Essex CHAMBERS

MENTAL CAPACITY REPORT:
HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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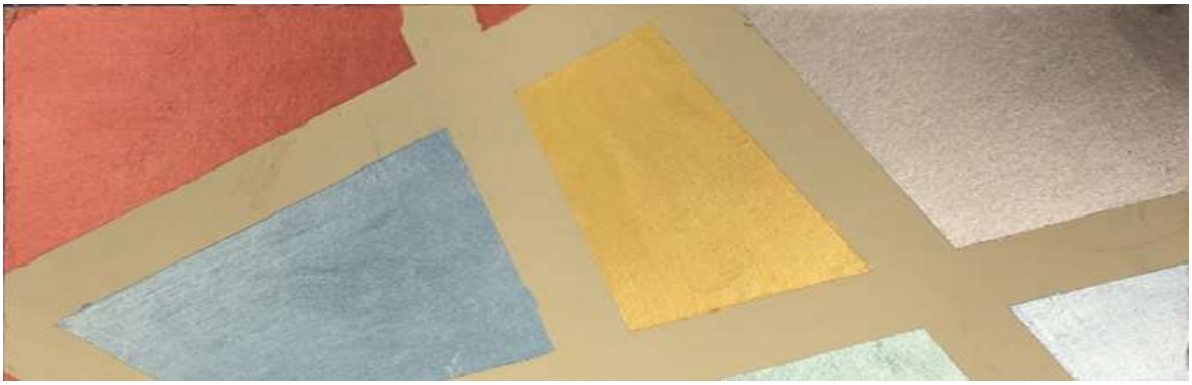

Welcome to the December 2021 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: the Supreme Court takes on capacity, learning to learn, and capacity and illicit substances;

(2) In the Practice and Procedure Report: the Court of Appeal's concern about judicial visits, and reporting restrictions and accountability;

(3) In the Wider Context Report: Parole Board guidance on mental capacity, and how consumer law can help navigate care home dilemmas;

(4) In the Scotland Report: a truly shocking report of institutional inhumanity, and the extent of incapacitation under s.67 of the Adults with Incapacity Act 2000.

Because there's not a huge amount to report, there is no Property and Affairs Report this month. However, a reminder of this consultation currently underway, closing on 12 January 2022 about third-party access to limited funds. Dr Lucy Series has provided an excellent overview of the consultation here.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also find updated versions of both our capacity and best interests guides.

You may notice some changes next year, as coordination duties are being taken over by Arianna whilst Alex is on sabbatical, but rest assured that this will remain a one-stop shop for all the capacity news which is fit to print. In the meantime, and for those for whom it is not an empty hope, we wish you happy holidays, and will see you (probably virtually) in 2022.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Contents

Capacity and best interests guides updated

To take account of the decision of the Supreme Court in *JB*, and of other case-law developments over the past few months, we have updated both our capacity and best interests guides.

The Supreme Court takes on capacity

A Local Authority v JB [2021] UKSC 52 (Court of Appeal (Supreme Court (Briggs, Arden, Burrows, Stephens and Rose SCJJ))

Mental capacity – assessing capacity – sexual relations

Summary

The Supreme Court has for the first time looked in detail at what it means to have or lack capacity to make a decision, and has done so in a very high-stakes context: that of sexual relations. In *A Local Authority v JB* [2021] UKSC 52, the central question was whether the man in question, JB, had to be able to understand, use and weigh the information that any prospective sexual partner must be able to, give, and maintain consent to any sexual activity he was initiating. In turn, this led to a profound question: is that something that anyone should be able to understand? If it is, then it would not be discriminatory to hold a person with a cognitive impairment such a JB to such a standard; if it is not, then it would be.

The factual background to the case is set out in some detail in the judgment of the Supreme Court, although, as Lord Stephens emphasised (paragraph 9), there have been no final factual findings, even if much of the evidence is not disputed. For present purposes, of most importance is the fact that the expert evidence relating to JB was to the effect that he could not understand or weigh the concept of consent by another sexual partner, and could not do so in consequence of an impairment of his mind (autism). As Lord Stephens identified (at paragraph 36), if the relevant information for purposes of the capacity test included the need for such consent, then JB would not satisfy the test. No-one could therefore make a decision on his behalf to engage in sexual relations by virtue of the ban in s.27(1)(b) MCA 2005.

The first judge to consider the question, Roberts J, approached matters on the basis that the relevant issue – the 'matter' for purposes of the capacity test in s.2 MCA 2005 – was JB's ability

to consent to sexual relations. She reached the conclusion that the other's consent was not information that JB had to be able to understand, use and weigh to be able to consent, the essential underpinning of her judgment being that such would be discriminatory. In essence, she considered that, given that those without cognitive impairments are not judged in advance, the questions of whether JB (or others in his position) might be committing offences in consequence by initiating sexual relations with a person who was not consenting should be examined through the criminal law in retrospect.

The Court of Appeal took a different course, firstly by reformulating the question as being one of whether JB had capacity to make the decision to engage in sexual relations, on the basis that "the word ''consent' implies agreeing to sexual relations proposed by someone else," but that in JB's case it was JB who wished to initiate sexual relations with others. The Court of Appeal also placed heavy emphasis upon the fact that, whilst the MCA enshrines the principles of autonomy and protection of those with potentially impaired decision-making capacity, the MCA and the Court of Protection do not exist in a vacuum, but are part of a wider system of law and justice, and must therefore take into account – where relevant – the need to protect others. The Court of Appeal therefore upheld the local authority's appeal against the decision of Roberts J and considered that the relevant information included the need for the others' consent.

As JB's litigation friend, the Official Solicitor appealed against the decision of the Court of Appeal.

JB's circumstances

Lord Stephens, giving the judgment of the court, set out an overview of JB's factual circumstances, including – as noted above – the expert evidence as to the effect of his cognitive impairments upon his 'factual' capacity to make decisions in relation to sexual activity. He also identified the expert evidence relating to the risks posed by JB to women (including those with learning disabilities) and the consequential risks to JB, including physical or psychological harm from others, including relatives or friends of the potential victims, incarceration (giving rise to 'significant harm' to his mental health) or hospitalisation. As Lord Stephens noted (at paragraph 41), the relevance of these matters was that "*if section 1(4)(a) MCA the reasonably foreseeable consequences of JB deciding to engage in or to consent to sexual relations, when the other person is unable to consent or does not consent throughout the sexual activity, is that JB could harm himself and/or the other person, then that would be information relevant to the decision. If it is, then under section 3(1)(a) MCA, JB should be able to understand that information and under section 3(1)(c) he should be able to use or weigh it as part of the decision-making process*" (paragraph 41). Lord Stephens also identified the work that had been proposed to ameliorate JB's risk to women in circumstances where one expert identified that his "'*sole goal,' if his account to her is correct' as being to have physical and sexual contact with a woman and any woman*" (paragraph 23); as Lord Stephens had noted previously (para 11), JB's current care plan imposed restrictions upon him, including 1:1 supervision when out in the community and in particular in the presence of women.

The MCA and the concept of capacity

Lord Stephens gave an overview of the concept of capacity within the MCA, including a commentary upon the principles in s.1. Of note, perhaps, is the fact that he carefully delineated the scope of s.1(4), which is often misunderstood as conferring a right to make unwise decisions. As he identified:

> *Legal capacity depends on the application of sections 2 and 3 of the MCA together with the principles in section 1. It does not depend on the wisdom of the decision. Furthermore, an important purpose of the MCA is to promote autonomy. That purpose aids the interpretation of sections 2 and 3 of the MCA. If P has capacity to make a decision then he or she has the right to make an unwise decision and to suffer the consequences if and when things go wrong. In this way P can learn from mistakes and thus attain a greater degree of independence.*

Lord Stephens then turned to the concept of capacity, identifying how that enshrined in the MCA represents a functional approach, as opposed to the outcome or status approach (see paras 57-62). Following the Court of Appeal in *York City Council v C* [2013] EWCA Civ 478 (sometimes also called *PC v NC*), he identified that section 2(1) – the core determinative provision – requires the court (and hence anyone else, outside court) to address two questions.

First, is the person unable to make the decision for themselves? As he noted:

> *67.* […] *The focus is on the capacity to make a specific decision so that the determination of capacity under Part 1 of the MCA 2005 is decision-specific as the Court of Appeal stated in this case at para 91. The only statutory test is in relation to the ability to decide. In the context of sexual relations, the other vocabulary that has developed around the MCA, of "person-specific", "act-specific", "situation-specific" and "issue-specific", should not be permitted to detract from that statutory test, though it may helpfully be used to identify a particular feature of the matter in respect of which a decision is to be made in an individual case.*
>
> *68. As the assessment of capacity is decision-specific, the court is required to identify the correct formulation of "the matter" in respect of which it must evaluate whether P is unable to make a decision for himself: see York City Council v C at paras 19, 35 and 40.*
>
> *69. The correct formulation of "the matter" then leads to a requirement to identify "the information relevant to the decision" under section 3(1)(a) which includes information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision: see section 3(4).*

This has the important consequence that the relevant information has to be identified within the specific factual matrix of the case. This has some very important consequences in relation to sexual relations. Ordinarily, "*it will ordinarily be formulated in a non-specific way because, in accordance with ordinary human experience, it will involve a forward-looking evaluation directed to the nature of the activity rather than to the identity of the sexual partner*" (paragraph 71). However, Lord Stephens disagreed with the Court of Appeal's determination *In re M (An Adult) (Capacity: Consent to Sexual Relations)* [2014]

EWCA Civ 37 that, largely for reasons of pragmatism, the test could only be looked at on a general specific-basis:

> *71.* […] *Pragmatism does not require that consent to future sexual relations can only be assessed on a general and non-specific basis. Furthermore, such a restriction on the formulation of the matter is contrary to the open-textured nature of section 2(1) MCA. A general and non-specific basis is not the only appropriate formulation in respect of sexual relations as even in that context, "the matter" can be person-specific where it involves, for instance, sexual relations between a couple who have been in a long-standing relationship where one of them develops dementia or sustains a significant traumatic brain injury. It could also be person-specific in the case of sexual relations between two individuals who are mutually attracted to one another but who both have impairments of the functioning of their minds.* (emphasis in original)

If, on the facts of the case, the formulation could properly be described as person-specific, Lord Stephens identified, there were two consequences:

> *72.* […] *then the information relevant to the decision may be different, for instance depending on the characteristics of the other person, see TZ at para 55 (risk of pregnancy resulting from sexual intercourse is not relevant to a decision whether or not to engage in, or consent to, sexual relations with someone of the same sex) or the risks posed to P by an individual who has been convicted of serious sexual offences, see York City Council v C at para 39. Moreover, the practicable steps which must be taken to help P under section 1(3) MCA may be informed by whether "the matter" in relation to sexual relations may be described as person-specific. For instance, it might be possible to help P to understand the response of one potential sexual partner in circumstances where he will remain unable to understand the diverse responses of many hypothetical sexual partners. Furthermore, if the matter can be described as person-specific then the reasonably foreseeable consequences of deciding one way or another (see section 3(4)(a) MCA and para 73 below) may be different. There may, for example, be no reasonably foreseeable consequence of a sexually transmitted disease in a long-standing monogamous relationship where one partner has developed dementia. Finally, the potential for "serious grave consequences" may also differ.*

Lord Stephens emphasised the need to be clear about reasonably foreseeable consequences for two reasons. The first is that this can include consequences for others (for instance, on the evidence before the court, for a person whom JB might sexually assault or rape). The second is that where there are "serious grave consequences," then, as the Code of Practice says (at paragraph 4.19), it is even more important that the person understand the information in question. That having been said, Lord Stephens made clear, there has to be a limit in terms of envisaging reasonably foreseeable consequences, so that:

> *75.* […] "*the notional decision-making process attributed to the protected person with regard to consent to sexual relations should not become divorced from the actual decision-making process carried out in that regard on a daily basis*

> *by persons of full capacity": see In re M (An Adult) (Capacity: Consent to Sexual Relations) [2015] Fam 61, para 80. To require a potentially incapacitous person to be capable of envisaging more consequences than persons of full capacity would derogate from personal autonomy.*

When the relevant information has been identified, it is necessary to test whether the person can (for instance) understand it. In relation to 'using and weighing,' Lord Stephens endorsed the observation of the Court of Appeal in *Re M* that the person's ability "*should not involve a refined analysis of* the sort which does not typically inform the decision … made by a person of full capacity," noting that "[i]*t would also derogate from personal autonomy to require a potentially incapacitous person to undertake a more refined analysis than persons of full capacity*."

If the court concludes that P cannot make the decision, then the second question is whether there is a "*clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain*." Silently putting comprehensively to bed the error in the current iteration of the Code of Practice (which guides people to start with the so-called 'diagnostic' element), Lord Stephens was clear (at paragraph 78) that the two questions in s.2(1) were to be approached in the sequence set out above, i.e. starting with the functional aspect.

The Official Solicitor's challenge

The first limb of the challenge mounted by the Official Solicitor was that the Court of Appeal was incorrect to recast the "matter" as engaging in sexual relations. Lord Stephens had little hesitation in dismissing this ground:

> *90. I agree with the Court of Appeal that formulating "the matter" as engaging in, rather than consenting to, sexual relations better captures the nature of the issues in a case such as this, where JB wishes to initiate relations with others, rather than consent to relations proposed by someone else.* […] *It may be helpful to observe that the terminology of a capacity to decide to "engage in" sexual relations embraces both (i) P's capacity to consent to sexual relations initiated by the other party and (ii) P's capacity to understand that, in relation to sexual relations initiated by P, the other party must be able to consent to sexual relations and must in fact be consenting, and consenting throughout, to the sexual relations.*
>
> *91. I also agree with the Court of Appeal at para 93, with my addition in brackets, that the formulation of engaging in sexual relations "is how the question of capacity with regard to sexual relations (under the MCA) should normally be assessed in most cases".*

The second limb of the challenge was as to the inclusion of the requirement that other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. On JB's behalf it was argued that: (1) this inappropriately extended the requisite information in order to protect the other person or members of the public; (2) that this was not the purpose of the MCA, which was confined to the protection of P, and did not extend to the protection of members of the public; and (3) the protection of the public

was the purpose of the criminal law and that such protection could also be obtained by making a sexual risk order under section 122A of the Sexual Offences Act 2003.

Lord Stephens disagreed:

> *92.* [….] *The information relevant to the decision includes information about the "reasonably foreseeable consequences" of a decision, or of failing to make a decision, which consequences are not limited to the consequences for P: see para 73 above. The consequences for other persons or for members of the public are therefore a part of the information relevant to the decision. Furthermore, I agree with the Court of Appeal, at para 6, that:*
>
> > *"as a public authority, the Court of Protection has an obligation under section 6 of the Human Rights Act 1998 not to act in a way which is incompatible with a right under the European Convention of Human Rights, as set out in Schedule 1 to the Act. Within the court, that obligation usually arises when considering the human rights of P, but it also extends to the rights of others."*
>
> *93. In this way the court as a public authority, in determining what information is relevant to the decision, must include reasonably foreseeable adverse consequences for P and for members of the public. In practice, by doing so, the court under the MCA protects members of the public. As the Court of Appeal observed, at para 98:*
>
> > *"Although the Court of Protection's principal responsibility is towards P, it is part of the wider system of justice which exists to protect society as a whole."*
>
> *Finally, the protection of the public provided by the criminal justice system or by a sexual risk order cannot detract from the protection which is provided in practical terms by including in the information relevant to the decision the reasonably foreseeable adverse consequences for P and for members of the public. For all these reasons I reject the submission that the purpose of the MCA is solely confined to the protection of P.*

The Official Solicitor also argued that including this information impermissibly recast the test as person-specific, contrary to the consistent case-law to the contrary. Lord Stephens rejected this:

> *First, the statutory test is decision-specific: see para 67 above. Second, the issues in this case (but, as I have stressed at paras 71-72 above, the position can be different in other cases) do not relate to sexual relations with any particular person. What is required is a generalised forward-looking evaluation in relation to JB's capacity to have sexual relations with any woman. The inclusion of the consent of the other in the relevant information for the purposes of that evaluation does not introduce the specific characteristics of any individual person into the evaluation, but instead reflects the consensual nature of all*

> *sexual activity. It is not, therefore, "person-specific."*

The Official Solicitor also argued that the concepts in question were: "*too extensive and nebulous for JB or for others with mental impairments to understand. Accordingly,* [Leading Counsel] *argued, JB and others were being set up to fail. The appellant was supported in this submission by Respond's* [a charity providing therapeutic and support services to those with learning disabilities and/or autism] *submission that the Court of Appeal had promulgated "an elevated abstract test" which was likely to give rise to problems in real life situations*." The Official Solicitor relied, in particular, upon the legal complexities of the criminal law relating to consent, but Lord Stephens did not agree, in particular that the person in question would need to be able to understand and apply the different ways in the absence of consent could be proved:

> *95.* […] *However, that is not the sort of refined analysis which typically informs the decision to engage in sexual relations made by a person of full capacity (see para 77 above). A potentially incapacitous person is simply required to understand that the other person must be able to consent and does in fact consent throughout. For my part the only alteration that needs to be made to the summary of the information relevant to the decision to engage in sexual relations, set out by the Court of Appeal (see para 84 above) is to change the words "must have capacity to" in (2) to "must be able to". Subject to that change, I consider that the concepts are not too nebulous or refined, nor do they amount to an elevated abstract test, nor do they require a detailed understanding of the Crown Court Compendium.*

Next, the Official Solicitor argued that to include the information "*imposes a discriminatory cerebral analysis on the potentially incapacitous*," a submission rejected by Lord Stephens:

> *96.* […] *As the Court of Appeal observed, at para 96, "amongst the matters which* ***every person*** *engaging in sexual relations must think about is whether the other person is consenting" (emphasis added). If that is properly viewed as cerebral or as involving a degree of analysis, a decision to engage in sexual relations is necessarily cerebral or analytical to that extent.*

The Official Solicitor then argued that the approach taken by the Court of Appeal created an impermissible difference between the civil and criminal law. Lord Stephens started by identifying (as had Munby J in *Re MM* [2007] EWHC 2003 (Fam)) that there is no necessary requirement for the test for capacity to consent to sexual relations to be the same in the two fields, and that there were already existing differences in relation to the *application* of the test for capacity which may lead to different conclusions in civil and criminal trials, two such differences being the different standard of proof, and the second being that there focus of the criminal law is retrospective focusing on the person's capacity to consent at the time of the alleged offence, whereas a court assessing capacity to engage in sexual relations under the MCA ordinarily needs to make a general, prospective evaluation which is not tied down to a particular time. However, Lord Stephens agreed with previous judicial observations that, all else being equal, it is in principle desirable, though not necessary, that there should be the same test for capacity in both the civil and

criminal law, that there were sound policy reasons to have the two tests aligned, and that that the civil law test for consent cannot impose a less demanding test of capacity than the criminal law test. However, he considered that it remained possible for the civil law to impose a different and more demanding test of capacity:

> *106.* […]. *In that respect, there are countervailing and overriding policy reasons supporting the clarification of the test for capacity under the MCA: namely, the protection of others and the protection of P, see para 92 above. Those policy reasons would amply justify any differences that might arise between the civil and criminal law tests for capacity. As the Court of Appeal stated in this case (at para 97) the fundamental responsibilities of the Court of Protection include the duty to protect P from harm. The protection given by the requirement that P should understand that P should only have sex with someone who is able to consent and gives and maintains consent throughout "protects both participants from serious harm" (see the Court of Appeal in this case at para 106). I agree. On that ground alone I would dismiss the argument that any differences between the civil and criminal law test for capacity which have been or may have been created by the clarification of the test under the MCA, are "impermissible". Accordingly, this argument falls at the first hurdle.*
>
> *107. In addition, while I agree with Munby J that, in general terms, both the criminal law and the civil law serve the same function in this context of protecting the vulnerable from abuse and exploitation, that should not conceal the different purposes of the civil and criminal law and the different ways in which they carry out their functions. The primary purpose of the criminal law is the prosecution of behaviour that is classified as criminal and the punishment of offenders by the state. In civil proceedings under the MCA the courts must balance the promotion of the autonomy of vulnerable persons with their protection from harm, all while, so far as required by general principles of law and the court's obligations as a public authority under the Human Rights Act 1998, having regard to the rights of others. Viewed in this way, the differences between criminal proceedings and civil proceedings under the MCA suggest that it may be permissible to adopt different tests of capacity in the civil and the criminal law.*

Importantly, however, Lord Stephens made clear that the question of whether the clarification of the test of capacity under the MCA by his decision resulted in any differences with the test for capacity in the criminal law is best left to be decided on the facts of individual criminal cases and may turn on the particular criminal offence in question. As he identified at paragraph 108, "[n]*ot only are the potential differences more appropriately left to individual cases, but the restricted way in which this appeal was conducted did not allow all the similarities or differences between the civil and criminal law to be fully explored*". Having done so, he then gave a series of obiter observations about the issue, in particular that:

> *111.* […] *the clarification of the test for capacity under the MCA creates a difference with the criminal law in the context of the offences created by sections 30-33 SOA* [offences in relation to persons with a mental disorder impeding choice]. *That difference is not*

impermissible, however, because it is capable of being identified and accommodated in any criminal trial.

112. Furthermore, and more broadly, in relation to the position of P as a complainant in respect of most other offences under the SOA (such as rape or sexual assault contrary to sections 1 or 3 SOA) the primary issue would relate to P's capacity to "consent to" not to "engage in" sexual relations. These are two different concepts. The capacity to "engage in" sexual relations encompasses both P as the initiator of those relations and P as the person consenting to sexual relations initiated by another. The information relevant to a decision whether to initiate sexual relations includes the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. That is not information relevant to an evaluation of whether P has the capacity to "consent to" sexual relations initiated by another person. As the Court of Appeal stated in this case (at para 93) "The word "consent" implies agreeing to sexual relations proposed by someone else." The capacity to consent to sexual relations for the purposes of the criminal law is concerned with the understanding of the complainant (who I have been referring to as P) about matters which are relevant to their autonomy, not those which are relevant to the autonomy of the alleged perpetrator. I do not consider that the criminal law requires that a complainant understands that their assailant must have the capacity to consent and in fact consents before the complainant can be considered to have capacity. I do not discern any difference in this regard between the civil and criminal law.

[…]

114. [Turning to the position where P is an accused, rather than complainant, and rejecting a submission that the Court of Appeal's approach required more of a P than an accused under the SOA 2003, who would be not guilty of certain offence if they 'reasonably believed' that the other person was consenting] *I consider this to be a distinction without a difference. An accused may have a reasonable belief that the complainant was consenting, but the accused in that situation will understand that the complainant was able to and must consent throughout and the accused has to use or weigh that information as part of the process of forming a reasonable belief. If P is able to understand the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity, and if P is able to use or weigh that information as part of the process of making the decision as to whether to engage in sexual relations, then P is in the same position as an accused in the criminal context. I am therefore not persuaded that there are any unnecessary differences in this regard as between the civil or criminal law (which in any event need not be identical).*

115. [if P is accused of an offence under ss.30-33 SOA 2003], *P's knowledge of the complainant being unable to refuse includes the reasonably foreseeable consequences of what is being done but it does not include a requirement that the complainant should have any understanding of the fact that the alleged perpetrator (that is, the other person) must have the ability to consent to the sexual activity and must in fact*

> *consent before and throughout the sexual activity. Again, I do not discern any difference in this regard between the civil and criminal law.*

Lord Stephens gave short shrift to the arguments based upon Article 8 ECHR, identifying that it was not clear whether the Official Solicitor on JB's behalf was "*advancing an argument that JB's article 8 ECHR rights have been breached (and, if so, by whom) or an argument as to how the MCA should be construed compatibly with article 8. Neither argument was advanced at first instance or in the Court of Appeal, so the appellant requires permission to bring them*" (paragraph 117). He did not consider that there was any merit in the compatibility argument and that permission should be refused:

> *118.* […] *I have explained, information relevant to the decision under the MCA takes into account not only the interests of P but also the interests of others and of the public. Furthermore, section 1(3) MCA provides that 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 which ensures that the interference with article 8, if it is engaged, is proportionate. I consider that the operation of the MCA is compatible with article 8.*

As to the question of whether there was a breach of Article 8 ECHR on the facts, Lord Stephens observed that there was considerable force in the respondent's contention that there had been no factual findings which could ground such an assertion, nor did the court have the complete factual picture, for instance as to the steps taken to support him to gain capacity to make decisions in relation to sexual relations (in circumstances where the Court of Appeal had only made an *interim* declaration that there was reason to believe that he lacked capacity to decide whether to engage in sexual relations); and (2) the steps being taken to secure his ability to develop safe relationships with women, including the ongoing education being provided by a clinical psychologist:

> *119.* […] *But in any event, any interference would be in accordance with the MCA, and therefore in accordance with the law. Furthermore, a legitimate aim of any interference with JB's article 8 rights, if that article is engaged, would be the protection of the health, both mental and physical, of both JB and of others. Other legitimate aims would be the protection of the rights and freedom of others as well as the prevention of disorder or crime. There have been no factual findings in relation to the proportionality of any interference in pursuit of those legitimate aims. For all these reasons I would refuse permission to raise this argument.*

Lord Stephens gave equally short shrift to the argument based upon Article 12 CRPD that a separate standard or test for capacity was being created for people with disabilities, and that this would be incompatible with Article 12(2):

> *There is no separate standard or test for persons with disabilities. The fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity applies to everyone in society. This ground of appeal therefore fails at the first hurdle, but in any event the contention that this court should examine whether the United Kingdom has violated provisions of an*

> *unincorporated international treaty (which is the effect of the appellant's contention at (b)) has recently been considered, and rejected, by this court in R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26; [2021] 3 WLR 428, paras 77-96.*

Disposal of the appeal

At paragraph 121, Lord Stephens reiterated that:

> *The evaluation of JB's capacity to make a decision for himself is in relation to "the matter" of his "engaging in" sexual relations. Information relevant to that decision includes the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity. Under section 3(1)(a) MCA JB should be able to understand that information and under section 3(1)(c) MCA JB he should be able to use or to weigh it as part of the decision-making process.*

Applying the test in section 2(1) MCA on the available information, Lord Stephens considered that JB was unable to make a decision for himself in relation to that matter because of an autistic impairment of his mind. Importantly, however, Lord Stephens agreed with the Court of Appeal that, "*because this information was not fully considered or analysed during the hearings before the judge, it would not be appropriate to make a final declaration that JB does not have capacity to make a decision to engage in sexual relations. The right course is therefore to remit the matter to the judge for reconsideration in the light of this judgment*."

Comment[1]

A recording of the webinar by members of 39 Essex Chambers held on 25 November discussing the case can be found here.

It is very important to preface this comment by making clear, as did Lord Stephens, that this is a situation where JB's individual case is to be remitted to the first instance judge; this comment is therefore **not** about his own circumstances.

The Supreme Court has previously considered the purpose of the best interests test, how that test is a choice between available options, what deprivation of liberty means for both adults and adolescents with impaired decision-making capacity, and when cases involving medical treatment have to come to court. Given its foundational importance, it is perhaps surprising that it took 14 years for the question of the proper approach to take to decision-making capacity to reach the Supreme Court. It is perhaps not entirely surprising, though, that it has done so in the context of sexual relations, because this has proven one of the most difficult and contentious areas of the law in this area. That the case involved a person who actively wishes to initiate sexual activity means – importantly – that the Supreme Court was faced with the issue in almost its starkest form for two reasons.

The first is that, unlike many areas where capacity is in play, those involved are not

[1] Note, this comment is written by Alex. His fellow authors – and the other members of the Court of Protection team – are not necessarily to be held to agree with every word!

considering whether a person can consent to something being proposed by others (often professionals). Rather, the question is whether and on what basis the law should respond where the person is an active agent – who may by seeking to exercise their agency harm others. Put another way, and as faced head-on by the Supreme Court, securing one person's autonomy may come at a cost for others.

The second reason is asking questions about capacity in this context makes profoundly clear that there is a normative element. The courts have been clear for many years that identification of information is important in terms of its consequences – for instance, that it is necessary to focus upon the salient information, because requiring "too much" information will make it more likely that the person in question will not be able to process it. This decision highlights that the identification of information is important for another reason – it represents choices as to the information that should be considered relevant. In JB's case, that gave rise to the important question of what sexual consent should mean for everyone. In this regard, it is perhaps striking that the Supreme Court was entirely content, and indeed perceived it as a fundamental part of its role, metaphorically to roll up its sleeves and descend into the arena of identifying the information relevant to decision-making in relation to sex, when only a couple of months previously the Court of Appeal had firmly chastised the Divisional Court in the *Tavistock* case for having done exactly the same thing in relation to decision-making by children in respect of puberty-blockers.

The court is perhaps also notable for the swift dismissal of arguments relating to the CRPD, following the line previously taken by the current constitution of the Supreme Court. However, the case will (or should) give rise to reflection by those concerned with the CRPD for at least two reasons:

1. The implications of Lord Stephens' conclusion that requiring the same information to be understood by all is non-discriminatory.

2. In relation to the interaction between the MCA (and other forms of capacity legislation) and the criminal law. Whilst there has been much debate about the validity of the concept of mental capacity in the civil context (a debate before, but which clearly did not attract the Supreme Court), the workings out of the 'hard-line' CRPD approach in the criminal sphere are still much less developed. This case would provide a good test to bring home sometimes abstract arguments about these issues.

At a practical level, the case has the following implications:

1. Forms which are based upon the 'two-stage' test contained in the Code of Practice should be reviewed, so that they direct the assessor to consider the person's functional ability first (see further our guidance note).

2. Determinations made in respect of those with impaired decision-making ability in the sexual context should be revisited to identify whether they remain valid. Particular attention will be required in any situation where: (1) decision has been made on a

"generalised forward-looking evaluation" basis that the person lacks capacity to make decisions about engaging in sexual relations; but (2) there is proper reason to consider that in the specific context of the person's life a different approach needs to be taken.

3. Although contact was not specifically addressed by the Supreme Court, it is likely that the approach now taken may mean there is a closer alignment between contact and sex. In other words, it may well be possible for there to be a greater alignment between the approach to a person's ability to make decisions about sexual relations with a specific identified person, and their ability to make decisions about contact with that person. That having been said, there may well still be cases where the *TZ* approach is still required: i.e. that, on a 'generalised forward-looking basis' the person has capacity to make decisions about engaging in sexual relations, but they lack capacity to make decisions about contact, such that best interests decisions need to be undertaken to enable a proper calibration of risk (as this case makes clear, that risk being be to or by the person).

Learning to learn – capacity and the awareness of choice

Re ZK (No.2) [2021] EWCOP 61 (HHJ Burrows)

Assessing capacity – contact – residence

Summary

This case is the sequel to one reported upon earlier here, and contains some important observations in relation to assessment of capacity and the revisiting of best interests decisions. In summary, the case concerned a man, ZK, who had as a child, developed Landau-Kleffner Syndrome (also known as acquired aphasia with epilepsy). ZK was not deaf but not unable to understand aural language. Until September 2020, he lived with his mother. In 2017, concerns had been expressed about whether he was to be married, leading to a Forced Marriage Protection Order application. This led to proceedings before the Court of Protection, during which it became clear that, despite ZK's profound communication difficulties, it was possible for him to make progress in language development. By September 2020, ZK was consistently expressing a wish to leave the home he shared with his mother. He expressed the wish to leave quickly. He did not wish his mother or family to have notice of his move. The Local Authority conducted a best interests meeting on 11 September 2020, having assessed ZK as lacking the capacity to make the decision. The decision was to move him out. In January 2021, the Court of Protection had to decide whether his best interests were served by him remaining where he was and then moving to another Placement 2, enjoying a consistent package of care from the local authority that enabled him to continue to benefit from immersion in British sign-language (BSL), or whether he should return to his mother's home, where the consistency and availability of such a package and support was far from certain. At that point, HHJ Burrows decided that it was vital for his best interests that he remained at the placement in which he was residing, with a view to moving to another, better placement within a short period of time.

At this second hearing, listed as a pre-trial review/early final hearing, there was agreement

as to most aspects of ZK's decision-making capacity, except for the issue of contact. HHJ Burrows was also asked on behalf of ZK's mother and some of his family to consider re-opening the issue of residence and to schedule another final hearing to decide whether ZK's best interests would be served by him moving home.

Capacity

In relation to ZK's capacity, HHJ Burrows made two observations of particular interest.

In relation to residence, ZK was given two options to consider: placement 2 and his family home (in line with *LBX v K & Others* [2013] EWHC 3230 (Fam)). As HHJ Burrows identified at paragraph 19:

> *He was able to understand the characteristics of each place, and that he would have access to his family at Placement 2, as well as the support workers using BSL. ZK has no apparent memory difficulties, although he may appear to have when he has not properly understood something. The "most complex aspect" of the assessment is "weighing up". Dr O'Rourke says: "We attempted 'weighing up' as described above and ZK demonstrated he could do this to an extent. In particular, he was 'weighing' the fact that his family would be upset if he went to Placement 2 and [MD][1] would be 'upset' if he goes to the family home. He was also able to indicate a greater level of stress in the family home". This led her to conclude that ZK "almost has capacity in this area" but that his cognitive and developmental limitations mean that he is unable to make a decision for himself where he is "in the middle". Her use of the term "almost has the capacity" was naturally picked up by the parties and resulted in questions. The expert recognises in her answers that the MCA test is binary. However, and significantly, she identifies what she considers the real issue to be for ZK in the following answer to the question whether she is mistaking lack of capacity with the effects of undue influence (emphasis added):*
>
> > *I am not suggesting that he is currently subject to undue influence or pressure, although he is aware of being in the middle of a dispute about where he should live. My comments reflect that, in order to make a decision, **first one needs to be aware that one is in a position to make a decision**. [ZK] has only recently begun to make very small decisions and assert his needs and is used to others telling him what to do. He does not experience himself as having agency and my concern is any 'decision' made by him would be a response to what he perceives others to want, rather than a consideration of what he himself would prefer.*

As HHJ Burrows identified at paragraph 20:

> *It seems to me this is the crux of the matter. ZK is having to learn that he can choose, as well as how to choose. If and when he develops that "skill", he will almost certainly have capacity to make the decision.*

That led HHJ Burrows onto his third comment, relating to the issue in dispute – contact. The family and (it appears) the local authority sought to persuade him to make a declaration that ZK lacked

capacity to make decisions around contact with those outside his family, but had capacity in relation to those within his family. HHJ Burrows noted that the case of A Local Authority in Yorkshire v SF [2020] EWCOP 15, Mr Justice Cobb declared that SF possessed capacity to decide on contact with her husband but not with others. However, HHJ Burrows identified that there was, in that case, "*a very firm evidential basis for distinguishing between decision making capacity with 'her husband' and 'other people' on the basis of the evidence and circumstances in that case*" (paragraph 26). However, on the fact of ZK's case, HHJ Burrows could see "*no such justification in this case having considered all the expert's evidence. ZK is unable to assess risk in relation to anyone. He is also unable to appreciate he can make a decision as to contact with anyone. I see no logical basis for the expert to express her conclusion as she did.*" HHJ Burrows asked himself whether he should adjourn, direct further questions of the expert and (if necessary) for her to attend for questioning at a further hearing? However, at paragraph 27, he decided that the answer was "no":

> *Although the evidence given by experts, particularly those who are single jointly instructed experts carry much weight, the decision on the question of capacity rests with the Court. In my judgment, the expert's conclusion on this one issue does not follow from its evidential premises. It is unnecessary and would be disproportionate to direct further questions or to list a further hearing. I am also conscious that my finding on the issue of capacity for contact will have no real adverse consequences for family members or ZK since he is already able to have contact with members of his family as he wishes.*

HHJ Burrows therefore declared that ZK lacked capacity to make decisions on each of the issues before the court, and (at paragraph 29), that:

> *It is in his best interests for him to continue to receive instruction and education, particularly in respect of sexual relations and relationships (including marriage/civil partnership). I say this because unlike the other areas of the decision making, whether the decision can be made for ZK, and he can enjoy the consequences of that decision, the same does not apply to sex and marriage. These issues should be kept under close scrutiny.*

Revisiting the earlier decision

HHJ Burrows accepted that working relationships had improved, and that it was entirely legitimate for the family to focus on the failure of Placement 2 to materialise in the way anticipated at the time of the earlier decision. However, he made clear (at paragraph 35) that:

> *in my judgment in January my focus was on how immersion in BSL had enabled ZK to become more autonomous and happier. I had hoped that the damage caused by conflict in the past would be mended, and the family and the carers would learn to work together. It seems that has happened. It seems ZK has benefitted from it happening. At para [33] of my judgment I was concerned that if an order was made that ZK should return to his home the prospects of maintaining any package of care that may be available would be reduced by the "suspicion and hostility" towards those providing it. However, and importantly, I was concerned about the apparent inability of ZK's family to understand*

> *what has happened and is happening to him. That is the product of a long history during which the prospects of ZK ever becoming autonomous have been written off by professionals.*

HHJ Burrows had reached the conclusion that the proceedings should come to an end:

> […] *This litigation began in 2017, when there was concern that a forced marriage was imminent. The Court of Protection proceedings have been ongoing since February 2018- not far off four years. It is impossible to know what levels of uncertainty and insecurity litigation has had on everyone in this case: on ZK's family, his carers, the professionals involved and, of course, on ZK himself, but it is likely to be considerable. I am also mindful of the effect it has on the deployment of resources- the local authority's, the family's, the carers' and the Court's. I am reminded of the words of Mr Justice Peter Jackson (as he then was) in Cases A & B (Court of Protection: Delay and Costs) [2014] EWCOP 48 at [12]:*
>
> > *"Just as the meter in a taxi keeps running even when not much is happening, so there is a direct correlation between delay and expense. As noted above, the great majority of the cost of these cases fell on the state. Public money is in short supply, not least in the area of legal aid, and must be focussed on where it is most needed: there are currently cases in the Family Court that cannot be fairly tried for lack of paid legal representation. Likewise, Court of Protection cases like these are of real importance and undoubtedly need proper public funding, but they are almost all capable of being decided quickly and efficiently, as the Rules require."*
>
> *I will also quote another part of that judgment that is equally relevant here (at [14]):*
>
> > *"Another common driver of delay and expense is the search for the ideal solution, leading to decent but imperfect outcomes being rejected. People with mental capacity do not expect perfect solutions in life, and the requirement in Section 1(5) of the Mental Capacity Act 2005 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." calls for a sensible decision, not the pursuit of perfection."*
>
> *37. It seems to me that these comments by Peter Jackson, J. must also be read with those of Poole, J* [in *An NHS Trust v AF and another* [2020] EWCOP 55]*, when I come to consider whether to re-open a clear determination on best interests, and thereby prolong litigation.*
>
> *38. My conclusion is that I have already determined best interests on the basis of evidence that remains essentially the same, save that Placement 2 has not yet materialised, but the plan still is that it will, and where the family and ZK's carers are getting on better than they were (which was always part of the hope behind that judgment). In the context of this litigation, its prolonged nature, and the cost it must have had on all those concerned, it is not appropriate,*

> *necessary or proportionate for me to prolong matters further.*

HHJ Burrows therefore dismissed the application to reconsider, as well as the local authority's application to adduce further evidence that ZK's family were trying to exert pressure on him to move back to his family home, making clear that, although he had read the material, he did not take it into account in any way in reaching his decision.

Comment

This judgment is of very considerable interest for a number of reasons, not least because, given the trajectory identified in the first judgment, it might have appeared that ZK would be found to have capacity to make the relevant decisions by the time of the second. It appears that the trajectory continues to be upwards, and hence HHJ Burrows' observations about the possible future direction of travel.

The other point of particular interest is in relation to the importance identified by the expert of the importance of a person having to learn that they can choose – an issue which very comes up very often, but has rarely been captured with such clarity as was done by the expert, Dr O'Rourke.

The case, finally, is of interest for containing something, again, which happens not infrequently, but is not often recorded: i.e. the court saying "enough is enough," and bringing a halt to proceedings. It serves as a useful reminder of the observations made by Peter Jackson J (as he then was) in the *A & B* cases about – in essence – the perfect sometimes being the enemy of the good, and the application of those principles (and those from *AF*) to a not uncommon scenario.

cases about – in essence – the perfect sometimes being the enemy of the good, and the application of those principles (and those from *AF*) to a not uncommon scenario.

Empowerment, safety and illicit substances

MM v A City Council [2021] EWCOP 62 (HHJ Burrows)

Assessing capacity – best interests –residence

Summary

The case related to a young man, 'Michael' or 'MM.' Michael had diagnoses of mild learning disabilities, dissocial personality disorder and had ongoing problems with using illicit substances. He regularly engaged in challenging or violent behaviour, which had led to the breakdown of several care placements for him. He had also been detained under the Mental Health Act following wounds to his neck, stating he was going to take his own life.

Michael had been living in a residential care placement where he was subject to a 10pm curfew and prohibited from using drugs or alcohol on-site. Subject to a standard authorisation, by March 2021 Michael was regularly absenting himself, often not returning for several days and often found by the police who did not consider that they had powers to return him to the placement by force.

Michael objected to the restrictions, and was regularly threatening staff and absconding. The local authority proposed a care plan with a greater level of restrictions at a new placement (ultimately, the new placement withdrew its offer to provide care for him due to his perceived level of risk to other residents). Michael's RPR brought

proceedings under s.21A.

The capacity assessment concluded that Michael had a mild learning disability, but his mental state was 'complicated by the long history of polysubstance misuse' (para 26). It found that he presented consistently with having Dissocial Personality Disorder, and a 'a history of substance misuse which is consistent with a Dependency Syndrome' (para 27). Dr O'Donovan concluded that Michael was not able to make decisions as to his residence and care, his property and affairs, and the consumption of illicit drugs and alcohol. Declarations were made that he lacked capacity to manage his property and finances and "make decisions to use and consume illicit substances" (para 29). She did not reach a conclusion regarding his capacity on contact or use of the internet and social media due to his non-engagement. However, as no orders were sought for these matters, the issue was not pursued further.

The court noted the independent social worker found that Michael was 'troubled by and resentful' of attempts to protect him, and as he saw it, 'control his life.' Michael did not agree that he was vulnerable, despite evidence that he likely had been financially exploited by others. The ISW concluded Michael was highly likely to object to living in a more restricted environment. A move to a locked facility would likely be unsuccessful, and potentially lead to his arrest or detention under the Mental Health Act. There would be some benefits in the severance of 'antisocial links' that Michael had developed, but that severance would itself harm Michael's autonomy. The court considered that:

23. …the crux of the ISW's opinion is contained in the next quoted passage:

> *"It is unlikely that any of the available options I could present to the court are likely to keep [MM] "safe". [MM] has both responded poorly to restrictions placed upon his liberty and benefitted from the security provided by robust wraparound care. The nature of his needs indicate that he is likely to, at times, attach undue weight to options which immediately meet his needs, but may place himself at risk. However, whilst he opposes the current restrictions, he appears to find them tolerable at present and has evidenced greater ability to comply with these, resulting in a more settled mental state and positive engagement with his staff team at [Placement 1].*
>
> *……[MM] has a longstanding pattern of struggling to assess risks in the context of the choices he makes. Whilst I note his poor engagement with health professionals previously involved in his care, he did engage well with me during my assessment and note that he has had episodic periods of engagement with various professionals, including SALT. I note that he will not discuss topics he is uncomfortable with, and he will refuse to engage with others when he identifies their attitudes or approaches as paternalistic. However, in interview, he accepted challenge and was able to discuss these proceedings, including the restrictions placed upon him."*

The ISW recommended that Michael remain at his current placement with access to 24-hour support and a curfew, but no effective deprivation of his liberty. The proceedings ultimately concluded by consent. The standard authorisation was necessary and proportionate to secure his safety, insofar as it could be secured:

> *11. The final Order in this case gives Michael a considerable amount of freedom, which he could use in a way that causes harm to himself. Both the Council and those acting for Michael in these proceedings, and DF in particular, have decided that removing risk with increased restrictions would not be in Michael's best interests. He would feel completely crushed. His life would have little interest. He would become frustrated, angry and resentful. He would become impossible to manage, unless even more restrictive measures were to be introduced…*
>
> *13. On the other hand, Michael will be left with the ability to go out and associate with potentially exploitative people, as well as use drugs and alcohol. He will therefore be exposed to seemingly unnecessary and avoidable risks. In my judgment, whether a risk is unnecessary or avoidable depends on the context in which it is to be taken.*

Comment

As the judge said, this case has "no legal novelty" and is a "fairly common sort of case to come before the Court of Protection". As such, it illustrates the common challenge in this field of balancing empowerment and safety. It is noteworthy that the police were sceptical about using MCA ss.5-6 to return him to his placement (for which LPS could provide more legal reassurance).

We note that Michael was declared to lack capacity "to make decisions to use and consume illicit substances". This is in the context of a potential high-risk offender, on probation for stealing cars, whose convictions included possession of cannabis. Like many other cases, it does raise the more general question as to the impact incapacity declarations can/ought to have on P's future criminal conduct. If, for example, Michael was arrested for cannabis possession (a necessary precursor to using or consuming), how would/should the prosecuting authorities approach the matter, given this declaration of incapacity?

Using/consuming is not a criminal offence, but possession is. One can possess without using/consuming, but not vice versa. It seems likely therefore that it would not prevent a prosecution for possession, and is more likely to be relevant to mitigation. In those circumstances, what is this declaration intended to achieve? A best interests decision as to whether P should use and consume illicit substances seems unlikely. So perhaps, like alcohol cases, the issue is more to do with the reasonably foreseeable consequences of using/consuming illicit substances on other matters, such as residence and care/support. For example, in *London Borough of Tower Hamlets v PB* [2020] EWCOP 34, Hayden J evaluated "*whether PB understands the impact on his residence and care arrangements of his continuing to drink, potentially to excess*". Perhaps by focusing on the care/treatment for which a defence under MCA s.5 is required, this will help

to identify the "matter" in respect of which a declaration is sought.

Places like home?

For some extremely thought-provoking reading over the holiday period (even if, for many, we are aware that the 'holiday' may be notional), we strongly recommend this blog post by Dr Lucy Series reflecting upon a question that had pre-occupied in writing her forthcoming book, *Deprivation of Liberty in the Shadows of the Institution*. The blog post digs into what makes a place a 'home,' and how does that differ from an 'institution.'

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Conferences

Members of the Court of Protection team are regularly presenting at webinars arranged both by Chambers and by others.

Alex is also doing a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in January. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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