

Court of Protection rules on capacity and best interests in pregnancy termination case involving detained woman

09 April 2024  Katie Viggers

In the case of [Rotherham, Doncaster and South Humber NHS Foundation Trust v NR and another \[2024\] EWCOP 17](#), the [Court of Protection](#) considered whether a 35 year old pregnant woman, NR, who was detained under the Mental Health Act (MHA), had the capacity decide whether to have a termination and whether such a procedure was in her best interests. Mr Justice Hayden found that NR lacked the capacity to make decisions about the termination. However, since she was deeply conflicted about carrying her baby to full term, he did not declare it in her best interests to have a termination. A care plan outlining the termination arrangements was deemed lawful, but the final decision on whether to proceed with the termination was left to NR.

Browne Jacobson acted for the Applicant Hospital Trust in this difficult and sensitive case. We are able to confirm that, following the judgment, NR decided to proceed with the termination, which went well. In this article, we explore the case in more detail, including the judge's reasoning for his decision.

Background

NR had a history of drug and alcohol abuse and significant mental health problems. She had two daughters, both of whom had been taken into care. This was her fifth pregnancy, and she reported that she had been drugged when the baby was conceived. In January 2024, she was detained under the MHA on an acute mental health ward, run by Rotherham, Doncaster and South Humber NHS Foundation Trust (RDaSH).

At the time of her detention, RDaSH was aware that NR was pregnant. However, as she had not engaged with any pre-natal appointments or scans, it was not clear how far along she was in her pregnancy and whether or not a termination could be legally carried out (which is only permitted up to 24 weeks). A scan was urgently arranged and it was confirmed that NR was 21 weeks pregnant and therefore within the legal time period for a termination.

NR had expressed ambivalence about carrying her baby to full term and RDaSH made an application to the Court of Protection, seeking a declaration that:

- NR lacked the capacity to decide whether to have a termination of her pregnancy, and
- It was lawful and in NR's best interests to have a termination in line with a carefully drafted care plan.

Capacity to decide whether to have a termination

The court outlined the "relevant information" that NR needed to understand to have the capacity to decide whether to terminate a pregnancy, namely:

- what the termination procedures involved ("what it is");
- the effect of the termination procedure / the finality of the event ("what it does");
- the risks to P's physical and mental health in undergoing the termination procedure ("what it risks"); and

- the possibility of safeguarding measures in the event of a live birth.

The clinical evidence showed that NR persistently refused to hear anything about what a termination would entail, and that the agitation caused by her mental health condition prevented her from engaging in such discussions. The judge therefore concluded that she lacked capacity in this regard.

Best interests

The judge went on to consider NR's best interests and noted her highly conflicting views on the termination. At times she expressed wanting a termination, but at other times said she could not bring herself to undergo it. He concluded that NR did not have "a determined view either to terminate or continue with the pregnancy", and that she was "paralysed by conflict".

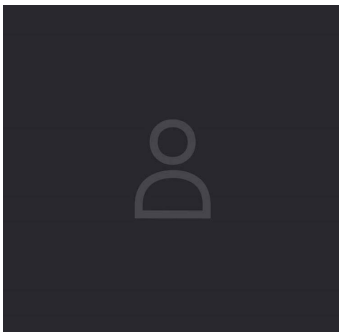
The judge considered the proposed care plan for the termination procedure. This emphasised the importance of helping NR to reach a decision by explaining to her what was involved at each stage and giving her tangible options – making clear the decisions were hers and that she could stop at any stage until the termination had reached an irrevocable stage. Even though the plan was "sensitively constructed", the judge recognised that the process would be traumatic for NR and could have an adverse impact on her mental wellbeing.

Given the above, Mr Justice Hayden declined to make a declaration that it was in NR's best interests to have a termination. He approved the proposed care plan for the termination and declared that it was lawful but went no further – leaving it to NR to make the decision herself, with the help of those she chose to be advised by. He remarked that whatever decision NR takes would have his "fulsome support".

Outcome

As explained, following the Judgment, NR elected to proceed to a termination in line with the care plan approved by Mr Justice Hayden. The Judge has confirmed he intends to prepare a short updating judgment in light of this which is awaited at the time of writing.

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