



Neutral Citation Number: [2022] EWCOP 33

Case No: COP13890570

**IN THE COURT OF PROTECTION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28 July 2022

**Before:**

**MR JUSTICE POOLE**

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**Between:**

**Hull City Council**

**Applicant**

**- and -**

**(1) KF (by her Litigation Friend, AI)**

**Respondent**

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**Simon Batt**, Solicitor, Kingston-Upon-Hull City Council Legal Department, for **the Applicant**  
**Joseph O'Brien QC** (instructed by Switalskis Solicitors) for **the Respondent**

Hearing date: 26<sup>th</sup> July 2022  
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**JUDGMENT**

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 incapacitated person 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.

**Mr Justice Poole:**

### **Introduction and Background**

1. I am concerned with KF who is aged 34. She has a condition of agenesis of the corpus callosum which causes her to have a learning disability and which has an impact on her capacity to make decisions for herself. On 13 May 2022, HHJ Whybrow considered a report from Dr Mynors-Wallis, Consultant Psychiatrist, dated 2 May 2022, and concluded on an interim basis that KF had capacity to engage in sexual relations but that she lacked capacity in respect of the conduct of the proceedings, to manage her property and affairs and to make decisions about residence, care and contact with others. He made declarations accordingly.
2. I understand that KF has had two children in the past but they are no longer in her care. More recently, KF has been in a long term relationship with KW. Following events that I shall describe more fully later in this judgment, and having made its interim determinations about KF's capacity, the court also most recently declared on an interim basis on 13 May 2022 that it was in KF's best interests to reside at her current placement and to continue to receive care there, and to have in person contact with KW and two other named persons only in a suitable public place by prior agreement with staff from the placement and on a supervised basis, such supervision to be undertaken by an appropriate representative of the placement. That order was agreed by the parties.
3. The background to those best interest declarations is one of violence perpetrated by KW against KF. The evidence provided to this court shows that during the course of their relationship, KW would encourage KF to have sex with other men. In September 2020, one of these men had sex, including anal sex, with KF over a three day period. The fact that they had anal sex caused KW to become offended and angry so that, whilst he himself had sex with KF, in his anger he "fisted" KW causing tears to her vagina such that she required hospitalisation, the administration of two units of blood, and suturing. Such was the loss of blood that the evidence suggests that without emergency treatment, KF could have died. Nevertheless, after a period of separation, KF returned to live with KW. In December 2021, the police were advised of an incident at KW's flat when he had lost his temper and slapped KF to the face. In January 2022, KW again assaulted KF and she moved into emergency accommodation. Shortly afterwards she moved back in with KW. Shortly thereafter, whilst she was lying in bed, KW entered the room and placed one of his hands onto KF's throat. Police disclosure reveals a number of incidents of verbal aggression by KW to KF and adult social services have had serious concerns about KW exercising coercion and control over KF, including taking her money and using it for his own purposes, and overbearing her decision-making. Earlier this year KF was moved from the accommodation she had shared with KW to her current care home placement.

### **Initial Expert Evidence**

4. Dr Mynors-Wallis assessed KF as having a full scale IQ of 49. He diagnosed her as having moderate learning disability. Dr Mynors-Wallis advised,

“It is my opinion that KF does not have capacity to make decisions about contact with others.

21.3 I will consider each of the functional tests in turn.

21.4 It is my opinion that KF does understand the issue about contact with others. She understands that there are benefits to seeing people. She reports that she enjoys the company of KW and his friends. She reportedly enjoys having contact with KW on the accompanied visits.

21.5 It is my opinion that KF has retained information about people she would like contact with. She was able to talk about having contact with KW and his friends, A and B. She was able to talk about having contact with her family.

21.6 It is my opinion, however, that KF is unable to weigh up the risks and benefits of contact with KW and his friends. There is clearly a significant overlap with decision that KF wants to live with KW and KW is the person she wants to have the most contact with. I will not repeat the information from the section on capacity to make decision about residence. It is my opinion that KF is not able to weigh up the reasonably foreseeable consequence that she might be assaulted by KW if she has contact with him or be the victim of financial and emotional abuse. She is therefore, in my opinion, unable to weigh up the risks and benefits.”

Of relevance, in his conclusions about capacity to make decisions about residence, Dr Mynors-Wallis noted:

“It is my opinion that KF has not retained information about the assaults and the risk that she might be assaulted by KW again. It may be that she knows this and deliberately withheld the information from me, or it may be that she will not allow herself to think about it. KF in Ms Sutherland’s capacity assessment had not retained the information that KW had assaulted other women. It is my opinion, on the balance of probabilities that KF has not retained all the information that she needs to make a capacitous decision about residence.”

5. It might be said that, in this case, the past assaults and the risk that KF might be assaulted by KW again, were relevant information to decision-making about contact with others. If KW lacks the ability to retain information about the assaults and the risk that she might be assaulted by KW again, then that would be an additional reason for finding that she lacked capacity to make decisions about contact with others.

6. Dr Mynors-Wallis did assess KF as having capacity to engage in sexual relations. In reaching that conclusion he referred to his instructions which referred to the test for capacity set out in *A Local Authority v JB* [2021] UKSC 52. At [84] and [92] to [96] of the judgment of Lord Stephens, he approved the formulation of Baker LJ of the information which “may be” relevant to a decision to engage in sexual relations as including,

- “(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 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.”

7. Mindful of that approach, Dr Mynors-Wallis advised,

“It is my opinion that KF does understand the key issues in sexual relations. She was able to describe the mechanics of a sexual relationship. She was able to describe the need for both parties to consent to a sexual relationship. She understands the risks of a sexual relationship including both pregnancy and sexually transmitted diseases. She understands how to protect herself from both.

20.5 It is my opinion that KF has been able to retain the necessary information about sexual relations. She was able to describe different sexually transmitted diseases. She clearly described how the process of consent might work. For example, if she did not want to have sex, she suggested that her partner could relieve himself in the bathroom.

20.6 It is my opinion that KF is able to weigh up the issues concerning sexual relations. She is aware that she enjoys sexual relations. She is aware that others might want to have sex with her when she does not want it. She is able to weigh up the risks and benefits.

20.7 I did note that KF told me that she wanted to have a child with KW but separately with her social worker talked about engaging with the Pause Programme which gives advice to vulnerable women about choices not to have children. It is my opinion, however, that the fact that she has at times different views on whether she would like to have another child, does not mean that she does not have capacity in this area but rather this is a complex and difficult decision. It is my opinion that it is helpful that she has agreed to undertake work with the Pause Programme.

20.8 It is my opinion that KF is able to communicate her decisions.”

## **The Application**

8. The present application by KF is for a declaration that it is in her best interests to have a short period, including overnight, of unsupervised contact with KW. The circumstances which give rise to this application are:

- i) KW was charged with a s.18 assault on KF arising from the event in September 2020 when he caused her serious internal injuries. It appears that a plea to an offence under s.20 of the Offences Against the Person Act 1861 has been accepted. KW is due to be sentenced in the next few days and the consensus is that he can expect a sentence of imprisonment.
- ii) KF has been diagnosed with metastatic breast cancer. It has spread to her liver, lungs, and spine. She has begun chemotherapy but her prognosis is poor and the medical advice is that she is unlikely to survive beyond a further eighteen months and may not live more than a further few months. Therefore, KW may not be released from prison during KF’s remaining lifetime.
- iii) KF has expressed a fervent and consistent wish to spend time, unsupervised and overnight, with KW before his sentencing hearing. In a helpful attendance note from Nichola Burridge Todd of Switalskis solicitors, acting for KF through her litigation friend, it is recorded that KF has been frank about the reason for wanting overnight unsupervised contract with KW:

“I queried the reason for KF wishing to stay overnight with KW. KF said that she misses him and that she wants to hug him and lay next to him. I apologised to KF but stated that I wanted to ask her a very personal question and questioned whether or not she wanted to have sex with KW. KF stated “I am open to having sex if it progresses to that that is fine”. I asked KF if KW is physically able to have sex. KF confirmed that he is. KF advised that he had had 3 children. I explained that I had understood that he had some issues previously. KF confirmed that he had but that he is able to have sex. I asked if KW had said he wants to

have sex with her and KF confirmed that KW has said that he does want to have sex with her.

“I explained to KF that there would be concern as to the cleanliness of KW’s flat. KF stated that KW has cleaned his flat and that it would be fine. She stated that he would make sure that everything is in order. I asked if the Social Worker will be allowed to check the flat and KF said that KW is happy for the Social Worker to do this and that this has been agreed. I stated that the Social Worker would also want to check that there is nothing hazardous that could harm KF. KF stated that he has the wires behind the TV and that there is nothing that could cause her any injury in the flat. I queried if KW smokes. KF confirmed that he does. I queried if he would be willing not to smoke while KF is in the flat. KF stated that he usually smokes outside the window. I explained that given KF will be starting chemo that her immune system will be weakened and as such, those caring for her will want to make sure that she is not at risk of any infection or illness.”

KW has been spoken to and has confirmed that he wants to have unsupervised contact with KF and to have sex with her during that time.

9. I am told that there are no conditions on KW’s bail. Given the nature of the assault on KF, the abuse perpetrated by KW on KF over time, and her vulnerability, I cannot understand why the CPS would not have applied for conditions to be imposed on KW’s bail to protect KF. I do not know whether conditions were sought, but rejected by the court, or whether they were not sought. Whatever the reasons, there are no conditions on KW’s bail and so, were it not for the proceedings in the Court of Protection, KF would not have been afforded any protection against KW pending his sentence for his violent assault on her.

### **The Legal Framework**

10. In *B (By her litigation friend the Official Solicitor v A Local Authority* [2019] EWCA Civ 913, [2019] COPLR 347 the Court of Appeal noted at [235] that,

“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) ECtHR Application No.53251/13.”

11. Sections 1 to 4 of the Mental Capacity Act 2005 (MCA 2005) set out the fundamental principles and provisions concerning capacity and best interests. They are well known and I do not need to set them out in full in this judgment. The core test of capacity is set out in s.2(1) of the MCA 2005,

“For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.”

Under s.1 of the MCA 2005, KF is assumed to have capacity unless otherwise established and the standard of proof is the balance of probabilities. She must not be treated as unable to make a decision unless all practicable steps have been taken to enable her to make the decision without success, or merely because she makes an unwise decision. Just because a person makes an unwise decision it does not mean that they lack capacity to make the relevant decision. S.3 of the MCA 2005 sets out the elements of the decision-making process which are understanding, retention and using or weighing “information relevant to the decision” and communicating the decision. The relevant information includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision. S.4 sets out the matters that must be taken into account when making a best interests decision.

12. . The enquiry as to capacity is fact sensitive – *London Borough of Tower Hamlets v PB* [2020] EWCOP 34. The bar must not be set too high. The MCA 2005 must not be interpreted so as to make care and treatment for P practically impossible and regard should be had to the overlap between different decisions rather than treating them as if they are in self-contained silos – *B (by her Litigation Friend, the Official Solicitor) v A Local Authority* [2019] EWCA Civ 913, [2019] COPLR 347.
13. The following passages at [65] to [75] of the judgment of Lord Stephens. In *A Local Authority v JB* (above) are of importance to the present case:

“[65] The core determinative provision within the statutory scheme for the assessment of whether P lacks capacity is section 2(1). The remaining provisions of sections 2 and 3, including the specific elements within the decision-making process set out in section 3(1), are statutory descriptions and explanations which support the core provision in section 2(1). Those additional provisions do not establish a series of additional, freestanding tests of capacity. Section 2(1) is the single test, albeit that it falls to be interpreted by applying the more detailed description given around it in sections 2 and 3: see the judgment of McFarlane LJ in *York City Council v C* at paras 56 and 58-60.

[66] Section 2(1) requires the court to address two questions.

[67] The first question is whether P is unable to make a decision for himself in relation to the matter. As McFarlane LJ stated in *York City Council v C* at para 37, “the court is charged in section 2(1), in relation to ‘a matter’, with evaluating an individual’s capacity ‘to make a decision for himself in relation to the matter’.” The focus is on the capacity to make a specific decision so that the determination of capacity under Part 1 of the MCA 2005 is decision-specific as the Court of Appeal stated in this case at para 91. The only statutory test is in relation to the ability to decide. In the context of sexual relations, the other vocabulary that has developed around the MCA, of “person-specific”, “act-specific”, “situation-specific” and “issue-specific”, should not be permitted to detract from that statutory test, though it may helpfully be used to identify a particular feature of the matter in respect of which a decision is to be made in an individual case. For instance, “the matter” in this case cannot be described as being “person-specific” as there is no identified person with whom JB wishes to engage in sexual relations.

[68] As the assessment of capacity is decision-specific, the court is required to identify the correct formulation of “the matter” in respect of which it must evaluate whether P is unable to make a decision for himself: see *York City Council v C* at paras 19, 35 and 40.

[69] The correct formulation of “the matter” then leads to a requirement to identify “the information relevant to the decision” under section 3(1)(a) which includes information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision: see section 3(4).

[70] I consider, and the Court of Appeal in this case held at para 48, that the court must identify the information relevant to the decision “within the specific factual context of the case”: see also *York City Council v C* at para 39. In this way if the matter for decision relates to sexual relations, but does not relate to a particular partner, time or place, so that it is non-specific, as in this case, because JB wishes to “engage in” or “consent to” sexual relations with any woman, then the non-specificity of the matter will inform the information which is relevant to the decision.

[71] Where the matter relates to sexual relations, it will ordinarily be formulated in a non-specific way because, in accordance with ordinary human experience, it will involve a forward-looking evaluation directed to the nature of the activity rather than to the identity of the sexual partner. Moreover, “[to] require the issue of capacity to be considered in respect of every person with whom P contemplated sexual relations would not only be impracticable but would also constitute a great intrusion into P’s private life” (emphasis added): see *A Local Authority v*



TZ [2013] EWCOP 2322, para 23. A general non-specific formulation of “the matter” is also informed by considerations of pragmatism, as recognised by Sir Brian Leveson P, giving the judgment of the Court of Appeal, in *In re M (An Adult) (Capacity: Consent to Sexual Relations)* [2014] EWCA Civ 37; [2015] Fam 61, para 77. However, I respectfully disagree with the statement (in para 77) that “capacity to consent to future sexual relations can only be assessed on a general and non-specific basis” (emphasis added). Pragmatism does not require that consent to future sexual relations can only be assessed on a general and non-specific basis. Furthermore, such a restriction on the formulation of the matter is contrary to the open-textured nature of section 2(1) MCA. A general and non-specific basis is not the only appropriate formulation in respect of sexual relations as even in that context, “the matter” can be person-specific where it involves, for instance, sexual relations between a couple who have been in a long-standing relationship where one of them develops dementia or sustains a significant traumatic brain injury. It could also be person-specific in the case of sexual relations between two individuals who are mutually attracted to one another but who both have impairments of the functioning of their minds.

[72] If the formulation of “the matter” for decision can properly be described as person-specific, then the information relevant to the decision may be different, for instance depending on the characteristics of the other person, see TZ at para 55 (risk of pregnancy resulting from sexual intercourse is not relevant to a decision whether or not to engage in, or consent to, sexual relations with someone of the same sex) or the risks posed to P by an individual who has been convicted of serious sexual offences, see *York City Council v C* at para 39. Moreover, the practicable steps which must be taken to help P under section 1(3) MCA may be informed by whether “the matter” in relation to sexual relations may be described as person-specific. For instance, it might be possible to help P to understand the response of one potential sexual partner in circumstances where he will remain unable to understand the diverse responses of many hypothetical sexual partners. Furthermore, if the matter can be described as person-specific then the reasonably foreseeable consequences of deciding one way or another (see section 3(4)(a) MCA and para 73 below) may be different. There may, for example, be no reasonably foreseeable consequence of a sexually transmitted disease in a long-standing monogamous relationship where one partner has developed dementia. Finally, the potential for “serious grave consequences” may also differ (see para 74 below).

[73] The information relevant to the decision includes information about the “reasonably foreseeable consequences” of

a decision, or of failing to make a decision: section 3(4). These consequences are not limited to the “reasonably foreseeable consequences” for P, but can extend to consequences for others. This again illustrates that the information relevant to the decision must be identified within the factual context of each case. In this case there are reasonably foreseeable consequences for JB of a decision to engage in sexual relations, such as imprisonment for sexual assault or rape if the other person does not consent. There are also reasonably foreseeable harmful consequences to persons whom JB might sexually assault or rape.

[74] The importance of P’s ability under section 3(1)(a) MCA to understand information relevant to a decision is also specifically affected by whether there could be “serious grave consequences” flowing from the decision. Paragraph 4.19 of the Mental Capacity Act 2005 Code of Practice provides:

“If a decision could have serious or grave consequences, it is even more important that a person understands the information relevant to that decision.”

This again illustrates the importance of “the specific factual context of the case.” In this case, for instance, there would be “serious or grave consequences” for JB’s mental health if he was incarcerated, see para 40 above. Other potential “serious or grave consequences” for JB would include anxiety, depression, self-harm and retaliatory harm requiring hospitalisation, see paras 10, 17, 38 and 40 above. There could also be “serious or grave consequences” for others if they were the victims of sexual assaults or of rapes perpetrated by JB. These “serious or grave consequences” make it “even more important [in this case] that [JB] understands the information relevant to” the decision to engage in or consent to sexual relations.

[75] On the other hand, there should be a practical limit on what needs to be envisaged as the “reasonably foreseeable consequences” of a decision, or of failing to make a decision, within section 3(4) of the MCA so that “the notional decision-making process attributed to the protected person with regard to consent to sexual relations should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity”: see *In re M (An Adult) (Capacity: Consent to Sexual Relations)* at para 80. To require a potentially incapacitous person to be capable of envisaging more consequences than persons of full capacity would derogate from personal autonomy.”

14. Previously, interim declarations have been made as to capacity, I approach this application on the basis that I must honour all of the provisions of sections 1 to 3 of the MCA 2005 in relation to capacity even if making further interim declarations.

### **Further Expert and Other Evidence**

15. This case first came before me on 13 July 2022 for directions. I gave permission for further evidence from Dr Mynors-Wallis to consider the issue of KF's capacity to decide to engage in sexual relations with KW. Mindful of the tight timescale preparations for different forms of meeting or contact between KF and KW were to be made so that appropriate contact could occur following this judgment. I understand that an activity in a public place followed by a meal at a restaurant have been arranged. Other arrangements for after the meal could be made. In his addendum report of 18 July 2022, Dr Mynors-Wallis has considered the judgment of Lord Stephens and in particular the passages set out above, and concludes:

“Although it is my opinion that KF does have capacity to decide whether to have sexual relations in general, in the person specific question of having sexual relations with KW, it is my opinion that she does not have the capacity as to whether sexual relations with KW are safe. It is my opinion that there is [a] reasonable foreseeable consequence that KW will assault KF again.

In considering each of the four functional tests of capacity in question of whether KF has capacity to have sexual relations with KW, I will consider each in turn:

It is my opinion that KF does understand the issue of having sexual relations with KW. This reflects my opinion about her capacity to have sexual relations in general as set out in my first report and her expressed wishes on the matter.

It is my opinion, however, that KF has not retained the information about the serious sexual assaults that have occurred both to her and to others. In that KF has not retained crucial information necessary for her to make a decision about keeping herself safe, it is my opinion that KF is not able to weigh up the risks and benefits of having sexual relations with KW.

It is my opinion that KF is able to communicate her decision.

I understand the very difficult circumstances that KF faces reflecting her recent diagnosis. I also understand KF's clearly expressed desire to have sexual relations with KW. However, it is my opinion based on my interview, that KF does not have the capacity to make this decision.”

I am very grateful to Dr Mynors-Wallis for his urgent but thorough consideration of this further question. It has supported the court to make a timely decision.

16. At the hearing before me today, I was provided with a further attendance note by Ms Burrige-Todd following a meeting with KF and her Litigation Friend on 25 July 2022. KF was quite communicative and became cross when it occurred to her that the court might not permit her to spend a night with KW. “I have had two children. I can have sex with KW. If that’s what I want, that’s what I will do. No-one can stop me. I’m sick of this. You can tell the judge that too. It’s my decision. I’m being treated like a child.” She could not understand why her capacity was being questioned: “I can make my own decisions. I want my freedom. I can make a decision about sex.”
17. During the discussions on 25 July 2022, KF suggested that she had been pregnant when she moved to her current care home in February 2022, KW being the father, but that she had a miscarriage which she did not reveal to anybody.
18. I met KF remotely before the hearing began. She was determined to tell me that she should not be treated like a child. She should be free to make decisions for herself. She has had two children and she is perfectly able to make decisions about having sex. KW has told her he will not “lash out”. She has missed having a kiss and a cuddle with him. She wants some “alone time” with KW. She made her wishes and feelings crystal clear. When I said that I had to take into account all the evidence and what others said to me at the hearing she said, “I just hope my wishes come true” and became upset. KF also attended the remote hearing when I announced my decision and gave brief reasons. She was supported during these attendances.
19. KF has accepted that KW’s flat is not suitable for an overnight or private meeting. It is unhygienic. She would agree, as would KW, to their meeting in private in a hotel room. The Local Authority have accepted that they could provide a hotel room and that carers could be present in another nearby hotel room in case they were needed, for example, if KF raised an alarm.
20. The evidence is clear that one of the reasons, perhaps the main reason, KF wants to have unsupervised, overnight contact with KW is to give them the opportunity to have sex together. I am concerned that KF’s wishes and feelings are still influenced by her long relationship with KW during which he has coerced and controlled her and overborne her decision-making. The circumstances of the sexual assault on KF also give rise to concern that KW could again “lash out”, as KF put it. If they were to meet in private now it would be on the eve of his possible incarceration for the assault on KF. KW’s mood might well be unpredictable. He might again become angry and take that out on KF. There is at least a risk that this might happen.
21. Whilst the evidence of Dr Mynors-Wallis is important, it does not determine the court’s decisions on capacity. I have to take into account all the relevant evidence, not only expert medical opinion.

## Capacity

22. I first consider the decisions that are under consideration. It might be possible to frame the decision to spend time with KF unsupervised and overnight, as a contact decision or a sexual relations decision. I do not believe that it would be helpful to consider one to the exclusion of the other. It seems to me that I should consider both the decisions:
- i) To spend private, unsupervised time with KW, including overnight.
  - ii) To engage in sexual relations with KW.
23. The court has already made an interim declaration that KF lacks capacity to make decisions about contact with others. There is no new evidence nor any change in circumstances that would lead me to reach a different decision on that issue. The expert medical evidence is that KF lacks capacity to retain information about past assaults on her by KW and the risk of further assaults on her from him. Although Dr Mynors-Wallis did not take that into account in relation to decision making about contact with others, but only in relation to decision making about residence, it seems to me to be highly relevant to the issue of capacity in relation to contact with others. In any event, Dr Mynors-Wallis has also advised that KF is unable to weigh up the risks and benefits of contact with KW. Hence, if the matter for decision is framed as one of contact with KW, then I have no hesitation in concluding that KF lacks capacity to make that decision as has been previously determined on an interim basis.
24. It is difficult to see how a person who lacks capacity to decide to have contact with a specific person could have capacity to decide to engage in sexual relations with that person. Sexual intimacy is a form of contact with another or others. If, however, the matter for decision is framed as engagement in sexual relations then I have to have regard to Dr Mynors-Wallis' opinion and the court's previous declaration, on an interim basis, that KF has capacity to decide to engage in sexual relations. On the other hand, Dr Mynors-Wallis has concluded in his addendum report that KF lacks capacity to decide to engage in sexual relations with KW. Are those legitimate and persuasive conclusions? In my judgment, they are.
- i) The court's previous determinations about capacity to engage in sexual relations concerned a general matter for decision by KF. She can understand, retain, weigh and use, and communicate relevant information (as set out in *JB* – see paragraph 6 above) about engagement in sexual relations in general.
  - ii) The application before this court concerns a person-specific decision about sexual relations. As Lord Stephens said in *JB*, even though decisions about engagement in sexual relations are usually assessed on a general or non-specific basis, the “matter” for decision may be framed as person-specific. Lord Stephens gave examples of when the “matter” might be framed as person-specific. His examples were not exhaustive and he emphasised the need for pragmatism. In the present case, KF does not want to make decisions about having sexual relations in general, she wants to have (the opportunity for) sexual relations with KW and for that to occur within the next few days, prior to his likely incarceration. Information relevant to that specific decision includes information about the history and nature of the relationship between KF and KW. KW has been violent to KF in that relationship and has perpetrated sexual

violence against her. KF is at specific risk of harm or assault by KW including in a sexual context. That risk is a foreseeable consequence of KF's decision-making about having sexual relations with KW. Dr Mynors-Wallis had already advised that KF cannot retain information about KW's past assaults on her or the risk that KW will assault her again. That is information relevant to the matter for decision, particularly given the nature and circumstances of the most serious assault by KW on KF, which was a sexual assault. Dr Mynors-Wallis also advises, that KF cannot weigh or use the foreseeable consequences of deciding to have sexual relations with KW, which include the risk of assault from him as has happened in the past. Dr Mynors-Wallis' previous report approached the matter for decision as general – the capacity to engage in sexual relations. He has now considered capacity to decide to engage in sexual relations in a person-specific context and, unsurprisingly given his previously expressed opinions, concludes that KF lacks capacity to decide to engage in sexual relations with KW.

- iii) It is important that the Court of Protection does not approach questions of capacity in “silos” – *B v A Local Authority* [2019] EWCA Civ 913. I would regard it as incoherent to find that KF did not have capacity to decide to meet KW alone for a meal in a restaurant but did have capacity to decide to have sexual relations with him. Decisions about capacity must be coherent and allow those responsible for caring for and safeguarding KF to make practical arrangements.
  - iv) In cases in which it has been determined that P lacks capacity to make decisions about contact with a past or potential partner because of the risk of harm to P or by P, and it has been determined that P has capacity to decide to engage in sexual relations, consideration should be given to P's capacity to decide to engage in sexual relations with that partner. Failure to do so could result in incoherent capacity decisions. It was right to consider capacity to engage in sexual relations as a person-specific issue in this case.
25. In my judgment the evidence clearly establishes that KF lacks capacity to make the decision to have unsupervised contact, including overnight, with KW and to decide to have sexual relations with KW. She is unable to retain, weigh and use the relevant information in relation to each of those matters for decision.
26. To be clear, because of the history and circumstances of this particular case, it is necessary to address the question of whether KF has capacity to decide whether to engage in sexual relations with KW, i.e. there is a person-specific question to be addressed. That is the decision that KF wishes to make and it is the matter in question that has triggered this application. In my judgment, alongside the relevant information set out in *JB* (above), the information relevant to that decision in this case includes that KW has sexually assaulted KF previously, that the assault was very harmful to KF, whether further sexual intimacy between KF and KW gives rise to a risk of a further assault on KF and/or harm to her, the degree of that risk, the consequence if it should materialise, and the means by which the risk could be mitigated. KF is unable to retain, and weigh or use the relevant information.
27. I note Baker J's judgment in *A Local Authority v TZ* (No. 2) [2014] EWCOP 973, [2014] COPLR 159, in which he found that whilst P had capacity to engage in sexual relations,

he did not have capacity to make a decision whether or not an individual with whom he may wish to have sexual relations was safe. Baker J then considered whether P had “the capacity to make a decision as to the support he requires when having contact with an individual with whom he may wish to have sexual relations.” That judgment shows not only that there can be a refinement of the general capacity to make decisions to engage in sexual relations, but also that in an appropriate case, when P has capacity to decide to engage in sexual relations, the court may consider whether P has capacity to decide what support they may need when having contact that may lead to sexual relations. In the present case, however, the matter in question is person-specific and I have decided that KF lacks capacity to decide to engage in sexual relations with KW. She cannot be supported to have safe sex with him. However, for completeness, I record that I am satisfied on the evidence that KF lacks capacity to make decisions about support required to keep her safe when having any form of contact with KW. The information relevant to that decision includes the risk to KW from contact with KW, which KF is unable to retain, and weigh or use. KW has been given notice of these proceedings but has not engaged in them. I do not know what he would say about the risk of him causing harm to KF or what reliable assurances he might give about not having sexual relations with her if afforded unsupervised contact time. There may be work that could be done with him if he were available and willing. There may be longer term work that can be done with KF about keeping herself safe when having contact with KW or others. But the particular circumstances of this application do not allow time for that kind of long-term support. The application is for a specific, one-off contact with a specific person. For the avoidance of doubt, I find that KF does not have capacity to make decisions about what kind of support might be required and when, during unsupervised contact with KW.

28. In summary, I am satisfied that KF lacks capacity to make decisions about:
- i) Contact with KW, including unsupervised contact with him whether overnight or at all.
  - ii) Sexual relations with KW.
  - iii) Support required to keep her safe when having unsupervised contact with KW.

### **Best Interests**

29. Having determined that KF lacks capacity to make those decisions, the court has to consider whether it is in KF’s best interests to spend unsupervised time with KW including overnight. The court cannot consent to sexual relations on behalf of a person. If someone had sexual relations with KF without her consent it would be an assault. Sexual intercourse without her consent would be rape. Therefore, having decided that KF lacks capacity to decide to engage in sexual relations with KW, the court cannot decide that it is in her best interests to have sexual relations with him.
30. KF has said that she hopes that unsupervised overnight contact would lead to sex. Nevertheless, I have considered whether any form of unsupervised, overnight contact would be in her best interests. For the following reasons, my conclusion is that it would not:

- i) KW has perpetrated sexual and physical violence against KF in the past and KF lacks the ability to retain that information and to use or weigh the risk of recurrence. This makes her vulnerable to harm when alone in his company.
  - ii) The circumstances of their proposed contact prior to his sentencing hearing would tend to increase the risk of repeat harm to her. This may be the last opportunity they have to be close together. KW's likely imminent imprisonment is likely to put him under stress. KF is under physical stress due to her metastatic cancer and chemotherapy treatment and emotional stress because of her parting from KW. In the past KW has responded to what he has found to be stressful situations with abuse and violence.
  - iii) KW has been coercive and controlling of KF in the past. Although her finances are now managed on her behalf, in her best interests, an unsupervised meeting would afford KW the opportunity to exercise coercion and control over KF.
  - iv) Unsupervised contact would expose KF to the risk of sexual relations or sexual intercourse with KW, to which, I have found, she cannot consent. KF has indicated that she would be happy if their contact became sexual. KF has said she would like to have a child with KW and this could be their last chance to have sex. KW is liable imminently to be imprisoned. He says he wants to have sex with KF. Their mutual desire to have sex means that there would be a significant risk that, whatever promises were made in advance, if they met in private without supervision, sexual intercourse or other sexual relations would occur.
  - v) KF does not appreciate that there is a risk of harm to her from KW including during sexual intimacy with KW.
  - vi) There are no adequate means of ensuring KF is kept safe without, at least some form of supervision of contact.
  - vii) Recent supervised contact in daytime and in public spaces, such as a park, appears to have worked satisfactorily allowing KF safe time with KW. Such contact would not preclude kissing and cuddling as safe activities for KF.
31. I do take into account KF's strong wish to have unsupervised, overnight contact with KW but I have to take into account her inability to retain, and to weigh and use information about the risk to her from KW, and KW's coercion and control of KF, when taking account of her wishes and feelings. I take into account the views of those who care for her, who oppose unsupervised, overnight contact. There are no family members from whom I have any expressed views. KW's views may have been of some relevance but he has not expressed them to this court.
32. In principle, support could be offered to KF before and during private, unsupervised contact with KW in an attempt to keep her safe but in my judgment such support would be impractical and could not effectively keep her safe. Given an interim finding that KF lacks capacity to decide to engage in sexual relations with KW, support would have to be provided to prevent sexual relations with KW taking place. However, any effective support arrangements would rely on KF seeking support or help at an appropriate time and KF cannot weigh and use relevant information about the risk of harm to her from sexual relations with KW. She wants to have sexual relations with KW and could not



be relied upon to seek support to prevent that happening. I have no information about the reliability of KW to stop sexual relations occurring. I also have to consider the practicality of preventing physical or emotional harm to KF including by KW coercing or controlling her when in private and unsupervised. By the time any alarm was raised, harm may well already have been caused. In any event it would be unreasonable to expect support workers to enter a hotel room to intervene to prevent sexual intimacy or physical harm. I cannot see any role for support in the circumstances of this case such that it would be in KF's best interests to allow unsupervised contact in a private place with KW, whether overnight or at all.

33. Weighing all the circumstances I am sure that it is not in KF's best interests to have unsupervised contact with KW whether overnight or during the day, and whether for a short period or longer. Indeed, I am sure that it is in her best interests to have contact with KW only in public places and under supervision. I therefore endorse the best interests declarations made previously by the court.
34. In reaching this conclusion I have again reminded myself that a person may make unwise decisions and yet have capacity to make them, and that I must avoid allowing any impulse to protect KF to interfere with my objective assessment of her capacity. I am sure that I have avoided doing so.
35. Supervised contact between KF and KW in public spaces has occurred. KW has not been reliable in attending, but such contact has been controllable and has not caused harm to KF. Mindful of the potential difficulties in drawing the line between affection and sexual relations, I nevertheless see no reason why it would be contrary to KF's best interests to accede to her wish to kiss and cuddle KW during a final supervised contact in a public place. Fully aware that KW has caused significant harm to KF in the past, I nevertheless have no substantial concerns for KF's safety if they are allowed to kiss and cuddle in a public place with support workers supervising nearby. Their meeting this week, which may be their last and which I hope KW will attend, can be meaningful to them, but it must be supervised and in a public place such as a park, café or restaurant.
36. The statements and submissions provided to the court on this application demonstrate the care, understanding, and sensitivity with which the issues have been addressed. Those involved in KF's care have thought deeply about the dilemma in this case and have strived to find ways to accommodate KF's wishes when considering her best interests. I commend them for that.