Neutral Citation Number: [2023] EWCOP 56

Case No: 13563179-04

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 December 2023

Before:

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

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Between:

Lancashire and South Cumbria NHS Foundation Trust	**Applicant**
- and -	
BNK (by his litigation friend, the Official Solicitor)	**Respondent**

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BNK, Re (Dental treatment)

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Jack Anderson (instructed by Louise Wilson, Hill Dickinson LLP) for the Applicant
Katharine Scott (instructed by Emma Baker, Lawyer, Healthcare and Welfare, the Official Solicitor) for the Respondent

Hearing dates: 7 December 2023

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APPROVED JUDGMENT

This judgment was delivered in open court. The judge has given permission for this version of the judgment to be published. There is a reporting restriction order in force in respect of this case. Permission to publish this version of the judgment is given expressly subject to the terms of the reporting restriction order.

Paul Bowen KC (sitting as a Deputy Judge of the High Court)

1. This application concerns the administration of dental treatment including extraction under general anaesthesia and associated medical treatment to BNK, a 36-year-old man with a diagnosis of severe learning disability, autism and Noonan syndrome, a genetic condition that stops typical development in various parts of the body. BNK lacks capacity to consent and is expected to object, perhaps aggressively, to the treatment, which may therefore require the use of reasonable force and restraint, both physical and pharmacological. An added complication may arise in the unlikely event that there is a medical emergency requiring a blood transfusion. His parents and, according to the parents and as recorded in Trust documents, BNK are Jehovah's Witnesses and object to blood transfusions on religious grounds, even if necessary to preserve life. In view of the potentially serious consequences of treatment the Trust very properly seeks the Court's authorisation of its proposals. The application is very urgent, the proposed treatment being timetabled for tomorrow, 8 December 2023. A transparency order and directions for the urgent hearing of the matter before me were made by the Vice-President on 5 December 2023. This is my judgment on the Trust's application. BNK's identity has been disguised to protect his privacy and to enable this judgment to be published.

<u>Relevant facts</u>

2. BNK has a number of broken teeth with only the roots remaining in his upper front teeth. Dental care has been a long standing issue given BNK's love of sugary drinks and snacks and his refusal to brush his teeth. BNK is consistently resistant to all medical interventions. There have been concerns for some time that BNK's teeth have been causing him pain. It is thought that this may have been the cause of, or contributed to, recent episodes of challenging behaviour. Staff at his current placement described recent episodes of facial swelling which they attribute to abscesses in his mouth. Given BNK's presentation, it has not been possible to engage him in any meaningful discussion of, or planning for, any dental work and associated medical treatment. It is very likely that BNK will be resistant to such treatment and that physical and chemical restraint would be required to give it effect.

3. The Trust have identified three available options for BNK's dental treatment. The advantages and disadvantages of each were discussed in detail at a best interests meeting held on 28 November 2023 attended by a range of professionals including Laura Kaura, specialist dentist with the Trust and Mr. Justin Roberts, consultant anaesthetist, who have produced written statement and gave evidence. BNK's father also attended; he also attended the hearing and gave evidence. In summary the options are these:

   3.1. Option one: Do nothing. This is likely to be BNK's preferred option and is the least restrictive option which avoids the disadvantages associated with Options 2 and 3. However, this option does not address BNK's current and future pain and the risk of serious infection, including sepsis which is a life-threatening condition.

3.2. Option two: General anaesthetic to allow full examination, radiographs, extraction of roots of upper front teeth and any other necessary treatment including fillings, extractions and/or extraction of all remaining teeth if they are not functional or unrestorable. This would address BNK's pain and infection and would make eating and drinking more comfortable once the initial pain and swelling have receded. Other baseline medical examinations could also be carried out while BNK is anaesthetised namely blood tests; an ultrasound scan of his abdomen to investigate his abdominal pain; rectal examination; and an ear examination. However, this is a more restrictive option, is likely to cause BNK distress and require physical or chemical restraint during conveyance and admission. After awaking from the anaesthetic there would be post-operative pain and a risk of post-operative complications, but these should be manageable with a specific aftercare plan. There may also be psychological distress and BNK may be more resistant to treatment in future.

3.3. Option three: General anaesthetic for planned extraction of all remaining teeth ('full dental clearance'). The advantages and disadvantages are as for Option 2, except a major additional disadvantage is BNK would have no teeth which would severely hamper his ability to eat and drink, which would be a significant loss. BNK's father considers this would cause him significant distress as eating snacks is the 'single activity that lights up his day'. This would be mitigated in future if BNK once his gums have hardened and/ or he is fitted for dentures, but this could only happen once the gums have healed. The major advantage of this option over Option 2 is that BNK would require no interventions in future which would spare him significant distress.

4. The best interests meeting agreed that Option 2 was in BNK's best interests, although it was also agreed that if, upon examination, it became clear that none of BNK's teeth were either restorable or functional, then Option 3 (full dental clearance) should be carried out. Option 3 should also be carried out if BNK's reaction to conveyance, admission or treatment requires restraint and his response is so disproportionate and traumatic for him that the disadvantages of this option are outweighed by the benefit that no further such treatment will ever be necessary. In either event the treating team would consult BNK's father but if, following consultation, BNK's father objected but they remained of the view that Option 3 was in BNK's best interests the medical professionals would continue.

5. I heard evidence of the step-by-step care plan that has been devised to convey BNK to hospital. Care workers who know BNK well will accompany him together with a specialist team from Prometheus Complex Care who are trained in the use of physical restraints, should that be necessary. Once he reaches hospital the anaesthetic team, led by Dr. Roberts, will be on hand who, in the event of any resistance from BNK, may administer sedation either by a nasal spray (which will take 20-30 minutes to take effect) or by intra-muscular injection to the buttock (which will take 2-3 minutes to take effect).

6. There is a very low risk that BNK will require blood or blood products as a result of the dental work. The applicant Trust propose to provide BNK with a blood transfusion only if he is at imminent risk of death or serious harm and if the use of alternative, non-blood products would not suffice to address the risk. BNK's father objects to this part of the care and treatment plan, even if necessary to preserve life. His objection stems from his faith as a Jehovah Witness. BNK is also said to be a Jehovah's Witness. This is recorded in Trust documents: for example in his 'Hospital Passport' dated December 2022 under the heading 'Things **you must** know about' and his Health Action Plan dated 2 October 2023 under the heading 'Important things you need to know about me' where it is stated 'I am a Jehovah's Witness and **cannot have a blood transfusion**'. The parties are agreed that this issue is so unlikely that it does not need to be resolved. Should a medical emergency arise the evidence of Ms. Kaura, the clinical specialist, was that it will arise slowly and there are non-blood products that can be used. The situation will either not eventuate or there will be time to bring the matter back before the Court for authorisation. In those circumstances the parties and BNK's father invited me not to make any ruling on that issue and I will say no more about it.

The legal background

7. By s 15(1) of the Mental Capacity Act 2005 ('the 2005 Act') the Court may make a declaration as to whether a person lacks capacity to make a specified decision. Section 16 empowers the Court, by making an order, to make a personal welfare decision on behalf of an incapacitated person (hereafter, 'P') which includes (s 17(1)(d)) the giving of consent to the carrying out of treatment by a person providing healthcare. The court must exercise its jurisdiction in accordance with the relevant sections of the 2005 Act, in particular the overriding principles in s 1, the test of capacity in s 2 and 3 and the requirements for assessing 'best interests' in s 4. I will set the relevant law out in a series of propositions.

8. The presumption of capacity. 'A person must be assumed to have capacity unless it is established that he lacks capacity': s 1(2). This is to be read with s 2(4): 'In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.' It is therefore for the party asserting that a person lacks capacity to establish that to be the case on the balance of probabilities.

9. The test of capacity. '[A] person lacks capacity in relation to a matter 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' (s 2(1)), whether temporary or permanent (s 2(2)). P is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means) (s 3(1) read with s 3(4)). P will also be deprived of capacity if he does not believe the treatment information, as

'belief' is subsumed in the more general requirements of understanding and of ability to use and weigh information: Munby J in *A Local Authority v MM* [2007] EWHC 2003 (Fam), [81].

10. <u>The duty of assisted decision-making</u>. 'A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success': s 1(3). This principle must be read alongside s 4(4), which requires that a best interests decision-maker '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'. Furthermore, by s 3(2) a person 'is not to be taken as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to the circumstances (using simple language, visual aids or any other means).'

11. <u>Unwise decision-making does not mean a lack of capacity</u>. 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision': s 1(4). This is perhaps the most fundamental of the principles that underpin the Act, which codifies the same principle at common law. A mentally competent adult is entitled to make decisions that are not in their best interests: *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [23]). That is so 'notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent': *Re. T* (CA) [1993] Fam 95.

12. <u>Best interests</u>. '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': s 1(5). In assessing best interests the decision-maker, including a Court, is not concerned with narrow medical best interests but 'must look at [the individual's] 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': *Aintree*, [39], per Lady Hale. In assessing best interests the decision-maker must comply with a number of procedural requirements, namely:

    12.1. Not to make any assumptions about what might be in P's best interests on the basis of his age appearance, condition or behaviour (s 4(1)).

    12.2. To consider whether it is likely and, if so, when P will at some time recover capacity (s 4(3)). If that is likely then the decision-maker ought to postpone any decision to see if P does recover capacity.

    12.3. To take into account P's reasonably ascertainable wishes and feelings and any beliefs and values that would be likely to influence P's decision if he had capacity (s 4(6)): 'they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be', *Aintree*, [39].

    12.4. In doing so, to discharge the duty of assisted decision-making in s 4(4), see above ¶10..

12.5. To consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be (s 4(7)), *Aintree*, [39].

13. <u>The balancing exercise</u>. The best interests assessment is in the nature of a balancing exercise, where the preservation of life carries the greatest, but not necessarily preponderant, weight: 'The law reflects human nature in attaching the greatest value to the preservation of life, but the quality of life as experienced by the individual must also be taken into account': *E v Northern Care Alliance NHS Trust* (CA) [2022] Fam. 130, [50], per the President.

14. <u>The least restrictive alternative</u>. 'Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action': s 1(6).

15. <u>Respect for human rights</u>. By virtue of s 6 Human Rights Act 1998 ('HRA'), the best interests decision-maker, including the Court, must also act compatibly with P's human rights, materially those under Article 8 (the right to respect for private life, which among other things protects the right of bodily integrity); Article 3 (the right not to be subjected to, and to be protected from, inhuman and degrading treatment); Article 2 (the right to life, which includes the right to be protected from foreseeable risks to life that are real and immediate); Article 5 (the right to liberty); and Article 9 (the right to hold and manifest a religion or belief). However, a properly conducted best interests analysis under the 2005 Act will lead to a decision that is compatible with the HRA, for the reasons given by Munby P in *NHS Trust v X* [2021] 4 W.L.R. 11.

<u>The position of the parties</u>

16. The parties agree that BNK is unable to understand or weigh in the balance information relevant to the decision whether to consent to dental treatment and any associated medical treatment, including a general anaesthetic, because of an impairment of, or a disturbance in the functioning of, the mind or brain, namely severe learning disability and autism. Accordingly, he lacks capacity to consent to that treatment. Evidence to that effect was given in writing by Laura Kaura, specialist dentist with the Trust; Kieron Tomlinson, Community Learning Disability Nurse; Dr. Justin Roberts, anaesthetist; and Charlotte Hunt, Senior Dental Officer.

17. The parties also agree that, consistent with the outcome of the best interests meeting of 28 November 2023, Option 2 is in BNK's best interests but Option 3 should be pursued in the circumstances outlined at paragraph 4. above.

<u>Determination</u>

18. This Court is familiar with applications of the kind brought by the Trust and has granted such applications in a number of cases: see, for example, *United Lincolnshire Hospitals NHS Foundation Trust v Q* [2020] EWCOP 27, Gwynneth Knowles J; *Livewell Southwest CIC v MD* [2020] EWCOP 57, Mostyn J; *South Tyneside and Sunderland NHS Trust Foundation v SA* [2022]

EWCOP 23 (Fam), Theis J. I have been much assisted by the approach taken by the judges in those cases as I have by the submissions of Mr. Anderson and Ms. Scott who appeared before me.

19. I am satisfied that BNK lacks capacity to give or refuse consent to any of the proposed treatment options for the reasons given at ¶16., above. There is no reasonable prospect that BNK will at some time recover capacity to decide this issue for himself in the future: s 4(3).

20. As to which of the options is in BNK's best interests, I will first address whether the procedural requirements of s 4 are satisfied. First, I am satisfied none of the medical professionals have made assumptions about what might be in BNK's best interests on the basis of his age appearance, condition or behaviour, and I make no such assumptions myself: s 4(1). Second, I am satisfied that all reasonably practicable steps have been taken to permit, encourage and assist BNK to participate in the decision-making process and that his wishes, feelings, values and beliefs have been ascertained, so far as they reasonably can be: s 4(4), s 4(6). Laura Kaura explains how she had made multiple attempts to talk with BNK about his dental issues, accompanied by his learning disability nurse, using communication strategies that usually work for him, but on each occasion these had been unsuccessful. For example, Ms. Kaura provided him with easyread information on dental treatment and asked him about his broken teeth and whether they were sore, but he responded by saying 'no' and then asked them to 'go home'. Third, I am satisfied that relevant persons caring for and with an interest in BNK's welfare have been consulted and their views taken into account: s 4(7). In particular, BNK's father has been involved in the Trust's decision-making and he has attended and given evidence before me.

21. As to the substantive best interests assessment, I will first set out the factors that weigh against both treatment Options 2 and 3 and which favour the *status quo* of Option 1 having regard to BNK's best interests 'in the widest sense, not just medical but social and psychological': above, ¶12..

22. First, both Options 2 and 3 will cause BNK pain and distress and he is incapable of understanding the reasons why those short term consequences are worth suffering for the longer term benefits. Option 3 is likely to cause him particular distress as a full dental clearance would prevent him from eating snacks, which is one of his favourite activities. BNK's father objects to Option 3 for the same reason. I accept that when a person is deprived by reason of illness or disability of the capacity to enjoy the full range of human pleasures and activities then those that they can enjoy assume particular importance, even though they may seem of little importance to someone who is not so deprived. This is therefore a potentially weighty factor against either Option 2 or 3. However, I heard evidence that the loss of this pleasure is not indefinite; once his gums have hardened or he has had dentures fitted BNK will be able to enjoy eating snacks once again. For example, Ms. Kaura gave evidence that BNK would be able to eat crisps (one of BNK's particular favourites) within a few weeks of having all his teeth removed, even without dentures. This appeared to alleviate some of BNK's father's concerns about Option 3.

23. Second, BNK is likely to resist both Options 2 and 3 which may require the use of reasonable force and restraint, both physical and pharmacological: see above, ¶3.2.. I am satisfied, however, that BNK's conveyance, admission and treatment have been carefully planned to reduce the likelihood of his resisting and, should he do so, that only such restraint as is necessary and proportionate will be used to ensure the treatment is successful or the plan aborted.

24. Third, I assume both Options 2 and 3 to be contrary to BNK's wishes and feelings, in so far as they are capable of being ascertained: s 4(6)(a). However, given BNK's profound mental impairment he is only able to articulate those wishes and feelings in the most basic form, without consideration for the costs and benefits of the proposed treatment, and these therefore carry relatively little weight in the balancing exercise.

25. I now consider the factors that weigh in favour of treatment Options 2 and 3 and against Option 1.

26. First, both Options 2 and 3 will treat the pain and infection that BNK is believed to be suffering, the severity of which cannot be gauged given the degree of his mental impairment. They will also avoid the risk of his contracting sepsis, a life-threatening condition. That is a real risk and the consequences could not be more serious.

27. Second, both Options 2 and 3 will allow for other medical examinations to be carried out which are currently not possible. BNK is said to have recurring abdominal complaints which can be assessed, while baseline blood checks (blood count, kidney and liver function, bone profile, vitamin B12, folate, ferritin and iron studies, sugar level, thryroid function blood tests, vitamin D levels and a coeliac screen) and other physical examinations may identify other medical conditions that may be life-threatening and can be treated or the symptoms alleviated.

28. In those circumstances I am satisfied that Options 2 and 3 are overwhelmingly to be preferred to Option 1 of doing nothing. In particular, there is a small but nevertheless real risk that Option 1 will lead to BNK suffering sepsis or some other life-threatening condition.

29. As between Options 2 and 3, I accept that Option 2 is to be preferred to Option 3. If there is any prospect of BNK retaining some manageable and functional teeth then he should enjoy those for as long as he can, not least as this will mean he can continue to enjoy the harder sugary snacks that are so important to him. However I accept that it is in BNK's best interests for Option 3 to be adopted if, upon examination, it transpires that he has insufficient manageable or functional teeth worth preserving; or if the process of conveyance and admission should prove so traumatic for BNK that it should be avoided in future at all costs. As I have already observed, the evidence is that BNK will still be able to eat many of the snacks he enjoys even after full dental clearance once the immediate sensitivity has gone.

30. The parties made no submissions to me in relation to the human rights implications of the proposed treatment but I am satisfied that both Options 2 and

3 are compatible with BNK's human rights and therefore lawful under s 6 HRA. Even if it might be said that the imposition of restraint and the administration of treatment against BNK's wishes reached the threshold of 'inhuman and degrading' treatment for the purposes of Article 3, a medical intervention which is a therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading and is therefore not a violation: *NHS Trust v X*, [109]. Furthermore, while such treatment is also a prima facie interference with the right to bodily integrity protected by Article 8(1), such treatment may be justified under Article 8(2) as a necessary and proportionate means of achieving the legitimate end of preserving life and protecting BNK from harm. The state may be under a positive duty to protect an incapacitated adult such as BNK from serious pain and illness and from any real and immediate risks to life of which it is aware under Articles 2 and 3: see *R. (Maguire) v HM Senior Coroner for Blackpool and Fylde* [2023] UKSC 20. Such a duty will outweigh any countervailing duty to respect BNK's right to bodily integrity under Article 8. I do not need to decide whether such a duty is in fact owed in these circumstances, as the state has a wide margin of appreciation when balancing its competing duties and 'is entitled to have regard to the preservation of life as a factor that can permissibly be taken into account in appropriate circumstances in evaluating, for example, whether there has been a breach of article 3 or whether the qualifications to articles 8 and 9 come into play': *NHS Trust v X*, [108]. I am satisfied that there is medical necessity for BNK to receive the proposed treatment in Options 2 and 3 and that if, on examination, Option 3 is preferred that will be for reasons of medical necessity. There will be no breach of BNK's human rights in those circumstances.

31. That is my judgment.