

Neutral Citation Number: [2023] EWCOP 60

Case No: 14078717

**IN THE COURT OF PROTECTION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/05/2023

**Before :**

**MR JUSTICE MOSTYN**

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**Between :**

**NORTH EAST LONDON NHS FOUNDATION  
TRUST**

**Applicant**

**- and -**

**BEATRICE (by her litigation friend the Official  
Solicitor) (1)  
EDWARD (2)**

**Respondents**

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**Vikram Sachdeva KC (instructed by Kennedys Law) for the Applicant**  
**Emma Sutton KC (instructed by the Official Solicitor) for the First Respondent**  
**The Second Respondent appeared in-person**

Hearing date: 18 May 2023  
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**Approved Judgment**

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**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.

The judgment should be reported as

North East London NHS Foundation Trust v Beatrice (No. 2) [2023] EWCOP 60

**Mr Justice Mostyn:**

1. This judgment is given from the foot of my previous judgment dated 9 May 2023 which has the neutral citation number [2023] EWCOP 17. I do not repeat the contents of that judgment here. The relevant facts and the issues are all set out in that judgment. The issue now before me is the question of what is in Beatrice's best interests.

2. In answering that question there are five chief factors. The first factor is the presumption in favour of the prolongation of life. This is derived from article 2.1 of the European Convention on Human Rights, incorporated by the Human Rights Act 1998, which provides:

**“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally.”**

3. This is subject to four exceptions, none of which is relevant to this case. This principle is further reflected in the somewhat impenetrable drafting of section 4(5) of the Mental Capacity Act 2005, which provides that:

**“Where the determination relates to life sustaining treatment the decisionmaker 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.”**

4. The second factor is the wishes and feelings of Beatrice. Section 4(6) provides:

**“The decision maker 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 her when she had capacity, b) the beliefs and values that would be likely to influence her decision if she had capacity and c) the other factors that she would be likely to consider if she were able to do so.”**

5. This factor, therefore, has two aspects, namely on the one hand Beatrice's wishes and feelings and on the other hand Beatrice's beliefs and values that would be likely to influence her decision if she had the capacity to make it. This factor incorporates the fundamental precept that the you have the right to lead your life as you choose, subject only to general lawful constraints. This is a key element of individual liberty.

6. That right finds expression in article 8 of the European Convention which guarantees the right to respect for a person's private life. Previously, the right found expression in the common law, which has always recognised that we are a free people entitled to live our lives as we choose, subject only to general lawful constraints. I very strongly agree with the Official Solicitor that this right belongs to everyone and the fact that Beatrice lacks mental capacity does not deprive her of its protection.

7. The third factor is the views of the members of her family. Section 4(7) provides, so far as is relevant:

**“(a) The decision maker must take into account, if it is practicable and appropriate to consult them, the views of anyone engaged in caring for the person or interested in her welfare.”**

8. The fourth factor is Beatrice's overall prognosis, which I am required to take into account as part of all the circumstances of the case as is mentioned in section 4(2).
9. The fifth factor is the views of the treating clinicians of her best interests. This also falls within the requirement to take into account all the circumstances of the case.
10. When weighing these factors, the exercise is quintessentially an evaluation rather than an exercise of discretion. The case law clearly establishes a number of simple propositions which guide the evaluative judgment which I must make as to Beatrice's best interests. The propositions are these.
  - a. When assessing best interests the exercise is first and foremost to consider matters from the point of view of Beatrice: *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 at paragraph 45.
  - b. Welfare must be assessed in the wider sense, not merely medical but social and psychological also (*ibid* at paragraph 39).
  - c. While there is a strong presumption in favour of the preservation of life this may, in an appropriate case, yield to the need to respect personal autonomy and dignity of the protected person and her right to self determination (*ibid* at paragraph 35).
11. The strong presumption in favour of preservation of life reflects the categorical terms of Article 2 of the convention, both in its mandatory and prohibitory aspects, as well as in the terms of section 4(5) of the 2005 Act.
12. I now render my findings on each factor.
13. Factor 1. Here my judgment accords exactly with the written submissions of Ms Sutton KC on behalf of the Official Solicitor from which I quote:

**“In this case, the evidence is that further treatment to achieve weight gain would be futile, overly burdensome to Beatrice and in circumstances where there is no prospect of any real recovery from her eating disorder. Treatment within a SEDU (including forcible feeding) would be an assault upon Beatrice and a violation of her rights under article 3, which prohibits inhuman or degrading treatment unless it is shown to be in her best interests on the basis of therapeutic necessity that has been convincingly shown to exist. There is no such evidence in this case and instead further inpatient admission would do more harm than good.”**

14. I fully agree with this.
15. My findings in relation to Factor 2 are these. Beatrice's present wishes and feelings are as to the existential question understandably ambivalent. Although she does not wish to die, she does not wish her suffering to continue. I do note that yesterday Dr A recorded this:

**“Beatrice's overall cognitive capacity appears to have declined significantly in the last two weeks in the context of her minimal nutritional intake, falling weight and probable ongoing**

**hypokalaemia. This means that her recent decision making is likely to be of poorer quality than it was previously.”**

16. However, she is absolutely clear about forced feeding, namely that it is abhorrent and cannot be contemplated. The quality of that specific opposition has not diminished since the matter was last before me. It was most recently expressed to Ms Sutton KC and to Mr Edwards, her instructing solicitor from the Official Solicitor’s department, at a Teams meeting held on 15 May 2023.
17. As to Beatrice’s beliefs and values, this is a somewhat unreal exercise because it asks what the beliefs and values of Beatrice would be if she had capacity and, of course, in that scenario we would not be here discussing this because the Court of Protection would have no jurisdiction. However, putting that logical objection aside, under this head I do record that Beatrice is a Christian and would subscribe to the Christian tenet that self-destruction is sinful.
18. However, I do not regard these aspects of Christian doctrine to be relevant in this case as I have found specifically and explicitly in my previous judgment that there is no element of voluntary self- destruction in Beatrice’s conduct. Beatrice has expressed a wish to have a dignified death, which I take to be to have no more moral significance other than that she wishes her ending to be as comfortable and as pain free as possible.
19. Factor 3. Edward wants his daughter to have whatever treatment is necessary to preserve her life, including compulsory treatment. Her brothers are of the same view.
20. Factor 4. The history clearly shows that various treatment options have been attempted to no avail over a prolonged period of time. I conclude that future similar treatment would be equivalently futile and that the level of distress that Beatrice would likely experience is not justifiable in terms of the accrual of marginal gain, if any.
21. I have noted the extremes that Beatrice has gone to in the past to avoid forced feeding, which have included swallowing washing up liquid in order to be transferred to a medical ward. The issue is, in any event, largely, if not entirely, academic as the clinicians within the Applicant Trust would not be prepared to implement forced feeding even if I were to declare that to be in Beatrice’s best interests; and I cannot order them to administer it.
22. If I were to declare that forced feeding was in Beatrice’s interests it would mean having to find a clinician somewhere who was prepared to administer it. There is no evidence of who that clinician might be, where that would take place or how long the process would take and so, for these reasons, I have reached the conclusion that the issue is largely academic.
23. Factor 5. The views of Beatrice’s treating clinicians, Dr H and Dr C in particular, and the views of the independent expert, Dr Glover, the consultant psychiatrist, is that further active treatment against Beatrice’s will would not be in her best interests and, I repeat, they would not, in any event, be prepared to administer forced feeding.
24. I now turn to my conclusion. I am very firmly satisfied, having duly weighed the above mentioned five factors, that it is in Beatrice’s best interests only to have

treatment which involves such feeding and/or weight restoration that her treating clinicians consider clinically indicated and which she expressly accepts or requests. That is my primary conclusion.

25. On the facts of this case, the factor with the magnetic influence in reaching my conclusion is the wish of Beatrice not to have compulsory treatment forced upon her. In my judgment, notwithstanding that I have to make the decision on Beatrice's behalf, she being incapacitated, I am quite sure on the facts of this case that I should respect her very strong wish that she should not be forcibly fed.
26. I record that the decision I have reached corresponds to the common position of the represented parties before me. I recognise that it could be said that there is an inconsistency here with my previous judgment in that I found therein that Beatrice was a victim of a (figurative) malign invader of her mind which is causing her to suffer the overpowering delusions to which I referred in that judgment.
27. Surely, it might be said, given there is no question of Beatrice being complicit in this struggle, the Court should authorise whatever measures are necessary to defeat that invader. But that approach would be to misunderstand the function of the Court when it makes a best interest decision on behalf of an incapacitated person such as Beatrice.
28. When making that highly nuanced individual evaluation I am obliged to afford appropriate weight to the decision that Beatrice has made not only to discontinue the struggle against this invader of her mind but more specifically emphatically to reject the idea of being forcibly fed.
29. I agree with Ms Sutton KC that the protection given to an individual's autonomy granted by article 8, building on the common law, applies to the incapacitated just as much as it applies to capacitous members of society provided that the decision in question is not antisocial, unlawful or obviously irrational. As I have said, on the facts of this case, this factor is the one with the magnetic influence in my decision making.
30. The decision that I make has nothing to do with the right to die or with the Court authorising somebody's death. It is simply a decision that respects Beatrice's own very strong opposition to, and abhorrence of, forced feeding.
31. It is a decision that not only respects the opposition of Beatrice in principle but it is also a decision which is realistic in that an order which required force feeding would likely be frustrated by Beatrice in short order by self-vomiting and where there is no evidence, as I have said, of a clinician who would be prepared to do it.
32. That is the primary decision which I reach.
33. There are consequential declarations that need to be made, which have been agreed between the represented parties and which I approve as being both procedurally correct and substantively appropriate. They are these.
34. First, there will be a declaration made under the High Court's inherent jurisdiction that it is lawful for Beatrice's treating clinicians not to take steps to provide Beatrice with nutrition and hydration by force under the Mental Health Act 1983 against her

wishes, even if in the opinion of her treating clinicians it would be immediately necessary to administer such nutrition and hydration to preserve her life.

35. However, the declaration will go on to say that if at any time Beatrice expressly accepts, or requests, an escalation of treatment to provide nutrition and hydration, even were she to request that restraint be used to facilitate this treatment (which I doubt but which is conceivably possible) then it is lawful for such treatment to be provided so long as her treating clinicians consider it clinically indicated and in her best interests and it remains at all times in accordance with her express wishes.
36. Second, there will be a declaration made under s.15 of the Mental Capacity Act 2005 that it is lawful for Beatrice's clinicians to refer her for end of life care at a named hospice. It will state, of course, that she will not be forced to move to that hospice against her wishes.
37. I accept and understand that this decision will be desperately disappointing to Beatrice's father and brothers. I hope they will understand that I am a mere servant of the law and that I have to administer it as it has been passed by Parliament. That law requires me to weigh certain factors. I have concluded that a correct weighing exercise requires me to give predominant and conclusive weight to Beatrice's strongly expressed wish not to be forcibly fed.
38. I end this judgment by referring briefly to an opinion which has been drawn to my attention by a commentator about my previous judgment. This opinion criticised as completely inappropriate my observation that the calorific intake of Beatrice was far less than that given to the volunteers in the Minnesota Starvation Experiment in 1944 (to which Dr A had referred in her evidence) or even to that given by the Nazis at the same time to slave labourers in the camps.
39. The suggestion was made that, in so doing, I was seeking insidiously to blame Beatrice for her condition and the predicament in which she finds herself. Having some personal experience of a progressive incurable neurological condition, and having gone out of my way in my earlier judgment to have explained how Beatrice's condition is entirely involuntary, I simply fail to understand how this imputation could possibly have been seriously made.
40. The suggestion that I have implied that Beatrice is complicit in the suffering that this malign invader of her mind is inflicting on her is incomprehensible to me in circumstances where the explicit tenor of my first judgment is to precisely the opposite effect. I now take the opportunity, therefore, to state with the utmost clarity that there is not the faintest suggestion that Beatrice is complicit in the desperate position in which she finds herself.
41. It may be that the commentator does not understand the essential function of a judge when giving judgment. Lord Devlin famously stated that:

**“The judicial function is not just to render a decision, it is also to explain it in words which will carry the conviction of its rightness to the reasonable man.”**
42. In order to make my judgments understandable to the reasonable person it is my practice to use analogy and metaphor in order to make them readable and, dare I say

it, interesting. To say that somebody's daily calorific intake is 260 is just an abstract number.

43. It does not begin to acquire any kind of real life significance until it is put in context by analogy and in my opinion the analogy of the amounts of bodily fuel allowed in the 1944 Minnesota Starvation Experiment and by the bestial Nazi regime to its victims at the same time shines a very strong light on the suffering that this malign invader of Beatrice's mind is inflicting on her.
44. The analogy is probably not necessary for those of extremely high intelligence but, in my opinion, it is apt in order to explain my decision to the reasonable person. Finally, I would point out that my first judgment was seen in draft by both leading counsel before it was published and neither raised any suggestion that the analogy was inappropriate.
45. That concludes this judgment.

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**This Transcript has been approved by the Judge.**

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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