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 children and members of their 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.

Neutral Citation Number: [2023] EWHC 2517 (Fam)

Case No: ZC17P00039

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th October 2023

**Before** :

**MRS JUSTICE ARBUTHNOT**

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**Between :s**

| | |
|---|---|
| **A Health Board** | **Applicant** |
| **&** | |
| **AZ** | **First Respondent** |
| **(through her Guardian)** | |
| **&** | |
| **A Local Authority** | **Second Respondent** |
| **&** | |
| **A Mother** | **Third Respondent** |
| **&** | |
| **A Father** | **Fourth Respondent** |

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**Thomas Jones** (instructed by A Solicitors Firm) for the **Applicant**

**Kate Hughes KC** (instructed by A Solicitors Firm) for the **1st Respondent**
**Rebecca Mann** (instructed by A Local Authority legal department) for the **2nd Respondent**
**Christina Thomas** (instructed by A Solicitors Firm) for the **3rd Respondent**
**The Father** (in person) for the **4th Respondent**

Hearing date: 4th September 2023

**APPROVED JUDGMENT – TERMINATION OF CHILDHOOD PREGNANCY: GUIDANCE**

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**Mrs Justice Arbuthnot:**

**Introduction**

1. This is an application by a Health Board ("HB") for declarations that a termination of pregnancy would be in AZ's best interests and it would be in her best interests for tissue taken from the placenta to be used for the purposes of forensic testing in a criminal investigation.

2. The first respondent is a child ("AZ") who was born on 23rd May 2012. She is now aged 11. She became pregnant after being raped by a 14-year-old she met on the internet when she was aged ten, on the 18th or 21st of May 2023. She was raped by another 14-year-old boy on the 11th of June 2023, but he did not make her pregnant.

3. AZ is living at home with the third respondent, her mother and the fourth respondent, her father. They both attended the hearing on 4th September 2023. The other party is the second respondent, a Local Authority ("LA") which has safeguarding concerns about the care AZ is receiving at home from the mother and father. AZ has a guardian who was present and represented at the hearing.

4. AZ had been self-harming since a family bereavement in 2022. In June 2023, she said her mental health was 'bad' and she feels 'very sad'. There is a history of AZ neglecting herself and not washing regularly. AZ is said to have been watching pornography since the age of eight and there are signs that she has been putting herself into "sexually exploitable positions". She suffers from social isolation and feels bullied at school. She has not attended school since February 2023. The mother was said to have her own problems which on the face of it have interfered with her ability to care for AZ.

5. The application was made on the 25th August 2023. It was listed urgently on 30th August 2023. The parents did not attend that hearing. At the time, AZ wanted to continue with the pregnancy and was supported in that view by the mother.

6. I adjourned the hearing for the parents to attend the next hearing. I appointed a guardian, and ordered that a care plan be prepared by HB. Various other orders were made to ensure that 4th September 2023 was an effective hearing.

**Parties' positions on 4th September 2023**

7. By 4th September 2023 AZ's pregnancy was of 14 weeks and six days gestation. The guardian and the social worker had each visited AZ. AZ's competence had been assessed again. The parents had had time to consider the risks and benefits to AZ of the pregnancy and had concluded that a termination was in her best interests. The guardian supported the application and AZ had accepted the need for a termination but wanted the adults to take the decision, rather than her. AZ and her parents supported the second application for a declaration that some tissue from the placenta be removed for forensic purposes.

8. In view of the positions taken by the parties I did not require any live evidence but heard submissions including from the father who was acting in person.

**Written Evidence**

9. In terms of the evidence before me the HB provided statements from a Consultant Psychiatrist and two Consultant Obstetricians and Gynaecologists.

10. On 7th August 2023 in a meeting with one of the Consultant Obstetricians when the many risks of continuing with the pregnancy were explained to her, AZ said she was 'happy' to be pregnant and wanted to continue with it. From that and other things she said, the Consultant concluded that she was not Gillick competent.

11. I was told there had been a multi-disciplinary team best interests meeting held on the 17th August 2023 when a number of specialists attended. It was agreed unanimously that not continuing with the pregnancy would be in AZ's best interests.

12. I had evidence from a CAMHS Consultant that on 30th August 2023 had met with AZ alone then with her mother. AZ told him that she was 'happy' to continue with the pregnancy and she said it made her feel 'special'. The mother supported AZ's position.

13. The CAMHS Consultant said AZ lacked competence and explained that she was very idealistic and unrealistic. Her views involved 'naïve magical thinking' in her approach to the pregnancy. She lacked the intellectual development and capacity to process the complexity of the decisions that had to be made and her emotional investment in one outcome was clearly clouding her judgment. An important factor in AZ's decision-making was that the birth of a child would ensure she would not have to return to school.

14. Understandably in the light of the CAMHS Consultant's findings, CAMHS has provided an appointment to see AZ again. The consultant provided also a CAMHS plan to support AZ following a termination.

15. The two Consultant Obstetricians were the two registered medical practitioners who addressed the requirements of section 1 of the Abortion Act 1967. They also set out the risks to AZ of a continuation of the pregnancy versus the benefits of a termination.

16. The physical health risks the Consultants set out were those over and above the normal risks of pregnancy. The specialists made the point that there are no studies on pregnancy in children as young as 11. The studies involved children aged 14 to 18. They considered that the risks would be at least as high and probably higher for a child as young as AZ. To some extent the clinicians were extrapolating their conclusions from the studies on adolescent pregnancy.

**The Applicable Law**

17. In so far as it is relevant the Abortion Act 1967, Section 1 provides:

"1. Medical termination of pregnancy.

(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith -

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or…"

**Discussion**

18. I was referred to two cases: *Re AB (Termination of pregnancy)* [2019] EWCA 1215 and *Re X (A Child)* [2014] EWHC 1871. *Re AB* concerned an adult who lacked capacity, whilst *Re X* concerned a 13-year-old who was about 14 weeks pregnant. The same general principles applied to children as to a non capacitous adult.

19. The function of the court is clear. There is a two-stage test. The first stage is for the doctors: I had the evidence from two Consultant Obstetricians that AZ's pregnancy did not exceed 24 weeks and that the continuation of the pregnancy would involve greater risk of injury to the physical and mental health of AZ than if the pregnancy were to be terminated. The requirements of section 1(1) of the 1967 Act were met.

20. If the requirements of section 1(1) had not been met then that would have been the end of the matter. As they were met, the second stage was for the Court. The role of the Court was to evaluate all the material factors and decide whether it was in AZ's best interests to provide the necessary consent in order for the proposed termination to take place. This would ensure that the procedure was lawful. The court's considerations overlapped with the factors considered by the doctors.

21. Based on the evidence of the two Consultant Obstetricians, I concluded the physical risks to AZ of a continued pregnancy were the following:

    a. An increased risk of AZ dying due to the small dimensions of her anatomy.
    b. A risk of physical harm from a growing foetus using up the nutrients that AZ herself needed to grow. AZ was already sleeping much more than was usual. The concern was that AZ would be provided with inappropriate and inadequate nutrition at home. AZ was said to have lost weight which had been hidden by baggy clothes. On the face of it the parents had not acted to ensure AZ's well-being.
    c. An increased risk in childhood pregnancy of infection of the lining of the womb.
    d. A risk that AZ's pelvic floor musculature might be affected by carrying a pregnancy for nine months.
    e. A risk of premature delivery, AZ would require antenatal corticosteroids to help the lungs of the foetus mature.
    f. An increased risk during childbirth, due to AZ's age and small size, of perineal and other tearing including to the anal sphincter with all the long-term problems that might cause.
    g. The risk that that AZ would struggle with pain even if a caesarean delivery were to take place.

22. In terms of the mental health risks to AZ of pregnancy, childbirth and the care of a baby, I found the following:

    a. An unquantifiable impact on AZ in the medium to long term from having to continue with a pregnancy that had been conceived during a rape.
    b. A worsening of AZ's already vulnerable mental health when studies showed that that could lead to an increase in the risk of death from suicide during pregnancy.
    c. The trauma of childbirth whether by a vaginal delivery or a caesarean. In terms of a vaginal delivery, the pain during labour and the physical pushing required for AZ would be traumatic for an eleven-year-old.

d. The connection between adolescent parenthood and adverse outcomes for young mothers, such as depression, suicide, substance abuse and PTSD.
e. The effect on AZ's mental health were the baby to be removed from her care at birth.
f. Even if the baby were to remain with her, it would be nearly impossible for AZ to return to school.
g. AZ's own development would be stopped at the expense of the baby's.
h. AZ would need support from her mother and father who on the face of it had not been able to ensure AZ attended the services she needed.
i. A transition from childhood straight to motherhood at age 11 would mean that the important developmental stage of adolescence would be missed.

23. I had evidence about the different types of termination which might take place at AZ's stage of gestation of 14 weeks and five days. A medical termination would involve more prolonged pain and bleeding and the delivery of a foetus which it was thought would be more traumatic than a surgical termination. The witnesses were unanimous in their view that although a surgical termination would carry its own risks, from the anaesthetic and from the procedure itself, it was better for AZ than the medical termination.

24. Before 4th September 2023, AZ and her parents had wanted to continue with the pregnancy and any termination, if ordered, would have been against AZ's will. I shared the guardian's concerns that the risks of a termination in these circumstances had not been clearly considered by the HB. This was particularly so in the light of AZ's mental health. In the light of the final position taken by AZ and her parents there was no need for the court to consider what would have been a much more nuanced decision.

25. I also considered there should have been a more detailed examination of the arguments in favour of a continuation of the pregnancy even in the light of AZ and her parents' changed position. It would have been helpful to have the risks of a surgical termination set out in more detail.

26. I was concerned that AZ had told a doctor on 31st August 2023 that if she had to undergo a termination she would 'return to self-harm more seriously'. The same doctor noted that 'the outcome of either continued pregnancy or termination on her development and mental health are likely to increase her mental health needs'.

27. In terms of the concerns raised by the Consultants neither outcome was a good option for this little girl. The question for the court was what was the least bad option for AZ, in her best interests.

28. I have set out the uncontested risks of physical and mental health harm to AZ of a continued pregnancy and childbirth above. The doctor's descriptions of these physical risks are clear and compelling. The risks to AZ are significant. I was particularly struck by the evidence about the impact of the size of AZ's anatomy: whereas many adult women struggle with the pain of childbirth, a child of eleven is likely to have a much worse experience. Her body may be just too small to give birth other than by a caesarean. Any experience would be likely to traumatize her.

29. It is not just a short-term problem for this child, another issue would be the long term physical effects on AZ of childbirth, perianal tearing and all its consequences. A caesarean is not much better, with pain from a surgical procedure and the specialists of the view that she would have difficulty coping with it.

30. The mental health risks of this pregnancy continuing are more finely balanced. They are set out above. In my judgment, there is the potential for AZ having mental health issues whichever decision is taken. I accepted that she had stopped self-harming when her mother told her that the loss of blood would harm the child but noted that AZ had told one of the doctors that she will start self-harming again if the termination takes place. There is therefore the potential for a continuation of her self- harming behaviour whichever decision is taken.

31. Another issue which in my judgment would affect her mental health in the longer term if the pregnancy were to continue is that the baby was conceived during a rape. She told

the consultant psychiatrist she was not bothered by this but in the medium and longer term as she matures she may see this differently.

32. Another important consideration is the effect on AZ's mental health were the baby to be removed from her care at birth. There was evidence that she had not been able to care for herself nor was she being assisted by her parents, she was said to be unkempt and unwashed. Her parents were not ensuring she was getting to school.

33. It was highly likely as things currently stood, that any baby would be removed at birth. In that situation AZ would have had the pain of the pregnancy and childbirth followed by what might be the overwhelming psychological impact of having her baby removed at birth.

34. Overall, having reviewed the material factors, I consider that the risks to AZ of the continuation of her pregnancy are considerably higher than the risks from a surgical termination. I have considered the care plan which sets out the next steps that the HB will take. The approach is child focussed, detailed and sensible. CAMHS will be supporting AZ's mental health after a termination.

35. It is in her best interests to have a termination. In my judgment, the termination should take place this week as any delay will put AZ at increased risk.

36. Another question raised is contraception. The mother made the telling point to the social worker that there was a risk that if AZ's pregnancy was terminated, she would just go out and become pregnant again. For some reason the parents do not appear to be able to prevent this. The risks of another pregnancy are obvious but there is no application for a declaration that an implant should be inserted against AZ's will. Instead, it is hoped that AZ may well agree to this.

37. The guardian said she would discuss contraception with AZ if it was appropriate. If AZ was too upset or if she failed to consent to it then no implant would be inserted although other contraceptive measures would be discussed with AZ in the near future.

38. It would seem to me that if AZ consented, an implant could be inserted at the same time as the termination was taking place. Both would then occur under general anaesthetic. This would then protect AZ for three years. This was not a very long time but at least it might ensure she entered her teenage years without a baby.

39. In conclusion, it is in AZ's best interests for me to make the following declarations, that:

    a. A termination of her pregnancy would be in AZ's best interests; and
    b. Tissue should be taken from the placenta to be used for the purposes of forensic testing in a criminal investigation.

40. Currently the 14-year-old denies having any sexual contact with AZ let along raping her and a DNA test is required.

41. There has been some delay in bringing this case to the High Court. I am not criticising the HB for this but it is clear the sooner a case of childhood pregnancy is brought to the High Court for it to make a best interests decision, the better.

42. The parties at my request have made suggestions about some guidance that might be given in these fortunately very unusual cases given there is very little provided.

43. The President of the Family Division, Sir Andrew McFarlane, has seen this guidance and has approved it.

**Guidance**

44. Any applicant in such a case is reminded to consider Part 12 of the Family Procedure Rules concerning proceedings relating to children and Practice Direction 12E where the approach to urgent business is considered. PD12E 3.1 sets out guidance for children subject to medical treatment, nothing I say below is meant to contradict that practice direction.

45. Where a termination of a pregnancy is contemplated in respect of a child who lacks *Gillick* competence, an application to the Family Division ought to be made as soon as practicable first if there is any doubt first as to what is in her best interests or second as to her or her parents' consent for her to undergo a termination: see *An NHS Trust and D* [2003] EWHC 2793 (Fam).

46. Where, as was initially the situation in the case of A, it appears that there is a divergence of views, consideration should be given to an application at an early stage, even if the application is subsequently withdrawn: *Re AB* [2019] EWCA Civ 1215.

47. Where a termination of pregnancy is contemplated in respect of a child, the applicant should make an early referral to the other relevant statutory bodies, including the relevant local authority, the relevant Integrated Care Board in England or the relevant Local Health Board in Wales, depending on the applicant, to consider whether the child meets the criteria to receive support.

48. Any application to the High Court should include the following:

    a. Written evidence from two registered medical practitioners who are able to address the requirements of section 1 of the Abortion Act 1967, preferably from two obstetricians;
    b. Written evidence from a child and adolescent psychologist or psychiatrist who has met with the child to provide evidence on her *Gillick* competence to consent to any decisions regarding termination. It would be preferable for this evidence to have been obtained in the absence of the child's mother and father.
    c. A full best interests analysis by one of the two obstetricians. The focus of this analysis ought to be on the subject child and not on the foetus, consistent with the case law in *Vo v France* (2005) 10 EHRR 12 at [81-82]; *Paton v British Pregnancy_Advisory Service* [1979] QB 276; *Paton v United Kingdom* (1980) 3EHRR 408. The analysis ought to include:
        i. all options available;

ii. a summary of the risks and benefits of each option;
iii. the preferred option and the reason why it is preferred;
iv. the applicant's position on any other consequential orders sought such as:
    1. sterilisation;
    2. contraception; or
    3. the retaining of any placenta tissue for the purposes of forensic investigation.

d. A care plan addressing the detailed logistics of the proposed treatment and the support that will be offered to the child prior to, during and following any sanctioned treatment. This support is to include mental health support where appropriate.

49. Should there be more than one agency involved with the child, a multi-agency meeting should take place to enable all relevant agencies to contribute to the care plan referred to at d. above. Where possible, this should take place within ten working days of any application first being contemplated.

50. The application ought to stress the urgency with which a directions appointment is sought, the nature of the application which gives rise to the urgency and the up-to-date gestation timetable.

51. The application should highlight the need for an urgent direction to join the child as a party, so the child is represented at the first directions hearing.

52. An application for a declaration which will permit an organ of the State to carry out a termination on a non-competent child should be regarded as a medical treatment issue of the utmost urgency.

53. The urgency is likely to arise from a number of factors:

a. First, due to the requirements of the Abortion Act 1967, it would not be lawful for the court to sanction the termination after twenty-four weeks gestation in

accordance with section 1(a), unless it was satisfied that the higher threshold of section 1(b) was met, namely that termination was "necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman".

b. Second, a more gestationally advanced foetus would be larger in size. If surgical termination is undertaken this becomes procedurally more complex to perform and can increase the risk of complications such as retained products of conception. If medical termination is undertaken advancing gestation would lead to increase in pain experienced and a greater likelihood of bleeding and psychological morbidity from witnessing the delivery of a more physically developed and recognisable foetus.

c. Thirdly, as time passes, the likelihood of finding a clinician with the relevant experience willing to perform the termination would decrease, which may result in further logistical difficulties in conveying the child to a different locality in order to affect the procedure.

54. Upon making the application, in accordance with the practice within care proceedings the applicant shall give notice to CAFCASS/CAFCASS Cymru that an application is pending and that a guardian may need to be allocated imminently.

55. The directions appointment should be listed within at least 48 hours of the application before a judge of the Family Division. At the time of the directions appointment, counsel instructed for the applicant would need to provide the court with the most accurate gestation timetable, including the date at which the child will be at 24 weeks gestation and her expected delivery date.

56. If the child remains unrepresented at the directions appointment, the court will consider a brief (1 hour) adjournment to enable the applicant to contact CAFCASS so that a duty guardian can represent the child at that hearing. Every attempt should be made to ensure that the child is represented at all hearings.

57. At the directions appointment, the court would be required to consider:

a. whether any of the evidence set out in the guidance above at paragraph 48 above is absent or requires clarification;
b. whether the joinder of any other statutory body is required, such as the relevant local authority, the relevant Integrated Care Board in England or the relevant Local Health Board in Wales (depending on the applicant);
c. the formal appointment of the Children's Guardian and directions for their analysis to be prepared in advance of any final hearing; and
d. provision for the parents to prepare statements.

58. The matter ought to be listed before a judge of the Family Division at the first available opportunity for a final hearing, no more than seven days later, with sufficient time to ensure that any outstanding evidence is obtained.

59. In circumstances where the court is satisfied that it is in the best interest of the child to undergo the proposed termination, it is advisable to make a declaration, instead of relying on any consent of the parents, to act as the substituted consent of the child, where the court has reasonable grounds to believe that either the parent's past exercise of parental responsibility has been called into question or there has been a history of changed positions which would cast doubt on the ability of the procedure to take place in accordance with the envisaged timetable.[1]

[1] In *Re AB (A Child) (Deprivation of Liberty: Consent) [2015] EWHC 3125*, paras 26-29, the court when considering parental responsibility to consent to the deprivation of liberty of a child held that if a parent's past exercise of parental responsibility has been called into question, it may not be right or appropriate to rely on his or her parental responsibility.