

The answer to this must be no!

Where are we now?

- However it is not always easy to distinguish between a dispute about clinical appropriateness (including, a dispute about whether treatment is futile) and a dispute about whether a treatment that is in principle appropriate is nonetheless not in the best interests of the person.

- If the clinical view is that the treatment is not clinically appropriate it is always sensible to obtain second opinions on that issue as the Trust did in GUP

- In some cases a Trust could bring proceedings for declaratory relief in the KBD

The End

Do also have a look at the article from Alex Ruck-Keene KC and Victoria Butler-Cole KC at

https://www.mentalcapacitylawandpolicy.org.uk/dont-ignore-the-serious-medical-treatment-guidance-but-lets-be-clear-about-what-the-law-requires/