RE: AB (TERMINATION OF PREGNANCY) [2019] EWCA CIV 1215: 'WISHES AND FEELINGS' UNDER THE MENTAL CAPACITY ACT 2005

MEDICAL LAW REVIEW

Termination of Pregnancy

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ABSTRACT

In *Re: AB (Termination of Pregnancy)*, the Court of Appeal was asked to consider an assumption made about the future living arrangements of a pregnant patient, and the weight to be ascribed to her wishes and feelings when she had no real understanding of her predicament. This commentary explores the importance of taking into account the perspective of the patient, even if suffering from a mental disorder, and it will analyse the existing common law to show that the weaker the ability of the patient to form her own wishes and feelings, the more appropriate it would be to rely on the remaining evidence.

Keywords: Best interests Capacity Incompetent patient Mental Capacity Act 2005 Pregnancy Wishes and feelings

INTRODUCTION

In the recent case of *Re: AB (Termination of Pregnancy)*,[1] the Court of Appeal was asked to review the best interests of a pregnant woman with severe learning difficulties under section 4(6) of the Mental Capacity Act 2005. The High Court had already granted an order for termination in the first instance, but an appeal was allowed with respect to an assumption made by the High Court that the patient would lose her home if she continued with the pregnancy, and also in relation to a lack of consideration ascribed to the 'wishes and feelings' of the patient, both factors swaying the decision in favour of a termination.

The Court of Appeal set aside the order for termination, stating that assumptions should not be made if they 'overshoot' the evidence. The Court of Appeal also reiterated the importance of taking the 'wishes and feelings' of the patient into account when carrying out a 'balancing act' for the purposes of the best interests test under the 2005 Act. However, the decision in *AB* has led to uncertainty as to *how much* weight to ascribe to the 'wishes and feelings' of a patient on occasions where, as is this case, they are indistinct and transitory.

FACTS

The patient, AB, was a 24-year-old woman born in Nigeria. AB was adopted by CD from birth, and in 2007, AB joined CD in the UK where CD worked as a midwife. AB was born with an IQ of 35–49 and functioned as a 6–9-year-old, displaying challenging and sometimes aggressive behaviour. There was no diagnosis or known cause for her mental disability, but her spoken English was very difficult to understand and she required prescription medication to control her outbursts. She could dress and feed herself in familiar environments, but she could not look after herself in any meaningful way and required constant supervision. She attended special schools throughout her life and lived with either her mother or her grandmother until the death of her grandmother in 2017 (which caused significant distress and confusion for AB). In her teenage years, AB showed signs of increased aggression; she smashed a television because she did not get her own way. She also became more independent and active, breaking out of the house unsupervised.

CD and AB travelled to Nigeria in late 2018 to stay with relatives. When AB returned home in April 2019, CD realised that AB was pregnant. The NHS Trust sought a termination based on AB's severe mental disability. The delay in proceedings meant that because AB was 22 weeks pregnant at the time of the court hearing, the termination would involve a surgical procedure under a general anaesthetic. The pain and discomfort would be manageable, and there were no complications anticipated. CD was a devout Roman Catholic of Nigerian (Igbo) heritage and was strongly opposed to the termination. CD submitted that AB would be very upset about a termination and would want the baby.[2] A social worker, Ms S, agreed with CD.[3]

Professor X (a consultant psychiatrist) diagnosed an intellectual disability in AB.[4] Dr N (a perinatal psychiatrist) carried out capacity assessments on AB with the help of the Speech and Language Service at the NHS Hospital. Dr N suggested that the fact that AB was taking Risperidone for her moods suggested that she may suffer from some form of psychosis. Dr N also had a particular concern about postpartum psychosis, stating that it was a very serious condition which required anti-psychotic medication on a psychiatric unit. It was thought that this could have a 'life-long and extremely traumatic' impact on AB, but it was almost impossible to assess the likelihood of this outcome.[5] Ms T (a consultant obstetrician) was concerned about engaging in ante-natal treatment with someone with such severe learning difficulties as AB, and wondered whether AB could cope after a caesarean section given that it was serious abdominal surgery.[6]

The three Trust witnesses (Professor X, Dr N, and Ms T) unanimously agreed that AB lacked the capacity to litigate, to consent to sexual intercourse, to make decisions about psychiatric treatment, and to decide whether or not to terminate her pregnancy, and that a termination would be 'less traumatic' for AB than having a live baby taken away after birth.[7]

Lieven J, presiding in the High Court on 21 June 2019, was quick to record her 'unhappiness' at the delay in proceedings because the deadline for terminations under section 1(1)(a) of the Abortion Act 1967 was 24 weeks gestation.[8] On listening to the expert evidence, she granted an order for termination.[9]

CD and the Official Solicitor (representing AB) appealed. The first question for the Court of Appeal was whether it was erroneous to assume that AB would lose her home should she continue with her pregnancy (a decision reached by Lieven J). The second question related to whether a 'grave risk' to the patient should be proven before an order for termination is granted under the Abortion Act 1967. The third question related to how much weight should be ascribed to the 'wishes and feelings' of the patient in light of her Article 8(1) right to motherhood.[10] King LJ delivered the judgment of the Court of Appeal three days later on 24 June 2019.

THE COURT OF APPEAL DECISION

King LJ set aside the order for termination. She dealt with the first two grounds of appeal with relative ease, but the discussion underpinning the third ground of appeal as to the weight to be ascribed to the 'wishes and feelings' of the patient has led to some uncertainty.

A. Erroneous assumptions

King LJ accepted the first ground of appeal that it was erroneous to assume that AB would lose her home if she continued with her pregnancy.

The High Court in the first instance read strong evidence that AB should not keep her baby. The local authority emailed the NHS Trust to state that should AB continue with her pregnancy, 'we will apply to the court for a Care Order prior to birth'.[11] In addition, CD requested a safer care package for AB from the local authority in early 2018 [via email]:

… the exit house key has to be hidden. At the least opportunity, AB would leave the home…AB left home on her own and I had to search for AB for one hour…she let herself out when I was asleep. As AB grows older, she gets more assertive about wanting to go out and not stay indoors. AB has a history of self-harm, hence all the knives including table knives are locked up to reduce her risk. She has in the past used a sharp knife to smash our glass top of our electric cooker because she was so upset. AB … needs 24/7 supervision.[12]

Lieven J considered the possibility of the baby living with AB and CD (as per CD's wishes), but decided against it:

CD accepts AB cannot be left alone, and could not be left alone with the baby. It was CD who raised the risks that AB posed to herself in the email in 2018. I think it unlikely that the local authority would be able to tolerate the risk to the baby of 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.[13]

King LJ in the Court of Appeal disagreed with this reasoning, stating that even though Lieven J was 'entitled to take into account the expert evidence available' and was 'simply expressing the sad reality of the situation', it erroneously impacted on the best interests' test to assume that AB would lose her home *and* contact with her mother as a result of carrying the baby to term:

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 judgment she went beyond what the evidence could support in finding that AB risked losing her baby and her home.[14]

This is surely correct: given the seriousness of the mental disability suffered by AB and her potential for violent tendencies, the likelihood of the baby being placed with CD was negligible and it should not have been assumed that AB would lose her home as a result of this arrangement. It follows that in future termination cases under the 2005 Act, the doctors/courts are entitled to express the (often sad) reality of the situation, but the future living arrangements of the patient are not to be assumed unless there is tangible evidence to support them.

B. A grave risk

The Official Solicitor (on behalf of CD and AB) submitted that a 'grave risk' to AB was required under section 1(1)(a) of the Abortion Act 1967 before an order to terminate could be granted. The Official Solicitor was relying on a passage from Sir James Munby in *Re X (A Child) (Capacity to Consent to Termination)*[15] whereby he stated that a termination should only be performed upon an incompetent patient for the most 'compelling arguments [and] powerful evidence that allowing the pregnancy to continue would put the mother's life or long-term health at very grave risk'.[16] King LJ dismissed the second ground of appeal stating that *Re X* had been misinterpreted, and that in its original context Sir James Munby was referring to a patient who was 'fully able to understand what being pregnant meant and was expressing clear wishes', whereas AB did not show any understanding and did not make any views known.[17] In addition, a termination under section 1(1)(a) of the Abortion Act 1967 does not require a 'grave risk' to be proven; there must instead be 'a greater risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman'. It follows that the stronger the view of the patient, the stronger the 'compelling arguments' to go against her wishes would need to be.

C. The 'wishes and feelings' of the patient

The appeal in *AB* becomes convoluted at this juncture. King LJ accepted the third ground of appeal that the 'wishes and feelings' of AB were not given sufficient consideration by the High Court under section 4(6)(a) of the 2005 Act:

The judge's conclusion as to what was in AB's best interests was substantially anchored in the medical evidence. In my judgment, that medical evidence, without more, did not in itself convincingly demonstrate the need for such profound intervention …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.[18]

King LJ's remarks pose an interesting question regarding just how much weight to ascribe to the 'wishes and feelings' of an incompetent patient when she cannot form a view on her own pregnancy because of her severe mental disability.

1. The weight ascribed to wishes, feelings, and medical evidence

The NHS Trust in *AB* went to great lengths to ensure that the patient could understand—as far as practicable—the questions asked of her and that she could respond to them in accordance with section 1(3) of the Mental Capacity Act

2005.[19] It was made clear in a transcript provided in evidence to the High Court (not referred to in the Court of Appeal judgment) that, when asked about her pregnancy, AB had no understanding of the birth, or of the termination, and was unable to answer any questions in detail. A conversation with the Official Solicitor shows her limited understanding of the facts:

OS: How would you feel AB if your baby went away?

AB: Good. Baby is happy.

OS: The doctors have said they could take your baby out of your tummy.

1. AB: No.
2. OS: How would you feel if they did that?
3. AB: Save it. Save it, the baby.
4. OS: How would you feel if there was no more baby?
5. AB: No more baby.
6. OS: How would you feel if there was no more baby?
7. AB: Good. Baby like it.
8. OS: How would AB feel?
9. AB: Feeling better.
10. OS: AB, if the doctors took the baby out of your tummy…
11. AB: Yeah.
12. OS: And took it away…
13. AB: Yeah.
14. OS: So there was no more baby, how would you feel?
15. AB: Happy.[20]

Ms T (a consultant obstetrician) also spent some time with AB and felt that AB:

only had a passing understanding of what having a baby meant, even though at any one time she might say she wanted to have the baby [she] thought the doll was her baby, then after a few minutes threw the doll away.[21]

Section 4(6)(a) of the 2005 Act requires the 'past and present wishes and feelings' of the patient to be taken into account. Lieven J in the High Court formed the view that AB struggled to 'understand that she is pregnant or indeed what that means', that she could not 'process the information about either the pregnancy, or giving birth, or the consequences of having a baby', and she could not 'weigh up the information she is given under section 2(1)(a) of the 2005 Act'.[22] Lieven J, therefore, concluded that although AB's expressions should not be dismissed altogether, she could not ascribe 'a great deal of weight' to them:

There are cases where wishes and feelings would be determinative, even where the person had no capacity. If AB's wishes and feelings were clearly expressed and I felt she had any understanding of the consequences of giving birth, I would give them a great deal of weight. However, AB's wishes are not clear. 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.[23]

King LJ disputed this particular passage on appeal, stating that: 'the fact that [Lieven J] was unable to give [AB's wishes and feelings] a great deal of weight does not mean they should be disregarded'.[24] King LJ looked to a passage from Peter Jackson J in *Wye Valley NHS Trust v B*[25] where he stated:

a conclusion that a person lacks decision-making capacity is not an 'off-switch' for his rights and freedoms…it would therefore be wrong in principle to apply an automatic discount to their point of view.[26]

King LJ formed the view that whilst Lieven J did not apply an 'automatic discount' to AB, she failed to take 'sufficient account of AB's wishes and feelings in the ultimate balancing exercise' and the fact that they might, in the end, be outweighed by other factors did not alter the fact that this was a 'significant omission'.[27] It is unclear what King LJ is referring to: apart from the transcript excerpt (above) and the comments of Ms T (the consultant obstetrician) about AB momentarily liking a doll, there is no further evidence of AB's wishes and feelings. In addition, it surely cannot be a 'significant omission' to afford less weight to evidence that is tenuous and is heavily outweighed by other evidence.

An additional case in this area, *Re SB (A Patient) (Capacity to Consent to Termination)*,[28] provides us with a clear example of the correlation between the wishes and feelings of a patient and the decision to order a termination. SB was pregnant but suffered from paranoia and delusions and was sectioned under section 2 of the Mental Health Act 1983 for a relapse in her bi-polar disorder. She was absolutely adamant to have a termination because of her paranoid fears that her marriage had 'no future' and that her mother offered her 'no support'.[29] She booked two termination appointments and ordered abortifacient drugs online, and threatened suicide if the pregnancy continued. The question for Holman J in the High Court was whether SB had made an 'unwise', but nevertheless valid, decision under section 1(4) of the Mental Capacity Act 2005.[30] He unreservedly accepted the evidence that SB suffered from an 'impairment of, or a disturbance in the functioning of, the mind or brain' under section 2(1) of the 2005 Act,[31] but he found that she could make a decision for herself. He concluded:

It seems to me that even if aspects of the decision making are influenced by paranoid thoughts in relation to her husband and her mother, she is nevertheless able to describe, and genuinely holds, a range of rational reasons for her decision. It seems to me that this lady has made, and has maintained for an appreciable period of time, a decision … It is a decision that she has made and maintains, and she has defended and justified her decision against challenge.[32]

It is clear, following the cases of *Re X*, *Wye*, and *SB*, that the wishes and feelings of the patient must be considered as part of the best interests' test under section 4(6) of the 2005 Act. However, it is difficult to justify setting aside an order for termination on the grounds that 'significant' weight was not ascribed to the wishes and feelings of a patient such as AB, who could not form a view as a direct result of her serious mental disorder. A comment by Macur J in *LBL v RYJ* [33] suggests that it is not necessary for a patient 'to comprehend every detail of the issue',[34] but it would surely be necessary for AB to comprehend at least *some* detail of her pregnancy, or of a termination or of a birth, for 'significant' weight to be ascribed to her wishes and feelings. She displayed a fleeting fondness towards a doll, but even that appeared to be transient. The medical evidence, on the other hand, clearly stated that should her pregnancy continue, the physical and psychological risks to AB were a significant concern for the experts. The decision of the Court of Appeal to set aside the order for termination on this particular ground of appeal with this set of facts is a bit perplexing. Lieven J could not afford 'significant' weight to something that was barely evident. *AB* has surely put the High Court in a difficult position for future cases.

2. *The views of relatives*

King LJ made an additional comment that the High Court did not sufficiently 'weigh up' the evidence of CD (AB's adoptive mother) as part of the best interests test.[35] Section 4(7)(b) of the 2005 Act allows a relative 'engaged in caring for the patient or interested in her welfare' to shed some light on their best interests. CD was strictly opposed to the termination on Roman Catholic (Igbo) grounds and wanted the baby to live with herself and AB. CD told the High Court that in her community, abortion was not acceptable and there was 'a real stigma attached to it'.[36] Lieven J in the High Court took CD's views into account:

CD is opposed to [AB] having a termination. CD made clear that terminations are not considered acceptable in her community, and are never carried out openly. She feels AB would be very upset by the termination. She accepts that AB could not care for the baby alone, but wants the baby and AB to live with her. She thinks that this could happen.[37]

Lieven J disregarded the feasibility of CD and AB living with the baby as a result of AB's previous violent outbursts, and also commented on CD's belief that AB enjoyed the babies of relatives:

I am afraid I think CD's position is wholly unrealistic. CD accepts AB cannot be left alone, and could not be left alone with the baby. CD's evidence that…holding a baby for a few minutes and enjoying being with it may have been a highly pleasurable experience for AB, but it gives [AB] absolutely no insight into what will happen to her life if this baby is born or the realities of living 24/7 with a small baby.[38]

It is submitted that not only did the High Court consider CD's views about the pregnancy and found them to be untenable, but King LJ herself discredited CD's religious influence in the Court of Appeal:

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. AB, however, has never had capacity and there can therefore be no direct evidence as to her actual beliefs and values. 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.[39]

King LJ also acknowledged that Ms S (the social worker) was of the view that both the termination and the birth would have the same impact on AB's emotional well-being, in that 'it is a baby that has gone'.[40] Therefore, this particular witness was neutral.

3. Analysis

The High Court considered the physical, psychological, emotional, social, cultural, and environmental factors in the best interests test for AB.[41] The sticking point for King LJ in the Court of Appeal seems to be the weight ascribed to the evidence of AB, CD, and Ms S in particular. Unfortunately, she gave no examples of how these witnesses may have been overlooked and did not acknowledge any of the expert evidence in the Court of Appeal judgment, except to say that 'each of these highly regarded experts [Professor X, Dr N and Ms T] were of the view that the pregnancy should be brought to an end'.[42]

It is accepted that every termination case turns on its facts, and that if the patient has any wishes or feelings about her pregnancy, they must be afforded a great deal of weight. However, this does not mean, with respect to King LJ, that the High Court failed to take 'sufficient account' of the wishes and feelings of AB simply because they were indistinct and transitory. An acknowledgement that AB had momentary feelings towards a doll should have been sufficient under section 4(6)(a) of the 2005 Act if the High Court was prevented from engaging in any further analysis because the evidence for AB was particularly weak.

It is instead submitted that the fact that AB's pregnancy had reached almost 23 weeks' gestation may have been the underlying reason behind the Court of Appeal's decision to set aside the order for termination. In terms of the law, however, the decision in *AB* suggests that it is no longer 'safe' for the High Court to lean towards the (stronger) medical evidence when granting an order for termination for fear of not ascribing 'significant' weight to the (weaker) non-medical evidence. This is slightly unhelpful. In cases as delicate as this, the High Court must be confident in its approach to be guided by the stronger evidence (whichever side it falls).

CONCLUSION

The Court of Appeal in *AB* correctly decided that it was erroneous to assume that AB would lose her home if she continued with her pregnancy. However, the best interests of the patient and the weight to be ascribed to her 'wishes and feelings' incited a more complex discussion.

The very purpose of the best interests' test under section 4(6) of the Mental Capacity Act 2005 is to guide medical professionals in making treatment decisions for adult patients when they lack the capacity to do so themselves. Whilst it is incredibly difficult for a judge to balance the wishes and feelings of a patient against medical evidence in the event of a conflict, it is submitted that there must be at least *some* comprehension of the facts on the part of the patient for their views to be ascribed 'significant' weight in a balancing exercise. If a patient has no real understanding of her situation, does not express any clear wishes or feelings, or the views of her family members are skewed by

religion, the correct approach must surely be to lean more heavily on the other (medical) evidence. This does not mean the patient should be ignored altogether, but the weight ascribed cannot be the same in every single case. It is possible that in some cases the viewpoint of the patient is articulate enough to override the medical evidence (as in *Re X*, *Wye*, and *SB*), whereas in other cases the viewpoint of the patient is simply too indistinct to do so (*AB*). The High Court in *AB* should have had the freedom to acknowledge the unsupported evidence from AB, CD, and [AQ3]Ms S and rule in favour of the experts, without fear that its order to terminate [AQ4]would be set aside a few days later for not gleaning a deeper meaning where there was none to be found.[AQ2]

Conflict of interest statement. None declared.

1. [2019] EWCA Civ 1215.

2. These facts were relayed in the High Court judgment: *An NHS Foundation Trust v AB* [2019] EWCOP 26, para 26.

3. ibid, para 26. The view of CD was described by Lieven J in the High Court as 'one of the real unknowns of the case', para 22.

4. ibid, para 7.

5. ibid, paras 15 and 24.

6. ibid, para 23.

7. ibid, para 22.

8. ibid, para 5.

9. ibid, paras 62 and 63.

10. These grounds of appeal are relayed in the Court of Appeal judgment: *AB* (n 1) para 32.

11. An email by the local authority submitted in evidence to the High Court: *An NHS Foundation Trust* (n 2) para 43.

12. ibid, para 10.

13. ibid, para 54.

14. Per King LJ, *AB* (n 1) paras 36, 41 and 74 (emphasis in original).

15. [2014] EWHC 1871.

16. ibid, para 9.

17. *AB* (n 1) per King LJ, para 25.

18. ibid, paras 73 and 75.

19. *An NHS Foundation Trust* (n 2) para 8. s 1(3) of the 2005 Act states: '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.'

20. ibid, para 27.

21. ibid, para 25.

22. ibid, para 45.

23. ibid, para 60.

24. *AB* (n 1) para 53.

25. [2015] EWCOP 60.

26. ibid, para 11.

27. ibid, para 55. In addition, see paras 72 and 76.

28. [2013] EWHC 1417.

29. ibid, para 42.

30. s 1(4) of the 2005 Act states: 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision.'

31. *SB* (n 28) para 37.

32. ibid, para 44.

33. [2010] EWHC 2665.

34. ibid, para 24.

35. *AB* (n 1) para 66.

36. *An NHS Foundation Trust* (n 2) paras 20 and 41.

37. ibid, para 41.

38. ibid, paras 29 and 54.

39. *AB* (n 1) para 58.

40. ibid, para 65.

41. Lieven J was very clear that medical evidence for her was 'not determinative': *An NHS Foundation Trust* (n 2) paras 47 and 48.

42. *AB* (n 1) para 43.

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