



Neutral Citation Number: [2023] EWCOP 17

Case No: 14078717

**IN THE COURT OF PROTECTION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 09/05/2023

**Before :**

**MR JUSTICE MOSTYN**

-----  
**Between :**

**NORTH EAST LONDON NHS FOUNDATION  
TRUST**

**Applicant**

**- and -**

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

**Respondents**

-----  
-----

**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: 2 May 2023

-----  
**Approved Judgment**

.....  
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.

**Mr Justice Mostyn:**

1. I shall refer to the first respondent as ‘Beatrice’ and to her father, the second respondent, as ‘Edward’. These are not their real names.
2. On 24 April 2023 the applicant applied for:

“An Order that the attached Care Plan be [declared] lawful, namely that the stopping of active psychiatric treatment, and referral to palliative care by North East London NHS Foundation Trust be lawful and in the best interests of Beatrice.”
3. Beatrice is 50. She is a highly intelligent woman. She has under- and post-graduate degrees. She has a social media presence, including her own YouTube channel. Interestingly, she has recently unsuccessfully sought judicial review of the Government’s initiative to require restaurants to display calorific values on their menus.
4. Beatrice has suffered from anorexia nervosa since she was 14 years old. She has also more recently been diagnosed with autistic spectrum disorder.
5. Dr A, the consultant psychiatrist employed by the applicant, and Beatrice’s treating clinician, in her report described Beatrice as:

“a likeable and determined woman with a clear sense of her own identity who is enthusiastic about giving her time to help other people. Staff enjoy working with Beatrice, valuing her sense of humour and her commitment to focusing on the things which make life worthwhile for her, rather than letting her anorexia determine everything about her life. Evidence of her interests can be seen in the short breaks she has taken over the years to a number of European destinations (sometimes despite staff concerns about the medical risks of her travelling), her enjoyment of the outdoors, her interest in voluntary work and in supporting others (for instance her current role as an involvement representative), her blog writing and the posts on her YouTube channel.”
6. This case is only about Beatrice’s struggle with anorexia. She has bravely battled this terrible condition for 36 years. She now says that she cannot continue the fight.
7. It is as if a figurative terrorist invaded and took occupation of part of her mind 36 years ago. Notwithstanding incessant counter-insurgency measures by Beatrice against this malign intruder, she declares she no longer has the strength or other mental resources to carry on the struggle, and is now ready to capitulate.
8. When I heard this case on Tuesday 2 May 2023 Beatrice weighed 31.9 kg, or a mere 4¾ stone, and her BMI was 11.5. A normal BMI for a healthy female is 18.5 – 24.9.
9. Beatrice told me on 2 May 2023 that recently she had been ingesting food and drink with a daily calorific value of a mere 260 units, but that on the day before it was 300.

It was clear that she had no intention of increasing the intake, and that if she did she would self-vomit.

10. A healthy adult female needs 1,800 – 2,000 calories a day.

11. In answer to questions from Ms Sutton KC, Beatrice gave this evidence:

“Q: If you are taking 260 calories a day but you understand 1800 is required why do you say you are unable to have any more calories, what is stopping you?”

A: I have not been in this calorie amount. Even though things weren't as they was I wouldn't be having my calories like that. I have been restricting more over the last few months and stopped purging as much. If I am eating more I am trapped in a cycle of drinking large amounts of water and vomiting after to rid myself of the food I have eaten. I do that twice a week but I want to stop. And I am caught up in a cycle where my weight has been dropping and I don't feel like I can physically manage to eat any more food at this point of time unless it is really controlled steps.

Q: What do you think will happen if you continue to have 260 calories a day?

A: My organs in the long term might be affected. I am not having any protein. My protein will drop. And my body will struggle to maintain and I will get progressively more unwell

That is the picture I have got placed in front of me.

Q: if you continue to limit your calorific intake to around 260 calories you will die in the near future?

A: yes

Q: can you explain if you understand that is the outcome why you are unable to intake more?

A: the anorexia is a separate issue, this issue is, I believe this is my end of life. I believe I am approaching the end of my life and it is difficult to raise my calories.”

12. Beatrice further told me:

“I have stopped taking vitamins and my heart medication.”

13. Dr A, the consultant psychiatrist, and treating clinician, put the calorific intake of Beatrice in context by referring to the 1944 Minnesota Starvation Study where 36 men spent the first three months of the study eating a normal diet of 3,200 calories a day, followed by six months of semi-starvation at 1,570 calories a day. The report stated:

“During the semi-starvation phase the changes were dramatic. Beyond the gaunt appearance of the men, there were significant decreases in their strength and stamina, body temperature, heart rate and sex drive. The psychological effects were significant as well. Hunger made the men obsessed with food. They would dream and fantasize about food, read and talk about food and savour the two meals a day they were given. They reported fatigue, irritability, depression and apathy. Interestingly, the men also reported decreases in mental ability, although mental testing of the men did not support this belief.”

14. To put the calorific intake of Beatrice further into context, I note that also in 1944 the Nazi regime reduced the daily calorific intake for slave labourers at Birkenau from 1,300 to 700. Mass starvation and deaths soon ensued.
15. Beatrice is ingesting only about one-third of even that existentially terminating amount. If she persists, death will undoubtedly rapidly ensue, although the suffering she will undergo, even if mitigated by palliative care, will be formidable.
16. Her father, Edward, is distraught at this prospect and has eloquently expressed his feelings to me. He said:

“Life is full of challenges. She has to be encouraged not to say ok go off to palliative care and starve yourself to death. That should not be allowed to happen. There is hope and light at the end of the tunnel. There is a lot of love and goodness in her. There is a lot of understanding in her. There is a lot of beauty in her. Our body has to be watered like a plant. The family together and everybody loves her. There is no death in her but life. She is not going to the grave.”
17. Having come to know quite a lot about Beatrice I think I can say that were she to die, the world would be an emptier place without her.
18. On 24 April 2023, when the applicant made its application, Beatrice wanted to be taken to a hospice to die. At that point she was rejecting all food and drink. The day before the hearing she changed her mind and started ingesting the minimal amounts referred to above. But by the time of the hearing itself she had reverted to the hospice option. In the light of this equivocation (which is hardly surprising) Mr Sachdeva KC therefore proposed that I should deal only with the application for declarations to be made under s. 15 of the Mental Capacity Act 2005 and adjourn generally with liberty to restore the application for best interests orders to be made under s. 16. The court does not normally make freestanding declarations but I was assured that the s. 16 application would be quite soon restored for final orders to be made. Indeed, the matter will be restored on Thursday 18 May 2023. Ms Sutton KC, representing Beatrice, did not demur on this basis.
19. The premise of the applicant’s application is that outside the sphere of nutrition and hydration, Beatrice has full capacity in respect of every aspect of her existence. However, in that sphere it is claimed that the effect of the disease is so powerful that it renders Beatrice almost, if not actually, delusional so that she believes she is

overweight and fat. The applicant argues that this belief derives from an impairment of the mind and prevents Beatrice from using or weighing the treatment options for someone in her position.

20. The applicant therefore seeks declarations:
- i) that Beatrice lacks capacity to decide on care and treatment options in respect of her nutrition and hydration; and
  - ii) that Beatrice lacks capacity to litigate the application made by the applicant.
21. For the purposes of this case the relevant provisions of the 2005 Act are ss. 2(1) and 3(1)(c). These state:

“For the purposes of this Act, 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.”

and

“For the purposes of section 2, a person is unable to make a decision for himself if he is unable ...to use or weigh [the] information [relevant to the decision] as part of the process of making the decision.”

It is not suggested that any other reason mentioned in s. 3(1) for an inability to make a relevant decision is applicable in this case.

22. When boiling the test down to its bare essentials, I note the following:
- i) it is common ground that anorexia nervosa is an impairment of the mind rather than the brain;
  - ii) it is also common ground that a “disturbance in the functioning of the mind” is, in this case, synonymous with its impairment, and therefore superfluous;
  - iii) the words “at the material time” state the obvious and can be excluded from the essential reduction; and
  - iv) the verb “use” adds nothing to “weigh”. To be capacitous Beatrice has to be able to weigh up the pros and cons of the decision not to eat or drink and in so doing has to use the relevant information.

23. Therefore, for my purposes the statutory test can be condensed to this:

“Beatrice will lack capacity to make a decision about treatment options in respect of her nutrition and hydration where, because of anorexia nervosa, she is unable as part of the process of making that decision to weigh the information relevant to the decision.”

24. Therefore, it being presumed that Beatrice has capacity, it must be shown by the applicant on the balance of probability, that:
- i) Beatrice is unable as part of the process of making a decision about care and treatment options in respect of her nutrition and hydration to weigh the information relevant to the decision; and
  - ii) the inability is caused by her condition of anorexia nervosa. Proof of causation is required by the use of the words “because of”.
25. In *Pennine Acute Hospitals NHS Trust v TM* (by his litigation friend, the Official Solicitor) [2021] EWCOP 8 Hayden V-P at [37] held that the court is not obliged exactly to identify a precise causal link when there are various, entirely viable causes for the inability to make the decision. That is no doubt true, but I nonetheless have to be satisfied that the inability to weigh the relevant information has been lost because of the impact of the anorexia. This means that I have to be satisfied that there exists the necessary causal link between the condition and the inability.
26. The relevant information is described in paragraph 4.16 of Chapter 4 of the Code of Practice as including the nature of the decision, the reason why the decision is needed, and the likely effects of deciding one way or another or making no decision at all. The weighing process was described by Hedley J in *PCT v P, AH and The Local Authority* [2009] COPLR Con Vol 956 at [35] as:
- “the capacity actually to engage in the decision making process itself and to be able to see the various parts of the argument and to relate one to another”.
- These explications are to state the obvious. In some ways I think it is better just to stick to the words of the statute.
27. In answer to Ms Sutton KC, Beatrice stated:
- “Q: In relation to what you have heard from Dr A and Dr Glover, and their joint opinion that you are unable to make decisions in relation to your nutritional intake, do you understand how they have come to that conclusion?”
- A: No, I don’t, I am of the opinion that I might have capacity.”
- It was interesting that Beatrice did not assess herself as certainly having capacity to make decisions in relation to nutritional intake but only the possibility that she might have it. I have to say that the subliminal message I received from Beatrice was that she did not think she had capacity to make decisions in relation to nutritional intake.
28. In my judgment, the evidence shows there is no doubt at all that Beatrice cannot weigh the information relevant to a decision about the options for her care and treatment. The weighing process requires her to recognise that into the scales go the stark fact that if she does not eat and hydrate normally, and very soon, she will die. I agree with Mr Sachdeva KC that for the purposes of the test there is nothing else to weigh. There are, *pace* Hedley J, no various, inter-relating, parts of the argument. There is nothing to put on the side of the scales objectively in favour of starvation.

29. Yet Beatrice cannot and does not undertake this weighing exercise because of the anorexia nervosa. The experts explained to me graphically and eloquently that the condition impairs Beatrice's mind by taking it over and creating delusions that she is overweight, with a fat, ugly body rather than being skeletal and at death's door.

30. Dr A wrote in her report:

“Anorexia nervosa is a mental illness characterised, along with a significantly low body weight due to restriction of energy intake relative to requirements, by a disturbance in the way in which one's body weight or shape is experienced, undue influence of body weight or shape on self-evaluation and an intense fear of gaining weight (see DSM 5 diagnostic criteria). As a result, in patients with anorexia nervosa both the prospect of increasing their nutritional intake and the goal of restoring weight, even from a life threateningly low starting point, can cause intense distress. The powerful anorexic cognitions that patients experience, as well as the distress entailed in challenging them, unduly influence decision making in relation to nutritional intake by impairing the ability to use and weigh up information relevant to such decisions. The severe and enduring nature of Beatrice's anorexia nervosa, her prolonged history of treatment sabotaging behaviours, her ongoing inability to comply with advice to make even minimal changes to her current nutritional intake and her compulsion to continue self-induced vomiting, despite her distress at this behaviour, provide ample evidence of the strength of the anorexic cognitions that Beatrice experiences and of their effect on her decision making and behaviour. Her description of all possible futures were she to decide not to cease food and fluid intake in the near future as entailing unendurable suffering for her is also firmly tied to the distress which her anorexic cognitions produce when contemplating the prospect of maintaining some nutritional intake and/or receiving treatment for her anorexia nervosa, further underlining the influence of her illness on her ability to use and weigh information relevant to her decision.”

31. In oral evidence she told me:

“[People with Anorexia] hold a false belief that they are not underweight and it can be as intense as a completely fixed and unshakeable delusion... It is not formally classified as a delusion but the belief can be as intense”

32. Dr Glover (the expert consultant psychiatrist instructed by the Official Solicitor) wrote in his report:

“99. The primary impairment in Beatrice's capacity is in her ability to weigh matters in the balance. Beatrice 's profound fear of weight gain is so great that it completely disrupts what would otherwise be a an entirely normal ability to weigh

matters of significance. Her fear of food and weight gain overshadows all other considerations in relation to treatment options and alone, this impairment causes Beatrice to lack capacity to make decisions care and treatment in respect of her Anorexia.

100. Beatrice also suffers [because of the anorexia] from a degree of body image distortion in that she believes that she is or appears larger than is in fact the case. She also believes that small increases in diet will lead to very significant increases in weight.

101. These misconceptions are best considered as impairments in Beatrice's comprehension. These impairments in comprehension, in addition to Beatrice's disrupted ability to weigh matters in the balance, are undoubtedly sufficient, in my opinion, to cause Beatrice to lack capacity to make decisions about care and treatment in relation to nutrition."

33. In his oral evidence he told me that his conclusion that the condition has entirely robbed Beatrice of the weighing component of the decision-making process was not a borderline call, but was an overwhelmingly strong one.
34. I agree. The evidence showed beyond any doubt at all that the key weighing component within Beatrice's decision-making process was not merely rendered faulty by the condition but rather that the condition caused it entirely to disappear. To revert to my metaphor, the terrorist has not just damaged the key signal box, but has destroyed it altogether.
35. I therefore make the first declaration namely that Beatrice is unable to make decisions about care and treatment options in respect of her nutrition and hydration.
36. As for the second declaration I remain convinced, as a matter of logic (I forebear from saying common sense), that if Beatrice is robbed by the condition of the key element in the decision making process of weighing the relevant information, then she will be equivalently disabled from formulating and making submissions to a judge as to how he or she should undertake that very weighing exercise: see *An NHS Trust v P (by her litigation friend, the Official Solicitor)* [2021] EWCOP 27 at [33].
37. The test for litigation capacity surely has to be premised on Beatrice acting in person for, if that were not so, there would have to be an invidious debate as to the quality of the legal team hypothetically engaged by her. I am not getting into that in this case as I am completely convinced that Beatrice, even if represented, would not be able to formulate valid instructions to her lawyers by virtue of the impact of the condition to which I have referred above.
38. In *Lancashire and South Cumbria NHS Foundation Trust v Q* [2022] EWCOP 6 at [24] Hayden V-P posited that when determining whether P lacked capacity to conduct litigation the court could take into account when analysing a hypothetical instruction by P of hypothetical lawyers that P would not be "required" to instruct her advisers in a particular way, and that "like any other litigant, in any sphere of law, [she] may



instruct [her] lawyers in a way which might, objectively assessed, be regarded as contrary to the weight of the evidence”.

39. I confess to finding the intellectual process which I should undertake under this formulation to be extremely difficult. I think it is being suggested that even though I have found that the anorexia has robbed Beatrice of the ability to weigh the relevant information she nonetheless may have the capacity to litigate that very issue because she has the facility to give completely unrealistic and objectively untenable instructions to her hypothetical lawyers. I do not accept that this is a valid or useful exercise for the purposes of the decision I have to make. I think the exercise is difficult enough without having to go down what I regard as an intellectual cul-de-sac.
40. I will therefore make the second declaration.
41. I record that I have been much assisted by the quality of the written and oral submissions by Mr Sachdeva KC and Ms Sutton KC. Ms Sutton KC’s memorandum on the law was a document of remarkable lucidity.
42. This has been a very disturbing case to hear. If anyone needs proof that the Family Division judges sitting in, and the professionals who practise in, the Court of Protection and High Court hearing cases of this type have to do the most difficult, demanding, stressful, and draining work that the law requires to be done in any field, then they only have to read this judgment.

### **Postscript**

43. The bundle for the hearing contained a draft “Reporting Restrictions Order”. I indicated that having regard to, and balancing carefully, the competing rights of Beatrice, Edward, Dr A, and the media (on behalf of the wider public) under Articles 6, 8 and 10 of the European Convention on Human Rights it would be just to make a time-limited anonymity order in respect of Beatrice, Edward and Dr A.
44. However, the order agreed between counsel went rather further than I had intended and required me to redraft it.
45. The problems I identified and corrected were as follows:
  - i) The agreed draft order described itself on its face as a “Transparency Order”, whereas the draft order in the bundle described itself as a “Reporting Restrictions Order”. The standard template for such an order<sup>1</sup> does not have a description on its face either way. In my opinion, if the order is to bear a description then, given that it is a *contra mundum* injunction with potentially penal consequence, it should describe itself accurately and not misleadingly. It is debatable whether an order which with one hand directs that the hearing and all later hearings shall be in public but then with the other hand imposes strict anonymity, is correctly to be described as an order which gives full transparency. At its highest it gives only partial transparency. It is correctly described as a Reporting Restriction Order and anyone served with it bearing that description will know immediately what the order does.

---

<sup>1</sup> <https://www.judiciary.uk/wp-content/uploads/2017/11/cop-transparency-template-order-for-2017-rules.pdf>

- ii) The draft order does not contain a recital (and neither does the standard template) that the court was satisfied, following the carrying out of an intense balancing exercise of all relevant convention rights and other relevant facts and matters, that it was in the interests of justice that the anonymity order should exceptionally be made. In my opinion, having regard to the stipulation by Lord Steyn in *Re S (Identification: Restrictions on Publication)* [2005] 1 AC 593 at [17], and approved subsequently on numerous occasions, it is essential that a recital to this effect is included.
- iii) The agreed draft order did not contain an end-date, saying merely that it would continue until further order. The template implies that an end-date should be included, although it is not very specific. Neither the agreed order, nor the template, contains a territorial limitation.
- iv) Both an end-date and a territorial limitation are essential: see *R (MNL) v Westminster Magistrates' Court* [2023] EWHC 587 (Admin) at [78].
- v) It is also my opinion that a reporting restriction order should be as short and simple as possible and to this end the template should be very carefully adapted to meet the facts of the individual case. Given that this case was returning before me in 16 days it was not necessary for there to be lengthy paragraphs spelling out what reporters were allowed to report. A reporting restriction order should be very specific about what cannot be reported, and that should be the end of it, leaving reporters free to report everything and anything that is not specifically prohibited.

46. I set out below the reporting restriction order made by me:

Case No. COP 14078717

**IN THE COURT OF PROTECTION  
AND IN THE MATTER OF THE MENTAL CAPACITY ACT 2005  
AND IN THE MATTER OF B**

**BETWEEN:**

**NORTH EAST LONDON NHS FOUNDATION TRUST**

**Applicant**

**- and -**

**(1) B (BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR)**

**(2) E**

**Respondents**

---

**REPORTING RESTRICTION ORDER**

---

**IMPORTANT**

**If any person disobeys the order made by paragraphs (3) to (6) (the Injunction) they may be found guilty of contempt of court and may be sent to prison, fined or have their assets seized. They have the right to ask the court to vary or discharge the order.**

**BEFORE** the Honourable Mr Justice Mostyn on Tuesday 2 May 2023

**UPON THE COURT** being satisfied, following the carrying out of an intense balancing exercise of all relevant convention rights and other relevant facts and matters, that it is in the interests of justice that this order should exceptionally be made.

**IT IS ORDERED** that:

- (1) The hearings on Tuesday 2 May 2023 and Thursday 18 May 2023 shall be held in public, but subject to the Reporting Restriction Order made below.

- (2) The following persons are bound by the Reporting Restriction Order made in paragraphs (3) to (6) below:
- (i) the parties and their representatives,
  - (ii) the witnesses,
  - (iii) all persons who attend any part of a hearing,
  - (iv) all persons who by any means obtain or are given an account or record of all or any part of a hearing or of any order or judgment made or given as a result
  - (v) all persons who are provided with or by any means obtain documents and information arising from this application, and
  - (vi) any body, authority or organisation (and their officers, employees, servants and agents) for whom any such person works or is giving evidence.
- (3) The material and information covered by this Reporting Restriction Order is:
- (i) any material or information that identifies or is likely to identify:
    - a. that B is the subject of these proceedings (and therefore a P as defined in the Court of Protection Rules 2017);
    - b. the names of any family member, including her father, E
    - c. the names of B's treating clinicians; and
  - (ii) any material or information that identifies or is likely to identify where any person listed above lives (or will live during these proceedings), or is being cared for, or their contact details.
- (4) Subject to further order of the Court the persons bound by this Reporting Restriction Order shall not by any means directly or indirectly:
- (i) publish or communicate the Information or any part or parts of it, or
  - (ii) cause, enable, assist in or encourage the publication or communication of the Information or any part or parts of it.
- (5) This Injunction shall have effect until 30 November 2023, unless extended or foreshortened by an order of the court made before that date.
- (6) In respect of persons outside England and Wales:
- (i) Except as provided in sub-paragraph (ii) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court.

- (ii) The terms of this order will bind the following persons in a country, territory or state outside the jurisdiction of this court:
- a. any person who is subject to the jurisdiction of this court;
  - b. any person who has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and
  - c. any person who is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order;
  - d. any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state.
- (7) Costs reserved, save that the Trust has agreed to pay 50% of the reasonable costs of the Official Solicitor to be assessed by the court, if not agreed.