Neutral Citation Number: [2024] EWCA Civ 1462

Case No: CA-2024-001894

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
HH Judge Burrows
14203804

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2024

Before :

SIR ANDREW McFARLANE, PRESIDENT OF THE COURT OF PROTECTION
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

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ZX (CAPACITY TO ENGAGE IN SEXUAL RELATIONS)

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- -

Victoria Butler-Cole KC and Francesca Gardner (instructed by **Irwin Mitchell**) for the **Appellant, (by his litigation friend, the Official Solicitor)**
Joseph O'Brien KC and Lucinda France-Hayhurst (instructed by **Local Authority solicitor**) for the **Respondent**

Hearing date : 13 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1. The appellant, acting through his litigation friend the Official Solicitor, appeals against a finding by a judge sitting in the Court of Protection that he lacks the capacity to engage in sexual relations.

Background

2. For the purposes of this appeal, it is unnecessary to recite the deeply concerning background in any detail. The following outline is sufficient.

3. ZX was born in 2006 and is now 18 years old. His older brother, YX, and he were made the subject of care proceedings when ZX was three weeks old. There were concerns about the parents' mental health, substance abuse difficulties, and neglect and physical injuries experienced by YX in their care.

4. In 2007, ZX and YX were adopted.

5. In 2011, aged 5, ZX was diagnosed with attention deficit hyperactivity disorder ("ADHD"). In 2012, the local authority again became involved with ZX and YX because of concerns about the brothers displaying harmful and violent sexual behaviours towards one another and towards animals.

6. The boys' adoptive parents found it increasingly difficult to manage their behaviour. In 2019, ZX was accommodated by the local authority under s.20 of the Children Act 1989 in a specialised residential placement for young people who display sexually harmful behaviours. At the unit, he engaged in sexual behaviour with other young people. It was alleged that he committed rape and acts of sexual assault. In therapy, he disclosed details of his sexual conduct and his interest in violent and coercive sexual activity.

7. In 2021, YX was also moved to local authority accommodation. The local authority started further care proceedings and the boys were made subject to full care orders again. In 2022, the brothers separately alleged that they had been sexually abused by their adoptive parents. The adoptive parents were arrested but after an investigation the police decided to take no further action. ZX remained at the specialist residential unit and was made subject to a deprivation of liberty order under the inherent jurisdiction. His use of social media and the internet was monitored, an alarm was fitted to his door, and his contact with other young people was subjected to 1:1 supervision. He received extensive therapeutic support. ZX later told his therapist that, despite these measures, he had engaged in sexual activities with other boys in the placement and behaved in a sexualised way towards members of staff.

8. In 2022, a Youth Justice Report concerning ZX reached the following conclusion:

> "It is my assessment that the risk of serious harm to others is imminent should ZX create an opportunity, or be represented with an opportunity to offend, however, whilst the frequency and prevalence of ZX perpetrating harm has reduced this is simply due to the presence of such stringent external controls, which currently restrict the opportunity to offend and provide a high level of supervision. Concerns surrounding ZX's immediate

> safety and well-being would severely increase should the current restrictions reduce and ZX is granted unsupervised access to the internet or the community."

The police concluded, however, that they were unable to apply for a sexual risk order or a sexual harm prevention order in respect of ZX.

9. Despite these continuing concerns, a decision was taken in 2023, following a series of "High Risk Management Meetings", to reduce the restrictions and allow ZX some unsupervised time in the community. After this, there were allegations that ZX touched his brother and others inappropriately when playing football. There were other occasions when he absconded. By December 2023, however, he was spending two hours on two evenings each week in the local town centre.

10. As ZX approached the age of 18, the professionals at the placement advised that he needed to remain there to complete further therapeutic work to reduce his risk of sexual harm. The need for a long-term plan for ZX in adulthood led the local authority in January 2024 to apply for permission to bring proceedings in the Court of Protection. Permission was granted and the Official Solicitor accepted an invitation to act as ZX's litigation friend. By its application, the authority sought an order that ZX lacked capacity to make decisions as to residence, care, contact with others, access to social media and internet use, managing property and affairs, entering into a tenancy agreement, and engaging in sexual relations. The authority also sought an order authorising the continued deprivation of ZX's liberty.

11. In preparation for the application to the Court of Protection, ZX was assessed by Dr Christopher Ince, a consultant psychiatrist who has been instructed in a number of similar cases in recent years. In his first report, dated 24 January 2024 and considered in more detail below, Dr Ince concluded that ZX lacked capacity to make decisions in all of the domains specified in the local authority's application, save for capacity to engage in sexual relations.

12. Dr Ince was then asked some supplementary questions, prompted in part by a decision of Theis J, the Vice-President of the Court of Protection, in *Re ZZ (Capacity)* [2024] EWCOP 21 allowing an appeal against a declaration by HHJ Burrows that the subject of those proceedings had capacity to engage in sexual relations. When submitting the questions to Dr Ince, the parties included a document summarising the decision in *Re ZZ.* In a supplementary report, Dr Ince changed his opinion and concluded that ZX did not have capacity to engage in sexual relations.

13. Towards the end of April 2024, the local authority reimposed restrictions on ZX's activities, including suspending his unsupervised time in the community, following two occasions when he had absconded from the placement, visiting the home of a former member of staff, and sending indecent images to a girl, aged 15, who he described as his girlfriend.

14. The question of capacity was considered at a hearing before Judge Burrows on 2 May 2024, a transcript of which has been prepared for this appeal. Before the hearing, the judge had a short meeting with ZX. In opening the case, Ms Lucinda France-Hayhurst for the local authority informed the court of a further incident that morning when ZX had been found wearing a necklace with the name of the 15-year-old girl, which he had

refused to take off. Dr Ince gave oral evidence over several hours, after which the hearing was adjourned for submissions to be given the following day. Judgment was reserved and handed down on 6 June. The judge concluded that ZX lacked capacity to make decisions in all of the areas specified by the local authority, including engagement in sexual relations. By the order made following the hearing, the judge made declarations as to capacity in line with his judgment, declared that in so far as the arrangements for ZX's care amounted to a deprivation of liberty they were a necessary and proportionate interference with his Article 5 and 8 rights, and made further interim orders and case management directions pending a final decision as to his future residence and care arrangements.

15. Following the hearing, the parties received a supplemental report from ZX's treating psychologist, who had previously assessed his risk of sexual offending as high. She advised that the risk remained high if ZX were to progress to a community setting or to an environment with less monitoring and supervision. She also advised that ZX meets the criteria for intellectual disability or learning disorder.

16. On 16 July 2024, Theis J granted an extension of time for filing a notice of appeal. On 26 July, the Official Solicitor filed a notice seeking permission to appeal against the judge's decision that ZX lacked capacity to engage in sexual relations. On 21 August, Theis J granted permission to appeal and allocated the appeal to be heard by this Court. At the appeal hearing, the Official Solicitor was represented by Ms Victoria Butler-Cole KC, leading Ms Francesca Gardner who had appeared before the judge, and the respondent local authority was represented by Mr Joseph O'Brien KC, leading Ms France-Hayhurst.

17. Meanwhile, the local authority reviewed the restrictions on ZX's activities and reinstated the former arrangements of two periods of unsupervised time in the community each week and restored ZX's use of his phone, subject to checks. At a further hearing on 18 September 2024, the judge extended the declarations as to capacity and deprivation of liberty and made further case management directions. To date, the local authority has not succeeded in securing an adult placement for ZX who remains living at the children's residential unit where he has lived for the past five years.

The law

18. The relevant statutory provisions in the Mental Capacity Act 2005 are as follows.

> "1. **The principles**
>
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

2. **People who lack capacity**

(1) 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.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

….

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

….

3. **Inability to make decisions**

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(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).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

> (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
>
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
>
> (a) deciding one way or another, or
>
> (b) failing to make the decision."

19. Where a person lacks capacity in relation to a matter concerning his welfare or property and affairs, the court may make the decision on his behalf in his best interests: ss.16 to 18. By s.27(1), however, no decision may be made on his behalf concerning consenting to sexual relations.

20. The question whether there is an impairment of, or a disturbance in the functioning of, the mind or brain is likely to be determined by psychiatric evidence. But the decision as to capacity is a judgment to be made by the court: *Kings College Hospital v C & V* [2015] EWCOP 80 (MacDonald J) (para 39), endorsed by the Court of Appeal in *Hemachandran v Thirumalesh* [2024] EWCA Civ 896 (para 133).

21. The approach to be followed by a court in deciding whether a person has capacity to engage in sexual relations was definitively settled by the Supreme Court in *A Local Authority v JB* [2021] UKSC 52. In his judgment, with which the other Justices agreed, Lord Stephens JSC (at paragraph 90) endorsed the view of this Court that "the matter" for the purposes of s.2(1) should be formulated as "engaging in" rather than "consenting to" sexual relations. At paragraph 84, he stated (substantially following the decision of this Court) that the information relevant to the decision to engage in sexual relations may include the following:

> "(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 be able 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."

22. The issue before the Supreme Court was whether the Court of Appeal had been right to include within the relevant information the fact that the other person must be able to

consent to the sexual activity and must in fact consent before and throughout the sexual activity. In his judgment Lord Stephens JSC said:

> "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* [2013] EWCA 478 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."

23. Lord Stephens continued:

> "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)* [2014] EWCA Civ 37 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.
>
> 76. Once the information relevant to the decision has been identified then P is unable to make a decision for himself in relation to the matter (section 2(1)) if, for instance, he is unable to understand the information (section 3(1)(a)) or to use or weigh that information as part of the process of making the decision (section 3(1)(c)).
>
> 77. P's ability under section 3(1)(c) MCA to use or weigh information relevant to the decision as part of the decision-making process "should not involve a refined analysis of the sort which does not typically inform the decision … made by a person of full capacity": *In re M (An Adult) (Capacity: Consent to Sexual Relations)* at para 81. It would also derogate from personal autonomy to require a potentially incapacitous person to undertake a more refined analysis than persons of full capacity.
>
> 78. If the court concludes that P is unable to make a decision for himself in relation to the matter, then the second question that the court is required to address under section 2(1) is whether that inability is "because of" an impairment of, or a disturbance in the functioning of, the mind or brain. The second question looks to whether there is a clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain.
>
> 79. The two questions under section 2(1) are to be approached in that sequence."

24. We were referred to several cases decided since *JB*, in particular two cases in which judges had considered capacity to engage in sexual relations in situations where P was considered to pose a risk to other people - *Re PN (Capacity: Sexual Relations and Disclosure)* [2023] EWCOP 44, a decision of Poole J in which an assessment of capacity was given by Dr Christopher Ince, the consultant psychiatrist instructed in the

present case, and *Re ZZ (Capacity)* [2024] EWCOP 21, a decision by Theis J on appeal from a decision of HHJ Burrows, the judge in the present case, in which an assessment of capacity was given by another psychiatrist, Dr Lisa Rippon. These cases featured in Dr Ince's evidence in the present case and in the judgment. (A third case in which Dr Ince had conducted an assessment, *DY v A City Council* [2022] EWCOP 51, was also cited but, as Mr O'Brien pointed out at the hearing, Dr Ince's assessment that DY had the capacity to engage in sexual relations was not disputed nor considered in the judgment.)

25. *Re PN* concerned a 34-year-old man with autism and a mild learning disability who also posed a risk of sexual harm to other people. Dr Ince's view, accepted by the court, was that PN had capacity to engage in sexual relations. Poole J's reasons for concluding that PN had capacity to engage in sexual relations were set out in paragraph 16 of his judgment:

> "Given that, as Lord Stephens made clear, consent is a "necessity" condition for engaging in sexual relations, it is not really information to be weighed alongside other information when deciding whether to engage in sexual relations. At the hearing, there was a focus on PN's ability to use the relevant information, in particular in the moment when he initiates sexual activity by touching another person without their consent. After careful consideration of all the evidence …, I am satisfied that in the moment when PN feels the impulse to touch a woman without her consent, he remains able to use the relevant information. He has sufficient understanding of the necessity of consent that he retains that understanding even at those moments. He chooses to surrender to the impulse but that does not mean that his ability to use the information is lost. To borrow a phrase used by Dr Ince during his oral evidence, PN knows that he should not touch, but thinks "Hang it! It is what I want to do." In any event, accepting as I do the expert opinion evidence of Dr Ince on this matter, I find that PN surrenders to his impulse because of his character and outlook not because of his impairments. His impairments do not cause him to lose his control in other fields of activity, or his sexual control in other settings. His sexual impulsivity is not a manifestation of his ASD and/or learning disability. There is no pattern of impulsivity due to his impairments of which his sexual offending is a part. When with his brother or others whose disapprobation he might want to avoid, he controls any impulses to sexually touch women. He disregards the need for consent but he remains able to use the information he retains, namely that the consent of the other person is necessary."

26. The second case, *Re ZZ*, played a pivotal part in the decision in the present case. It is therefore necessary to refer to it in some detail. It concerned a 20-year-old man with a diagnosis of mild learning disability, ADHD and possible obsessive compulsive disorder who had been convicted of a sexual assault on a child. The psychiatrist Dr Rippon had initially concluded that he lacked capacity in some areas but had capacity

in others, including the capacity to engage in sexual relations and to marry. In an addendum report, she had revised her view and concluded that he lacked capacity in those areas. She adhered to that view in oral evidence, save that she considered ZZ had capacity to engage in sexual relations with his then girlfriend TD, provided TD knew about his offending history, and (as recorded in paragraph 36 of Theis J's judgment on appeal) identified as risk factors in ZZ "the strength of his sexual urges, his limited ability to refrain from acting upon them, impulsivity and lack of empathy". It was her view (*ibid* paragraph 39) that "there is evidence that ZZ does have compulsive and obsessional behaviours, which I believe is a disorder of … the mind, the brain, and I think it is that that drives behaviour, and makes it difficult for him to stop himself from doing something that he knows is wrong and inappropriate."

27. HHJ Burrows, however, concluded in that case that ZZ had capacity to engage in sexual relations. He said:

> "Clearly, urges are, by their very nature, difficult to control, and it would be setting the bar too high if capacity to consent to sexual relations were to be ruled out because a person was unable to control an urge (for instance) to carry on with the sexual act."

He cited the case in *Re Z* [2016] EWCOP 4 in which Cobb J had concluded that a 20-year-old woman had capacity to make decisions about various matters, including residence, contact with others and her care. Cobb J had started his judgment by saying:

> "It is well known that young people take risks. Risk-taking is often unwise. It is also an inherent, inevitable, and perhaps necessary part of adolescence and early adulthood experience."

There had been no issue in *Re Z* that the young woman had capacity to engage in sexual relations. In *Re ZZ*, however, Judge Burrows drew on Cobb J's observations as support for his decision:

> "the conclusion I have reached, namely that ZZ has capacity in this area, fits in with Cobb J's statement in *Re Z* namely that ordinary risk taking, which may be unwise does not render the decision incapacitous. I would go further. A person can have the capacity to engage in sexual relations, understanding that his partner may withdraw her consent at any moment, and that with that he must stop the sexual act. If, however, when that withdrawal of consent happens the person is unable to overcome his urges, that is nothing to do with capacity to consent to sexual relations."

28. Theis J allowed the local authority's appeal and set aside the declaration that ZZ had capacity to engage in sexual relations, for the following reasons set out in paragraph 85 of her judgment:

> "(1) The Judge did not properly deal with various aspects of Dr Rippon's evidence in particular (a) whether ZZ was able to use or weigh information about consent in the context of ZZ's sexual impulsivity and the complexity of the causes of that,

> including his mental impairment; (b) that ZZ's disinhibited sexual behaviour was due to a combination of his mental impairment, which included his cognitive functioning, and executive functioning and gave disproportionate weight to the significance of ZZ's ordinary sexual urges/desire.
>
> (2) The Judge wrongly equated ZZ's sexual disinhibition with the usual risk-taking of a person of commensurate maturity (as Cobb J did in *Re Z).* The Judge failed to properly weigh in the balance the evidence that ZZ has a record of sex offending and has been assessed as manipulative and presenting a very high risk. His sexually disinhibited behaviour falls into a different category than that envisaged by Cobb J in *Re Z,* with the result that the ability to use or weigh the question of consent needs to be considered in that context.
>
> (3) The Judge erred in not following the approach set out in *JB* by asking himself first is the person unable to decide the matter for himself by reference to the matter and the relevant information, second is there a clear nexus between his inability to make a decision in relation to the matter and an impairment of, or disturbance in the mind or brain. If he had taken that structure it would have directed him to the relevant parts of Dr Rippon's evidence."

29. A number of other cases were cited either before the judge or in the course of submissions to this Court. Of these, it is only necessary to mention *A Local Authority v TZ* [2014] EWCOP 973 which addressed the difficulties arising where a court concludes that P has capacity to engage in sexual relations but lacks capacity to make decisions relating to contact. In *TZ,* the court approved a care plan aimed at providing the individual with the necessary education and support to allow him to meet persons with whom he might wish to have sexual relations. In subsequent cases, including this case, professionals have commonly referred to a plan of this sort as a "*TZ* plan".

Dr Ince's evidence in this case

30. In his comprehensive first report, Dr Ince responded to a series of instructions addressing ZX's capacity across a range of areas. For the purposes of this appeal, it is unnecessary to consider in detail his analysis and conclusions about ZX's capacity save in relation to engaging in sexual relations. From his reading of the extensive documentation provided to him, Dr Ince summarised the accounts of ZX's behaviour and the reports previously prepared by a number of professionals, including his therapists, a youth justice service officer, and ZX's treating psychologist. He cited records of ZX continuing to disclose that his sexual thoughts were often violent and controlling and describing how he would target potential victims. He quoted the opinion of a therapist at his residential unit in November 2023 that ZX "continues to be 'high' risk of displaying further harmful sexual behaviours if left in a risky situation, for example in a room on his own with somebody vulnerable." The therapist noted, however, that in the previous twelve months ZX had been allowed an increased amount of time alone in the community without engaging in any concerning or harmful sexual conduct.

31. For the purposes of his first report, Dr Ince interviewed ZX and conducted a mental state examination. In the course of the interview, he showed ZX a series of line-drawn images to gauge his understanding of information relating to sexual activities. The report contained a very full record of ZX's comments in interview.

32. In Part 11 of his first report, Dr Ince set out his opinion. He concluded that there was clear longitudinal evidence to confirm a diagnosis of ADHD and conduct disorder. He also found that, as a result of his neurodevelopmental disorder, ZX presented with a range of deficits within his executive functioning including impaired working memory, poor impulse control, inattention, difficulties with planning and organisation, cognitive flexibility, and emotional regulation. He concluded:

> "Overall, I rely upon the presence of ADHD with consequential executive dysfunction that manifests with conduct disorder and is compounded by ZX's trauma and early developmental difficulties, to include neglect and attachment difficulties, as forming the causative nexus to the functional test."

33. In respect of all the other areas of decision-making, he concluded that, on the basis of that causative nexus, ZX was unable to understand, retain, weigh or use the information relevant to the decision and lacked capacity to make decisions in each area.

34. At section 11.12 of the report, he considered capacity to engage in sexual relations. Having quoted the first three sentences of paragraph 121 of Lord Stephens' judgment in *JB*, he continued:

> "11.12.2. In terms of the assessment of ZX's capacity to engage in sexual relations, I would make the following comments that are based upon [his] direct responses within this assessment:
>
> 11.12.2.1. The assessment was conducted primarily using the BILD Sexual Resource pack (as referenced above), thus removing the reliance upon understanding of verbal terminology.
>
> 11.12.2.2. The assessment proceeded using terminology that ZX introduced to the conversation and – thus – words that he understood and was comfortable to use; this contributed to rapport building and his effective engagement.
>
> 11.12.2.3. ZX was able to correctly identify male and female genitalia.
>
> 11.12.2.4. ZX was able to explain the use of condoms to prevent sexually transmitted diseases.
>
> 11.12.2.5. ZX understood the mechanics of the sexual act and identified vaginal intercourse could lead to pregnancy (and that other sexual acts would not).
>
> 11.12.2.6. ZX was able to articulate the concept of 'consent' and further that both parties would need to consent; this was

> reinforced by his ability to identify and comment upon pictures depicting unwanted physical and sexual contact.
>
> 11.12.2.7. ZX understood that consent could be withdrawn at any time and that consent needed to be validly given; this was shown by his understanding that a person could not consent if they were drunk or asleep.
>
> 11.12.3. Accordingly – and based upon the updated threshold in *A Local Authority v JB* [2021] UKSC 52 – ZX can understand the relevant stem information and demonstrates a relevant ability to retain and weigh the information that has been provided to [him]; he has capacity to engage in sexual relations."

35. In his addendum report, Dr Ince started by responding to questions about the other areas of capacity with which this appeal is not concerned. On the issue of capacity to engage in sexual relations, he quoted from the summary of the decision in *ZZ* supplied by the parties and continued:

> "3.10.5. In drawing conclusions in the context of this judgment, I have further given consideration to the judgments within *DY v A City Council* [2022] EWCOP 51, and *Re PN (Capacity: Sexual Relations and Disclosure*) [2023] EWCOP 44 – within these cases, in which there was a degree of clinical and diagnostic similarity, the conclusion was reached the P had capacity to engage in sexual relations, that there was a risk of offending, but, paraphrasing, the offending occurred in the context of P understanding the nature of the offending and the relevant risks therein – accordingly, these judgements differ from the judgement in *ZZ* (quoted above) on the basis that in the latter case, a clear nexus is created between P's 'mental impairment' and his 'urges'.
>
> 3.10.6. In the case of ZX, I would opine that the diagnostic formulation is very much analogous to the *ZZ* case, with ZX displaying clear impulsivity that I would consider to be due to his diagnoses of Conduct Disorder, ADHD and attachment difficulties, and contextualised (on a dynamic basis, AKA 'in the moment') by his underlying social scripts and broader narratives regarding relationships and sexual encounters that, to date, have not been fully explored or therapeutically addressed – this formulation differs from *DY* and *PN*, in that those cases were associated with a greater chronological age, settled presentation, and chronicity of behaviours despite longitudinal (and in the case of *PN*) prolonged psychological therapy regarding sexual offending."

36. This led Dr Ince to a revised conclusion which he expressed in these terms:

> "3.17.1. I refer the reader to my updated views, as set out above, in the context of the most recent case law threshold, and that I

> have, accordingly, altered my view and prior conclusion such that I have now updated my opinion and conclude that ZX is unable to effectively use and weigh the information relevant to the decision and lacks capacity to enter into sexual relations as a result of the causative nexus as set out."

37. In answer to a question as to whether there were gaps in ZX's understanding of safe sexual activity which required further education or training, Dr Ince said (at paragraph 3.21.1):

> "further psychological work to determine the degree to which his underpinning core believes and 'scripts' can be shaped in a more pro-social manner … is crucial in the longer-term determination as to whether ZX will continue to act in a manner that is impulsive as a consequence of the causative nexus, or whether there will be eventual alignment in the formulation as per *Re PN*, with ZX understanding the relevant risks, and being able to use and weigh the relevant information, but choosing to disregard this information to continue to opportunistically offend."

38. In answer to a further question, Dr Ince said that he did not consider it was currently necessary to interview ZX, but added (at 3.25.1):

> "due to his diagnoses and chronological age, there is a high likelihood that the position may change within relatively short periods of time, and that ZX's capacity within a number of domains, and the degree to which his decisions can be solely attributed to said diagnoses (and thus the establishment of the causative nexus) should be kept under rigorous review."

39. Dr Ince gave oral evidence at the hearing, a transcript of which has been obtained for this appeal. In a significant number of places the transcript is marked "inaudible", but counsel have attempted to fill the gaps by providing their own agreed note of his evidence.

40. At an early stage in his evidence Dr Ince stated that "in the light of the ZZ judgment I've revised my view around capacity to engage in sexual relations". Later he referred again to the *ZZ* judgment, which he said he had found "very helpful". Asked by the judge whether he had read the judgment or just the summary, he replied (as recorded in the transcript):

> "The judgment. I went on BAILLI and read the judgment. (*Several inaudible words*) I felt that compared to the case of [*PN*], [PN] was a substantially older person who has -- the chronology of the offending is very clear and the nature of the offending very much differs from behaviours that ZX demonstrates. That's why I have changed my opinion in the context of the updating case law that there is from my perspective significant difference and sufficient information regarding the relevant aspects of the diagnoses that are present and would add to that(*?*), such that I believe that (*inaudible*) ZZ

> there is sufficient information to create that causative nexus that at this time I view that ZX was unable to effectively use and weigh the information relating to the other person's ability to consent in the moment."

41. Cross-examined by Ms Gardner for the Official Solicitor, Dr Ince said that, at the time of his assessment, it was his view that ZX had capacity "on the basis of the threshold within *JB* and the case law at that time". He agreed, however, that, having read the decision in *ZZ* he now considered the evidence to suggest that "in the moment" ZX was unable to use and weigh the relevant information in relation to consent. The cross-examination continued, according to the transcript:

> "Q: … you viewed the direction of travel in ZX's case … to go in the direction of a *TZ* plan
>
> A: Yes, yes that's where were [*sic*] in terms of case law, and yes my understanding of the application of the threshold in JB is that its [*sic*] low, so as not to exclude people with learning disabilities etc, so reading summary of judgment in ZZ that resonated with me as a neater or more linear and obvious way of conceptualising the risk issues to and from ZX and conceptualising in terms of relevant domains. Rather than addressing through domain of contact, ability to consent in the moment or understand other person's ability to consent in the moment. I don't know direction of travel, and I don't know if ZX will develop way of managing own compulsive behaviours or if will require lifelong supervision and management. He is very young, a lot can change, a lot has already changed. What we see in the chronology and continue to see in the updating chronology is a repetition of incidents that are thematically similar if not exactly the same, without any evidence of an ability to use or weigh or apply the consequences of prior incidents to inform his understanding of risk and his actual behaviour. So my expectation is, and we see it with the information about [the 15-year-old girl], this repetition of offending behaviour, moves into criminality, my view would be that the manner in which ZX currently acts is a consequence of his neurodivergent disorders and without evidence of a premeditated recidivistic kind of sexual offending, he is sexually offensive in what he does but I would view that as currently different to *PN*."

42. In the course of Dr Ince's evidence, there was a lengthy exchange between the witness, counsel and the judge about whether he should see ZX again before changing his opinion. Dr Ince said:

> "I think as a sort of an ethical clinician, I suppose, that the assessment needs to occur, but I suppose if we're in the position where, as I said across other domains in his life there was evidence that ZX was able to incorporate the advice and the education that has been given to him (inaudible), that might be different. But I don't see that we have that evidence to suggest

> that his global level of impulsivity and inability to weigh information has changed."

A little later, Ms Gardner pressed him on whether he should see ZX again. Dr Ince replied:

> "I don't think my view has changed …. My view is still the same but how it's concluded in terms of the domain has changed …. taking into account *ZZ*."

When the judge observed "so you think *ZZ* has changed where the bar is", Dr Ince replied "I think it has". Later, asked by the judge whether he was happy for him to make the decision on the basis of his evidence without a further interview with ZX, Dr Ince replied: that, whilst he was "humanistically more than willing" to see him again, and thought that a further assessment would be appropriate at a later date, he did not consider it was necessary to conduct a further interview now because

> "at the moment there is no substantive shift in the evidence of his behaviour upon which to potentially shift the conclusions I've reached."

The judgment

43. The judge started his judgment with a summary of the factual background. Having cited the conclusion of the Youth Justice Report quoted at paragraph 8 above, he observed (at paragraph 39):

> "It is all the more shocking, therefore, that the same entry in the chronology records that there is no option for ZX to be involved with forensic CAMHS or Youth Justice because he was about to turn 18. As at the time of the hearing, despite being considered as a considerable risk to others of serious sexual harm, ZX was not subject to any proceedings or restrictions within the criminal justice system. There were also no provisions of the Mental Health Act 1983 (MHA) in place to keep him and others safe."

The judge then summarised other parts of the written evidence, including reports prepared by ZX's therapists.

44. Next the judge set out at some length the relevant law, including a summary of the statutory provisions, the Supreme Court judgment in *JB*, and several other decisions, including *Re PN* and *Re ZZ*. In doing so, he made observations relied on by the appellant in support of this appeal:

> "63. Of course, there are many people who commit serious sexual offences including rape who are fully capacitous. They initiate or force sexual activity on others knowing that to be against that person's wishes. There are some who, once engaged in consensual sexual activity with another, will not accept "no" for an answer, and will carry on regardless of the withdrawal of

> consent. Not all perpetrators of sexual offences lack capacity to engage in sexual relations. There must be a connection between the disturbance in the functioning of the mind and brain and using and weighing of the relevant information in [requirement (2) in *JB*].
>
> 64. This is the subject of Mr Justice Poole's decision in *PN* ….. The judge had clearly in his mind the need to avoid the protection imperative. Although, when considering requirement (2) in *JB* it leads to the somewhat odd conclusion that one should allow those the Court is considering to be able to commit serious sexual offences unless they lack the capacity to understand that the other person's consent to sexual activity is needed: see [11]."

45. The judge summarised Dr Ince's reports and oral evidence. At paragraph 95, he observed:

> "Dr Ince was confronted with a very complex and difficult case, not helped by being referred to caselaw (ZZ) as if that case had somehow changed the law. In fact, that case was an application of the pre-existing law."

He quoted passages from Dr Ince's oral evidence, including the passage set out at paragraph 41 above. He said he did not find it easy to follow his evidence, but was satisfied he understood his conclusion and how he reached it. He noted (at paragraph 105):

> "when asked the *JB* questions in an interview he gave answers that indicated that he understands all the information needed to avoid being found to lack capacity. However, Dr Ince is concerned that because of mental disorders, particularly ADHD, he is impulsive, and that impulsivity is something that removes from him the ability to use and weigh the information he understands in the moment. In other words, during sexual activity, if the partner does not give, or withdraws consent to carry on, ZX might be unable, because of his mental disorder, to make a decision about whether to carry on or not."

46. The judge then explained his conclusions in the following terms:

> "110. The question I have to ask myself about ZX and the second limb of JB is this: If ZX is engaged in sexual activity or is in a situation where sexual activity is anticipated/expected by him with a person and consent from the other party is either not forthcoming or is withdrawn will ZX be able to make a capacitous decision about whether to stop that sexual activity accordingly?
>
> 111. "Capacitous" in this context means as per the five-limb test in JB.

112. The answer to that question must be based on the evidence I have read and heard. It seems quite likely that ZX may find himself alone with a vulnerable would-be sexual partner, quite likely by design.

113. Once in that position, the question is not whether he would respect the refusal of the other party to consent to sexual activity, or the withdrawal of consent once sexual activity had begun. The question is whether he would be able to respect that refusal, or whether, because of his mental disorder as described by Dr Ince he would not be able to use and weigh (or process) his understanding of their right to refuse being respected. That would be what Dr Ince refers to as "in the moment".

114. The evidence I have seen and read leads me to conclude:

(1) ZX has developed a longstanding appetite for sexual experience in which the coercive nature of the experience is part of the appeal, the thrill. Indeed, due to his trauma it may have become a necessary part of the experience in order for him to feel fulfilled.

(2) Although Dr Ince identifies impulsivity, or at least he infers the existence of impulsivity, I am not satisfied that impulsivity is what I see. I see in ZX a young man who is cunning and opportunistic but is also capable of planning sexual contact with other people within the context of such liaisons being forbidden. Hence the reference made about his waiting until adults are out of the way before initiating sexual contacts.

(3) ZX was able to satisfy the JB test in his assessments with Dr Ince.

(4) However, and on reflection in the light of Theis J's judgment in ZZ, he concludes that "there is sufficient evidence within the chronology and [ZX]'s recent acts to demonstrate that firstly what he says within an assessment setting cannot be relied upon, and also that he continues to display a range of behaviours that disregard the norms and education provided to him"….

(5) It is not clear to me whether Dr Ince only refers to "in the moment" here. In his first report (from 11.5.20) onwards, he refers to ZX's "range of deficits within his executive functioning - and causally - would rely upon the presence of a neurodevelopmental disorder as an explanation for his observed difficulties", and then identifies the areas in which this affects. These are:

• Impaired working memory (impacting upon his ability to retain and use information)

• Poor impulse control (as evidenced in the chronology and risk assessments)

• Inattention (and the impact upon learning and decision-making)

• Difficulties with planning, organisation and consequential decision-making

• Cognitive flexibility (and the ability to transition between tasks and transfer learning from one situation to another)

• Emotional regulations (and the ability to transition between tasks and transfer learning from one situation to another)

(6) It seems to me these features would apply to any situation in which ZX had the urge to engage in sexual activity with another person. It may lead to him planning to enable him to be alone with that person. It would certainly apply where he was involved in sexual activity and there was an absence or withdrawal of consent by the other party.

(7) Dr Ince is a jointly instructed expert, and his expert evidence is not countered by another expert. Although it is for me as the Judge to reach a conclusion of his own, and not blithely to follow what the expert says, I need to give a good reason if I come to a different conclusion.

(8) In order for me to reach the conclusion that ZX lacks capacity to consent to sexual activity I need to be satisfied on the basis of all the evidence I have read and heard that ZX is not be able to satisfy the JB test and particularly "in the moment" in the real world, rather than in a mental capacity assessment with Dr Ince.

(9) I am concerned this may involve speculation on my part as to what ZX may do if those circumstances arose. As Ms Gardner [for the Official Solicitor] put it both in her questioning of Dr Ince, but also in her closing submissions, there is no evidence base for this. In other words, the Court has no evidence of what ZX does or would do when confronted with the absence or withdrawal of consent during sexual activity.

(10) The response to that is twofold. First, there is a good deal of evidence from ZX himself and his brother that he has engaged in non-consensual sexual activity with other people over the years. Secondly, Ms France-Hayhurst [for the local authority] would invite the Court not to allow ZX to engage in activity that provides an evidence base, at the expense of ZX's liberty and the devastating experiences of his victims.

> (11) In response to the first of these, my answer is that the evidence considered within Dr Ince's conceptual framework (post *ZZ*, in any event) does allow me to conclude that ZX does not "pass" the test in JB at limb (2). I am extremely concerned about doing so. It seems to me this is an hormonal 18 year old man with a considerable sexual appetite. If I conclude he lacks the capacity to engage in sexual activity, he will be subjected to an extremely restrictive regime where his only sexual "outlet" will be masturbation whilst watching selected on-line pornography; censored, I would imagine, to avoid images of violent rape, children and animals.
>
> (12) On the other hand, I have to avoid what has been called the protection imperative. I must not tailor my formulation of the capacity assessment to ensure a particular outcome. Normally, that means trying to protect a vulnerable person who would otherwise be exploited or harmed unless protective measures can be put in place. Here, the same applies except it is ZX's potential as a perpetrator in a serious sexual offence, and the consequences that flow for him, rather than his potential victim is what he is being protected against.
>
> (13) At first glance, this is a somewhat perverse use of the MCA. However, it is explicitly sanctioned by the Supreme Court in *JB*. Naturally, I must follow that judgment.
>
> 115. For all those reasons, I am satisfied that the presumption of capacity in respect of his engaging in sexual relations is displaced in ZX's case. At the moment this judgment is written, I am satisfied that his behaviour in connection with sexual activity in combination with his mental disorder means that he is unable to use and weigh relevant information concerning his would be or actual sexual partner's refusal to, or withdrawal of, consent in in real time."

The appeal

47. Three grounds of appeal were put forward:

(1) The learned judge applied the wrong legal test to the decision, and in doing so erroneously lowered the standard and quality of evidence that is required to rebut the presumption of capacity enshrined in s.1 MCA.

(2) The judge was wrong to conclude to that ZX lacks capacity to consent to sexual relations by reason of being unable to use or weigh information "in the moment".

(3) The Judge was wrong to consider wider issues relating to the protection of the public and the non-availability of mental health services and/or involvement of the criminal justice system when determining whether ZX has capacity to make the decision; and to accept the evidence of Dr Ince given Dr Ince's reliance on these considerations.

48. Under ground 1, Ms Butler-Cole submitted that at paragraph 63 of the judgment, the judge had identified the test under s.2 MCA as being whether there was "a connection between the disturbance in the functioning of the mind and brain and using and weighing of the relevant information". At paragraph 115, he concluded that ZX lacked capacity to engage in sexual relations as he was satisfied that his "behaviour in connection with sexual activity in combination with his mental disorder means that he is unable to use and weigh relevant information concerning his would be or actual sexual partner's refusal to, or withdrawal of, consent in real time". Ms Butler-Cole submitted that s.2(1) of the MCA requires "a clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain": *JB* paragraph 78. A 'connection' between the two is insufficient and wrong in law.

49. Ms Butler-Cole submitted that, having applied the wrong test, the judge proceeded to accept evidence as to the causal nexus which was not of a sufficient standard or quality. There was evidence of ZX not in fact weighing up the need for consent, or not affording sufficient weight to that factor, as there was a long history of non-consensual sexual activity. What was missing was evidence as to whether he was unable to weigh up the need for consent, or was choosing not to weigh it. Dr Ince had not asked ZX about his experience of decision-making "in the moment". In oral evidence he said there would be no point in a further visit to explore this question as there was "no substantive shift in evidence of ZX's behaviour". It followed that, for Dr Ince, the only evidence that could show that ZX was able to weigh the need for consent in the moment was evidence that he was no longer engaging in non-consensual sexual encounters, and was no longer acting impulsively in other areas of his life. Ms Butler-Cole cited passages from Dr Ince's evidence which demonstrated his reasoning moving directly from evidence of inappropriate behaviour to a conclusion that ZX cannot weigh up relevant information. She submitted that there were multiple examples of ZX expressing his intention to offend and his decision making around his sexually deviant behaviour. It was the appellant's case that Dr Ince had failed properly to grapple with whether ZX's offending behaviour is a consequence of his choosing to disregard the feelings of the other person and the absence of consent, rather than an inability to weigh information. At paragraph 114(9), the judge had expressed concern that in the absence of an evidence base his decision would involve speculation but had nonetheless gone on to make the decision.

50. Under ground 2, Ms Butler-Cole submitted that the judge was wrong to conclude that ZX lacks capacity to consent to sexual relations by reason of being unable to use or weigh information "in the moment", for several reasons, which can be summarised under three headings.

51. First, as the judge acknowledged at paragraph 114(9), there was no direct evidence of what ZX does or would do when confronted with the absence or withdrawal of consent during sexual activity. Instead, the judge had wrongly relied on Dr Ince's analysis that ZX's continuing inappropriate behaviour was by itself evidence of a lack of capacity. To the extent there was evidence relevant to ZX's ability to make decisions in the moment, it supported a conclusion that ZX was able to weigh up information and was not acting impulsively when engaging in sexual activity. The undisputed evidence was that ZX is able to control his sexual behaviours and that he seeks out opportunities to

avoid detection, acting in a way which the judge accepted was "cunning and opportunistic".

52. Secondly, the judge's conclusion was wrong because, contrary to Dr Ince's opinion, he found that ZX was not impulsive. For Dr Ince, impulsivity was the key factor linking his mental disorder with an inability to weigh up information about sex, rather than other identified deficits on cognitive functioning quoted by the judge at paragraph 114(5) of the judgment. The judge rejected this view ("I am not satisfied that impulsivity is what I see. I see in ZX a young man who is cunning and opportunistic …."). Ms Butler-Cole submitted that, having rejected that critical element of Dr Ince's opinion, there was not a sufficient evidential basis for the judge to conclude that ZX would be unable to use and weigh the relevant information "in the moment" as a result of his ADHD. Although Dr Ince set out a generic list of deficits in cognitive functioning caused by ADHD in his first written report – including impaired working memory, inattention, and cognitive flexibility which was then quoted by the judge at para 114(5) of the judgment – it was evident from the note of Dr Ince's oral evidence that impulsivity rather than these other difficulties was the key factor linking ZX's mental disorder with an inability to weigh up information about sex. There is no analysis in the judgment of what other features of ADHD, aside from impulsivity, could result in ZX being unable to make a decision despite understanding and retaining all the relevant information about engaging in sexual relations.

53. Thirdly, Ms Butler-Cole submitted that the judge's conclusion was wrong in circumstances where Dr Ince had not discussed with ZX any of the matters which changed his opinion in the course of the assessment but rather reached a conclusion on the basis of an inference from the fact of ZX's continued non-consensual sexual behaviour that his diagnosis of ADHD was the causal explanation. Both Dr Ince and the judge concluded that ZX lacked capacity to engage in sexual relations notwithstanding the fact that, during the assessment, he was "able to satisfy the *JB* test". In reaching that conclusion, they had proceeded on the erroneous basis that *Re ZZ* had changed the approach laid down in *JB*. That erroneous basis, if correct, would significantly raise the bar as regards what a person needs to understand in order to have capacity to engage in sexual relations. Ms Butler-Cole cited the observation of this Court in *Re M (An Adult) (Capacity: Consent to Sexual Relations)* [2014] EWCA Civ 37 at paragraph 81 (endorsed by the Supreme Court in *JB* at paragraph 77):

> "…the ability to use and weigh information is unlikely to loom large in the evaluation of capacity to consent to sexual relations. It is not an irrelevant consideration; indeed (as we have emphasised) the statute mandates that it be taken into account, but the notional process of using and weighing information attributed to the protected person should not involve a refined analysis of the sort which does not typically inform the decision to consent to sexual relations made by a person of full capacity."

54. Under ground 3, it was submitted that there was clear evidence in the transcript of the hearing and the judgment, that the tail of welfare was being allowed to wag the dog of capacity. The question of whether ZX should be supervised, or prevented from forming sexual relationships, to avoid harm to third parties, is not part of the test of mental capacity under the MCA. The risk of sexual offending behaviour should be managed through the criminal justice system where the courts are well-versed in dealing with

those who are vulnerable by virtue of a mental disorder and in balancing their needs and rights against the need to ensure public protection. It is inappropriate for the Court of Protection to step into the shoes of the criminal law.

55. In response on behalf of the local authority, Mr O'Brien submitted in respect of the first ground that the judge's use of the word "connection" at two points in the judgment should not be interpreted as indicating that he applied the wrong test. He pointed to other passages in the transcript of the hearing and judgment, in particular to the way in which the judge had framed the question in his conclusions at paragraph 113 ("whether, because of his mental disorder as described by Dr Ince, he would not be able to use and weigh …"). Although the judge may have expressed concern about taking a speculative approach, he was not wrong to have relied on the wider context for an indication of how ZX would respond at the material time, in the midst of a sexual encounter. It would be both impractical and meaningless to expect that every assessment of capacity to engage in sexual relations should be carried out purely on the basis of what P might say in a clinical environment. In the pursuit of accuracy, the court has no option but to look to the wider canvas of evidence for information about how P would decide, and then whether that decision is affected by P's impairment.

56. In respect of ground 2, Mr O'Brien submitted that, in the absence of direct evidence, the judge was entitled to conclude that ZX lacked capacity on the basis of the wider context including his history of sexually offensive behaviour. It was too reductive to imply that the judge could have, should have and did only take account of ZX's diagnosis of ADHD when considering impairment and causal nexus. Dr Ince had presented to the court in written and oral evidence an expansive and descriptive diagnostic picture (summarised at para 35 above) which did not rely on one symptom but rather identified an array of symptoms arising from ZX's neurodiversity and trauma. In other words, where ZX's diagnosis is concerned, the whole is greater than the sum of its parts. Impulsivity was but one symptom in a long list of symptoms caused by ZX's neurological impairment. There was a host of other symptoms in the list including difficulties with impaired memory, consequential thinking, emotional regulation difficulties, inflexibility and inattention (the impact on learning and decision-making). In those circumstances, the judge was entitled to reject Dr Ince's opinion in relation to ZX's impulsivity and the impact of it and equally, entitled to accept that ZX lacks capacity because of his impairment as a whole. The judge was also entitled to proceed without requiring Dr Ince to conduct a further assessment, on the basis of Dr Ince's view, based on his experience of ZX at interview, that little if any further evidence would be adduced within the sterility of a clinical environment.

57. With regard to ground 3, Mr O'Brien acknowledged that the judge had been concerned about the risks to vulnerable people from ZX's behaviour, but submitted that it was clear from the transcript of the hearing and the judgment that he was profoundly uncomfortable with the potential for the Court of Protection to be used as vehicle for public protection and that, when determining the issue of capacity, he was not improperly influenced by public protection issues and did not trespass into a welfare-based evaluation of capacity. In oral submissions, Mr O'Brien submitted that the judge's comments were consistent with the observations by Lord Stephens in *JB* about the relevance of the consequences to other people to the assessment of capacity to engage in sexual relations.

Discussion and conclusion

58. The assessment of capacity to engage in sexual relations presents challenges to psychiatrists and judges alike. The evaluation of whether P is unable to understand, retain, weigh and use the information identified in *JB* because of an impairment of, or disturbance in, the mind or brain is never straightforward and often difficult. In this case, there were specific difficulties which made the assessment undertaken by Dr Ince and the judge even more arduous than usual. I regret to say, however, that the decision that ZX lacks capacity to engage in sexual relations was flawed and will have to be reconsidered.

59. The approach to be followed when assessing capacity in this area under sections 2 and 3 of the MCA is as prescribed by the Supreme Court in *JB*. It has not been materially amended by any subsequent decision. The decision in *Re PN* did not change the law. In some cases, as suggested by Poole J, it may be appropriate to focus on whether P is able to use the relevant information "in the moment", (i.e. when he is initiating, or about to initiate, sexual activity with another person) and, if not, whether that inability is due to an impairment of, or disturbance in, the mind or brain. The second limb of the information specified in *JB* includes not only "the fact that the other person must be able to consent to the sexual activity" but also that the other person "must in fact consent before and throughout the sexual activity". That is consistent with a focus on whether P is able to use the information "in the moment". It is also entirely consistent with the observation of this Court in *Re M*, endorsed by the Supreme Court in *JB*, 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".

60. Similarly, the decision in *Re ZZ* did not change the law in this regard. In that case, Theis J allowed an appeal because of a series of errors by the judge at first instance. I am unclear why it was considered necessary or appropriate in the present case to send Dr Ince a 3-page summary of the decision. In their submissions to this Court, Mr O'Brien and Ms France-Hayhurst stress that it was never suggested to Dr Ince that *Re ZZ* had changed the law, the "test" in *JB*, or the "threshold". But it is plain from the transcript of the hearing on 2 May that Dr Ince thought it had. His response to receiving the 3-page note was to study the whole judgment on BAILII. He said that "in the light of the ZZ judgment I've revised my view around capacity to engage in sexual relations". Later he said that he thought the decision had "changed where the bar is". This misinterpretation undermined the reliability of his conclusions in his addendum report.

61. In his judgment, the judge correctly stated that *Re ZZ* had not changed the law but was rather an application of the existing law. But he did not give sufficient consideration to whether Dr Ince's misunderstanding about the judgment undermined the reliability of his revised opinion. I accept Ms Butler-Cole's submission that the erroneous basis on which Dr Ince proceeded significantly raised the bar as to what a person needs to understand in order to have capacity.

62. For those reasons, the whole process of assessing capacity in this case was flawed. The judge should have declined to proceed on the basis of an assessment conducted on an erroneous basis. I also accept Ms Butler-Cole's submission that, given the radical change in Dr Ince's understanding of the basis of assessment between his first and addendum reports, the proper course would have been to direct a further interview and assessment before the court reached a conclusion.

63. In any event, even if the judge had been entitled to proceed on the basis of Dr Ince's revised assessment, his treatment of that assessment was flawed.

64. The central planks of Dr Ince's analysis were (1) that ZX's impulsivity was the reason for concluding that, "in the moment" of sexual activity with another person, he was unable to use or weigh the fact that the other person must be able to consent to the sexual activity and must in fact consent and (2) that this impulsivity was due to his diagnoses of ADHD, conduct disorder and attachment difficulties. The judge rejected Dr Ince's view that ZX was acting impulsively, holding instead that he was "cunning", "opportunistic" and "capable of planning sexual contact with other people within the context of such liaisons being forbidden", but nevertheless concluded that he lacked capacity in this area. His conclusion was flawed for two reasons.

65. First, the judge erred in basing his conclusion on the basis of ZX's history of offending. That pattern of conduct is not by itself indicative of an inability to understand, weigh or use information about consent. It is at least as consistent, if not more consistent, with having the ability to understand and use the information but choosing not to do so. Whilst not endorsing the terms in which the judge described ZX's conduct, Ms Butler-Cole acknowledged that there were "multiple examples of ZX expressing his intention to offend". The judge concluded at paragraph 114(10) and (11) that "there is a good deal of evidence from ZX himself and his brother that he has engaged in non-consensual sexual activity with other people over the years" which "considered within Dr Ince's conceptual framework (post *ZZ*, in any event) does allow me to conclude that ZX does not "pass" the test in JB at limb (2)". But a key element in Dr Ince's "conceptual framework" was ZX's impulsivity. If that is removed, the only evidence is the history of non-consensual sexual activity. There is no explanation in the judgment of why the judge concluded that this history established that a young man who was "cunning", "opportunistic" and "capable of planning sexual contact with other people within the context of such liaisons being forbidden" was unable to understand, use or weigh information about consent.

66. Secondly, even if the judge was entitled to find on the basis of the history of non-consensual sexual activity that ZX was unable to use or weigh information about consent, he failed to establish a clear causative nexus between that inability and his mental disorders as required by s.2(1) of the MCA as explained in *JB*. At paragraph 114(5) of the judgment, he listed a number of deficits in ZX's cognitive functioning identified by Dr Ince as attributable to the presence of a neurodevelopmental disorder, including not only poor impulse control but also impaired working memory, inattention, difficulties with planning, cognitive flexibility, and emotional regulation. The judge asserted at paragraph 114(6) that these features "would certainly apply where he was involved in sexual activity and there was an absence or withdrawal of consent by the other party". That is not a sufficiently clear causative nexus between what the judge found to be an inability to use or weigh the information and ZX's neurodevelopmental disorders. I agree with Ms Butler-Cole that there is no sufficient analysis in the judgment of what other features of ADHD and ZX's other disorders, aside from impulsivity, resulted in his being unable to make a decision despite understanding and retaining all the relevant information about engaging in sexual relations.

67. The judge's failure to focus on the need to establish a clear causative nexus between ZX's inability to use or weigh information needed to make a decision to engage in

sexual relations and an impairment of, or a disturbance in the functioning of, his mind or brain leads me to conclude that there is force in the assertion in the first ground of appeal that he applied the wrong test and proceeded on the basis stated in the judgment that "there must be *a connection* between the disturbance in the functioning of the mind or brain and using and weighing of the relevant information" (emphasis added). "A connection" is insufficient. The presumption of capacity can only be rebutted if there is a clear causative nexus between the inability to make a decision and an impairment of, or a disturbance in the functioning of, the mind or brain.

68. The appellant contends under ground 3 that, in reaching his decision, the judge was wrongly influenced by wider issues relating to public protection. It is true, as Mr O'Brien observed, that the Supreme Court in *JB* identified the serious or grave consequences for others if they were the victims of sexual assaults or of rapes perpetrated by JB as a factor which made it even more important in that case that JB understood the information relevant to the decision to engage in or consent to sexual relations. It is clear from Lord Stephens' judgment that this was one reason for including consent as part of the information relevant to the decision whether to engage in sexual relations. But as Lord Stephens explained at paragraph 93 of his judgment, the consequences for others, and other matters relevant to public protection, are not separate components of the information.

69. At paragraph 11 of his judgment in *Re PN*, Poole J made some pertinent observations about the consequences of the decision in *JB*:

> "following *JB*, there may be a natural desire to protect those with whom P might want to have sexual relations, in particular in cases where P has a history of sexual offending. Lord Stephens repeatedly refers to the MCA 2005 protecting not just P, but others …]. However, it seems to me, although the issue of the consent of others to sexual relations has entered the list of relevant information, the Court of Protection must not allow the desire to protect others unduly to influence a clear-eyed assessment of P's capacity. The unpalatable truth is that some capacitous individuals commit sexual assault, even rape, but also have consensual sexual relations. An individual with learning disability, ASD, or other impairment, may act in the same way, but it is only if they lack capacity to make decisions about engaging in sexual relations that the Court of Protection may interfere. If P would otherwise have capacity, then the court should not allow its understandable desire to protect others to drive it to a finding that P lacks capacity, thereby depriving P of the right they would otherwise have to a sexual life. The Court of Protection should not assume the role or responsibilities of the criminal justice system."

70. I respectfully agree with those observations and with similar concerns raised by the Official Solicitor in submissions under ground 3. I am, however, not persuaded by her argument that the judge took wider issues relating to the protection of the public into account when determining whether ZX had capacity to engage in sexual relations. It is correct that the judge made a number of references to his concerns that the issue was being dealt with by the Court of Protection. At an early point in the hearing, the judge

expressed concern about the extent to which the Youth Justice Service and CAMHS had been involved with ZX and the steps they had taken "to protect the public from somebody who is assessed as being a very high risk of serious harm". Importantly, however, he immediately added:

> "But the point is that this court is not a court of public protection. It's the protection in the name – what it says on the can – is the protection of the person concerned."

71. Plainly the judge was deeply concerned about the risk posed by ZX to vulnerable people. This is evident from the transcript of Dr Ince's evidence and from the judgment (including, for example, his expression of shock in paragraph 39 of the judgment quoted above). At paragraph 64 of his judgment, citing the passage from *PN* quoted above, he stated that requirement (2) in *JB* "leads to the somewhat odd conclusion that one should allow those the Court is considering to be able to commit serious sexual offences unless they lack the capacity to understand that the other person's consent to sexual activity is needed." I am satisfied, however, that, although he remained concerned about the risk posed by ZX, he did not allow these concerns to influence his decision about capacity. At paragraph 114(12) of his judgment, he said:

> "I have to avoid what has been called the protection imperative. I must not tailor my formulation of the capacity assessment to ensure a particular outcome".

72. I would therefore not accept the premise in the third ground of appeal. But for the reasons set out above, I would allow the appeal on grounds 1 and 2. The declaration that ZX lacks capacity to engage in sexual relations should be set aside and replaced by an interim declaration to that effect under COPR rule 10.10.

73. Regrettably this Court is not in a position to determine whether ZX has capacity. There must be a fresh psychiatric or psychological assessment, which will be further informed by the recent finding by his treating psychologist that that ZX meets the criteria for intellectual disability or learning disorder. The assessment should be conducted on the basis of the principles set down by the Supreme Court in *JB*. As part of that, it would be helpful in this case if the assessor could attempt to establish whether ZX has the ability to use information about consent "in the moment", that is to say when he is engaged in sexual activities with another person, relevant to the decision whether to engage in sexual relations. If my Lord and My Lady agree, I would remit the case to Theis J for a further case management hearing to decide the terms of the capacity assessment and the identity of the appropriate expert to conduct it.

LADY JUSTICE ANDREWS

74. I agree.

SIR ANDREW MCFARLANE, PRESIDENT OF THE COURT OF PROTECTION

75. I also agree.