Neutral Citation Number: [2019] EWCA Civ 1215

Case No: B4/2019/1489

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
Mrs Justice Lieven
[2019] EWCOP 26

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2019

Before:

LORD JUSTICE MCCOMBE
LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

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RE: AB (TERMINATION OF PREGNANCY)

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- -

John McKendrick QC and Victoria Butler-Cole QC (instructed by **Bindmans Solicitors**) for the **Appellant**
Fiona Paterson (instructed by **An NHS Foundation**) for the **1st Respondent**
Katie Gollop QC (instructed by **the Official Solicitor**) for the **2nd Respondent**
Parishil Patel QC (instructed by **A London Authority**) for the **3rd Respondent**

Hearing date: 24th June 2019

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Approved Judgment

Lady Justice King (with whom Lord Justice McCombe and Lord Justice Peter Jackson agree):

Introduction

1. AB is a 24-year-old woman with moderate learning disabilities. She exhibits challenging behaviour and functions at a level of between 6 and 9 years old. At the turn of the year, AB was staying with her family in Nigeria and, in circumstances which are unclear, became pregnant; a fact that was discovered by her adoptive mother (CD) upon AB's return to this country in April 2019.

2. Having carried out psychiatric and social assessments, the NHS Foundation Trust responsible for the antenatal care of AB concluded that it would be in her best interests for the pregnancy to be terminated. It is common ground that AB lacks capacity to consent to a termination. CD was implacably opposed to the proposal and, accordingly, the Trust made an application to the High Court. Unhappily, time moved on and by the time the matter came before Mrs Justice Lieven on 20 and 21 June 2019, AB was 22, going on 23 weeks pregnant.

3. Having heard extensive evidence, the judge made a number of declarations and orders, in particular:

> "1. The first respondent lacks the capacity to consent to the termination of her current pregnancy and any ancillary treatment thereto.
>
> 2. It shall be lawful in the present circumstances, as being in the first respondent's best interests, for a doctor treating her to carry out a termination in accordance with the criteria as set out in section 1 of the Abortion Act 1967 notwithstanding her incapacity to provide legal consent."

4. CD, supported by the Official Solicitor who represents AB, sought permission to appeal against those orders and, if granted, to appeal against the making of the declaration which would result in the termination of AB's pregnancy.

5. The local authority was neutral in the appeal, although AB's social worker Ms T (whilst not representing the views of the local authority) was herself opposed to the proposed termination. The Trust alone opposed the appeal, submitting that the declaration permitting them to carry out a surgical termination of the pregnancy remained in the best interests of AB.

6. Given that the latest possible date under the Abortion Act 1967 of 24 weeks gestation was imminent, the Court of Appeal heard the case urgently on Monday 24 June 2019. Permission to appeal was granted and the appeal allowed. The proposed termination has not, and will not, therefore take place and AB will now give birth to her child by caesarean section under general anaesthetic at, or near, full term. The following are our reasons for allowing the appeal.

Background

7. AB was born in Nigeria in 1994 and adopted by CD when she was a few days old. Although CD thereby became AB's legal mother, for many years thereafter AB lived with CD's sister in Nigeria whilst CD was working as a midwife in London, returning to Nigeria twice each year for a visit. In 2007, when AB was 12, she joined CD in the UK. By now it was apparent that AB had significant developmental delay and learning difficulties, and for the rest of her childhood AB was educated in special schools in London.

8. AB has an IQ in the range of 35 – 49 and as indicated, has a history of significant behavioural difficulties; she is prescribed medication to help manage her mood.

9. Upon her relocation to England, AB lived largely with her grandmother to whom she was very close, although, for substantial periods of time, CD, who continued to work as a midwife, also lived with them.

10. In May 2017, AB's grandmother died, a matter of considerable distress and loss to AB. From then onwards, AB lived exclusively with her mother. In October 2018, CD arranged for AB to travel to Nigeria with a friend of CD's. AB remained in Nigeria until the end of March 2019 with CD joining her for several weeks over the Christmas period. Upon AB's return to this country in April, it became clear to CD that AB was pregnant. The pregnancy was confirmed in mid-April. At that stage AB was 10-12 weeks pregnant. A termination, if proposed then, would have thrown up entirely different issues, given that at that stage AB was entirely unaware and had no understanding of the concept of pregnancy, and that the pregnancy could have been brought to an end in a non-invasive way.

11. Capacity assessments were undertaken early in May which inevitably concluded that AB lacked the capacity to decide whether to continue with the pregnancy. As she explained in her statement, CD is wholly opposed to abortion both from a religious and cultural point of view; she is a devout Roman Catholic and in Nigeria, she says, terminating a pregnancy is 'simply unheard of'.

12. On 16 May 2019, by which time AB was about 16 weeks pregnant, CD arrived at the hospital with AB, together with all of AB's possessions packed into three suitcases and two rucksacks. CD told the hospital that she was 'handing over' the care of AB. Since that time, AB has lived in a residential unit. In her statement, CD says that she did not do this for fear of being ostracised by her community if AB had a termination, but because she felt she could not support AB in having a termination. CD's position at trial was that, contrary to her feelings in May, she would now wish to have AB back to live with her even if she had a termination. The rights and wrong of all of this were not matters with which the judge needed to concern herself and, for my part, the relevance is only in that it highlights that AB's home circumstances are complicated and that it would be naive to presume that an easy solution to the conundrum presented to the court would be for AB to have her baby and move back home where she and her baby would live with, and be cared for, by CD.

13. The Trust issued its application on 21 May 2019 by which time AB was 18 weeks pregnant. Keehan J gave directions on 3 June 2019 and listed the matter for hearing on 20 June. In her judgment Lieven J deprecated that proceedings were not issued by the

Trust for some 5 weeks after they were aware of the pregnancy. I endorse her view. In fairness to the Trust however, it should equally be noted that having issued the proceedings, a further 4 weeks elapsed before the matter was heard. I am conscious that Trusts are rightly reluctant to make such applications and properly aim to reach agreement with the family in such fraught situations. I am also conscious that the courts are overwhelmed with urgent work and also that any judge giving directions for trial, in a case of this type, will be alert to the need to ensure that the trial judge has, in particular, the medical evidence necessary to inform the decision-making process. In my judgement however, an application for a declaration which will permit a Trust to carry out termination on a woman lacking capacity should be regarded and litigated as a medical treatment issue of the utmost urgency.

14. Given the critical urgency of such a case, it may be that, where it appears to a Trust that there is a potentially intractable divergence of views with the family, consideration should be given to an application being made at an early stage following the making of the "best interests" decision. The application should then be listed as a matter of urgency, even if it is subsequently withdrawn. If the pregnancy is allowed to reach a very late stage and a termination is then determined to be in the best interests of the mother, she will be unnecessarily exposed to what is on any view a highly invasive and, for a woman lacking capacity, bewildering procedure. (In saying this I accept, of course, that there will inevitably be occasions where the pregnancy does not come to the authorities' attention until it is well established.)

15. As I have said, when the matter came before the court on 20 June 2019, AB was 22+ weeks pregnant.

16. There are few units specialising in late surgical terminations and the plan put before the judge necessitated AB being taken to one of those units. The complexity of the procedure is demonstrated by the fact that the whole process was to take place over three days; the first day was for pre-operative assessment which was in fact being carried out whilst the parties were in court at the hearing of this appeal; the following day AB would be brought back to hospital for the first of a two-part procedure which would be carried out over the following two days. Each part would necessitate a general anaesthetic.

17. AB would be told, in simple terms, that this procedure would end the pregnancy and she would not have a baby in a few months' time. As Miss Gollop QC on behalf of the Official Solicitor explained, it was the Trust's intention to tell AB that they would be 'taking the baby away'. The care plan sets out that:

> "To minimise the potential impact of not having a baby girl to take home with her, AB can be given a new "baby doll" soon after the procedure to keep with her. AB is known to enjoy keeping a doll. The doll will need to be female, and AB can keep it with her/dress it etc."

18. By its application, the Trust sought a declaration that it was in AB's best interests to carry out this procedure in order to terminate her pregnancy.

The Applicable Law

19. In so far as it is relevant the Abortion Act 1967, Section 1 provides:

> "1. **Medical termination of pregnancy**.
>
> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman."

20. AB's case falls within section 1(1)(a), that is to say the treating doctors have formed the view that continuing the pregnancy involves a greater risk to the mental health of AB than if the pregnancy were terminated. No one has suggested that the case falls within section 1(1)(b), namely that the continuation of the pregnancy would result in "grave permanent injury" to AB's health. There was, therefore, no lawful medical basis for a termination being carried out beyond 24 weeks.

21. Where a termination of a pregnancy is contemplated in respect of a woman who lacks capacity, an application to the Court of Protection is necessary "where there is any doubt as to either capacity or best interests"*:* see *An NHS Trust and D* [2003] EWHC 2793 (Fam). Further, where such a termination is performed in accordance with the requirements of the Abortion Act and it is in the best interests of the incapacitated person that it should take place, then the procedure is a legitimate and proportionate interference with Article 8(1) ECHR as being carried out for the protection of health under Article 8(2): see *Re SB (A patient: capacity to consent to termination)* [2013] EWHC 1417 (COP).

22. Given that the doctors were united in their view that the test in s1(1)(a) was met, the role of the court was to consider, by way of an evaluation of all the material factors, whether it would be in the best interests of AB to provide the consent necessary in order for the proposed termination to take place. It follows that, whilst the court's task in identifying the best interests of AB may overlap with the task of the doctors in applying the Abortion Act, they are not one and the same: *Re X (A Child) [2014] EWHC 1871* per Munby J (as he then was) at [6-7].

> "6. In a case such as this there are ultimately two questions. The first, which is for the doctors, not this court, is whether the conditions in section 1 of the 1967 Act are satisfied. If they are not, then that is that: the court cannot authorise, let alone direct,

> what, on this hypothesis, is unlawful. If, on the other hand, the conditions in section 1 of the 1967 Act are satisfied, then the role of the court is to supply, on behalf of the mother, the consent which, as in the case of any other medical or surgical procedure, is a pre-requisite to the lawful performance of the procedure. In relation to this issue the ultimate determinant, as in all cases where the court is concerned with a child or an incapacitated adult, is the mother's best interests.
>
> 7. An important practical consequence flows from this. In determining the mother's best interests this court is not concerned to examine those issues which, in accordance with section 1 of the 1967 Act, are a matter for doctors. But the point goes somewhat further. Since there can be no lawful termination unless the conditions in section 1 are satisfied, and since it is a matter for the doctors to determine whether those conditions are satisfied, it follows that in addressing the question of the mother's best interests this court is entitled to proceed on the assumption that if there is to be a termination the statutory conditions are indeed satisfied. Two things flow from this. In the first place this court can proceed on the basis (sections 1(1)(a) and (c)) that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, to the life of the pregnant woman or of injury to her physical or mental health or (section 1(1)(b)) that the termination is necessary to prevent grave permanent injury to her physical or mental health. Secondly, if any of these conditions is satisfied the court is already at a position where, on the face of it, the interests of the mother may well be best served by the court authorising the termination."

23. Mr McKendrick QC on behalf of CD, relies heavily on Munby J's further observations:

> "8. There is another vitally important factor that in many cases such as this may well end up being determinative and which in this particular case is, in my judgment, determinative: the wishes and feelings of the mother.
>
> 9. I leave on one side cases where the mother has for whatever reason so little appreciation of what is going on as not to be able to express any wishes and feelings. This, I emphasise, is not such a case. The point is very simple and profoundly important. This court in exercise of its inherent jurisdiction in relation to children undoubtedly has power to authorise the use of restraint and physical force to compel a child to submit to a surgical procedure: see *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180 and *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083. I say nothing about how this power should appropriately be exercised in the case of other forms of medical or surgical intervention. In the case of the proposed termination of a pregnancy, however, the point surely

> is this. Only the most compelling arguments could possibly justify compelling a mother who wished to carry her child to term to submit to an unwanted termination. It would be unwise to be too prescriptive, for every case must be judged on its own unique facts, *but I find it hard to conceive of any case where such a drastic form of order – such an immensely invasive procedure – could be appropriate in the case of a mother who does not want a termination, unless there was powerful evidence that allowing the pregnancy to continue would put the mother's life or long-term health at very grave risk.* Conversely, it would be a very strong thing indeed, if the mother wants a termination, to require her to continue with an unwanted pregnancy even though the conditions in section 1 of the 1967 Act are satisfied.
>
> 10. A child or incapacitated adult may, in strict law, lack autonomy. But the court must surely attach very considerable weight indeed to the albeit qualified autonomy of a mother who in relation to a matter as personal, intimate and sensitive as pregnancy is expressing clear wishes and feelings, whichever way, as to whether or not she wants a termination."
>
> *My emphasis at [9]*.

24. Mr McKendrick submitted that terminating a pregnancy without the consent of the woman carrying the child represents such a profound invasion of her Article 8 rights that it should only ever be contemplated where section 1(1)(b) of the Act is satisfied, that is to say "the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman". That, he says, is an approach which is in accord with paragraph [9] of Munby J's judgment in *Re X* (highlighted above) and should be followed by this court.

25. Read in context, it is clear that Munby J was expressing himself in this way specifically on the facts of that case, namely in circumstances where the young woman was fully able to understand what being pregnant meant and was expressing her clear wishes that she wished to terminate the pregnancy.

26. In my judgement, *Re X* does not purport to prescribe a test to be applied by the courts in considering such an application, let alone elevate such a test to some sort of rule of law preventing a court from giving consent on behalf of an incapacitous woman where section 1(1)(a) of the Act is satisfied, but section 1(1)(b) is not. In saying so I do not for one moment take issue with Munby J's characterisation of the ordering of a termination as a "drastic"' order and "an immensely invasive procedure", views which the judge clearly espoused in the present case. At [42], she referred to the "draconian nature of the state ordering a termination on a woman who is not compliant" and at [46] to a termination in such circumstances as "immensely intrusive and certainly interfer[ing] with her article 8 rights".

27. However one looks at it, carrying out a termination absent a woman's consent is a most profound invasion of her Article 8 rights, albeit that the interference will be legitimate and proportionate if the procedure is in her best interests. Any court carrying out an assessment of best interests in such circumstances will approach the exercise conscious

of the seriousness of the decision and will address the statutory factors found in the Mental Capacity Act 2005 (MCA) which have been designed to assist them in their task.

28. Limited guidance as to the proper approach to the "best interests" analysis is found in Section 4 MCA which provides:

> "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)."

29. The Mental Capacity Act 2005: Code of Practice provides guidance at Section 5: "What does the Act mean when it talks about 'best interests'". At 5.13, the Code recognises the wide and flexible range of factors that may be relevant to a best interests decision:

> "Not all factors in the checklist will be relevant to all types of decisions or actions, and in many cases other factors will have to be considered as well, even though some of them may then not be found to be relevant."

30. In the leading case of *Aintree University Hospital v NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591 the Supreme Court considered the proper approach to 'best interests' with reference to the report of the Law Commission on which the MCA is based. Lady Hale said this:

> "24. The advantage of a best interests test was that it focused upon the patient as an individual, rather than the conduct of the doctor, and took all the circumstances, both medical and non-medical, into account (paras 3.26, 3.27). But the best interests test should also contain "a strong element of 'substituted judgment'" (para 3.25), taking into account both the past and present wishes and feelings of patient as an individual, and also the factors which he would consider if able to do so (para 3.28). This might include "altruistic sentiments and concern for others" (para 3.31). The Act has helpfully added a reference to the beliefs and values which would be likely to influence his decision if he had capacity. Both provide for consultation with carers and others interested in the patient's welfare as to what would be in his best interests and in particular what his own views would have been. This is, as the Explanatory Notes to the Bill made clear, still a "best interests" rather than a "substituted judgment" test, but one which accepts that the preferences of the person concerned are an important component in deciding where his best interests lie. To take a simple example, it cannot be in the best interests to give the patient food which he does not like when other equally nutritious food is available."

31. It is well established that the court does not take into account the interests of the foetus but only those of the mother: *Vo v France* (2005) 10 EHRR 12 at [81-82]*; Paton v British Pregnancy Advisory Service* [1979] QB 276; *Paton v United Kingdom* (1980) 3 EHRR 408. That does not mean that the court should not be cognisant of the fact that the order sought will permit irreversible, invasive medical intervention, leading to the termination of an otherwise viable pregnancy. Accordingly, such an order should be made only upon clear evidence and, as Peter Jackson LJ articulated it in argument, a "fine balance of uncertainties is not enough".

The Grounds of Appeal

32. There are three grounds of appeal:

    i) The judge erred in finding that if AB's pregnancy continued to term, her baby would be removed by way of protective order on the part of the local authority and/or placed too much weight on this factor in the best interests analysis. Such a finding materially impacted on her best interests analysis, such that it was wrong. The judge was wrong to go further than the view of the local authority in their email of 18 June 2019 (see below).

    ii) The judge erred in failing to carry out a detailed and careful balancing exercise in respect of whether termination or planned caesarean section were in AB's best interests, having regard to the need for powerful evidence of risk to the mother's life or grave risk to the mother's long-term health of continued pregnancy.

    iii) The judge erred in failing to have full regard to AB's wishes and feelings and/or her Article 8 right to motherhood.

33. I am grateful to Mr McKendrick for drafting these brief grounds of appeal on the morning of the appeal. They have to be considered against the backdrop of his global submission that the judge had failed properly to weigh up all the relevant factors in conducting her best interests analysis.

The relevance of the likely removal of the baby from AB's care at birth:

34. The email to which Mr McKendrick refers in his second ground of appeal, is dated 18 June 2019 and was written by the local authority to the Trust. In it the local authority confirm that it will be their intention to apply for a care order in respect of the unborn child. The email continues:

> "We may consider if there any protective family members who could care for the baby. We will consider parenting assessment, psychological assessment and Family Group Conference for any potential family members who put themselves forward to be assessed. If the outcome of this assessment is not positive the Local Authority will place the child in care. After all family findings is [completed] and there is no one who can care for the baby, the LA may consider adoption."

35. Mr McKendrick initially submitted that on a proper reading of that email, the judge had no basis upon which to conclude that AB would not be able to keep and care for her baby. He, however, accepted in discussion in court that in reality the email does no more than set out what any local authority is obliged to do prior to reaching a final conclusion as to whether it will be in the best interests of a child to remain in the care of his or her mother. In other words, the local authority will carry out assessments of the birth mother and endeavour to identify a family placement if that can be achieved, the welfare of the baby being the paramount consideration. Importantly, the email is unequivocal in indicating that the local authority will be seeking a care order.

36. It was submitted on behalf of CD that the judge was wrong to anticipate the outcome of any assessments by concluding that AB would have her baby taken away from her. I do not agree. The judge was entitled to take into account the expert evidence available which stated categorically that AB would be unable to care for a baby. The judge, far from improperly anticipating future events, was simply expressing the sad reality of the situation, namely that AB is incapable of caring for herself, let alone a baby. Based on the totality of the evidence from both the lay and medical witnesses, it cannot be said, or even argued, that for the judge to have concluded that AB will be unable to care for her baby, was premature, inappropriate or discriminatory.

37. In *Re X* (above) at [18], Munby J said that it was important to take into account the likelihood or otherwise of a pregnant 14-year-old girl being able to keep her baby. In my judgement, the judge was right to weigh in the balance the fact that, should AB's pregnancy go to term, she would not be able herself to care for her baby. On the facts of this case, this was an important, but by no means decisive factor. Ms Butler-Cole QC (led by Mr McKendrick) submitted that the risk of removal had been the 'tipping point' and that the judge was wrong in so concluding. As to that, the judge said as follows:

> "53. If AB has the baby then all the parties accept that she will not be able to care for it alone. In those circumstances there is no doubt that the LA will step in and seek (and in all probability, obtain) some form of protective orders. What happens next is necessarily speculative, but it is speculation which I have to enter into to try to decide what is in AB's best interests. I also think that there is a very real risk, if not probability that the view of the LA, supported by the Court, will be that AB cannot live with the baby. Dr M gave evidence that if asked for advice by the LA, and she and her team would be so asked, she would advise that AB should not live with the baby because of the risks to the baby and should not have unsupervised contact with the child."

38. Up to this point I am in agreement with the judge. But she went on:

> "54. In this regard I think CD's position is wholly unrealistic and indeed so is that of the OS. CD accepts that AB cannot be left alone, and could not be left alone with the baby. ……I think it unlikely that the LA would be able to tolerate the risk of the baby living with AB. Therefore, if CD seeks care of the baby the consequence is likely to be that AB could no longer live with her mother.

> 55. In that scenario AB suffers the real trauma of having the baby taken away and not being able to live at her home or with her mother."

39. This final conclusion seems to proceed on the premise that if CD puts herself forward to care for the baby there would be a strong possibility that she would be allowed to do so. That this would be the outcome is, in my judgement, by no means certain. The local authority and the police are currently investigating the circumstances in which AB became pregnant, and any assessment of CD would inevitably involve close consideration of all that has happened since AB returned from Nigeria, including CD having 'handed over' AB into the care of the hospital without warning to the hospital or any preparation for AB.

40. It was therefore premature for the judge to conclude that if CD put herself forward to care for the baby, AB would lose not only her baby but her home and her important relationship with CD. That this was a finding which carried considerable weight is clear, not only from [55] above but from the penultimate paragraph of the judgment when the judge sums up the factors which have led her to conclude that a termination is in AB's best interests:

> "62. Focusing on AB and her own facts, the risks of allowing her to give birth are in no particular order; increased psychotic illness; trauma from the C section; trauma and upset of the baby being removed and the risk of the baby being placed with CD and AB losing her home with her mother as well as the baby. The benefits are that of having her child born alive and the possibility of some, albeit limited future contact. She may take joy from this, it is not possible to know."

41. In my judgement, that part of Ground 1 which criticises the judge's finding that the baby would be removed from AB after birth is not made out. The judge did however, in my view, subsequently fall into error in extrapolating from that finding a real risk that the baby would be placed with CD and that, as a consequence, AB would lose her home as well as her baby, a finding that erroneously impacted on the best interests analysis.

The risk to the Mother's long term physical or mental health; the medical issues:

42. It can be seen from my analysis of *Re X* above that I do not accept Mr McKendrick's argument at Ground 2 of his Grounds of Appeal that only if s1(1)(b) of the Act is satisfied and the court has "powerful evidence of risk to the mother's life or grave risk to the mother's long term health" can a termination be in the best interests of AB.

43. That does not mean that the medical evidence did not require careful evaluation. The judge had the benefit of both reports and oral evidence from: Miss S, Consultant Obstetrician; Professor Z, a psychiatrist and Professor in Intellectual Disabilities; and Dr N, Consultant in perinatal psychiatry. Each of these highly regarded experts were of the view that the pregnancy should be brought to an end.

44. Miss Anderson on behalf of the Trust described the choice facing the court as being between "massive invasion –v– nature's course". The evidence, she accepted, must be

"clear and cogent" otherwise the interference would not be necessary and proportionate. Her submission was that just such evidence had been before the judge.

45. The unenviable task facing the judge was, amongst all the other factors, to weigh up the psychiatric/psychological risks to AB of each of the two alternatives as presented to her by the doctors:

    i) Termination would be at a stage requiring invasive intervention to bring the pregnancy to an end at a time when AB has an increasing awareness (but very limited understanding) of her pregnancy. AB knows she has a "baby in her tummy" and that it will be born. There is an acceptance by all the parties that AB was, and is, at the very least, 'engaged' with the pregnancy and has indicated on occasions that she likes the idea of having the baby;

    Or alternatively,

    ii) The continuation of the pregnancy to term when the baby would be born by caesarean section and would be taken away from her, if not immediately, then very soon thereafter.

46. The experts had to grapple in particular with the likely psychological and mental health consequences of each of the two alternatives. Summarising as best I can:

    i) Termination: Each of the three doctors thought that termination would be less traumatic for AB than having the baby and the baby then being taken away. CD who, as the judge noted at [22], knows her best, thought she would be very upset at the loss of her baby. AB's social worker felt the pregnancy should continue, as did the Official Solicitor acting on behalf of AB herself. The judge described AB's likely reaction to a termination as "one of the real unknowns in the case".

    ii) Continuing the pregnancy: For AB there is a relatively small risk of postpartum psychosis. The judge said it was "almost impossible to assess the likelihood of this happening" [24] but it is a very serious mental illness and, if it occurs, is a psychiatric emergency requiring inpatient care for weeks or even months. The medical evidence was that postpartum psychosis can trigger lifelong problems and leaves most patients very frightened and traumatised afterwards. Professor S felt that the removal of her baby after delivery would have a negative effect on AB's mental health. Although she said the symptoms could be treated and AB does "appear to be able to bounce back and is easily distracted", Professor S, nevertheless, felt that "on balance I would still consider the separation from her baby could affect her in the long term".

47. The judge held that the Official Solicitor and Mr McKendrick "underplayed the consequences for AB of taking the risk of AB's mental illness being exacerbated by giving birth and the baby being taken away" [24].

48. Whilst ultimately the three experts were in agreement, it can be seen that they were faced with a most challenging task in trying to determine which of the two outcomes would be the worst for AB and ultimately the view was one expressed to be 'on balance'.

Wishes and Feelings

49. As set out above, but repeated here for convenience, by section 4(6)(b) MCA the court, when conducting the best interests analysis:

> "(6) … 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."

50. The Code of Practice gives some help as to the role of "wishes and feelings". At para 5.38, the Code of Practice says:

> "In setting out the requirements for working out a person's 'best interests', section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now. But their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests."

51. There was some dispute at the appeal as to how AB's own wishes and feelings under section 4(6)(a) should, in so far as she was able to express them, be interpreted. Having been taken to various passages in the evidence and in particular the attendance note of the interview the Official Solicitor's representative had with AB, I can see no basis upon which the judge's findings, in relation to the quality of AB's wishes and feelings, can be undermined. Reference to two short passages from the judgment will serve to demonstrate her evaluation of AB's wishes and feelings:

> "28…..What I glean from this is that AB is happy that she is pregnant and likes the idea of having a baby. I think that it shows that if she was making the choice, at this moment she would not want a termination. But the very nature of her lack of capacity is that she does not have a full (or actually on the evidence very much) understanding of the nature of the decision. Ms T's evidence was that her attitude to the baby fluctuates. From the OS attendance note, she has no understanding, either of the birth process or more importantly what happens next. She has no idea

> that the baby is unlikely to be able to live with her, the consequences for her relationship with her mother, the potential mental health impact, or the emotional and psychological issues that arise. Her perception of the situation seems to be of the baby as an object, like a nice doll."

52. And later:

> "60. AB's wishes and feelings are plainly a relevant consideration. There are cases where wishes and feelings would be determinative, even where the person has no capacity. If AB's wishes and feelings were clearly expressed and I felt she had any understanding (albeit non-capacious ones) of the consequences of giving birth, I would give them a great deal of weight. However AB's wishes are not clear. She likes being pregnant, she would probably like to have the baby, but she has no sense of what this means. As I have said I think she would like to have a baby in the same way she would like to have a nice doll. I just do not feel I can give very much weight to those expressions of wishes and feelings. I also take into account that she has no idea of the risks with her mental health that she would be taking by continuing with the pregnancy."

53. By his ground of appeal, Mr McKendrick submits that the judge failed to have full regard to AB's wishes and feelings. In my judgement, the judge in the early part of her judgment considered them and gave a careful analysis as to why she felt unable to attach great weight to them. However the fact that she was unable to give them "a great deal of weight" does not mean they should be disregarded.

54. In *Wye Valley NHS Trust v B* [2015] EWCOP 60 at [10-15], Peter Jackson J (as he then was) discussed the great importance of giving proper weight to the wishes and feelings, beliefs and values of a patient who lacks capacity. He said at [11]:

> "…..As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an *"off-switch"* for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view."

55. Whilst it is clear that the judge did not apply any "automatic discount" to AB's view, in my judgement she failed to take sufficient account of AB's wishes and feelings in the ultimate balancing exercise. The fact that they might in the end be outweighed by other factors does not alter the fact that this was a significant omission.

Beliefs and Values

56. Section 4(6)(b) goes on to require the court to take into account "the beliefs and values that would be likely to inform his decision if he had capacity". Paragraph 5.46 of the

Code of Practice identifies "cultural background" and "religious beliefs" amongst other features as providing evidence of "beliefs and values" which should be taken into account, and says:

> "Everybody's values and beliefs influence the decisions they make. They may become especially important for someone who lacks capacity to make a decision because of a progressive illness such as dementia."

57. No reference is made in the judgment to the beliefs and values that would be likely to influence AB had she capacity, nor were any submissions made in relation to "beliefs and values" to this court.

58. It is undoubtedly the case that AB has been brought up in a community whose religious and cultural beliefs and values are strongly opposed to abortion. This cultural background and these religious beliefs could, in the right circumstances, have a profound impact upon the best interests assessment. AB, however, has never had capacity and there can therefore be no direct evidence as to her actual beliefs and values; who can say if she might not have lost her faith or rebelled against the tenets of her community by the time she reached her twenties. It may be that, had she capacity, she would have been heavily influenced by the beliefs governing her community, but there is no evidential basis for concluding that to be the case, and to import those views into the best interests analysis would be mere speculation.

59. It follows that the fact that the judge did not refer specifically to s4(6)(b) does not represent a shortcoming in her best interests evaluation; in other cases it might be different

Consultation with others

60. In the search for the individual's best interests section 4(7) provides that the court:

> "(7) …. must take into account, if it is practicable and appropriate to consult them, the views of—
>
> (b) anyone engaged in caring for the person or interested in his welfare."

61. The Code of Practice says at 5.54:

> "This information may be available from somebody the person named before they lost capacity as someone they wish to be consulted. People who are close to the person who lacks capacity, such as close family members, are likely to know them best. They may also be able to help with communication or interpret signs that show the person's present wishes and feelings. Everybody's views are equally important- even if they do not agree with each other. They must be considered alongside the views of the person who lacks capacity and other factors."

62. The judge recorded CD's views in this way:

> "20. CD is a devout Roman Catholic of Nigerian (Ibo) heritage. She is strongly opposed to abortion and said that within the community it is never spoken about, and there is a real stigma to having a termination…..CD's evidence was strongly focused on AB's interests, and CD's concern that AB would be very upset by having a termination and not know what had happened to the baby."

63. The judge therefore set out CD's views, but nowhere did she thereafter weigh them in the balance when considering what outcome was in AB's best interests. At [47] of the judgment the statutory consideration of the views of a carer were not included in those matters that the judge identified as being relevant; these were:

> "…medical risks; psychiatric risks; emotional/psychological risks from termination; emotional/psychological risks from having the baby; A's wishes and feeling"

64. The judge, in my judgement, was in error in failing to make any reference in her ultimate analysis to CD's views about AB's best interests when, as the judge found, she knew AB better than anyone and had her best interests at heart.

65. The judge similarly failed to give any weight to the opinion of AB's social worker, Ms T. Ms T, whilst not a psychiatrist, is an expert in her field, namely social work, and has known AB and been her social worker since July 2017. Unlike CD, Ms T also has the benefit of professional objectivity. She said that, in her view, it would be in AB's best interests to have her baby. In oral evidence she expressed the view that the impact on AB emotionally would be the same whether she had the termination, in which case she would find it "hard to forget she was pregnant", or has the baby and "sees it and then it disappears". In both cases, she said, the impact on her emotional wellbeing would be the same: "it is a baby that has gone".

66. CD and Ms T each know AB better than the assessing psychiatrists could possibly do notwithstanding the lengthy, caring and careful assessments they had carried out. The judge had the expert evidence of the psychiatrists on the one hand and the views of those who know AB best on the other, but she did not weigh them up, the one against the other.

67. Finally, the Official Solicitor's representative, it must be recalled, spent a considerable amount of time with AB and, the Official Solicitor having had in addition, the benefit of considering all the expert evidence, submitted on behalf of AB that the termination should not take place.

The Judge's Conclusion

68. In drawing together her best interests analysis the judge said:

> "49. I am concerned about Dr M's evidence about the risk of postpartum psychosis. There is a risk of this happening, but how

> big a risk is not possible to assess. However it would be a tragedy for AB to give birth, have the baby taken away… and suffer lifelong consequences on her mental health by reason of exacerbating her psychosis.
>
> 50. It is very difficult to predict the emotional/psychological risks to AB from the termination. She undoubtedly knows she is pregnant and understands that she will give birth to a baby. She may forget quickly, as Professor S thought might happen, she may not. But for AB the impact of having a termination under a general anaesthetic would be the same as a miscarriage, that might be very upsetting, but she will not go through the emotional, philosophical and moral dilemmas of a termination as might some women who were making a "choice". There is a real danger in this case of everyone imposing their own moral or philosophical views on termination onto a woman who operates with a mental age of about a 6-9 year old. Concepts of choice, guilt and cultural norms are not ones which I suspect mean anything to AB.
>
> 51. I have to focus on AB as an individual and her best interests, not societal views on termination, the rights of disabled people in general (including as set out in the United Nations Convention on the Rights of Persons with Disabilities) or some concept of the benefits of having a genetic child and being biological mother; in circumstances where AB is unable to comprehend these concepts.
>
> 52. Therefore I accept that she will probably suffer some trauma or upset from the termination but … I think that will be a lesser impact than having the baby."

69. The judge went on:

> "56. [I] think it is likely that AB would suffer great trauma from the baby being removed, that is the known experience of most women. It will be a real baby which she will probably have touched, and it will go. In contrast the pregnancy although real to her, does not have a baby physically before her, and the impact is in my view likely to be [*sc.* less]. As Ms P puts it the baby is not a physical presence. The psychiatric evidence is that AB thinks in immediate and concrete terms. This also means I reject Mr McKendrick's suggestion that the team at the Hospital will have plenty of time to prepare AB for the removal of the baby… It does not seem to me that AB would understand such an idea in the abstract, and the removal of the baby would be deeply traumatic for her."

70. As already recorded, the judge summarised her conclusion as follows:

> "62. Focusing on AB and her own facts, the risks of allowing her to give birth are in no particular order; increased psychotic illness; trauma from the C section; trauma and upset of the baby being removed and the risk of the baby being placed with CD and AB losing her home as well as the baby. The benefits are that of her having a child born alive and the possibility of some, albeit future contact. She may take joy from this, it is not possible to know.
>
> 63. In my view the balance in terms of AB's best interests lies in her having the termination. I should make clear that I do not underestimate the harm from this course, but I think that it is clearly outweighed by the harm from continuing the pregnancy."

Conclusion

71. Part of the underlying ethos of the Mental Capacity Act 2005 is that those making decisions for people who may be lacking capacity must respect and maximise that person's individuality and autonomy to the greatest possible extent. In order to achieve this aim, a person's wishes and feelings not only require consideration, but can be determinative, even if they lack capacity. Similarly, it is in order to safeguard autonomy that s1(4) provides that "a person is not to be treated as unable to make a decision merely because he makes an unwise decision".

72. It may be that, on any objective view, it would be regarded as being an unwise choice for AB to have her baby, a baby which she will never be able to look after herself and who will be taken away from her. However, inasmuch as she understands the situation, AB wants her baby. Those who know her best, namely CD and her social worker, believe it to be in AB's best interests to proceed with the pregnancy as does the Official Solicitor who represents her in these proceedings.

73. The judge's conclusion as to what was in AB's best interests was substantially anchored in the medical evidence. In my judgement, that medical evidence, without more, did not in itself convincingly demonstrate the need for such profound intervention.

74. The judge was entitled to take into account the fact that AB would be unable to care for her baby and to place weight on the traumatic effect on AB of having her baby taken from her, but in my judgement she went beyond what the evidence could support in finding that AB risked losing her baby and her home.

75. In many of the passages set out above, and in particular in her conclusion at [62], the judge made no mention of AB's wishes and feelings or of the views of CD, the social worker or the Official Solicitor This was, in my opinion a significant omission.

76. The requirement is for the court to consider both wishes and feelings. The judge placed emphasis on the fact that AB's wishes were not clear and were not clearly expressed. She was entitled to do that but the fact remains that AB's feelings were, as for any person, learning disabled or not, uniquely her own and are not open to the same critique based upon cognitive or expressive ability. AB's feelings were important and should have been factored into the balancing exercise alongside consideration of her wishes.

77. These were all important features of the case and needed to be part of the decision-making process, all the more so given that the medical evidence was, substantially, based on an attempt (albeit by experts) to assess AB's likely emotional reaction to each of two traumatic events.

78. I am conscious that, to borrow from Lord Sumption in *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119, this is an appeal:

> "15…..against a discretionary order, based on an evaluative judgment of the relevant facts. In the ordinary course, this court would not disturb such an order unless the court making it had erred in principle or reached a conclusion that was plainly wrong."

79. To this I add that I also have in mind that the judge made her decision having heard the oral evidence and having written a careful and thoughtful judgment produced under considerable pressure of time. However, in my judgement, she clearly gave inadequate weight to the non-medical factors in the case, while the views expressed by the doctors were necessarily significantly predicated upon imponderables. In the end, the evidence taken as a whole was simply not sufficient to justify the profound invasion of AB's rights represented by the non-consensual termination of this advanced pregnancy.

80. For these reasons we granted permission to appeal, allowed the appeal and set aside the declarations that would have permitted the termination to take place.