



Neutral Citation Number: [2018] EWCOP 6

Case No: 13228376 & 13228382

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2018

Before :

MR JUSTICE WILLIAMS

Between :

The Secretary of State for the Home Department	<u>Applicant</u>
- and -	
Sergei Skripal	<u>First</u>
(by his Litigation Friend the Official Solicitor)	<u>Respondent</u>

-and-

Salisbury NHS Foundation Trust	<u>Second</u>
	<u>Respondent</u>

The Secretary of State for the Home Department	<u>Applicant</u>
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-and-

Yulia Skripal	<u>First</u>
(by her Litigation Friend the Official Solicitor)	<u>Respondent</u>

-and-

Salisbury NHS Foundation Trust	<u>Second</u>
	<u>Respondent</u>

James Eadie QC, Owain Thomas QC and Matthew Hill (instructed by **Government Legal Department**) for the **Applicant**
Vikram Sachdeva QC and Jack Anderson (instructed by the **Official Solicitor**) for the **First Respondents**

Hearing dates: 20, 21 and 22 March 2018

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the witnesses must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Williams

Introduction

1. On 4 March 2018 Sergei Skripal and Yulia Skripal were admitted to hospital in Salisbury. Tests carried out by Defence Science and Technology Laboratory at Porton Down concluded that they had been exposed to a nerve agent. Both Mr and Ms Skripal remain in hospital under heavy sedation. The precise effect of their exposure on their long term health remains unclear albeit medical tests indicate that their mental capacity might be compromised to an unknown and so far unascertained degree.
2. The fact of their exposure to a nerve agent has already had significant consequences on the wider domestic and international stage which I need not go into for the purposes of this judgment. However central to the application before me is the fact that on 14 and 16 March 2018 the UK government issued a formal invitation to the Director-General of the Organisation for the Prohibition of Chemical Weapons (OPCW) to send a team of experts to the United Kingdom ‘to assist in the technical evaluation of unscheduled chemicals in accordance with Article VIII 38(e).’ This in effect is to independently verify the analysis carried out by Porton Down. In order to conduct their enquiries the OPCW wish to
 - i) Collect fresh blood samples from Mr and Ms Skripal to
 - a) Undertake their own analysis in relation to evidence of nerve agents,
 - b) conduct DNA analysis to confirm the samples originally tested by Porton Down are from Mr and Ms Skripal,
 - ii) Analyse the medical records of Mr and Ms Skripal setting out their treatment since 4 March 2018,
 - iii) Re-test the samples already analysed by Porton Down.
3. Because Mr Skripal and Ms Skripal are unconscious and neither are in a position to consent to the taking of further blood samples for these purposes or to the disclosure of their medical records Salisbury NHS Foundation Trust have quite properly confirmed to the UK Government that a court order would be required to authorise (a) and (b) above.
4. Thus the Secretary of State has applied to this court for personal welfare orders in respect of Mr and Ms Skripal under the provisions of the Mental Capacity Act 2005 seeking determinations that it is lawful for the NHS Trust to take a blood sample for provision to the OPCW and to disclose the relevant medical records to the OPCW and for the blood samples taken from Mr and Ms Skripal to be subjected to testing by the OPCW.
5. The application came before me on 20 March 2018. It was made on an urgent basis. The OPCW wished to collect samples in the near future. The evidence is that samples taken from living individuals are of more scientific value than post mortem samples.

At present both Mr and Ms Skripal are critical but stable; it is not inconceivable that their condition could rapidly deteriorate. I heard submissions from the Secretary of State and from the Official Solicitor who was to be appointed the Litigation Friend of both Mr and Ms Skripal. The NHS Trust were neither present nor represented although they are a Respondent to each application. I was told that the NHS Trust were aware of the application and the evidence I have read from the lead treating clinician is that they do not feel comfortable going beyond their clinical role. In effect the NHS Trust are therefore neutral on this application although they have confirmed that they will implement or facilitate any order that I make. At the conclusion of the hearing I gave my decision and short reasons and now I set out that decision and reasoning more fully.

Preliminary Matters

6. At the outset of the hearing I addressed the issue of whether the application was to be heard in private or in public. Both Mr Eadie QC on behalf of the Secretary of State and Mr Sachdeva QC on behalf of the Official Solicitor submitted that the applications should be heard in private because of the potentially sensitive nature of the evidence and the need to protect Mr and Ms Skripal and other people involved in the proceedings.
7. The Court of Protection Rules 2017 which came into effect in December 2017 and the accompanying Practice Direction 4C provide as follows:

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private hearings

Private hearings

General rule – hearing to be held in private

4.1.—(1) The general rule is that a hearing is to be held in private.

(2) A private hearing is a hearing which only the following persons are entitled to attend—

(a) the parties;

(b) P (whether or not a party);

(c) any person acting in the proceedings as a litigation friend or rule 1.2 representative;

(d) any legal representative of a person specified in any of sub-paragraphs (a) or (b); and

(e) any court officer.

Court's general power to authorise publication of information about proceedings

4.2.—(1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated in accordance with paragraph (2) or (3).

(2) The court may make an order authorising—

- (a) the publication or communication of such information or material relating to the proceedings as it may specify; or*
- (b) the publication of the text or a summary of the whole or part of a judgment or order made by the court.*

- (3) Subject to any direction of the court, information referred to in paragraph (1) may be communicated in accordance with Practice Direction 4A.*
- (4) Where the court makes an order under paragraph (2) it may do so on such terms as it thinks fit, and in particular may—*
 - (a) impose restrictions on the publication of the identity of—*
 - (i) any party;*
 - (ii) P (whether or not a party);*
 - (iii) any witness; or*
 - (iv) any other person;*
 - (b) prohibit the publication of any information that may lead to any such person being identified;*
 - (c) prohibit the further publication of any information relating to the proceedings from such date as the court may specify; or*
 - (d) impose such other restrictions on the publication of information relating to the proceedings as the court may specify.*

Power to order a public hearing

Court's power to order that a hearing be held in public

4.3.—(1) The court may make an order—

- (a) for a hearing to be held in public;*
 - (b) for a part of a hearing to be held in public; or*
 - (c) excluding any person, or class of persons, from attending a public hearing or a part of it.*
- (3) A practice direction may provide for circumstances in which the court will ordinarily make an order under paragraph (1), and for the terms of the order under paragraph (2) which the court will ordinarily make in such circumstances*

PRACTICE DIRECTION 4C – TRANSPARENCY

This practice direction supplements Part 4 of the Court of Protection Rules 2017

1.1. This practice direction is made under rule 4.3. It provides for the circumstances in which the court will ordinarily make an order under rule 4.3(1) and for the terms of the order under rule 4.3(2) which the court will ordinarily make in such circumstances.

1.2. This practice direction applies to hearings in all proceedings except applications for a committal order (for which rule 21.27 makes specific provision).

2.1. The court will ordinarily (and so without any application being made)—

- (a) make an order under rule 4.3(1)(a) that any attended hearing shall be in public; and*
- (b) in the same order, impose restrictions under rule 4.3(2) in relation to the publication of information about the proceedings.*

2.4. The court may decide not to make an order pursuant to paragraph 2.1 if it appears to the court that there is good reason for not making the order, but will consider whether it would be appropriate instead to make an order (under rule 4.3(1)(b) or (c))—

- (a) for a part only of the hearing to be held in public; or*
- (b) excluding any persons, or class of persons from the hearing, or from such part of the hearing as is held in public.*

2.5. (1) In deciding whether there is good reason not to make an order pursuant to paragraph 2.1 and whether to make an order pursuant to paragraph 2.4 instead, the court will have regard in particular to—

- (a) the need to protect P or another person involved in the proceedings;*
- (b) the nature of the evidence in the proceedings;*
- (c) whether earlier hearings in the proceedings have taken place in private;*
- (d) whether the court location where the hearing will be held has facilities appropriate to allowing general public access to the hearing, and whether it would be practicable or proportionate to move to another location or hearing room;*
- (e) whether there is any risk of disruption to the hearing if there is general public access to it;*
- (f) whether, if there is good reason for not allowing general public access, there also exists good reason to deny access to duly accredited representatives of news gathering and reporting organisations.*

8. It will immediately be apparent that the ‘General Rule’ propounded by COPR 4.1 is that proceedings are to be heard in private and the scheme of COPR 4.2 and 4.3 is such as to give the court the power to make orders which derogate from that General Rule by providing [COPR 4.2] that information may be ‘published’ in certain circumstances and [COPR4.3(1)(a)] that the court may make an order for a hearing to be held in public. However the effect of PD4C 2.1 is to reverse that apparent ‘General Rule’ by providing that the Court will ordinarily make an order under COPR 4.3(1)(a) for the hearing to be in public unless it appears to the court there is a good reason for not making the order.
9. The apparent tension between the wording of the Rule and the Practice Direction is not a matter which I am able to or need to resolve today. Given the unique and exceptional circumstances of this application it appears to me that the ‘General Rule’ should apply and there is good reason for not making a PD4C 4.3(1)(a) order. I have also considered whether it would be appropriate instead to make an order (under rule 4.3(1)(b) or (c)). In particular I have regard to PD4C 2.5(1) (a) & (b). It appeared to me there was good reason because:
- i) The evidence came from 5 witnesses who ranged from Porton Down scientists to senior FCO and HO officials which addressed issues which might be considered sensitive,
 - ii) The documentary exhibits similarly contained sensitive material including material deriving from the OPCW an international organisation who might wish to make observations on what should go into the public domain.
 - iii) The background to the application indicates that great care may need to be taken in relation to individuals who are involved in the proceedings.
 - iv) Directing the matter be heard in public would have potentially inhibited the ability of the court to explore the issues, it not being possible to weigh the sensitivity of any query or answer in the course of an urgent hearing.

For those reasons I concluded that this urgent hearing should take place in private but I determined that my judgment would be published in accordance with COPR 4.2(2)(b).

10. Section 50(2) MCA 2005 provides that the Secretary of State requires the permission of the court to make this application. Section 50(3) requires the court to have regard when deciding whether to grant permission in particular to:

- i) The applicant's connection with the person to whom the application relates,
 - ii) The reasons for the application,
 - iii) The benefit to the person to whom the application relates of a proposed order, and
 - iv) Whether the benefit can be achieved in any other way.
11. The reasons for the application in themselves are sufficient to persuade me that permission should be granted to the Secretary of State. The application and the reasons underpinning it are unique and of the utmost gravity.
12. The Court of Protection Rules 2017 rule 1.2 requires the court to consider the participation of the person who lacks capacity. Given the nature of the issues raised in the case and the gravity of the situation I conclude that both Mr and Ms Skripal should be joined as parties and that the Official Solicitor should be appointed as Litigation Friend to each of them. As a result of my having appointed a Litigation Friend for Mr and Ms Skripal I raised the issue with the parties of whether this gave rise to any notification obligation pursuant to Articles 36 and 37 of the Vienna Convention on Consular Relations of 24 April 1963 as Ms Skripal is a Russian national although Mr Skripal became a British national. In the field of care cases in the Family Court the President gave some guidance on this issue in *In Re E (A Child)* [2014] EWHC 6 (Fam). Mr Thomas QC submitted that as there is no domestic implementation of Art 37 no obligation arises. He also questioned whether the court could be a competent authority. He noted that the Convention is implemented by section 1 and Schedule 1 of the Consular Relations Act 1968 and that this does not include Article 37. I note that at paragraphs 41 and 44 in *Re E* (above) the President noted the issue in relation to the effect of Article 37 in public international and English domestic law. Mr Sachdeva QC drew my attention to the context in which the President offered the guidance and that it was guidance only for the purposes of care cases in the family court. Both Mr Thomas QC and Mr Sachdeva QC also submitted that even if (and it is a very big if) that guidance could be transposed into the Court of Protection there was good reason for not imposing a notification obligation still less the other obligations the President identified in paragraph 47 of *Re E*. I am satisfied for the reasons set out above that there is no notification obligation in law on this court. The nature and extent of any good practice which might be followed in Court of Protection cases where a foreign national is the subject of an application may require consideration in another case. In practice, the Russian consular authorities will be made aware of these proceedings because this judgment will be published. I do not consider it necessary to list the issue for the sort of further extensive argument that would be necessary to enable the court to determine if any good practice guidance should be given.
13. At this stage the issues in relation to each application are almost identical and there is every reason to hear the applications together. Whether that will remain the case cannot be ascertained. I will not consolidate the applications but will at present direct that they be listed together. If separate considerations arise in respect of either Mr Skripal or Ms Skripal that will enable one application to be restored to court without the necessity of the other application being listed at the same time.

The Parties Positions

14. The Secretary of State's position is set out in the Skeleton Argument drafted by Mr Eadie QC, Mr Thomas QC and Mr Hill and was supplemented in oral submissions. The main points made by the Secretary of State are
- i) Capacity: the patients are unconscious and so lack capacity to make a decision on whether or not to consent to giving blood samples.
 - ii) Best interests:
 - a) Neither patient is expected to regain capacity by the time the sampling will be needed; neither can participate; there is no other person who might practicably and appropriately be consulted.
 - b) Best interests is not to be determined by reference to purely medical factors but the OPCW evaluation may be of direct medical relevance in that it might add to the knowledge base against which they are being treated and even if it only confirms the current evaluation this is of direct medical relevance to them.
 - c) The main consideration ought to be the beliefs and values that would be likely to influence the decision if Mr Skripal or Ms Skripal had capacity. An individual subjected to such an attack with personally catastrophic consequences would want to see it fully and properly investigated and that all appropriate steps to identify the perpetrators (individual and state) have been taken so that they can be held to account.
 - d) In addition the other factors that Mr Skripal or Ms Skripal would be likely to consider if he or she were able to would include the effects of their decision on others and their duties as responsible citizens. In particular they would be likely to want to support the work of the international body set up by international law knowing that its processes are unimpeachable, it is entirely independent, that the results of its enquiry would potentially be beneficial to the criminal investigation, confirming the nature of the attack and the substance used; assistance in bringing to justice those responsible; identifying those who carried out the attack. They would want to support the UK Government in taking steps on the international plane to hold those responsible to account.
 - e) The detriment to Mr Skripal and Ms Skripal is negligible.

- i) In medical terms the taking of blood through the sited cannula will be no different from taking blood for other purely medical purposes.
 - ii) The OCPW has rigorous processes for ensuring confidentiality.
 - iii) The intrusion in terms of privacy in respect of medical records can be limited as only records dealing with medical matters since 4 March 2018 will need to be considered.
 - iv) Any publicity related to the outcome of the OPCW evaluation will be limited in particular having regard to what is already in the public domain.
 - v) There is no alternative less restrictive means of addressing the issue.

15. Mr Sachdeva QC on behalf of the Official Solicitor supported much that Mr Eadie submitted. In particular he referred me to the decision of the Supreme Court in the ‘James’ case (cited at para 22 below) and the speech of Baroness Hale and he focussed on the ‘substituted judgment’ of what the patient would consider if he were able to and in particular the interest any individual victim would have in seeking to further the inquiry into what had happened to them. He submitted that although there was little evidence before the court about Mr Skripal or Ms Skripal as individual persons there was nothing that should cause the court to consider either hold views which would suggest they would not want to get to the bottom of what had happened. Mr Sachdeva QC also noted that in this case at present it did not appear practicable or appropriate to seek the views of others who might be interested in the welfare of Mr Skripal (his mother perhaps) or Ms Skripal’s (perhaps a fiancé). In particular he emphasised that the detriment to either Mr Skripal or Ms Skripal was negligible; in particular in relation to the physical aspects of the taking of the samples but also the disclosure of medical records and the subsequent consequences of the investigation.

The Evidence

16. The evidence in support of the application is contained within the applications themselves (in particular the Forms COP 3) and the witness statements.

17. I consider the following to be the relevant parts of the evidence. I shall identify the witnesses only by their role and shall summarise the essential elements of their evidence.
 - i) CC: Porton Down Chemical and Biological Analyst

Blood samples from Sergei Skripal and Yulia Skripal were analysed and the findings indicated exposure to a nerve agent or related compound. The samples tested positive for the presence of a Novichok class nerve agent or closely related agent.

 - ii) DD: Porton Down Scientific Adviser

The evidence summarises the timeframes for the visit of the OPCW and the collection of additional samples and confirms that Porton Down consider samples taken post-mortem would be of less scientific value.

iii) EE: Foreign and Commonwealth Office Arms Control

The OPCW is the implementing body of the Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction (The Chemical Weapons Convention or CWC). 192 States are parties. The OPCW has a Technical Secretariat which amongst other roles provides technical assistance and technical evaluation to State Parties in implementing the CWC. The CWC requires States to designate a National Authority to liaise with the Technical Secretariat (TS). The UK requested assistance from the Technical Secretariat to obtain independent, internationally recognised expert identification of the nerve agent used. Their report on that and any other matter they consider appropriate will be of real importance for many reasons including in relation to the on-going criminal process, detecting and deterring any further attacks, allaying false rumour and in supporting the international response. The OPCW have agreed to visit to provide assistance in the week commencing 19 March 2018. This is pursuant to Art VIII 38(e) of the CWC. The TS intends to obtain new blood samples, obtain and test some of the samples already taken and undertake DNA testing to match the new and existing samples. The OPCW TS has well established procedures dealing with obtaining samples, use, preservation and storage, maintaining chain of custody, confidentiality and destruction. If the OPCW results differ from UK tests the UK national authority will be able to share them with clinicians to inform medical treatment.

iv) FF: Home Office

Neither Mr Skripal nor Ms Skripal appear to have relatives in the UK although they appear to have some relatives in Russia. The SSHD have not sought to make contact with them. Discussions have taken place with the OPCW TS about precisely what enquiries they wish to undertake. In summary the main issues are

- To collect fresh blood samples under observation
- To obtain details of the drug treatment administered to date and records of certain tests
- To obtain samples of the initial bloods taken at hospital and Porton Down's initial analysis.

v) ZZ: Treating Consultant.

- a) Mr Skripal is heavily sedated following injury by a nerve agent.
- b) Ms Skripal is heavily sedated following injury by a nerve agent.
- c) Mr Skripal is unable to communicate in any way.

- d) Ms Skripal is unable to communicate in any meaningful way.
- e) It is not possible to say when or to what extent Mr or Ms Skripal may regain capacity.
- f) Both are currently in a physically stable condition which is not expected to change in the immediate or near future.
- g) They are both being treated on the basis that they would wish to be kept alive and to achieve optimal recovery and the treatment currently being given is aimed to achieve that.
- h) The hospital has not been approached by anyone known to the patients to enquire of their welfare. The hospital know little about either patient or what they might have wished. Independent Mental Capacity Advocates have been appointed by the Trust to assist with best interests decisions on clinical matters.
- i) The Trust do not view this application as a clinical issue.
- j) The taking of blood samples is unlikely to adversely affect their condition. There is currently in place a cannula from which the samples will be drawn by Trust staff, under observation by an OPCW observer and another NHS consultant.
- k) Disclosure of medical records should only be to the extent necessary and the Trust understands inspection is sought but not copies.

The Substantive Application: Legal Framework and Analysis.

18. The Mental Capacity Act 2005 sets out the statutory scheme in respect of individuals aged over 16 who lack capacity. Section 15 gives the court the power to make Declarations as to whether a person lacks capacity to make a specified decision and the lawfulness or otherwise of any act done or to be done in relation to that person. Section 16 gives the court the power to make an order and make the decision on a person's behalf. Section 48 gives the court a discretion to make an order on an interim basis and in particular if it is in the person's best interests to make the order without delay.
19. The Mental Capacity Act 2005 deals with the jurisdiction of the court by implementing into domestic law the jurisdictional provisions contained in the 2000 Convention on the International Protection of Adults; s.63 MCA 2005 and Sch 3. Part 2 and in particular paragraphs 7(1)(a), (c) and (d). Thus the courts of England and Wales would have jurisdiction over a person habitually resident in England and Wales or a person present in England and Wales if the measure is urgent. Where the court is unable to ascertain habitual residence the court is to treat the person as habitually resident in England and Wales.
20. The evidence before me does not enable me to ascertain the habitual residence of either Mr Skripal or Ms Skripal. I am therefore to treat them as habitually resident in England and Wales and thus jurisdiction arises under Schedule 3 paragraph 7(1)(a).

In any event I am satisfied that in respect of both Mr and Ms Skripal I have jurisdiction pursuant Schedule 3, paragraph 7(1)(c) to make the orders sought on the basis that whatever other jurisdiction may exist they are present and the measures are urgent.

21. Section 2(1) of the Act provides that a person lacks capacity if,

‘at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.’

It does not matter whether the impairment or disturbance is permanent or temporary. The determination of whether a person lacks capacity is to be made on the balance of probabilities. Section 3 sets out various criteria by which the court should determine whether a person is unable to make a decision but is not applicable to this situation. Section 2 imposes a ‘diagnostic threshold’ which in this case is addressed by the medical evidence contained in the Forms COP 3 and the witness statement of a medical consultant involved in the care of Mr and Ms Skripal. I am satisfied on the basis of the medical evidence that Mr Skripal currently lacks capacity to take a decision for himself on the issue of providing consent to a further blood sample for provision to the OPCW, the testing of his blood samples and for the disclosure of his medical records. There is no means by which he could currently be enabled to make a decision. On the evidence currently available it is not possible to say whether the current lack of capacity is temporary or permanent. On balance the lack of capacity arises from an impairment or disturbance of the brain arising out of both sedation and the impact of the exposure to a nerve agent. I am satisfied on the basis of the medical evidence that Ms Skripal currently lacks capacity to take a decision for herself on the issue of providing consent to a further blood sample for provision to the OPCW, the testing of her blood samples and for the disclosure of her medical records. There is no means by which she could currently be enabled to make a decision. On the evidence currently available it is not possible to say whether the current lack of capacity is temporary or permanent. On balance the lack of capacity arises from an impairment or disturbance of the brain arising out of both sedation and the impact of the exposure to a nerve agent.

22. Section 1 of the Act sets out the principles applicable under the Act. Sub-section (5) provides that

‘An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made in his best interests.’

23. Section 4 of the Act deals with ‘Best interests’

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) "Relevant circumstances" are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

(my added emphasis)

24. The courts have emphasised in a variety of contexts that 'best interests' (or welfare) can be a very broad concept.
- i) *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, 2013 1 FLR 677. Best interests must be taken in its widest sense and its evaluation will change according to developments in society. It need not be confined to the short-term but should look at the medium to long term and can take account of anything that might affect the best interests.
 - ii) In *Re A (A Child)* 2016 EWCA 759, the Court of Appeal said:

[39]The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude towards the treatment is or would be likely to be; and they must consult others who are looking after him or are interested in his welfare, in particular for their view of what his attitude would be

iii) *An NHS Trust v MB & Anor* [2006] EWHC 507 (Fam), Holman J:

That test is the best interests of the patient at this particular time. Is it in THIS patient's best interests to receive this treatment? Best interests are used in the widest sense and include every kind of consideration capable of impacting on the decision. In particular they must include the nature of the medical treatment in question, what it involves and its prospects of success and the short, medium and longer-term outcome, best interests goes far beyond the purely medical interests. They must also include non-exhaustively medical, emotional, social, psychological, sensory (pleasure, pain and suffering) and instinctive (the human instinct to survive) considerations.

iv) *Re G (TJ)* [2010] EWHC 3005 (COP)

'The word "interest" in the best interests test does not confine the court to considering the self-interest of P. Further the wishes which P would have formed if P had capacity, which may be altruistic wishes can be a relevant factor. '

v) *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591. The Supreme Court noted that treatment may not be futile even though it has no effect upon the underlying disease and it may therefore be in a patient's best interests to receive it even though it has no beneficial clinical effect on the condition. It may have other benefits which is of direct other benefit to the patient.

25. The Lord Chancellor's Code of Practice issued in accordance with ss 42-43 of the Act also identifies at para 5.47-8 the possibility that other factors that the person lacking capacity might consider if they were able to could '*include the effect of the decision on other people..... the duties of a responsible citizen*'.

26. So the evaluation of what order is in the best interests of Mr Skripal and Ms Skripal involves a far broader survey of whether the taking of blood samples will have any medical benefit to them and whether the disclosure of their medical records will bring any medical advantage to them. It includes every consideration that might bear on what is in their best interests.

27. Given the absence of any contact having been made with the NHS Trust by any family member, the absence of any evidence of any family in the UK and the limited evidence as to the possible existence of family members in Russia I accept that it is

neither practicable nor appropriate in the special context of this case to consult with any relatives of Mr Skripal or Ms Skripal who might fall into the category identified in s.4(7)(b) of the Act.

28. Section 4(6) requires that in evaluating ‘best interests’ I consider past and present wishes, beliefs and values that would be likely to influence his or her decision if he or she had capacity and the other factors he or she would be likely to consider if she or she were able to do so.
29. I am unable to ascertain on the evidence before me either Mr Skripal’s or Ms Skripal’s past or present wishes and feelings.
30. There is little or no evidence to assist me in identifying any particular beliefs or values which either Mr Skripal or Ms Skripal held for the purposes of applying s.4(6)(b). The case is put both by the Secretary of State and the Official Solicitor on the basis of how the beliefs and values of the reasonable adult subjected to an attack of any sort, but particularly of this sort, might influence their decision. Although it would be impossible for me to be unaware of what is in the public domain about Mr Skripal and Ms Skripal that is not evidenced before me and so I am constrained to approach this decision at this moment in time on the basis of assumptions as to how a reasonable citizen would approach matters. In the absence of any evidence to show that either Mr Skripal or Ms Skripal was not a reasonable citizen that is how I will approach it. The evidence establishes that the OPCW is an independent organisation with the support of 192 nation States and one of whose primary tasks is providing technical assistance in relation to chemical weapons issues. Their procedures appear to be rigorous and robust – as would be expected given the subject matter of their work. Their enquiry can be expected to be entirely objective and independent. The results of their enquiry will likely hold very considerable weight in any forum. Their enquiry is therefore likely to produce the most robust, objective, independent and reliable material which will inform any determination of what happened to Mr Skripal and Ms Skripal. That might simply confirm the current conclusions, it might elaborate or clarify them, it might reach a different conclusion. Although the Secretary of State does not believe the latter prospect to be likely given her confidence in Porton Down’s findings I do not think the possibility can be ignored – and in particular I do not think an individual faced with supporting or not supporting such an inquiry would ignore that possibility at this stage.
31. Most reasonable citizens in my experience have a quite acute sense of justice and injustice. Most want to secure the best information about what has happened when a serious crime is alleged to have been committed. I accept that such a person would believe in the rule of law; that justice requires that crime or serious allegations of crime are thoroughly investigated; that where possible answers are found as to who, how and why a crime was perpetrated, that where possible truth is spoken to power; that no-one whether an individual or a State is above or beyond the reach of the law and that in these turbulent times what can be done to support the effective operation of international conventions is done. Whilst I don’t assume that the reasonable citizen would necessarily have asked himself or herself those sorts of questions in quite such detail I do believe that if those issues were put to them they would adopt them and they would influence their decision. In any event all go to the general point that the reasonable citizen, including Mr Skripal and Ms Skripal believe that justice should be done. The conduct of the investigations proposed by the OPCW will further the

general aim of justice being done as well as perhaps the more precisely identified goals which Mr Eadie QC identified in the course of argument. I accept that Mr Skripal and Ms Skripal's decision would be influenced by these values and beliefs and that the influence would be in favour of consenting to the taking and testing of samples and disclosure of notes. I am satisfied that an inquiry such as the OPCW will conduct which might verify Porton Down's conclusion, might elaborate or clarify them or might reach a different conclusion is something they would wish be conducted and they would want to assist in that by providing samples.

32. Even if I am wrong on these assumptions as to their beliefs or views I am satisfied it is in the broad parameters of their best interests for it to be known as far as may be possible what occurred to them and the OPCW enquiry will promote that aspect of their best interests.
33. Quite separately I accept that there may be some potential medical benefit in the tests being conducted by the OPCW in that they may identify some matter which sheds further light on the nature of the agent involved and thus the treatment that might be administered. I understand that the Secretary of State reposes complete confidence in the results of the tests carried out by Porton Down but I believe both that Mr Skripal and Ms Skripal would wish for the further analysis (and so s.4(6)(c) would be engaged) but that also objectively there is benefit in the expertise of the OPCW also being brought to bear even if the possibility of them uncovering something useful from a medical perspective may be slight.
34. Those matters therefore support the conclusion that it is in the best interests of Mr Skripal and Ms Skripal to have further blood samples taken and for their medical records to be disclosed.
35. On the other side of the equation what points to such steps not being in their best interests or being harmful? The taking of the modest blood samples proposed through the cannula already in situ will have very little impact. ZZ is of the opinion that it will be unlikely to adversely effect their clinical condition. The involvement of the OPCW and the use to which the results may be put in support of the pursuit of 'justice' will no doubt lead to further publicity but it seems to me to be unlikely to lead to any further intrusion than is currently the case and assuming that Mr Skripal and Ms Skripal regain consciousness so as to be aware of it. Does the authorisation of further testing create any further risk to the physical safety of Mr Skripal or Ms Skripal? I have not been addressed on this issue – theoretically I suppose it might if it were thought the death of Mr Skripal and Ms Skripal prior to the taking of samples might undermine the efficacy of the evidence gathering exercise (as opined by DD). The Secretary of State has confirmed that measures are already in place to ensure their physical safety. Does the disclosure of medical notes to the OPCW amount to an intrusion into their privacy which is not in their best interests? I accept ZZ's point that disclosure of medical records should only go so far as is necessary and this will cover disclosure from the period 4 March 2018 and for the specific information that the OPCW has sought. If it is sought I consider that it is in their best interests that OPCW is provided with copies of the relevant records not merely having sight of them. The processes which are in place for maintaining the confidentiality of such records (along with the integrity of the samples) which are evidenced satisfy me that copies could be provided subject to their destruction or return at the conclusion of the enquiry.

36. The overall balance in the evaluation of the best interests of Mr Skripal and Ms Skripal assessed on a broad spectrum and taking account of the pros and cons of taking and testing the samples and disclosing the notes in my judgment falls very clearly in favour of the taking of the samples, their submission for analysis by OPCW and the disclosure of the medical notes to aid that process. In so far as it is necessary it is also lawful and in their best interests that the existing samples are provided to OPCW for further testing.
37. I will therefore make Declarations pursuant to section 15 Mental Capacity Act 2005 and Orders pursuant to section 16 Mental Capacity Act 2005 that:
- i) Mr Skripal lacks capacity to make a decision as to the provision of blood samples, the testing of blood samples and disclosure of medical notes
 - ii) Ms Skripal lacks capacity to make a decision as to the provision of blood samples, the testing of blood samples and disclosure of medical notes
 - iii) That it is lawful for Salisbury NHS Trust to take blood samples for provision to OPCW and to provide copies of medical notes to OPCW
 - iv) That it is in the best interests of Mr Skripal and Ms Skripal for the samples to be taken, tested and the notes provided

These are incorporated in the order I approved yesterday.

END.