

## [2016] PILARS CC 2

### WHAT CONSTITUTES A BELIEF?

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On 28<sup>th</sup> September 2015, the England and Wales Court of Protection handed down judgment in the case of [Wye Valley NHS Trust v Mr B \[2015\] EWCOP 60](#), a case concerning whether it would be in the best interests of a 73 year old gentleman to amputate his foot on medical grounds, despite his objections to the procedure.

#### The facts

The respondent, Mr B, was a diabetic who was diagnosed with paranoid schizophrenia in his mid-twenties. His medication had enabled him to live in the community for a long period, despite a number of compulsory admissions for treatment. During this time he suffered from “persistent auditory hallucinations” in which he heard the voices of the Virgin Mary and angels.<sup>1</sup> The picture painted was of an “isolated but not unsociable person with an interest in the outside world whose mental illness did not cause him undue distress”.<sup>2</sup>

In July 2014, Mr B was admitted to hospital for treatment of a chronic foot ulcer. Whilst in hospital, he suffered a relapse in relation to his mental health and became a psychiatric in-patient.<sup>3</sup> In May 2015 he was detained compulsorily but resisted treatment for his diabetes and his ulcer. As a result, despite his mental health improving, his physical health significantly deteriorated and on 12<sup>th</sup> September 2015 he was moved to a general hospital ward to manage his physical condition.<sup>4</sup>

An application was made to the Court of Protection on 15<sup>th</sup> September 2015 and, following an initial hearing on 18<sup>th</sup> September 2015, a consultant surgeon provided the Court of Protection with expert evidence that amputation was “the only clinical option”. Without this procedure, Mr B would quickly “succumb to overwhelming infection” meaning it would “not then be possible to save him”.<sup>5</sup> Following an amputation, Mr B could potentially live for several more years.<sup>6</sup>

Although Mr B did not follow an established religion, his religious beliefs were said to be “extremely important to him”.<sup>7</sup> The “angelic voices” he heard advised him whether or not to take his medication<sup>8</sup> and during a meeting with Mr Justice Jackson, Mr B stated that “I’m not afraid of dying, I know where I’m going. The angels have told me I am going to heaven. I have no regrets. It would be a better life than this”.

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He also said (of the amputation) “I don't want it. I'm not afraid of death. I don't want interference. Even if I'm going to die, I don't want the operation”.<sup>9</sup>

## The relevant law

The Mental Capacity Act 2005 (“the Act”) provides the legal framework for determining whether a person has the mental capacity to make decisions and, if not, how these decisions should be made.<sup>10</sup> Drawing on s1 and s2 of the Act, and subsequent case law (notably [Aintree University Hospitals NHS Trust v James \[2014\] AC 591](#)<sup>11</sup>) the Court of Protection found that Mr B lacked the capacity to make the decision for himself.<sup>12</sup> In this situation, s1(5) of the Act provides the general principle that:

An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.<sup>13</sup>

When determining what is in a person’s best interests, s4 of the Act states that “all the relevant circumstances” must be considered.<sup>14</sup> This includes the person’s “past and present wishes and feeling” and “beliefs and values that would be likely to influence his decision if he had capacity”.<sup>15</sup> When considering “life-sustaining” treatment a desire to bring about death is not a valid motivation for the person making the decision.<sup>16</sup>

Regardless of whether or not a person has capacity, they are also entitled to the protection of the European Convention on Human Rights (“the Convention”).<sup>17</sup> Article 9 of the Convention states that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>18</sup>

## The judgment

Lord Justice Jackson dismissed the NHS Trust’s application for an enforced amputation to be declared lawful, deciding that this would not be in Mr B’s best interests.<sup>19</sup> He emphasised that the effect of his ruling was that it would be unlawful

to conduct the amputation against Mr B's wishes, but that if he changed his mind (which Lord Justice Jackson viewed as very unlikely) it could go ahead.<sup>20</sup>

Lord Justice Jackson stated that, when deciding what was in a person's best interests "there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due".<sup>21</sup> Therefore, although there is a "strong presumption" that staying alive is in a person's best interests, this is not always the case.<sup>22</sup>

Together with Mr B's beliefs, Lord Justice Jackson also referred to the general risks associated with surgery, the possible damage to Mr B's mental health and well-being (particularly as his lost foot would be a reminder that it was removed "against the Lord's wishes"), the continuation of his current poor quality of life and the need for him to co-operate in the rehabilitation process.<sup>23</sup> In conclusion, he stated:

I am quite sure that it would not be in Mr B's best interests to take away his little remaining independence and dignity in order to replace it with a future for which he understandably has no appetite and which could only be achieved after a traumatic and uncertain struggle that he and no one else would have to endure. There is a difference between fighting on someone's behalf and just fighting them. Enforcing treatment in this case would surely be the latter.<sup>24</sup>

## The effect of Article 9

Of particular interest to scholars of law and religion is Lord Justice Jackson's discussion of Mr B's religious beliefs. He emphasised that mental incapacity is not an "off-switch" for rights and freedoms generally<sup>25</sup> and indicated that, although no determination was required on the point, he had treated the case as one where Mr B's rights under Article 9 were engaged in the way "it would be for any other devout person".<sup>26</sup> The fact that Mr B's apparent delusions had a religious element to them could not automatically lead to his wishes and feelings being given less weight.<sup>27</sup> In particular, it was emphasised that:

His religious beliefs are deeply meaningful to him and do not deserve to be described as delusions: they are his faith and they are an intrinsic part of who he is.<sup>28</sup>

Although not cited in Lord Justice Jackson's judgment, there are clear echoes here of Judge Eldergill's comments in [A County Council v MS and RS \[2014\] EWCOP B14](#). This case involved Mr S, who suffered from a schizoaffective disorder<sup>29</sup> and claimed to be (in his words) "a prophet, and the first outside the Godhead"<sup>30</sup>. Mr S

was seeking permission to pay a substantial sum of money as a tithe to the Church of the Latter Day Saints.<sup>31</sup> The court held that, although Mr S's belief he was a prophet was delusional, the remainder of his religious beliefs were not compromised by this and found that it could not be demonstrated his desire to tithe was part of his delusional belief system.<sup>32</sup> Judge Eldergill stated:

I accept that sometimes it can be difficult to distinguish between a religious delusion and a particular religious belief or practice. There is a risk of pathologizing religious beliefs when listening to content alone. It is important to look at the degree of conviction, the pervasiveness of beliefs, the context of the individual's spiritual history and deviations from conventional religious beliefs and practices when determining whether a religious belief is authentic or delusional.<sup>33</sup>

Referring to Mr S's desire to pay the tithe, Judge Eldergill emphasised the importance that both the law generally, and the ECHR in particular, places on respect for religious beliefs.<sup>34</sup> As in the case of Mr B, it appeared that for Mr S "his religion is now part of his life and is embedded in his existence".<sup>35</sup> This led to Judge Eldergill finding that Mr S did have capacity to make the decision to tithe, as well as indicating that he would have authorised the payment in any event had Mr S lacked capacity.<sup>36</sup> Thus for both Mr S and Mr B, the presence of religious beliefs governing their decisions was not only acknowledged but also fully taken into account by the courts.

In the case of Mr B, for a definition of "religious beliefs", Lord Justice Jackson referred to the case of [\*Hodkin & Anor, R \(on the application of\) v Registrar-General of Births, Deaths and Marriages \[2013\] UKSC 77\*](#) where the Supreme Court defined religion (for the purposes of the Places of Worship Registration Act 1855) as:

...In summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.<sup>37</sup>

He referred to the ways in which the belief systems of those with mental capacity can influence their approach to medical treatment. While the beliefs of those incapable of making their own decisions could not always prevail, he argued it would be wrong for such a person's "religiously-based wishes and feelings" to "always be overruled".<sup>38</sup>

These comments by Lord Justice Jackson clearly demonstrate the importance of respect for a person's religious beliefs, regardless of whether they have mental

capacity, or if they follow an established religion. The approach taken in this judgment could prove to be problematical in some instances, for example, where the person in question lacks capacity and it is unclear whether the apparent beliefs are genuine and longstanding. However, it does provide a sensitive and non-paternalistic starting point for dealing with such cases, by ensuring the protection of Article 9. In Mr B's case, indicating that Article 9 is engaged could be viewed as something of an avoidance tactic, to dodge the necessity of trying to make a distinction between delusions and an abiding belief system.<sup>39</sup> However, in the context of a holistic approach to a person's best interests, it makes sense to err on the side of respect for religious beliefs where there is evidence of their importance to the person in question.

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<sup>1</sup> *Wye Valley NHS Trust v Mr B* [2015] EWCOP 60 at para. 19.

<sup>2</sup> *Ibid.*, n.1, para. 21.

<sup>3</sup> *Ibid.*, n.1, para. 22.

<sup>4</sup> *Ibid.*, n.1, para. 23-24.

<sup>5</sup> *Ibid.*, n.1, para. 28-29.

<sup>6</sup> *Ibid.*, n.1, para. 33.

<sup>7</sup> *Ibid.*, n.1, para. 14.

<sup>8</sup> *Ibid.*, n.1, para. 14.

<sup>9</sup> *Ibid.*, n.1, para. 37.

<sup>10</sup> Mental Capacity Act 2005 c 9.

<sup>11</sup> The first case under the Mental Capacity Act 2005 to be heard by the Supreme Court.

<sup>12</sup> *Ibid.*, n.1, para. 34-35.

<sup>13</sup> Mental Capacity Act 2005, s1(5).

<sup>14</sup> *Ibid.*, n.9, s4(2).

<sup>15</sup> *Ibid.*, n.9, s4(6).

<sup>16</sup> *Ibid.*, n.9, s4(5).

<sup>17</sup> *Ibid.*, n.1, para. 6.

<sup>18</sup> European Convention on Human Rights, Article 9.

<sup>19</sup> *Ibid.*, n.1, para. 42 and 46.

<sup>20</sup> *Ibid.*, n.1, para. 3.

<sup>21</sup> *Ibid.*, n.1, para. 10.

<sup>22</sup> *Ibid.*, n.1, para. 7 and *Aintree University Hospitals NHS Trust v James* [2014] AC 591 at para. 35.

<sup>23</sup> *Ibid.*, n.1, para. 2-8.

<sup>24</sup> *Ibid.*, n.1, para. 45.

<sup>25</sup> *Ibid.*, n.1, para. 11.

<sup>26</sup> *Ibid.*, n.1, para. 14.

<sup>27</sup> *Ibid.*, n.1, para. 14.

<sup>28</sup> *Ibid.*, n.1, para. 43.

<sup>29</sup> *A County Council v MS and RS* [2014] EWCOP B14 at para. 33.

<sup>30</sup> *Ibid.*, n.29, para. 33.

<sup>31</sup> *Ibid.*, n.29, para. 3.

<sup>32</sup> *Ibid.*, n.29, para. 105 and 114.

<sup>33</sup> *Ibid.*, n.29, para. 87.

<sup>34</sup> *Ibid.*, n.29, para. 125.

<sup>35</sup> *Ibid.*, n.29, para. 125.

<sup>36</sup> *Ibid.*, n.29, para. 122 and 123.

<sup>37</sup> *Hodkin & Anor, R (on the application of) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77 at para. 57.

<sup>38</sup> *Ibid.*, n.1, para. 15.

<sup>39</sup> A suggestion referred to in Cranmer, F. (2015) "Can a patient who lacks capacity refuse medical treatment? *Wye Valley NHS Trust v B*" in *Law & Religion UK* <http://www.lawandreligionuk.com/2015/10/02/can-a-patient-who-lacks-capacity-refuse-medical-treatment-wye-valley-nhs-trust-v-b/> (accessed 13<sup>th</sup> June 2016).