Neutral Citation Number: [2019] EWCOP27

Case No: COP 13321617

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2019

Before :

THE HONOURABLE MR JUSTICE HAYDEN

- -

Between :

London Borough of Tower Hamlets	**Applicant**
- and -	
NB	**1st Respondent**
- and -	
AU	**2nd Respondent**

- -
- -

Mr Michael Walsh (instructed by **London Borough of Tower Hamlets**) for the **Applicant**
Mr Andrew Bagchi QC, Ms Anna Lavelle (**Mackintosh Law** instructed by **Official Solicitor**) for the **2nd Respondent**

Hearing date: 7th May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

Mr Justice Hayden :

1. This case first came before me on 11th December 2018. The parties on that occasion were inviting me to make an order which purported to be *'by consent'*. I was not prepared to endorse the order and adjourned the case for full argument, listed to be heard on the 7th May 2019. Following that hearing I delivered an interim judgment, reported **[2019] EWCOP 17**. The Court and the parties became aware that the Court of Appeal was considering issues relating to capacity to consent to sexual relations in another case and all agreed that it was appropriate to await that judgment before determining this application.

2. On 11th June 2019 the Court of Appeal delivered its judgment in **B v A Local Authority [2019] EWCA Civ 913.** A few days later Mr Bagchi QC and Ms Lavelle, instructed on behalf of the Official Solicitor, requested an opportunity to submit further written submissions addressing the framework surrounding capacity to consent. These submissions were received on 28th June 2019. The Local Authority also filed supplemental submissions on 8th July 2019.

3. Something of the background to these proceedings is set out in my interim judgment but it requires to be repeated and expanded here. The proceedings concern NB. She came to live in the UK in 1985 and married her husband in 1992. The marriage was contracted abroad. When NB first came to live in the United Kingdom she did so without her husband (AU). There was a period in which the couple were separated whilst AU made an application for permission to enter the UK, but in May 1996 NB travelled abroad to return to live with her husband. Following a series of applications to the Home Office throughout 1997 the couple came, eventually, to live together here in London. They lived with NB's parents. A daughter was born a year later (1998).

4. Mr Bagchi has taken me through some of the records in this case which illuminate the evolution of the couple's relationship. Though some of this is now historical, it identifies NB's early attachment to and affection for her husband which continues to resonate in the more recent evidence. In a letter to the Immigration Appeals department, as long ago as March 1996, a clinical psychologist, Ms Suzanne Wilson, stated:

> *'I believe NB's experience of AU's absence is stressful due to her attachment and affection towards him which has developed during their periods together in [Country C]. In her daily life NB consistently demonstrates her intense attachment to her husband. She often says his name with affection. She repeatedly asks where he is and pleads that he should be with her. [NB] appears to understand the lasting nature of marriage, including that of marriage as a committed sexual bond between a man and a woman. It is my view that [NB] would be very unlikely to have such an affectionate attachment to her husband if this were not on a mutual basis and I therefore believe that her attachment can be taken as evidence of AU's positive attention and caring towards her when they are together'.*

5. NB suffers from what is referred to as 'general global learning difficulty' and 'an impairment' in relation to her facility to communicate with others. She has been, at least historically, assisted by using the Makaton sign language. Her sentences are limited.

6. In consequence of what appears to have been a number of remarks made by NB to her dentist, in October 2014, a safeguarding enquiry was instigated. There is no record of what it was that she said to the dentist, or at least none which has been presented to this court, but it is clear that it had something to do with the quality of her relationship with her husband and it was such as to give rise to a concern that she might be vulnerable to sexual exploitation. Very quickly, a programme was put in place focusing on sex education, relationships, contraception, sexually transmitted diseases as well as more general issues relating to NB's health.

7. Following this work, a further assessment was undertaken by a clinical psychologist to consider NB's range of understanding on those key issues. The conclusion of the assessment was that NB was unable to demonstrate an appreciation of why people got married, separated or divorced. It was concluded that she lacked the mental capacity to marry. In respect of her capacity to consent to sexual relations it was considered that she lacked an understanding of the association between sexual intercourse and pregnancy. Additionally, she lacked the ability to appreciate the link between sexual intercourse and sexually transmitted disease. Inevitably, it followed, that she could not link various forms of contraception to the concept of averting pregnancy. She did not have the capacity to retain information in relation to these issues. It was also considered that she was unable to communicate the concept of refusal of sex to her husband. That opinion appears to have been re-evaluated as further information came to light. These different facets of the test reflect the development of the applicable case law. See: **X City Council v MB, NM and MAB [2006] 2 FLR 968; CH v A Metropolitan Council [2017] EWCOP 12; Re RS, (Forced Marriage Protection Order) [2015] EWHC 3534 (Fam) (03 December 2015).**

8. I am bound to say that I do not consider that the papers filed in this case provide a clear picture of what has actually been happening in this family. Perhaps, given the incredibly sensitive nature of the issues involved, this is inevitable. There are however, a number of key factors which are, in my judgement, important to isolate:

> i) NB's husband (AU) has, on his own account, abstained from sexual relations with his wife following the conclusions of the assessment in 2017. In a statement prepared by Laura Baker, dated 31st August 2018, I am told the couple share a bedroom but sleep in single beds. NB uses betel nut which I am told is a stimulant and frequently causes her to wake through the night. AU's approach is to pacify his wife and support her. Inevitably his disrupted sleep pattern has led to tiredness. Though he expressed a need to take a break and there was some discussion about a package of support, AU did not take it up. Ms Baker illustrated examples of NB exhibiting challenging behaviours when she is being encouraged to do something she does not wish to. From this it is now extrapolated that *'it is unlikely that NB is being forced in to a sexual relationship with her husband';*

ii) The advice given to AU appears to have been that any sexual activity with his wife would expose him to the risk of prosecution for serious sexual offences, including rape;

iii) AU told the social services that initially NB would seek to initiate sexual intercourse by leading him to the bedroom and laying naked on the bed. AU reported that she rarely does this now;

iv) Ms Baker includes the following in her statement *'I have also spoken to NB's sisters… and met with her mother about the issues of capacity and sexual relationships… all family members feel that NB does have capacity to engage in sexual relationships and… would not be forced into something she did not wish to do.'* Ms Baker expresses her own conclusions in these terms:

> *'This has been a rather complex matter which in my view is very finely balanced. It has been a rather difficult task in trying to reach a balance between NB's lack of capacity and ensuring not to breach her human rights more than is necessary in order to safeguard her…*
>
> *From a human rights perspective we have sought to ensure that any action taken by the local authority is both proportionate and necessary. In doing so we have considered all the options and sought to educate NB around marriage and sexual intercourse. We have also explored the least restrictive options; hence why NB has continued to reside with her husband and daughter… given that they have been married for twenty-five years and NB has a very clear attachment to her husband'*

9. The Local Authority's application was now made as long ago as 5th October 2018. The Official Solicitor was invited to act as NB's litigation friend on the same day. On 12th October 2018, HHJ Hilder allocated the proceedings to a Tier 3 judge, that is to say a judge of the High Court. Legal aid was granted to NB on 9th November 2018. On 11th December 2018 AU was joined as a party and a wide-ranging assessment of NB's mental capacity, across a number of spheres of decision making, was undertaken by Dr Lisa Rippon, consultant psychiatrist. I highlight the following passages from her report dated, 6th March 2019:

> *'……capacity to consent to sex remains act-specific and requires an understanding and awareness of i) the mechanics of the act; ii) that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections; iii) that sex between a man and a woman may result in the woman becoming pregnant.*

10. To summarise, Dr Rippon identified that NB lacked capacity in the following areas of functioning:

    i. to conduct this litigation;

ii. to decide where to live;

iii. to make decisions in relation to the care she receives;

iv. to make decisions in relation to contact;

v. to contract a marriage; and

vi. to consent to sexual relations.

11. In respect of NB's capacity to consent to sexual relations, Dr Rippon expressed the following view:

> *'At interview, NB was able to demonstrate an extremely basic understanding of the physical act of sexual intercourse, in that she knew that the penis goes into the vagina. However, I could find no evidence that she understood that sexual intercourse could result in pregnancy or in sexually transmitted infections. This was despite me giving NB a very simple explanation of this area. She was able to tell me that she did not like sex.*
>
> *Given the current case law, it is therefore my opinion that NB lacks capacity to consent to sexual relationships and once again I believe that this is a direct result of her learning disability'.*

12. On the question as to whether the living arrangements should be changed in view of her conclusions, Dr Rippon stated:

> *'I believe that, should NB not be able to reside in her family home with her husband and daughter, there would be a significant risk to her psychological well-being. There is evidence that she has a definite attachment and affection towards her husband and, should they be separated, I believe this would have a significant impact on NB's presentation. As noted in my previous answer, the risk would be that her mood may deteriorate and her behaviour become more challenging".*

13. As I observed in the interim judgment, this couple found themselves in an invidious situation, in which their private and sexual life was being scrutinised by a variety of professionals. For entirely understandable reasons, AU was, in my assessment, both frightened and embarrassed when he came to court. When this case came before me on 29th March 2019 there had been an agreement between AU, Mr Walsh and Mr Bagchi that the case would proceed by way of AU giving an undertaking to the court not to sleep with his wife, in particular and, for the avoidance of any ambiguity, AU was being invited to give a formal undertaking not to have sexual intercourse with his wife.

14. It is, of course, the case that the breach of a formal undertaking to the Court is punishable in contempt proceedings and may, if appropriate, result in a period of imprisonment. My concern was that if these were the proposed answers to the challenges presented by this situation it may be that the wrong questions were being asked.

15. Given that the hearing on 29th March 2019 was listed only for directions it was necessary to adjourn for full argument in the way I have indicated above. I encouraged the Official Solicitor to use his best endeavours to enable AU to obtain legal representation. I am very clear that strenuous efforts were made but AU had become highly anxious and did not attend when requested or make himself available. A short time after the directions hearing, the case suddenly ignited a great deal of media coverage, notwithstanding that no argument had been advanced and no judgment delivered. In my earlier judgment I made the following observations:

> *'Unfortunately, the case attracted a great deal of media coverage, this notwithstanding that no argument had been heard and no Judgment delivered. A great deal of the comment was sententious and, in some instances, irresponsible. It is considered, by the Official Solicitor and the applicant Local Authority, that the impact of that publicity frightened AU very considerably, leading him to believe that he was likely to be sent to prison. He has left the party's flat and disengaged with these proceedings. It seems that he visited a solicitor, local to where he lived, who may have given him poor advice.'*

16. This is a very troubling feature of this case. It raises questions concerning the protection of the vulnerable in media coverage, which will require to be addressed by the ad-hoc Court of Protection Rules Committee. It has exacerbated the difficulties in an already challenging situation.

The Legal Framework

17. The development of the law in this area really begins prior to the introduction of the Mental Capacity Act 2005 (MCA 2005) with the judgment of Munby J (as he then was) in ***X City Council v MB, NM and MAB*** **[2006] 2 FLR 968.** Munby J said this, at paragraphs 74, 84 and 86:

> *'[74] In my judgment, this decision of the Supreme Court of Victoria stands as an essentially correct summary and statement of the common law rule. The question is whether the woman (or man) lacks the capacity to understand the nature and character of the act. Crucially, the question is whether she (or he) lacks the capacity to understand the sexual nature of the act. Her knowledge and understanding need not be complete or sophisticated. It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent…'*

> *[84] I agree with Ms Ball, and essentially for the reasons she gives. Generally speaking, capacity to marry must include the capacity to consent to sexual relations. And the test of capacity to consent to sexual relations must for this purpose be the same in its essentials as that required by the criminal law. Therefore, for present purposes the question comes to this. Does the person have sufficient knowledge and understanding of the nature and character – the sexual nature and character - of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse (and, where relevant, to communicate their choice to their spouse)? …*
>
> *[86] As we have seen, amongst the questions on which Dr Land was asked to advise in this case was whether MAB has the capacity to consent to sexual relations. In responding to that question Dr Land treated the model set out in* Re MB (Medical Treatment) *[1997] 2 FLR 426 as providing what he called 'an appropriate framework'. I do not in any way criticise him for doing so, because his letter of instructions contained no guidance for him on the point. Applying the approach in* Re MB*, Dr Land asked himself what information might be relevant to making a decision about embarking on sexual activity. His answer was:*
>
> *'Such information might include basic knowledge about the risks of pregnancy, sexually transmitted diseases; some understanding of what is involved in sexual activity; and an understanding of the nature of the relationship they have with the other party.'*

18. There are many features of this judgment which, it seems to me, benefit from being revisited. Munby J talks of capacity to marry *'generally speaking',* as including the capacity to consent to sexual relations. He also observes that the capacity to consent to sex *'must for this purpose'* be the same, '*in its essentials'*, as that required by the criminal law. In a characteristically thorough exegesis of the caselaw, Munby J traces the criteria for assessment of capacity to consent to sex, to the model set out in **Re: MB (Medical Treatment) [1997] 2 FLR 426,** which by some alchemy broadly equates to the present orthodoxy. The entire tenor of the language of this judgment strikes me as emphasising the flexibility of the applicable tests, consciously eschewing a rigidity of approach. In this it strikes me as holding fast to the central tenet of the Mental Capacity Act 2005, which requires the focus of assessment to be centred upon an evaluation of the particular individual and a specific decision. The Code of Practice issued by the Lord Chancellor and to which judges must have regard (see s. 42(5)(a) of the Act) makes it clear (at para. 4.4) that the assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general: as it is often expressed in the Court of Protection, it is *'decision-specific'* (see ***PC & NC v City of York Council* [2013] EWCA Civ 478** at paras. 31-35).

19. The approach in **X City Council v MB (supra)** strikes me as approaching the issue of consent in a way which is structured but not constrictive. It was revisited by Munby J in **Local Authority X v MM [2007] EWHC 2003 (Fam).** There he made the following observations (at paras 86 and 87):

> *'The question of capacity to marry has never been considered by reference to a person's ability to understand or evaluate the characteristics of some particular spouse or intended spouse. In my judgment, the same goes, and for much the same reasons, in relation to capacity to consent to sexual relations. The question is issue specific, both in the general sense and, as I have already pointed out, in the sense that capacity has to be assessed in relation to the particular kind of sexual activity in question. But capacity to consent to sexual relations is, in my judgment, a question directed to the nature of the activity rather than to the identity of the sexual partner.*
>
> *A woman either has capacity, for example, to consent to 'normal' penetrative vaginal intercourse, or she does not. It is difficult to see how it can sensibly be said that she has the capacity to consent to a particular sexual act with Y whilst at the same time lacking capacity to consent to precisely the same sexual act with Z. So, capacity to sexual intercourse depends upon a person having sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it, the capacity to decide whether to give or withhold consent to sexual intercourse. It does not depend upon an understanding of the consequences of sexual intercourse with a particular person. Put shortly, capacity to consent to sexual relations is issue specific; it is not person (partner) specific.'*

20. Munby J also expressed himself in clear terms regarding the interrelationship of the civil and criminal law:

> *'88. I add only this. Mr Sachdeva correctly pointed out that there is no necessary requirement that the civil (family) law and criminal law should adopt the same test for capacity to consent to sexual relations, though plainly the civil law's test of consent cannot derogate from the protections afforded to the vulnerable by the criminal law. So, it is at least possible to contemplate the civil law imposing a different and more demanding test of capacity. But, as Mr Sachdeva says, it adds clarity if the civil law and the criminal law do share the same test.*
>
> *89. Moreover, and of equal if not greater importance, there are sound reasons of policy why the civil law and the criminal law should in this respect be the same, why the law should, as it were, speak with one voice and why there should not be any inconsistency*

> *of approach as between the criminal law and the civil law. In this context both the criminal law and the civil law serve the same important function: to protect the vulnerable from abuse and exploitation (see further below). Viewed from this perspective, X either has capacity to consent to sexual intercourse or she does not. It cannot depend upon the forensic context in which the question arises, for otherwise, it might be thought, the law would be brought into disrepute.'*

21. The language of this later judgment is, to my mind, rather more prescriptive. The approach was followed by Mostyn J in **D Borough Council v AB [2011] EWHC 101 [COP]; [2011] 2 FLR 72,** where the following observations were made:

> *'[22] At the end, this test is really very simple, and is set at a relatively low level: 'does she have sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent?' The simplicity and low level of this test is set consistently with the equivalently low test for capacity to marry.'*

22. Having articulated *'a really very simple test'*, Mostyn J applied criteria which he observed had *'more specificity'* to, what he described as the *'simple test propounded by Munby J'*. The factors he took in to account, were those identified by the expert witness in the case before him. Having considered the expert evidence and heard submissions by counsel, Mostyn J concluded thus:

> *'[42] I, therefore, conclude that the capacity to consent to sex remains act-specific and requires an understanding and awareness of:*
>
> - *the mechanics of the act;*
> - *that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections;*
> - *that sex between a man and a woman may result in the woman becoming pregnant.'*

23. Against this backdrop arose a decision of the House of Lords in **Regina v Cooper [2009] UKHL 42.** The speech of Baroness Hale has been the subject of much scrutiny and particularly:

> *'27. My Lords, it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place. Autonomy entails the freedom and the capacity to make a choice of whether or not to do so. This is entirely consistent with the respect for autonomy in matters of private life which is guaranteed by article 8 of the European Convention on Human Rights. The object of the 2003 Act was to get*

> *away from the previous "status" based approach which assumed that all "defectives" lacked capacity, and thus denied them the possibility of making autonomous choices, while failing to protect those whose mental disorder deprived them of autonomy in other ways.'*

24. Though not binding, ***Regina v Cooper*** had a real impact on the judges of the Court of Protection. In ***D County Council v LS*** **[2010] EWHC 1544 (Fam), [2010] COPLR 331** Roderic Wood J expressed the view that, in principle, there should be a significant degree of conformity in the tests relevant to establishing capacity in both the civil and criminal courts. He suggested (at para. 40) that it was necessary to discriminate between those matters which go directly to a person's capacity to make a choice and those matters that could only be relevant to a *'best interests'* decision. He continued:

> *'What is necessary is that the particular sexual partner … impedes or undermines or has the effect of impeding or undermining the mental functioning of a person when that person makes their decisions, so as to render them incapacitous.'*

25. In **A Local Authority v H [2012] EWHC 49 COP, [2012] 1FCR 590** Hedley J also considered the interrelationship of the criminal and civil law. He said at (para 22):

> *'[22] These issues, moreover, resonate both in criminal and in civil law. It is of course highly desirable that there should be no unnecessary inconsistency between them. However, capacity arises in different contexts. In the criminal law it arises most commonly in respect of a single incident and a particular person where the need to distinguish between capacity and consent may have no significance on the facts. In a case such as the present, however, capacity has to be decided in isolation from any specific circumstances of sexual activity as the purpose of the capacity enquiry is to justify the prevention of any such circumstances arising. There is of course no absolute distinction between capacity in civil and capacity in criminal law, it is merely that they fall to be considered in very different contexts and often, perhaps, for different purposes.'*

26. Later, at paragraph 26, he concluded:

> *'The focus of the criminal law must inevitably be both act and person and situation sensitive; the essential protective jurisdiction of this court, however, has to be effective to work on a wider canvas. It is in those circumstances that I find myself closer to the views expressed by Munby J and Mostyn J …'*

27. The omnipresent danger in the Court of Protection is that of emphasising the obligation to protect the incapacitous, whilst losing sight of the fundamental principle that the promotion of autonomous decision making is itself a facet of protection. In

this sphere i.e., capacity to consent to sexual relations, this presents as a tension between the potential for exploitation of the vulnerable on the one hand and P's right to a sexual life on the other.

28. These are difficult issues involving intensely personal interactions. The lexicon of the law, perhaps even that of ordinary discourse, presents a challenge when seeking to distil the essence of the concepts in focus. With hesitation and some diffidence, it seems to me to be important to recognise and acknowledge, that in this interpersonal context, relationships are driven as much by instinct and emotion as by rational choice. Indeed, it is the former rather than the latter which invariably prevail. This fundamental aspect of our humanity requires to be identified and appreciated as common to all, including those who suffer some impairment of mind. To fail to do so would be to lose sight of the primary objective of the MCA. It would require a disregard of at least two decades of jurisprudence emphasising P's autonomy. Moreover, it would seriously risk discriminating against vulnerable adults with learning disabilities and other cognitive challenges.

29. It strikes me as artificial, at best, to extract both instinct and emotion from an evaluation of consent to sex, they are intrinsic to the act itself. In many ways, of course, instinct and emotion are the antithesis of reason. However, whilst they may cloud decision making, perhaps even to the point of eclipsing any calculation of risk, they are nonetheless central to sexual impulse. To establish an inflexible criterion to what may properly constitute 'consent' risks imposing a rationality which is entirely artificial.

30. It also needs to be emphasised that the law does not identify the criterion which are being considered here. The MCA 2005, in some ways like the Children Act 1989, is a distillation of principles which require to be applied in the context of a careful balance, one in which proportionality of intervention will always be an indivisible feature. Much of the applicable criteria concerning assessment of capacity, across a broad range of decisions, finds its way into this process via the conduit of expert evidence. This is all profoundly helpful to the practitioners and the professionals but the danger is that conceptual silos are created which fail to appreciate the individual and the infinite variety of people's lives.

31. The Court of Appeal analysed many of these issues in **IM v LM and others [2014] EWCA Civ 37.** Mr Bagchi has, helpfully, summarised what he identifies as the central principles emerging from that judgment. I agree with him that the first obligation of the Court is to apply the test pursuant to Section 3 (1) of the MCA 2005. Sir Brian Leveson identifies this imperative in these terms (at para 73):

> *'For the avoidance of doubt, every single issue of capacity which falls to be determined under Part 1 of the Act must be evaluated by applying s 3(1) in full and considering each of the four elements of the decision-making process that are set out at (a) to (d) in that sub-section. A person is unable to make a decision for himself if he is unable to undertake one or more of these four functions:*
>
> *(a) To understand the information relevant to the decision,*
>
> *(b)To retain that information,*

(c) To use or weigh that information as part of the process of making the decision, or

(d) To communicate his decision (whether by talking, using sign language or any other means).'

32. Having highlighted the statutory criteria, Sir Brian Leveson makes the following observation:

'The extent to which, on the facts of any individual case, there is a need either for a sophisticated, or for a more straightforward evaluation of any of these four elements will naturally vary from case to case and from topic to topic.'

33. The emphasis here, which focuses on the individual and his or her particular circumstances, captures the prevailing character and tone of the MCA 2005 itself. I highlight it, not least because, it seems to me, that it is a passage which has, too often, been overlooked. Mr Bagchi's summary of the judgment continues thus:

- *'The correct approach was to ask whether P has the capacity to consent to sexual relations in general not sexual relations with a particular partner, in a particular manner or place or at a particular time; (§74-77);*
- *The information typically regarded by persons of full capacity to consent to sexual relations is relatively limited (§82);*
- *A narrow construction of 'reasonably foreseeable consequences' as propounded by Bodey J in* ***Re A (Capacity: Refusal of Contraception)*** *[2011] Fam 61 was to be preferred (§80);*
- *The judge's approach in the court below had been correct when he highlighted the following factors (§ 83 and §18):-*
- *[P] understands the rudiments of the sexual act;*
- *P has a basic understanding of the issues of contraception;*
- *P has a basic understanding of sexually transmitted diseases; and*
- *P had sufficient understanding of the fact that sexual relations may lead to pregnancy.'*

34. It is important at this point to consider Section 27 MCA 2005:

'(1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person

(a)consenting to marriage or a civil partnership,

(b)consenting to have sexual relations'

The unambiguous effect of this is to strip the Court of any power to sanction a sexual relationship between P and another individual, in all circumstances, where it is established that capacity to consent to a sexual relationship does not exist. This is self-evidently necessary for a variety of ethical, moral and legal reasons.

35. I turn to the recent judgment of the Court of Appeal, **B v A Local Authority [2019] EWCA Civ 913.** The tension or dichotomy that I have identified at para 26 above is emphasised in similar, though not identical, terms (at para 35):

> *'Cases, like the present, which concern whether or not a person has the mental capacity to make the decision which the person would like to make involve two broad principles of social policy which, depending on the facts, may not always be easy to reconcile. On the one hand, there is a recognition of the right of every individual to dignity and self-determination and, on the other hand, there is a need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation: comp. A.M.V v Finland (23.3.2017) ECrtHR Application No.53251/13.'*

36. There was no dispute in the appeal that the test for capacity to consent to sexual relationships is general and issue specific, rather than person or event specific. The thrust of the appeal appears to have concentrated on what was said to have been Cobb J's failure to follow *'the steps required in the statutory mandated decision-making processes, relating to residence'* and the relevance properly to be attributed to the various factors he took into account addressing questions of incapacity, concerning consent to sexual relations and internet use.

37. The Court of Appeal was referred to my interim judgment in this case and made the following remarks (at para 49) which I set out in full:

> *'So far as Cobb J's guideline is concerned, it is not in dispute on this appeal that the test for capacity to consent to sexual relationships is general and issue specific, rather than person or event specific. The application of that test in other cases is, however, a live matter as it is currently under consideration by Hayden J in London Borough of Tower Hamlets v NB [2019] EWCOP 17. In that case the judge observed in his interim judgment (at [12]) that there was only one individual with whom it was really contemplated that NB was likely to have a sexual relationship, her husband of 27 years; and it therefore seemed to the judge entirely artificial to be assessing her capacity in general terms when the reality was entirely specific. He added (at [13]) that it might be that NB's lack of understanding of sexually transmitted disease and pregnancy might not serve to vitiate her consent to have sex with her husband. There was no reason to suggest that her husband had had sexual relations outside the marriage and there was no history of sexually transmitted disease. Hayden J has reserved his judgment on the issue. Another example would be a post-menopausal woman, for whom the risk of pregnancy is irrelevant. In IM (at [[75]- [79] the Court of Appeal held that, by contrast with the criminal law where the focus, in the context of*

> *sexual offences, will always be upon a particular specific past event, in the context of mental capacity to enter into sexual relations the test is general and issue specific. The argument before Hayden J in London Borough of Tower Hamlets v NB was presumably that the conclusion in IM does not preclude the tailoring of relevant information to accommodate the individual characteristics of the person being assessed. We heard no argument on these points and do not need to decide them on the present appeals since it was not contended by the OS that anything in Cobb J's guideline was inapplicable because of B's personal characteristics. The criticism of the OS is that parts (iii), (iv) and (v) in their present form are inapposite in all cases.'*

38. Whilst the Court of Appeal assumed that there was *'argument'* before me to the effect that IM does not *'preclude the tailoring of relevant information to accommodate the individual characteristics of the person being assessed'*, the fact is that there was no such argument. The Local Authority advanced the same arguments as the Official Solicitor and, of course, AU was neither present nor represented for the reasons I have already set out. Accordingly, the central question was raised by the Court, as analysed at paragraph 13 above.

39. Addressing the passage in B v A Local Authority (supra) set out above Mr Bagchi, in his supplemental submissions states as follows:

> *'The passages emphasised may be construed as leaving open the possibility that the components of the test might be tailored to the individual case; specifically, to P's "individual characteristics". In other words, if P's individual circumstances exclude the risk of pregnancy or of contracting a STI, it is arguably logical to say that those risks are not reasonably foreseeable consequences of a decision by P to consent to sex; and thus that P should not be required to show that she is able to understand, retain and use or weigh them.'*

40. Mr Bagchi then makes the following point which also requires to be set out:

> *'The Official Solicitor accepts the logic of this position in principle, recognising the imperative to maximise the capacity of the individual where possible and not to "wrap them in cotton wool" when the risks are assessed as low.'*

41. It is important to identify that depriving an individual of a sexual life in circumstances where they may be able to consent to it with a particular partner, is not *'wrapping them up in cotton wool'*. Rather, it is depriving them of a fundamental human right. Additionally, I repeat, AU's Article 8 rights are also engaged in this context. He too has a right to a sexual life where there is true consent and mutual desire.

42. One of the central difficulties faced by practitioners, both in the court setting and in the wider community, is that the relevant tests for capacity are framed by psychologists, psychiatrists etc and a practice has developed of applying these tests as if they had the force of statute. It is necessary to emphasise that when an application is made to a judge, it is the judge who evaluates the broad canvas of evidence to determine the question of capacity.

43. In simple terms, in these circumstances, it is judges not experts who decide these issues. Judges have the enormous advantage of hearing a wide range of evidence about P from a diverse field of witnesses, often including family members. As I have sought to illustrate in my analysis of the law above: ***X City Council v MB, NM and MAB*** **[2006] 2 FLR 968.** (per Munby J); **IM v LM and others [2014] EWCA Civ 37.** (per Sir Brian Leveson) and now, most recently, **B v A Local Authority [2019] EWCA Civ 913** (per Sir Terence Etherton MR), the Courts have repeatedly emphasised that the tests are to be applied in a way which focus upon P's individual characteristics and circumstances. Whilst it is difficult to contemplate many heterosexual relationships where a failure to understand a risk of pregnancy or sexual disease (consequent upon sexual intercourse) will permit a conclusion that P has capacity, it should not be discounted automatically. This is to elevate the expert guidance beyond its legitimate remit.

44. Moreover, expert evidence gains its force and strength when challenged and robustly put to the assay. Theories grow, develop and, as the Courts have seen in recent decades, are sometimes debunked. Attributing to expert evidence the status of legislative authority serves also to deprive it of its own intellectual energy and inevitably, in due course, some of its forensic utility.

45. As I recorded in my interim judgment, Mr Bagchi conceded that if a *'person specific'* test was applied, NB may very well have been assessed as capacitous to consent to sexual relations with her husband. It struck me as odd, to say the least, that the Official Solicitor, who is appointed to represent NB, was advancing a case which was potentially restrictive of her autonomy. When I raised this with Mr Bagchi he told me that, in the view of the Official Solicitor, any departure from the *'issue specific'* test and certainly any substitution of it by *'a person or event specific test'* would create a general administrative burden of such dimension as to become effectively unworkable. Even if that were correct, it could hardly be an appropriate basis for abandoning an argument that NB was entitled to advance. This is simply inconsistent with the role of the Official Solicitor.

46. Having now seen the Court of Appeal's judgment, the Official Solicitor has amended his position. Mr Bagchi submits as follows:

> *'The Official Solicitor submits that a tailored approach to the application of each element of the test to any individual case is logical and permissible and reflects the reality of relationships. It is noteworthy that in considering the components of the test on the question of B's capacity to use of social media is concerned King LJ (sic) said this at [44]:*
>
> *"So far as concerns the appropriateness of the list, as in the case of the list specified by Cobb J in relation to a decision to use social*

> *media, we see no principled problem with the list provided* ***that it is treated and applied as no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case.****"*
>
> *This statement plainly suggests a pragmatic and flexible approach to the indicia of capacity in that domain.'*

47. This said, it remains the Official Solicitor's position that whilst it may be *'theoretically possible to imagine cases'* where there is no need to address understanding of pregnancy or sexually transmitted disease, it creates difficulties both in *'practice and in principle'*. Mr Bagchi seeks to illustrate this proposition in a number of ways:

> *'Focussing on the practical implications of 'tailoring' the components of the test to the individual case, it is right to observe that very few assessments are made within proceedings in the Court of Protection. Most are made in the community by social and healthcare professionals. There is accordingly a public interest in the test being relatively simple and easy to apply. If the court were to suggest that in relation to certain individuals there would be no need to assess an understanding of the risk of pregnancy or of STIs (that is, components (ii) (iv) or (v) in the test articulated by Cobb J (and endorsed by the Court of Appeal in B), it is incumbent on the court to specify how those undertaking the assessment are to approach that preliminary question.'*

48. Whilst I accept some of the force of this and recognise that there is a public interest in the test being relatively simple and therefore easier to apply, this must be balanced against the countervailing public interest in the test being both fair and most likely to facilitate the rights of the incapacitous. Mr Bagchi suggests that the Court should identify a category of individuals for whom pregnancy and sexually transmitted disease will not require assessment. Indeed, he goes further and asserts that it is *'incumbent on the Court to specify how those undertaking the assessment are to approach that preliminary question.'* This, in my judgment, is only likely to overburden the test and to introduce unnecessary technicalities. It is also, with respect to Mr Bagchi, difficult to reconcile with his own acceptance of the *'tailored'* approach which he characterises as *'pragmatic and flexible'*. At risk of labouring the point further, I am emphasising that the tests require the incorporation of P's circumstances and characteristics. Whilst the test can rightly be characterised as *'issue specific'*, in the sense that the key criteria will inevitably be objective, there will, on occasions, be a subjective or person specific context to its application. This entirely accords with the approach pursued by Sir Terence Etherton MR in B v A Local Authority (supra).

49. The terminology which bedevils this area of law obscures rather than illuminates many of the issues. To my mind, it risks becoming an obstacle to clear thinking. Sir Brian Leveson also was plainly, instinctively, uncomfortable with it. He made the following observations:

> *51. McFarlane LJ was also clear about the importance of the statutory language. He said (at para. 35 PC v City of York Council [2013] EWCA Civ 478):*
>
> *"The determination of capacity under MCA 2005, Part 1 is decision-specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person-specific. But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the statute to be embellished. ... The MCA 2005 itself makes a distinction between some decisions (set out in s 27) which as a category are exempt from the court's welfare jurisdiction once the relevant incapacity is established (for example consent to marriage, sexual relations or divorce) and other decisions (set out in s 17) which are intended, for example, to relate to a 'specified person' or specific medical treatments."*
>
> 52. ***We endorse the language of McFarlane LJ and express concern that the terminology that has developed in this field ('person-specific', 'act-specific', 'situation-specific' and 'issue-specific') although superficially attractive, tends to disguise the broad base of the statutory test which, when applied to the question of capacity in the wide range of areas that is covered by the Act, will inevitably give rise to different considerations.*** *It is important to emphasise that s. 3(1)(c) of the Act refers to the ability to use or weigh information as part of the process of making the decision. In some circumstances, having understood and retained relevant information, an ability to use it will be what is critical; in others, it will be necessary to be able to weigh competing* considerations. (my emphasis)

50. In seeking to persuade the Court to identify, prospectively, a category of people who may be exempt from aspects of the test, Mr Bagchi is, fundamentally, seeking to preserve what I have referred to as *'conceptual silos'*. It is not without irony that the objective informing this thinking is said to be the pursuit of *'simplicity'*. It is, in fact, the antithesis of simplicity and inimical to the flexibility which I identify as necessary.

51. The applicable criteria in evaluating capacity to consent require to be rooted within the clear framework of MCA 2005 ss 1 to 3. The individual tests are not binding and are to be regarded as guidance *'to be expanded or contracted'* to the facts of the particular case. They are to be construed purposively, both promoting P's autonomy and protecting her vulnerability.

52. Mr Bagchi expands on the difficulties presented by the *'tailored'* approach. Again, he contends that these are problems based '*both in practice and in principle'*. I am left with the clear impression that whilst the Official Solicitor accepts the judgment of the

Court of Appeal in B v A Local Authority (as he must), it is rather a luke-warm embrace:

> *'It can be readily seen that where there is strong evidence that P would only engage in a same-sex relationship or where P, a female, is of an age beyond any ability to conceive a child, it may not be necessary to assess an understanding of the risks of pregnancy. It is however submitted that even this is not without complications: it is possible, for example, to imagine a case where a woman indisputably beyond child-bearing age has a (delusional) belief that she could still become pregnant, and is motivated by that belief to engage in a sexual relationship. It is doubtful that a woman in those circumstances could give capacitous consent to sex. It may, therefore, be necessary in the appropriate case to establish whether P accurately understands that pregnancy is <u>not</u>, in fact, a reasonably foreseeable consequence; and thus for that still to form a part of the assessment of P's capacity.'*

53. Mr Bagchi is there contemplating the facts of **NHS Foundation Trust v QZ [2017] EWCOP 11**, which concerned a woman in her late sixties with chronic, treatment resistant paranoid schizophrenia whose most pervasive delusion was that she was a young Roman Catholic virgin. Those facts do not strike me as sufficiently common to illustrate the difficulties either in practice or principle for which Mr Bagchi contends.

54. That there is no need to evaluate an understanding of pregnancy when assessing consent to sexual relations in same sex relationships or with women who are infertile or post-menopausal strikes me as redundant of any contrary argument. Nor, with respect to what has been advanced in this case, can it ever be right to assess capacity on a wholly artificial premise which can have no bearing at all on P's individual decision taking. It is inconsistent with the philosophy of the MCA 2005. Further, it is entirely irreconcilable with the Act's defining principle in Sec. 1 (2) … *'a person must be assumed to have capacity unless it is established that he lacks capacity'*

55. Engaging, properly, with the actual circumstances confronting NB, Mr Bagchi submits as follows:

> *'Where however (perhaps as in the instant case) P is involved in an apparently monogamous relationship, can it always be said that the risks of P contracting an STI are so remote that it becomes unnecessary to assess understanding under limbs (iv) and (v)? The difficulty stems from the fact that even people in apparently happy and apparently monogamous relationships can and do have sexual encounters with others and are not always prone to tell the truth about it. In theory, this is as true of P as P's partner. The material questions are likely to include:-*
>
> i) *will it ever be justified for the person assessing mental capacity to exclude limbs (iv) and (v)?*
>
> ii) *if so, in what circumstances will it be justified to conclude that the risks of future encounters with others (by P or P's partner)*

> *are sufficiently remote to exclude assessment under limbs (iii) and (iv)?'*

56. It is facile to seek to exclude P in some absolute way from future harm. Like the Family Court, the Court of Protection frequently evaluates risk. It may do so only on the basis of known facts. Thus, a monogamous marriage of some thirty years duration, where there is no history of sexually transmitted disease, is probably a secure base from which to predict that this is a very low risk for the future. It is in this context that Mr Bagchi's absolutist approach runs the risk of *'dressing an incapacitous person in forensic cotton wool'*, to use Hedley J's striking phrase in **A NHS Trust v P [2013] EWAC 50 (COP)**. It is not the objective of the MCA to pamper or to nursemaid the incapacitous, rather it is to provide the fullest experience of life and with all its vicissitudes. This must be kept in focus when identifying the appropriate criteria for assessing capacity, it is not to be regarded as applicable only to a consideration of best interests.

57. The Local Authority has also changed its position following the Court of Appeal's judgment. It mirrors the Official Solicitor's approach, with, what seems to me to be an equally tepid response. In his supplemental submissions Mr Walsh states:

> *'....the Local Authority agrees with the Official Solicitor that the legal test to determine capacity in any domain is theoretically capable of adaptation to the facts of the particular case.'*

58. Later in his document Mr Walsh submits:

> *'However, the Local Authority also avers that attempting to tailor the circumstances for individual Ps is likely to prove impractical in the overwhelming majority of cases of capacity to consent to sexual relations, and is likely to prove impracticable to implement, as a person-specific approach invariably introduces an often-fluctuating factor – namely P's intended partner(s).*

59. This is expanded as follows:

> *Whilst P may often be assessed as neither possessing, nor being likely to ever gain, capacity to consent to sexual relations when a general test is applied, P's characteristics / situation, will include the intended sexual partner, who may well be more labile in temperament or circumstances and likely to require frequent re-assessment (in terms of the risks presented), if adequate safeguarding is to exist.*
>
> *Hence, were certain criteria to be excluded from the relevant information, P and their partner would need careful monitoring to ensure risks have not arisen that require reassessment including the previously excluded criteria.*
>
> *The domain of sexual relations is also more likely to require consideration of a number of third parties / partners over P's lifetime, either consecutively or concurrently, and would*

> *significantly increase the number of assessments required, which by their very nature can constitute an intrusive examination of a sensitive area of any individual's life.'*

60. It is important not to conflate an approach, which tailors the applicable criteria of assessment to a particular individual and his circumstances, with a *'person specific'* test. The two are fundamentally different. In the passages above I consider Mr Walsh falls in to that trap. What I am emphasising here is the application of *'the Act specific test'* (to use the favoured argot), deployed in a way which promotes P's opportunity to achieve capacity. This, as I have laboured to highlight, is nothing less than a statutory imperative. It cannot be compromised.

61. In IM v LM and others (supra) Sir Brian Leveson addresses the danger in assuming that the concepts of consent underpinning the criminal law are transferable to those contemplated here:

> '76. *Baroness Hale is plainly right that: 'One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place' [emphasis added]. The focus of the criminal law, in the context of sexual offences, will always be upon a particular specific past event with any issue relating to consent being evaluated in retrospect with respect to that singular event. But the fact that a person either does or does not consent to sexual activity with a particular person at a fixed point in time, or does or does not have capacity to give such consent, does not mean that it is impossible, or legally impermissible, for a court assessing capacity to make a general evaluation which is not tied down to a particular partner, time and place*.
>
> *77. Going further, we accept the submission made to us to the effect that it would be totally unworkable for a local authority or the Court of Protection to conduct an assessment every time an individual over whom there was doubt about his or her capacity to consent to sexual relations showed signs of immediate interest in experiencing a sexual encounter with another person. On a pragmatic basis, if for no other reason, capacity to consent to future sexual relations can only be assessed on a general and non-specific basis.'*

62. The Criminal Courts and the Court of Protection are plainly addressing entirely different issues, engaging distinct and separate principles of social policy and personal autonomy. In the context of the criminal law the test to be applied is a retrospective assessment of whether consent was truly given. In the Court of Protection, the assessment is prospective, contemplating assessment of capacity to consent with both specific individuals and generally.

63. I have read the concluding passages to Mr Walsh's supplemental submissions very carefully. They require to be set out:

> *'Ultimately, the Local Authority agrees with the Court of Appeal's observation that the two broad principles of social policy, of recognizing P's right to dignity and self-determination, and protecting P and safeguarding her interests as a vulnerable person, may not always be easy to reconcile. It is averred this is unfortunately such a case.*
>
> *Whilst it is desirable to avoid interference in such an intimate sphere of human activity as the bedroom, that interference unfortunately cannot be achieved at the level hoped for in the case of NB. As adopting a person-specific approach (had limb (iii) been satisfied), would fail to safeguard NB, it is respectfully submitted that the level of interference resulting from an issue-specific approach, does appear to be the necessary price to ensure NB has a regime of effective safeguarding.'*

64. Again, I consider Mr Walsh is conflating an *'act specific'* test which nonetheless accommodates NB and her individual circumstances, with a *'person specific'* test. The focus of submissions has now been honed and refined, following the Court of Appeal's decision. To my mind, this properly identifies a more nuanced approach which is entirely consistent with the existing case law.

65. I profoundly disagree, in any event, with Mr Walsh's submission that, on the available information, NB's assumed capacity to consent to a sexual relationship with her husband has been rebutted. On the contrary, the preponderant evidence suggests that she is capacitous. This was foreshadowed in Mr Bagchi's earlier submissions, referred at para 44 above (though I recognise that they were not structured around the test as now identified). The Local Authority may wish to consider a reassessment of NB's capacity in the light of this judgment. This will, of course, depend on whether the marriage survives.

66. The Court of Protection deals with human beings who, for a whole variety of reasons, have lost or may have lost capacity. This may be temporary, permanent, fluctuating or limited to a constrained sphere of decision taking. A declaration of incapacity whether tightly circumscribed or expansive in its scope, should not impose sameness or uniformity. The personality and circumstances of the incapacitous are as rich, varied and complex as those of anybody else. All this requires to be taken in to account when evaluating capacity in every sphere of decision taking. As practitioners and indeed as judges we must be vigilant to ensure that the applicable tests do not become a tyranny of sameness, in circumstances where they are capable of being applied in a manner that may properly be tailored to the individual's situation. To do otherwise would, for the reasons I have set out, lose sight of the key principles of the MCA 2005.