Neutral Citation Number: [2021] EWCOP 28

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2021

Before:

MRS JUSTICE KNOWLES

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Between:

A Local Authority	**Applicant**
- and –	
A Mother	
And	
A Father	
and	
DY	**Respondents**
(by her litigation friend, the Official Solicitor)	

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Mr Foster for the local authority
Mr Mant for DY
The other Respondents were neither present nor represented

Hearing dates: 3 February and 23 April 2021

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Approved Judgment

I direct that 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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This judgment was delivered following remote hearings conducted on a video conferencing platform. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the Respondents and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court

Mrs Justice Knowles:

1. The application concerns a young woman who turned 18 in March 2021. I shall refer to her as DY. DY has been diagnosed with two chromosomal duplicities, fetal alcohol spectrum disorder, and a moderate learning disability. Additionally, an independent expert report prepared during these proceedings by Dr Camden Smith concluded that DY had developmental trauma disorder or complex post-traumatic stress disorder, both of which are disorders of the mind or brain. DY is represented in the proceedings by the Official Solicitor as her litigation friend. The applicant is the local authority ("the local authority") which had responsibility for her as a looked after child since 2012 and now has ongoing responsibility for her adult care services. Both her parents are respondents to the proceedings but neither has taken part nor been represented.

2. These proceedings commenced as an application dated 17 July 2020 by the local authority for authorisation to deprive DY of her liberty under the inherent jurisdiction of the High Court. The proceedings were transferred to the Court of Protection on 23 July 2020 and eventually allocated to me because DY's capacity to consent to sexual relations was in issue. In September 2020 I made a variety of interim declarations and approved a proposal made by the Official Solicitor that Dr Camden Smith should carry out an assessment of DY's capacity in various domains. A roundtable meeting took place on 12 January 2021 and, given that the Official Solicitor accepted some but not all the conclusions of Dr Camden Smith's report, it was agreed that the matter should be listed for hearing before me to determine the disputed matters.

3. Consideration of the written evidence made plain that the diagnostic test under the Mental Capacity Act 2005 ("MCA 2005") was met. Dr Camden Smith's conclusions that DY lacked the capacity to conduct the proceedings and to make decisions about care, contact, social media use and her finances were not challenged. Additionally, there was no challenge to Dr Camden Smith's conclusion that DY had the capacity to decide between residence options which were capable of meeting her assessed needs. The matter in dispute related to DY's capacity to decide to engage in sexual relations.

4. At the hearing on 3 February 2021, the local authority was of the view that, when unsettled or distressed, DY may be unable to make a clear and rational decision in relation to sexual relations but, when settled or in a familiar situation or surroundings, then DY was able to make a capacitous decision. The Official Solicitor submitted that DY had the capacity to decide to engage in sexual relations contrary to the report of Dr Camden Smith. It was submitted that Dr Camden Smith may have set the bar too high in her analysis of DY's understanding of the distinction between consenting to sexual relations within and outside a relationship.

5. I heard oral evidence from Dr Camden Smith and from Miss YZ (DY's social worker) and read an extensive bundle of evidence. At the conclusion of the evidence on 3 February 2021, there was some confusion about the local authority's position in that it sought a declaration that DY lacked the capacity to make decisions as to sexual relations in circumstances when she was unsettled or distressed or, alternatively and without notice to the Official Solicitor of the same, a declaration in identical or similar terms pursuant to the inherent jurisdiction. I adjourned the hearing and required the local authority to set out in clear and unambiguous terms its written submissions as to capacity on this important issue with provision for the Official

Solicitor to respond. I heard both parties in argument on 23 April 2021 and indicated that I would reserve my judgment for a short period.

6. Prior to the February 2021 hearing, I met with DY in the presence of her legal representative and her social worker. DY did not attend the hearing on 3 February 2021 but did attend the hearing on 23 April 2021. I was very pleased that she was able to attend. She listened to the submissions and to my questions and told me that she had found the experience interesting.

Background Facts

7. As I indicated earlier, DY has a diagnosis of two chromosomal duplicities, fetal alcohol syndrome disorder, and a moderate learning disability. Her full-scale IQ has been assessed with a score of 53. When assessed by child and adolescent mental health services in July 2020, DY was considered to be at medium-high risk of child sexual exploitation.

8. Whilst in the care of her parents, DY was at risk of neglect and physical chastisement and was said to have sexualised behaviour. In September 2011, DY moved to foster carers following the making of an interim care order and, in May 2012, a final care order was made to the local authority. Shortly after being placed in local authority foster care, DY made an allegation of rape which allegedly occurred while she was in the care of her parents. She also made other allegations about their care and about sexual abuse by those with whom the parents associated. A police investigation ensued, and an individual was charged.

9. During her time in foster care, DY also made a variety of allegations about the care given to her by her carers. Notwithstanding these allegations, DY lived with these same foster carers until January 2019. The placement broke down following a further allegation made by DY.

10. Alongside the concerns about her placement, DY used her mobile phone in 2017 to send graphic messages of a sexual nature. The police were informed and a child sexual exploitation risk assessment was completed. Once more in 2018, DY was reported to be sending messages of a sexual nature at school. It is fair to say that the local authority has had concerns about DY’s sexually inappropriate behaviour both at school and in her foster home since about 2016.

11. In July 2020, DY’s placement with her carer broke down and she returned briefly to live with her father before moving to a residential placement. That placement appears to have been responsible for settling her behaviour and she began attending college. She also formed a boyfriend/girlfriend relationship with a young man called AB. By April 2021 DY had moved to a supported living placement with the aim of working on independence skills and making safe new friendships and social relationships. I record that DY has been compliant with her care plan and cooperative with professionals working with her on her transition from children’s services to adult services.

12. DY is presently in a relationship with the young man called AB. He does not have learning difficulties. DY speaks to him daily and her contact with him is supported by staff.

Capacity to Decide to Engage in Sexual Relations: The Current Law

13. I have taken into account the principles set out in sections 1-4 MCA 2005 which are applicable in considering/determining capacity and best interests in the Court of Protection. A person must be assumed to have capacity unless it is established that s/he lacks capacity: section 1(2) MCA 2005. The burden of proof therefore lies on the party asserting that a person does not have capacity. The standard of proof is the balance of probabilities: section 2(4) MCA 2005. I have also reminded myself against imposing too high a test of capacity, as to do so would run the risk of discriminating against persons suffering from mental disability and thereby deprive them of autonomy.

14. In A Local Authority v JB [2020] EWCA Civ 735 (hereafter "Re JB"), Baker LJ re-cast the test of capacity in respect of sexual relations (which previous judgements of the Court of Protection assessed in terms of capacity to "consent") as whether the person has capacity to *"decide to engage in sexual relations"* [93]. He held at [100] the following information was relevant to that decision:

1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;

2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;

3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;

4) that a reasonably foreseeable consequence of sexual intercourse between a man and a woman is that the woman will become pregnant;

5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

15. The relevant information does not include any moral or emotional aspect of sexual relations beyond the simple requirement for mutual consent. In A Local Authority v H [2012] EWCOP 49, Hedley J said, at [24]-[25]:

"The greater problem for me is whether capacity needs in some way to reflect or encompass the moral and emotional aspect of human relationships. I have reflected long and carefully on this given Miss Jenni Richards QC's challenge to formulate and articulate a workable test. In relation to the moral aspect, I do not think it can be done. Of itself that does not alarm me for two reasons: first, I think the standard for capacity would be very modest, not really going beyond an awareness of "right" and "wrong" behaviour as factors in making a choice; and secondly, the truly amoral human is a rarity and other issues would then come into play. Accordingly, although in my judgment it is an important component in sexual relations, it can have no specific role in a test of capacity.

And so one turns to the emotional component. It remains in my view an important, some might argue the most important, component; certainly, it is the source of the

greatest damage when sexual relations are abused. The act of intercourse is often understood as having an element of self-giving qualitatively different from any other human contact. Nevertheless, the challenge remains: can it be articulated into a workable test? Again I have thought long and hard about this and acknowledge the difficulty inherent in the task. In my judgment one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse? That seems to me an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component."

16. It is well established that the test for determining the capacity to engage in sexual relations is transaction-specific or act-specific and not person-specific (see [79] in IM v LM [2014] EWCA Civ 37). Munby J (as he then was) in Re MM; Local Authority X v MM and another [2007] EWHC 2003 (Fam) articulated the test clearly at [86]:

"... 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."

Concerns about a person's ability to understand or weigh risks posed by potential sexual partners could lead to a conclusion that they lacked capacity to make certain decisions about contact or support arrangements. However, such concerns were irrelevant to the person's capacity to consent to the sexual act itself (A Local Authority v TZ (No 2) [2014] EWCOP 973). It is noteworthy that the requirement to assess capacity on a general basis applies to the timing and circumstances of the decision, not just to the identity of the sexual partner: see [76]-[77] of IM v LM (see above) wherein the Court of Appeal stated:

"[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.

[78] Finally, as s 27 of the Act makes plain, where a court finds that a person lacks capacity to consent to sexual relations, then the court does not have any jurisdiction to give consents on that person's behalf to any specific sexual encounter. The exclusion in s 27 supports the conclusion that assessment of capacity to consent to sexual relations can only be on a general basis, rather than tied to the specific

prospect of a sexual relationship with a particular individual in specific circumstances."

17. When assessing a person's ability to use and weigh information relevant to the decision to engage in sexual relations, the court should bear in mind the visceral nature of such decisions and avoid setting higher standards of decision-making for people with a mental impairment than are ordinarily applied by persons who have capacity. In TZ v A Local Authority (No 1) [2013] EWCOP 2322, Baker J (as he then was) stated at [55]:

"Most people faced with the decision whether or not to have sex do not embark on a process of weighing up complex, abstract or hypothetical information. I accept the submission on behalf of the Official Solicitor that the weighing up of the relevant information should be seen as a relatively straightforward decision balancing the risks of ill-health (and possible pregnancy if the relations are heterosexual) with pleasure, sexual and emotional brought about by intimacy. There is a danger that the imposition of a higher standard for capacity may discriminate against people with a mental impairment."

In Re JB, Baker LJ at [96] noted that decisions about sexual relations are not exclusively visceral or emotional, but he did not otherwise qualify or disapprove the guidance cited above.

18. At the hearing on 23 April 2021, Mr Mant on behalf of the Official Solicitor informed me that the Supreme Court had given permission to appeal the decision of the Court of Appeal in Re JB. The precise basis upon which the permission decision was given was not known save that it appeared unlikely to impact directly on the main issues in this case [100].

The Evidence

19. In her report dated 5 December 2020, Dr Camden Smith concluded that DY was *"a vulnerable person as a consequence of her learning disability, disrupted attachment and traumatic childhood. She has repeatedly shown a vulnerability to being unduly influenced by others due to her overwhelming need for love and attachment. Her previous decisions regarding residence have been made impulsively on the basis of being offered warmth and care by people in a position of power and authority over her…"*. As to sexual relations, Dr Camden Smith concluded as follows:

"In my opinion, [DY] lacks capacity to consent to sex, due to an inability to understand some of the relevant information, namely that consent is required both within and outside of a relationship. She has a good knowledge of consent within a relationship but didn't appear to understand consent outside of a relationship. I also have concerns that she would not be able to use or weigh any information about capacity if she weren't in a relationship. She has previously shown a desperation to be loved and in a relationship which is a consequence of her disordered attachment and experience of trauma. As with decisions about contact, [DY] appears to have no understanding that she has the same rights as others, and that she would be able to say no to someone if she did not want to have sex with them (if she were not in a relationship). The only reason [DY] could think of for not having sex with other

people was because she is currently in a relationship. She appears to place more weight on being in a relationship than in her autonomy and ability to say no to others.

[DY] is cognitively able to understand the relevant information, however her disordered attachment and complex trauma prevent her from being able to use the information. Therefore, sex education on its own is unlikely to lead to her being able to gain capacity to consent to sex. It is crucial that [DY] receives therapy in developing a sense of self and assertiveness that would then enable her to make decisions to keep herself safe. This is a long piece of work and is unlikely to lead to [DY] gaining capacity within a practicable timescale for the current hearing. I would hope that [DY] would be able to gain capacity in this area and would recommend a reassessment of capacity following work on assertiveness and keeping herself safe. I would envisage this taking approximately a year or two, however this depends on the availability of a therapist experienced in trauma with people with an LD, the skill of therapist and [DY's] engagement. DY could easily learn to say that she could say no outside of a relationship, however I do not believe she would easily be able to use this information after she had learned it. Any further assessment of capacity will therefore need to be carried out by an experienced assessor with a knowledge of trauma and disrupted attachment."

20. In her oral evidence, Dr Camden Smith conceded that she may have set the bar too high in terms of her analysis of DY's understanding of the distinction between consenting to sexual relations within and outside a relationship. Whilst she accepted that DY had capacity to consent to sex, her concern was how DY would make that decision outside of a relationship. It was difficult to say what her capacity would be if her relationship with her present boyfriend were to end. When unsettled, DY may be unable to make a clear and rational decision. DY did not think the sex act was very special and had a pragmatic unemotional view of sex that could be something quite transactional rather than something particularly intimate because of her experiences growing up. Dr Camden Smith accepted that her view that DY thought sex was not special had not been specifically explored with DY but was based upon DY's presentation. She confirmed that DY understood the mechanics of the sexual act, the risk of pregnancy, and the risk of a sexually transmitted disease. DY had told her that she had said no to sex within the context of her relationship with her boyfriend and that she had had penetrative vaginal intercourse with her boyfriend. The main confusion arose because DY could not conceive of not being in a relationship with her present boyfriend and the nature of DY's cognitive deficit meant that it was much harder for her to analyse things in abstract terms. It would be possible to support her if she expressed a wish in future to have a relationship with someone else. There were times when, unsupported, DY would lose capacity but if she were provided with support then her capacity would not fluctuate.

21. YZ, DY's social worker, confirmed that DY understood the mechanics of the sexual act, understood that she could become pregnant, and understood about sexually transmitted disease. She confirmed that DY had an understanding that she could say no if she did not want to have sex. The difficulty was that DY's understanding of sexual relationships was so caught up in the relationship with her boyfriend that it was very difficult to tease apart how she might respond to someone else in other circumstances. However, YZ confirmed that, within her present relationship, DY had capacity to consent to sexual relations. Given her lack of capacity with respect to

contact, YZ did not demur from the proposition advanced by the Official Solicitor that, in circumstances where there would be controls over who DY had contact with, DY would be able to be supported to make decisions about the act of sex.

Discussion

22. I begin by acknowledging the real tension in this case between a desire to protect DY and a decision to permit her freedom to engage in sexual relationships which might place her at some risk. Whilst the MCA 2005 and the case law warns me against losing sight of the fundamental principle that the obligation to protect the incapacitous must be tempered by respect for the autonomy of those with mental disabilities/disorders, my personal experience of meeting DY served to highlight her vulnerability. She was eager to please and found it hard to identify any risks she might face either generally or in relation to the issue of consent to sexual relations. When coupled with an awareness of her difficult personal history, I found myself concerned about her vulnerability in general and acutely conscious of how easy it would be to exploit and harm her. My experience of DY is, I believe, shared by those who have daily contact with her and those who are responsible for her care. Their anxieties about DY shaped the local authority's position in these proceedings and, whilst it was unfortunate that this was not initially as clearly articulated as it might have been, I do not criticise the local authority for taking the stance it did.

23. It is important to note that both parties were in agreement that DY lacks capacity to make decisions about her contact with others. I agree with that proposition. DY's care plan will require the local authority to have oversight of her contact with others and there may be some individuals who pose so great a risk to DY that all contact with them should be forbidden. Within that protective context, DY should be able to decide for herself who she wishes to have sexual relationships with and the local authority should put in place care arrangements to support her to make those choices safely.

24. Both parties were agreed that DY had capacity to engage in sexual relations when she was not upset or distressed. The issue between them was whether DY had capacity to make decisions as to sexual relations in circumstances when she was unsettled or distressed. The local authority sought a prospective declaration to that effect or, alternatively, a declaration in identical or similar terms pursuant to the inherent jurisdiction. The Official Solicitor submitted that the local authority's approach was wrong in principle and wrong on the facts because (a) the court was required to assess capacity on a general and non-specific basis; (b) the evidence before the court could not rebut the statutory assumption that DY had capacity on that basis; and (c) any concerns about her vulnerability or ability to assess risk could and should be addressed through provision of support and best interest decisions on care and contact.

25. The law requires that capacity to decide to engage in sexual relations should be assessed on a general non-specific basis. The local authority asserted that its formulation did not fall foul of that requirement because it related to *"circumstances as opposed to a particular person"*. I note however that the requirement to assess capacity on a general basis and the policy underpinning it applies to the timing and circumstances of the decision and not just to the identity of the sexual partner. The passage in IM v LM quoted above [16] makes plain that assessment of capacity to consent to sexual relations can only be on a general basis rather than tied to the

specific prospect of a sexual relationship with a particular individual in specific circumstances. Likewise, Hedley J in A Local Authority v H [2012] EWHC 49 (COP) held that capacity had to be decided in isolation from any specific circumstances of sexual activity.

26. Absent from the local authority's written submissions were any standards by which DY's level of distress or unsettledness should be judged to determine whether or not she had capacity to engage in sexual relations. Though Mr Foster suggested in his oral submissions that plain words such as *"upset", "unsettled"* and *"distressed"* would be sufficiently descriptive and that it might be open to the court to provide greater specificity in that regard, I found myself unpersuaded by that submission. Whilst all those particular words might describe DY's mood at any given time, they did not adequately describe the point at which she might cease to have capacity to engage in sexual relations. As I understand the local authority's case, that would seem to be a matter of degree. The difficulty with Mr Foster's submission was that, on each occasion that DY appeared to be unsettled or distressed and was proposing or had the potential to engage in sexual relations, the prospective declaration sought would require an assessment of whether DY was sufficiently distressed or unsettled so as to have lost capacity to engage in sexual relations. That would give wide discretion to individual professionals without any check to ensure that DY's autonomy was respected, and that decisions were not being driven by the desire to protect her.

27. Whilst I acknowledge that prospective declarations of incapacity are permissible pursuant to s 15 MCA 2005, these are exceptions to the general approach. They may be appropriate in cases where there is clear evidence of the circumstances in which a person would or may lack capacity in the future and where there were practical reasons why a declaration or declarations should be made in advance. Neither of those conditions applied in this case. Here, the distress and unsettledness were not well defined and, even if DY did experience such emotions, it could not be assumed that this would impair her decision-making ability without an analysis of the particular facts pertaining at the time.

28. I heard no evidence that would justify an order in the terms sought. Dr Camden Smith's written report did not assert that DY's capacity fluctuated. Although she conceded that, if DY's relationship with AB ended, it might be difficult to say what her capacity was in those circumstances and that, when unsettled, DY may be unable to make a clear and rational decision, Dr Camden Smith did not say that DY would lack capacity applying the relevant statutory criteria. Even if DY's capacity were to fluctuate as was suggested by Mr Foster in questioning, Dr Camden Smith was clear that, if DY were provided with support, she did not think her capacity on this issue would fluctuate. DY's social worker agreed with me that it was very difficult to tease apart how DY might respond to someone other than AB and conceded that she was speculating about what might happen in other situations. At its highest, the local authority's concern that DY may lack capacity to make decisions about engaging in sexual relations when distressed or unsettled was based on speculation as to how DY would respond in circumstances which may not even arise if care and contact were appropriately managed.

29. In his written submissions, Mr Foster identified a wide range of generic factors about DY's presentation and vulnerabilities in support of his submission that her capacity fluctuated. Many of them related to DY's difficulties in assessing the risk that may be

posed by others and her awareness of her own particular vulnerabilities. Those factors were, in my opinion, more directed to an assessment of DY's capacity to make decisions about those with whom she had contact. None of them supported a conclusion that DY lacked capacity to make decisions about engaging in sexual relations generally or when she was distressed or unsettled.

30. So far as the relevant information required by the reformulated test in Re JB (see [100]), the evidence was that DY satisfied this test. I had asked the parties to address the court's use of the word *"may"* in the phrase *"the information relevant to the decision may include the following"*. Both parties accepted that it would be inappropriate for me to add to the list of relevant information, and I accept the Official Solicitor's submission that the use of the term *"may"* left open the possibility that some of the factors identified may not be relevant in some cases. I have accordingly tempered any enthusiasm to add to the list of relevant criteria set out in Re JB.

31. The local authority suggested that the *"nature and character of the act"* included: (1) the qualitative difference between the act from the perspective of a man in the act from the perspective of a woman, including the risk of immediate pain and injury and the consequences in terms of pregnancy and the health risks associated with pregnancy; (2) an appreciation that sex was uniquely physically and emotionally intimate; and (3) an awareness that the act placed a person participating in a position of unique vulnerability. The difficulty with the local authority's submission is that the long-established case law requires only a *"rudimentary"* knowledge of what the act comprises and an awareness that it is an act of a sexual nature (see Munby J (as he then was) in X City Council v MB [2006] EWHC 168 (Fam) at paragraph 74). Applying that test, it was clear that DY understood the nature and character of the sexual act on a rudimentary level. Dr Camden Smith gave clear evidence that DY understood the mechanics of the act and there was no suggestion that she thought the act was anything other than an act of sexual connection. Though DY had an unemotional view of sex and did not think it was very special, that could not, in my view, form part of a workable test since there are a wide range of views about sexual relations ranging from the purely transactional to an act imbued with deep emotional and religious significance.

32. There was no evidence before the court that DY had any difficulty in understanding that the other person must consent to the sexual activity before and throughout. Likewise, there was no dispute that DY understood she was able to say no in the context of her relationship with AB. Whilst she may have been unable to grasp the abstract concept of sexual relations with another person when she was in an established relationship with her boyfriend and did not want a sexual relationship with anyone else, it was difficult to conclude that she would be incapable if and when a decision arose with respect to another person. The evidence was also clear that DY understood the risk of pregnancy and of sexually transmitted disease.

33. Standing back and considering the issue in the round, I am satisfied that, at the time she was assessed, DY understood and was able to weigh all relevant information and had the capacity to decide to engage in sexual relations on a general non-specific basis. There was no dispute that she had the capacity to make decisions about sexual relations with her boyfriend, the only person with whom there was any current prospect of having sexual relations. The evidence of both Dr Camden Smith and YZ, DY's social worker, as to how she might respond in other circumstances was

uncertain and speculative. She should not be assessed as lacking capacity unless all practicable steps have been taken to support her to make the decision without success, that included putting in place a package of support to limit and/or mitigate the effect of any periods of distress or unsettledness. The local authority's concerns about the risk of abuse and exploitation could be addressed through an appropriate package of care and contact arrangements, decided in DY's best interests. The prospective declaration proposed by the local authority was unworkable and imprecise.

34. In his written submissions, Mr Foster suggested that it would be *"unconscionable if the court, recognising [DY's] vulnerability, held itself unable to protect her due to her situation not fitting within the framework of the MCA 2005"*. Whilst I understand the instincts which prompted that submission, DY's care would be supported within the framework of the MCA 2005 as it is agreed by the parties, and I accept, that DY lacks capacity to make decisions about her care and contact with others. In those circumstances, the MCA 2005 provides an appropriate legal framework for a care package which protects DY from abuse and exploitation. I see no justification for invoking the inherent jurisdiction since it affords no greater scope for making a declaration of incapacity on grounds of a disturbance of the functioning of the mind than exists under the MCA 2005.

Conclusion

35. I am satisfied that I should make a final declaration that DY has capacity to decide to engage in sexual relations. I direct the local authority to prepare a care plan that will facilitate this in a way that reduces risk and supports DY to make informed decisions.

36. That is my decision.