



Neutral Citation Number: [2023] EWCOP 21

Case No: 14081552

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 May 2023

Before :

MR JUSTICE MOSTYN

Between :

**GLOUCESTERSHIRE HOSPITALS NHS
FOUNDATION TRUST (1)
GLOUCESTERSHIRE HEALTH AND CARE
NHS FOUNDATION TRUST (2)**

Applicants

- and -

**JOANNA (by her litigation friend, the Official
Solicitor)**

Respondent

**Conrad Hallin (instructed DAC Beachcroft LLP) for the Applicants
Elizabeth Fox (instructed by the Official Solicitor) for the Respondent**

Hearing date: 15 May 2023

Approved Judgment

MR JUSTICE MOSTYN

This judgment was delivered in public. The court has made an anonymity order which must be strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. I shall refer to the respondent as Joanna, although this is not her real name.
2. This is my judgment on the application made jointly by the applicants on 26 April 2023 to authorise, pursuant to the terms of the Mental Capacity Act 2005, serious medical treatment on Joanna, namely a planned caesarean section, obstetric care and the delivery of her child. The application seeks a declaration that Joanna lacks the capacity to make decisions regarding her obstetric care and to litigate, and that it is in Joanna's best interests and, therefore lawful, for the necessary obstetric care to be provided to her, including restraint if necessary. The proposal is for a planned caesarean section to take place on 18 May 2023.
3. Given the urgent nature of this case, I approved this plan on the day of the hearing (15 May 2023). I set out my reasons in a written judgment for two reasons. First and most important, it will stand as a full and fair record for the benefit of Joanna so that she can be reassured that these proceedings were conducted totally fairly and justly. My second reason is that it is in the interests of transparency for the judgment to be made available publicly, so that the wider public can see that these cases in the Court of Protection are conducted openly and not clandestinely behind closed doors.
4. On 15 May 2023 I was satisfied after carrying out an intensely focussed balancing exercise of Article 8 and Article 10 of the European Convention on Human Rights that it was in the interests of justice for a Reporting Restrictions Order ("RRO") to be made. I therefore made an RRO on that day to restrict the publication of any information which may lead to the identification of Joanna, her family or the clinicians providing her with care, to last until 15 May 2025 unless varied in the meantime

Background facts

5. Joanna is 26 years old. She is currently 38 weeks pregnant and her due date is on 25 May 2023. She has been detained in a hospital operated by the second applicant since 9 March 2023 pursuant to Section 3 of the Mental Health Act 1983.

6. Joanna was recently diagnosed with first episode psychosis. At the hearing on 15 May 2023, Dr M explained to me that this is the first presentation of psychosis which is further assessed over time to explore whether it may become a formal diagnosis of, for example, schizophrenia. The symptoms are both positive and negative. Examples of positive symptoms include hearing voices and experiencing hallucinations along with fixed and firmly held delusional beliefs. Dr M opined that Joanna historically and currently experiences such symptoms. Negative symptoms include poverty of thoughts, lack of speech, a markedly reduced range of emotional expression and a lack of functioning including neglecting one's self-care, all of which Dr M told me she has clearly observed in Joanna. Dr M further explained that these negative symptoms tend to present after a long episode of untreated psychosis and opined that Joanna's psychosis has gone undetected for at least a year, indicating a poorer prognosis in terms of recovery.
7. Joanna has a significant family history of psychosis; her sister has a severe history of psychosis as does as her brother. She is therefore genetically inclined to the illness, which is further compounded by her traumatic upbringing. Dr M explained that as Joanna was in care as a child, this level of trauma also left her vulnerable to developing psychosis.
8. Throughout Joanna's admission to hospital, she has experienced a great fear that normal actions and movement will harm her unborn child and lead to miscarriage. Due to her presentation and recent diagnosis of first episode psychosis, there is a medical concern that she may not cooperate during a vaginal delivery, which may then result in having to undergo an emergency caesarean section. There is a higher risk of complications associated with such.

Capacity

9. Sections 2(1) and 3(1)(b) & (c) of the Mental Capacity Act 2005 state, for the purposes of this case:

“A person lacks capacity in relation to a matter if ... she 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.”

and

“A person is unable to make a decision for himself if she is unable ...to retain [the] information [relevant to the decision], or to use or weigh that information as part of the process of making the decision.”

10. To be capacitous in relation to the subject matter, Joanna has to be able to make a side-by-side assessment of the advantages and disadvantages of decisions in relation to her obstetric care, weighing up the options of vaginal birth or a caesarean-section.

11. It must be shown by the applicants, on the balance of probability: (a) Joanna is unable to make decisions in relation to her obstetric care and (b) the inability is “because of” her diagnosis of first episode psychosis.

12. The medical opinion is unanimous. Joanna lacks capacity to make decisions in relation to her obstetric care as on multiple occasions she has been unable to retain and weigh the information provided to her. The most recent reassessment took place on 9 May 2023, when Dr M and Dr A visited Joanna at hospital. They observed that Joanna was unable to name any risks associated with a caesarean section. In her evidence at the hearing, Dr M explained to me:

“What has become very evident as part of her thinking disorder is difficulty retaining and processing information on a daily basis. [...] She muddles up information explained to her a number of times. The cognitive difficulties are part of negative symptoms when somebody has been unwell for a long time.”

13. Significantly, Dr M’s view is that it is unlikely that Joanna will improve to any significant degree prior to the delivery of her child.

14. The updating capacity assessment dated 9 May 2023 observed Joanna’s presentation as follows:

“She sat with a reduced blink rate, very still, appearing thought blocked at times. Blunted affect is very prominent. There was minimal spontaneous speech, she did answer questions, but

questions frequently needed to be direct /leading questions to get a response. Her speech was more organised today with less obvious evidence of a formal thought disorder.”

15. In my judgment, the evidence demonstrates that on the balance of probabilities Joanna cannot retain or weigh the information relevant to a decision about the options for her care in relation to the healthy and safe delivery of her child, and I am satisfied that she is unlikely to regain capacity before her due date of 25 May 2023, or at any point soon thereafter.
16. As to litigation capacity, I reiterate my reasoning in *Re Beatrice* [2023] EWCOP 17 at [36] – [39] that if someone is unable to weigh the relevant information in a decision-making process, then, logically, it would be vanishingly unlikely she would be able to formulate and make submissions to a judge in relation to that decision making process. To be clear, in this case I am satisfied that Joanna also lacks the capacity to litigate.

Best interests

17. I now turn to whether it is in Joanna’s best interests, and therefore lawful, for obstetric care to be provided to her, including restraint if necessary.
18. When assessing Joanna’s best interests, under s. 4 of the Act, I must have regard to all the relevant circumstances, including:
- a) The strong presumption that it is in a person’s best interests to stay alive (although this is not absolute) and that therefore it is not normally in someone’s best interests to engage in risky conduct that imperils life;
 - b) Joanna’s own wishes and feelings;
 - c) The views of members of Joanna’s family;
 - d) Joanna’s overall prognosis;
 - e) The views of Joanna’s treating clinicians of her best interests.
19. I address first the starting point that it is in a person’s best interests to live, save in those rare cases where it is objectively demonstrable that it is not in a person’s best interests to receive life sustaining treatment. This starting point is applicable here given the potential consequences of non-compliance or aggression during a vaginal delivery and

the required antenatal care. Without appropriate management of the situation this has the potential to be life-threatening to both Joanna and her child. Dr A considers it very unlikely that Joanna will be able to comply with the care and interventions that may be needed. This could lead to an emergency caesarean section which carries a greater risk to Joanna and her child than a planned caesarean section.

20. The next point is that, regardless of whether Joanna has the capacity to make decisions for herself, she is entitled to protection under the European Convention of Human Rights, particularly, in these circumstances, under Article 8. Furthermore, s. 4 requires me to focus on Joanna's wishes and feelings. In *Aintree v James* [2013] UKSC 6 at [39] and [45], Baroness Hale stated:

"[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.

...

[45] Finally, insofar as Sir Alan Ward and Arden LJ were suggesting that the test of the patient's wishes and feelings was an objective one, what the reasonable patient would think, again I respectfully disagree. The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament. In this case, the highest it could be put was, as counsel had agreed, that "It was likely that Mr James would want treatment up to the point where it became hopeless". But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a

component in making the choice which is right for him as an individual human being.”

21. A caesarean section accords with Joanna’s expressed wishes as to the mode of her child’s delivery, albeit the reasons she has expressed for this preference are not well-founded and do not need to be stated in this public judgment. It is my judgment that her wishes have nonetheless been expressed clearly and that they should be afforded due respect.
22. I also accept, as submitted to me by the applicants, that if Joanna had capacity she would likely choose a caesarean section for the wellbeing of both her and her child after weighing up the risks posed of attempting a vaginal birth compared to a caesarean section. Furthermore, if a vaginal birth were attempted against her wishes, I accept that this would only increase the risk of non-compliance and therefore pose risk of harm to Joanna and her child. Dr M explained:

“I would have concerns that if [Joanna] went into spontaneous vaginal delivery as this would trigger her anxiety and exacerbate her already fragile mental state. [Joanna] has shown a profound fear around perceived risks to her baby and I think there is a real likelihood that she may misinterpret physical sensations that can naturally occur during a vaginal delivery as harm being caused to her baby. This may prevent her from engaging with the obstetric team due to fear that movement may cause harm to her baby.

Moreover, I have found that [Joanna] is not open to persuasion when she has made a decision and I do not consider it likely that the team will be able to convince her to take any of the necessary steps to maintain [Joanna] and her baby’s safety if she decides that she does not wish to do so. This is despite [Joanna’s] account that she is happy to be pregnant and wishes to keep her baby safe.”

23. I turn to the views of Joanna’s family. Joanna’s mother, Tina (not her actual name), has expressed support for Joanna’s preference to give birth via a caesarean section. Dr R made telephone contact with Joanna’s mother on 25 April 2023 to explore her views. The conversation is recorded as follows:

“[Tina] highlighted that [Joanna] had always been scared about giving birth and that it had taken her a long time to become

pregnant. [Tina] was supportive of this as she shared that it had always been her daughter's preference for a c-section. Indeed she added that all her children had been via c-section and that neither her nor [Joanna] could ever countenance a vaginal birth. Overall [Tina] feels that the c-section is what [Joanna] always wanted – and that [Joanna] had expressed this on multiple occasions whenever thinking about having children. [Tina] reported that [Joanna] had been so terrified of vaginal birth that she had talked to [Tina] about adopting instead. [Tina] stated that she wasn't sure that restraint will be needed or resistance to the procedure will be encountered by us.”

24. Finally I consider Joanna's overall prognosis and the views of her treating clinicians of her best interests, as mentioned above. I have already referred to the opinion of Dr M that Joanna's psychosis has gone undetected for at least a year and that therefore she has a relatively poor prognosis. Joanna's treating clinicians are of the categorical view that it is in her best interests to proceed with the planned caesarean section, as the safest plan to ensure the healthy delivery of her child.
25. For all of the reasons set out above, I am satisfied that I should make the declaration sought by the applicants, namely that Joanna lacks the capacity to litigate and to make decisions in relation to her obstetric care and it is in Joanna's best interests for the mode of delivery of her child to be by way of a planned caesarean section.
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