Neutral Citation Number: [2021] EWCOP 27

Case No: COP 13708563

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2021

Before :

MR JUSTICE MOSTYN

- -

Between :

AN NHS TRUST	**Applicant**
- and -	
P (BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR)	**Respondent**

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- -

Jack Anderson (instructed by **Bevan Brittan LLP**) for the **Applicant**
Katie Gollop QC (instructed by **the Official Solicitor**) for the **Respondent**

Hearing date: 28 April 2021

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of her family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. This case concerns P, a 60 year old woman. This judgment is concerned solely with the issue of whether P has litigation capacity.

2. P came to the UK in 1988 and is of Ugandan origin. She has been diagnosed with diabetes, paranoid schizophrenia and HIV. P currently lives with her daughter in West London and works as a carer.

3. These proceedings were brought by an NHS Trust ("the Trust") by way of an application issued on 28 January 2021. The application was brought because since 2018, P has refused to take the antiretroviral medication she has been prescribed to treat her HIV. P has fixed delusional beliefs and ongoing auditory command hallucinations, and hears God telling her not to take her HIV medication, but rather to pray. P has also previously seen snakes emerge from her HIV medication.

4. Antiretroviral medication is little short of miraculous in the effect that it achieves. I discussed this at some length in my judgment of *Re AB* [2016] EWCOP 66. The difference between taking and not taking the medication is, usually, the difference between life and death. In this case the medical evidence is that there was a 50% probability that P would die within a year if she were to continue to refuse to take the medication; by contrast if she took the medication then she could expect to enjoy a normal life expectancy reduced by 5 to 8 years.

5. In their application, the Trust therefore sought orders and declarations that P lacked capacity to decide whether to take the HIV medication; that it was in P's best interests to take her HIV medication (which takes the form of an oral tablet, taken once daily); and, inferentially, that she should be made to do so.

6. From 30 May 2018 to 30 September 2019, P was detained under the Mental Health Act 1983. She was discharged under a Community Treatment Order ("CTO"), and continues to take her antipsychotic medication, but has indicated that this is only because of the existence of the CTO.

7. The matter first came before me on 1 February 2021 ("the February hearing"). At that hearing, I made an order that it was in P's best interests to take daily oral HIV medication, and I directed P to take the daily medication. It was hoped that the existence of such an order would result in P taking her HIV medication, even if begrudgingly, given that she takes her antipsychotic medication, albeit reluctantly, because of the existence of the CTO.

8. Unfortunately, the order has had no effect and P still refuses to take her HIV medication. I therefore heard the matter again on 28 April 2021 ("the April hearing").

9. At the February hearing, the question of whether or not P had litigation capacity to conduct these proceedings was not an issue. In a statement dated 7 December 2020, P's consultant psychiatrist, Dr Roisin Kemp, concluded that P did have litigation capacity following a capacity assessment. Dr Kemp stated:

> "28. When I last saw P on 3 September 2020 she demonstrated that she understood the concept of a court and engaging a

> solicitor, but stated that she did not believe that she needed to go through this process. I believe that because P's delusions are encapsulated and because she is coherent and not thought disordered she will, with assistance be able to participate in litigation proceedings and understand the process. She is also fully aware of the fact that her delusional belief system is at odds with her medical and psychiatric team's advice, but nevertheless she remains adamant not to comply with that advice due to her delusions, hence the need for the application to the Court of Protection.
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> 29. Apart from P being guarded in presentation, her delusional system is quite limited to her beliefs that God communicates with her and tells her not to take medication, specifically her HIV medication. Despite the illogicality that such delusions imply, she is able to communicate and argue her viewpoint coherently. P is not thought disordered in terms of the form of her thought. P would be able to understand with appropriate assistance the issues on which her consent or decision is likely to be necessary during the course of these proceedings, even though she absolutely refutes that such proceedings are necessary. P would fully understand, retain and weigh the rules about confidentiality in such proceedings. Therefore, P has litigation capacity despite the fact that she does not have subject matter capacity."

10. In a document prepared by Mr Anderson, who appeared on behalf of the Trust, on 18 January 2021, in which he set out the Trust's reasons for making the application, it was stated:

> "…although P lacks capacity to make decisions with regards to treatment for HIV, she does appear to have capacity to litigate, as explained in Dr Kemp's statement. The scope of her delusion is narrow and her cognition and ability to understand, retain and weigh up information is not otherwise affected. While it will be rare for a person to have litigation capacity who does not have subject matter capacity, it is possible in principle (see *Sheffield City Council v E* [2004] EWHC 2808 (Fam), *Northamptonshire Healthcare NHS Foundation Trust v AB* [2020] EWCOP 40) and this is one of those rare cases."

11. Since the position of the Trust at the February hearing was that P had litigation capacity, notwithstanding her lack of subject-matter capacity, the Official Solicitor was not present and the hearing proceeded on the basis that P did indeed have litigation capacity.

12. However, on 16 March 2021 P's care coordinator, Ms Michelle Grant, conducted another mental capacity assessment and concluded that P did lack litigation capacity. Dr Kemp was therefore asked to conduct another assessment of P's litigation capacity and reached the following conclusion, as set out in her second statement dated 27 April 2021:

> "I now agree that P lacks litigation capacity, my reason for my change in opinion is that I have considered Michelle's assessment (Exhibit RK1) and have spoken to her about P's case. Michelle was able where I was not to ascertain that P did not think the proceedings related to her. Secondly, P's refusal to read the court papers and to communicate with others about the proceedings would be replicated in refusal to engage with counsel in my opinion, to instruct and take expert evidence."

13. Therefore, by the time of the April hearing, the Trust had reached the view that P did, in fact, lack litigation capacity, notwithstanding their initial opinion at the February hearing that she did not.

14. In her second statement, Dr Kemp attached the 'Confirmation of Assessment' document completed by Ms Grant following her meeting with P on 16 March 2021. That document included a transcript of the meeting. It was clear from that transcript that P had failed to engage with Ms Grant's questions as to these proceedings. She said that she did not want anything to do with court, that she was not going to take any medication, and that she would not attend court even if she had someone to support her. She did not answer when she was asked whether or not God still spoke with her and told her not to take her medication.

15. The Trust notified the Official Solicitor of these proceedings following Ms Grant's assessment on 16 March 2021, and Ms Gollop QC appeared on behalf of the Official Solicitor at the April hearing. In the position statement prepared by Ms Gollop QC (who had at the time of drafting not yet seen the second statement of Dr Kemp), it was submitted that P did have litigation capacity.

16. Given the dispute between the Trust and the Official Solicitor as to P's litigation capacity, and the Official Solicitor's position that she did not need to be involved given that she considered that P has litigation capacity, I was concerned by Ms Gollop's standing at the beginning of the April hearing. I therefore directed that before considering the substantive issue of P's treatment, I would hear submissions from counsel, and evidence from Dr Kemp and Ms Grant, on the preliminary issue of whether or not P has litigation capacity. I heard Ms Gollop QC *de bene esse*.

17. Mr Anderson and Ms Gollop QC first made introductory submissions setting out why they say, respectively, that P does not and does have litigation capacity.

18. I then heard evidence from Dr Kemp. Dr Kemp told me that a key factor in her change of mind as to P's litigation capacity, which she said she herself had not picked up on when she performed her first capacity assessment, was that Ms Grant had picked up on the fact that P did not think these proceedings had anything to with her. Consequently, Dr Kemp was of the view that P may not be able to instruct counsel or take expert advice, as a result of being 'closed off', intransigent, unable to think logically, and believing that she did not need to be involved in the court process.

19. I asked Dr Kemp to refer me to the document where Ms Grant set out her opinion on this issue, but Dr Kemp was unable to do so and told me that Ms Grant had communicated her view to her, but that she could not remember whether that was done orally or in writing.

20. It was clear that Dr Kemp's view on P's litigation capacity was based, first, upon the fact that she had been told that P did not think these proceedings were about her, and secondly upon the fact that she felt that P would not engage with the court process in terms of taking legal advice or instructing counsel.

21. I then heard evidence from Ms Grant. Ms Grant, however, could not recall making the comment to Dr Kemp about P not thinking these proceedings were about her. Nonetheless, Ms Grant told me that she had concluded that P lacked litigation capacity on the basis that P failed to engage with her questioning, and that such failure was underpinned by P's delusional beliefs.

22. I then heard further, final, submissions from Mr Anderson and Ms Gollop QC as to P's litigation capacity.

23. I then signified that I was satisfied that P lacked litigation capacity in relation to this particular proceeding, for reasons which would follow in a later judgment. These are my reasons.

24. Section 1(2) of the Mental Capacity Act 2005 states, unsurprisingly, that a person is assumed to have capacity unless it is established that he or she lacks capacity. Therefore there is a burden of proof on any person or body claiming that a person lacks capacity, and the standard of that proof is the balance of probability (s.2(4)).

25. P will lack capacity in relation to a matter if at the material time she is unable to make a decision for herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, her mind or brain (s.2(1)). It does not matter whether the impairment or disturbance is permanent or temporary (s.2(2)). She will be unable to make a decision for herself if she is unable to understand the information relevant to the decision; or to retain that information; or to use or weigh that information as part of the process of making the decision; or to communicate her decision by any means (s.3(1)). That P may be able to retain the information relevant to a decision for a short period only does not prevent her from being regarded as able to make the decision (s.3(3)). She is not to be treated as being unable to make a decision unless all practicable steps to help her to do so have been taken without success (s.1(3)).

26. It is trite law that a person can have capacity in relation to some matters but not in relation to others. In *Dunhill v Burgin* [2014] UKSC 18 at [13] Baroness Hale of Richmond stated "capacity is to be judged in relation to the decision or activity in question and not globally". When judging a person's capacity to conduct litigation the question is whether the person can conduct the particular proceeding rather than litigation generally.

27. Conducting litigation is not simply a question of providing instructions to a lawyer and then sitting back and watching the case unfold. Litigation is a heavy-duty, dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, on many occasions, on a number of issues, over the span of the proceedings as they develop: *TB and KB v LH (Capacity to Conduct Proceedings)* [2019] EWCOP 14 at [29] per MacDonald J.

28. In *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2002] EWCA Civ 1889, a case which pre-dated the Mental Capacity Act 2005, Kennedy LJ at [26] stated that litigation capacity required the ability to recognise a problem; to obtain and receive and understand relevant information about it, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision; and the ability to communicate that decision. It is obvious that when the Act came to be written the draughtsman took those standards and restated them in very similar language in s.3.

29. Unlike certain other human activities discussed in the caselaw, where the level of capacity is set low, I am of no doubt that the level of capacity to conduct litigation is set relatively high. Litigation, even so-called simple litigation, is a complex business. For virtually every case the substantive law, to say nothing of the procedural rules, is a daunting challenge, and can be a minefield.

30. In *TB and KB v LH (Capacity to Conduct Proceedings)* MacDonald J at [25] went on to say:

> "…where a litigant in person does not, in their own right, have capacity to conduct proceedings, the question remains whether they have the capacity to instruct others to conduct those proceedings on their behalf. This is consistent with the principle that an individual who, by themself, lacks capacity on the subject matter in issue should be facilitated to make a capacitous decision on that subject matter by the taking of all practicable steps to help them to do so. Where a litigant in person lacks capacity to conduct proceedings absent advice and assistance and lacks capacity to instruct advisers, he or she will lack capacity to conduct proceedings. A question remains as to the position where a litigant in person lacks capacity to conduct proceedings in his or her own right but has capacity to instruct advisers to conduct those proceedings and *chooses* not to do so. However, for the reasons set out below, that is not the situation in this case and it is not therefore necessary for me to consider that point."

31. For my part, I would respectfully disagree that if a person lacks capacity to conduct proceedings as a litigant in person she might, nevertheless, have capacity to instruct lawyers to represent her and that the latter capacity might constitute capacity to conduct the litigation in question. I differ because, as MacDonald J himself eloquently explained, conducting proceedings is a dynamic transactional exercise requiring continuous, shifting, reactive value judgments and strategic forensic decisions. This is the case even if the litigant has instructed the best solicitors and counsel in the business. In a proceeding such as this, a litigant has to be mentally equipped not only to be able to follow what is going on, but also to be able figuratively to tug counsel's gown and to pass her a stream of yellow post-it notes. In my opinion, a litigant needs the same capacity to conduct litigation whether she is represented or not.

32. As mentioned above, this case is most unusual in that the initial capacity assessment of Dr Kemp concluded that P lacked capacity to make decisions about the treatment of the HIV, but nonetheless had capacity to conduct litigation about that very treatment. The

document of Mr Anderson referred to above cited *Sheffield City Council v E* [2004] EWHC 2808 (Fam). In that famous case Munby J stated at [49]:

> "Whilst it is not difficult to think of situations where someone has subject-matter capacity whilst lacking litigation capacity, and such cases may not be that rare, I suspect that cases where someone has litigation capacity whilst lacking subject-matter capacity are likely to be very much more infrequent, indeed pretty rare. Indeed, I would go so far as to say that only in unusual circumstances will it be possible to conclude that someone who lacks subject-matter capacity can nonetheless have litigation capacity."

33. I would go further and say that it is virtually impossible to conceive of circumstances where someone lacks capacity to make a decision about medical treatment, but yet has capacity to make decisions about the manifold steps or stances needed to be addressed in litigation about that very same subject matter. It seems to me to be completely illogical to say that someone is incapable of making a decision about medical treatment, but is capable of making a decision about what to submit to a judge who is making that very determination.

34. The assessment at the start of P's lack of capacity in relation to the subject-matter decision, namely the need to take the antiretroviral medication, was rightly made by Dr Kemp and Ms Grant. The opposition expressed by P was, and is, completely irrational and directly contrary to her best interests. There is no doubt that she suffers from an impairment of, or disturbance in the functioning of, her mind. As a direct consequence it is clear that she cannot understand the information relevant to the administration of the antiretroviral medication, nor can she use or weigh it as part of her decision-making process. The assessment of P's incapacity in this regard was open and shut, and was rightly made by Dr Kemp and Ms Grant.

35. The subject matter of this litigation is, of course, P's treatment with the antiretroviral medication. As indicated, the court has to decide for itself two separate questions concerning P's capacity. First, it must decide whether P has capacity to decide to receive that medication and, if the answer is no, then go on to make the best interests decision under s.4 on her behalf. The second question is whether P has capacity to conduct the litigation. If the answer is no, then she must have a litigation friend to conduct the proceedings on her behalf. The answer to the first question does not depend on the answer to the second question. The court will make its decision on the first question irrespective of its decision on the second question. The second question merely determines how P conducts the proceedings. Does she do so directly either in person or by instructing lawyers, or does someone do so on her behalf?

36. In a case such as this, if a party is assumed to have litigation capacity then she is taken to be capable of understanding, in a real sense, what is being proposed, and why. She is taken to be able to weigh, again in a real sense, the advantage of the medication. This understanding, and this weighing, will be the key drivers of the formation of the forensic decisions that she will make in the litigation process. Thus, she weighs all the information, both written and spoken, to formulate instructions to her lawyers in order to equip them to cross-examine and advocate generally on her behalf.

37. How P could be assessed as being capable of doing all this when her schizophrenia-induced belief is that God has spoken to her and told her not to take the medication, and where she believes that the medication is infested by snakes, is completely beyond me.

38. I have to admit that I took my eye off the ball in the February hearing when I allowed the case to proceed on the footing that P had capacity to conduct this litigation.

39. In my judgment, the correct decision by Dr Kemp about subject-matter incapacity should have led, almost inevitably, to an equivalent decision being made by her about P's capacity to conduct litigation about that very subject matter. I disagree with the initial assessment by Dr Kemp that P had capacity to conduct this litigation. I am not saying that differential decisions are impossible, but I am saying, as I have previously said in an admittedly completely different context, that such a case should be as rare as a white leopard. And this is not one of them.

40. I therefore hold that P does not have, and has not had, capacity to conduct this litigation. That decision having been reached, the Official Solicitor agrees to act as P's litigation friend.

41. In reaching my decision I have disregarded Dr Kemp's reliance on the (unremembered) comment of Ms Grant referred to above. This I judge to be completely irrelevant.

42. That is my judgment.
