

COURT OF PROTECTION

Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

**VICE PRESIDENT OF THE COURT OF PROTECTION
THE HONOURABLE MRS JUSTICE THEIS**

BETWEEN:

	NHS BIRMINGHAM AND SOLIHULL INTEGRATED CARE BOARD	<u>APPLICANT</u>
	- and -	
	JI (by his litigation friend the Official Solicitor)	<u>1stRESPONDENT</u>
	-and-	
	BIRMINGHAM CITY COUNCIL	<u>2ND RESPONDENT</u>
	- and -	
	GH	<u>3rd RESPONDENT</u>
	-and-	
	BIRMINGHAM COMMUNITY HEALTHCARE NHS FOUNDATION TRUST	<u>4TH RESPONDENT</u>

Legal Representation

Mr Parishil Patel KC (Counsel) on behalf of the **Applicant ICB**
Mr Ben Harrison (Counsel) on behalf of the **Official Solicitor**
Mr Ian Brownhill (Counsel) on behalf of the **Respondents**
Mr Pravin Fernando (Counsel) on behalf of the **4th Respondent NHS Trust**

Judgment

Judgment date: 13 December 2023

This judgment was delivered in public, but a Transparency Order dated 24 July 2023 is in force. This version of the judgment is published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of Z must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Theis:

1. I am giving this short extempore judgment in the context of proceedings relating to JI, who is a 29 year old man who has been the subject of proceedings since early 2021. In accordance with the last Directions Order made by me on 3 November, one of the issues the Court was to consider to today are submissions regarding the issues raised by the Court of Appeal's decision of *Re C* [2021] EWCA Civ 1527.
2. JI has complex needs with a diagnosis of learning disability, autism, personality disorder and ADHD. He requires a considerable amount of support. The current level of support is two to one support throughout the day and when he accesses the community, and one to one waking night support. He lives with his mother, and the support is currently being provided by an organisation called New Leaf. It has been in place since 1 July 2023. Prior to that there had been similar organisations who had provided the support but for various different reasons set out in the papers those arrangements had been terminated.
3. The care package is commissioned jointly by the Integrated Care Board and the Local Authority on an 80:20 split under section 117 of the Mental Health Act 1983, and the Integrated Care Board commissions Birmingham Community Healthcare NHS Foundation Trust to case manage the provision of services required to meet JI's healthcare needs, and to provide JI with the services of the intensive support team, IST, to help New Leaf manage JI's behaviour.
4. In relation to these proceedings, in terms of capacity, there is no dispute between the parties that JI lacks capacity to:
 - 1) Conduct the proceedings.
 - 2) Make decisions about his residence, care and support, and contact with others.
 - 3) Use and access the internet and social media.
5. Even though JI has capacity to engage in sexual relations, he lacks capacity to make decisions about choosing who it would be safe to have sexual contact with, and choosing to pay for sexual entertainment services including a sex worker. There is evidence in the papers that JI can at times be verbally and physically aggressive to his carers and to his mother when he is anxious, agitated, or elevated in mood. The Local Authority commissions and case manages the provision of services to meet JI's social care needs.
6. Just standing back from that very brief description, it is a complex picture that governs the management of JI's particular position and the support that he has. The issues raised in the context of the Court of Appeal decision in *Re C* centre on the Integrated Care Board's commissioning decision to stop funding part of the support that JI currently has to visit an establishment called Adult World on a long term basis.
7. That support is currently taking place in the way described in the papers and in the evidence, namely that if he wishes to go there, it is on a two to one basis, and in relation to all visits involve one support worker remaining outside Adult World, and

the other accompanying JI inside the building when he goes into the private room where the lap dance that he wishes to be able to see takes place.

8. The evidence demonstrates that normally takes about three to four minutes and the support worker takes a number of steps described in the evidence to manage the risks involved with that activity for JI, such as ensuring that he only has sufficient money, namely £20, for the private lap dance, and also the support worker reminds JI of appropriate behaviours and the importance of leaving the room once the dance has finished. That activity and support for that activity has been part of JI's care plan since 2019, and by and large has taken place on a monthly basis, generally at JI's request.
9. The Integrated Care Board and the Local Authority are of the view that the support workers are at risk of committing an offence under section 39 of the Sexual Offences Act, in that it could be said that the care workers cause JI to engage in sexual activity, or they are creating the circumstances for the sexual activity to take place. The Integrated Care Board considers the risk of this is more than fanciful. As a consequence, they have made the decision to phase these visits out gradually to manage the impact on JI.
10. This is in the context of the Integrated Care Board and the Local Authority having commissioned additional activities for JI as outlined in the statements from Mr G, including weekly visits to a recording studio to be able to build on the musical interests that JI has, weekly trips to the cinema, swimming, attending the gym, and for JI to attend weekly educational groups providing advice on dating and other social activities.
11. The evidence is that they have funded these additional activities for at least a period of three months when they will then review that, to be able to look at the wider picture in relation to JI's best interests and the care plan that would support meeting those best interests. The visits to Adult World, as I have said, have been taking place monthly for about four years and are led I am told by JI requesting them.
12. It is perhaps of note that in the recent evidence that the Court has in the best interest analysis in the papers, there is reference to JI not going in November as he preferred and prioritised his financial resources, his money, for another activity that he wanted to go to.
13. The NHS Trust and the official solicitor take issue with the Integrated Care Board's interpretation of section 39, and consider that JI's best interests require that such visits continue as meeting JI's best interests to explore his sexual identity, and as JI has said himself, to manage his sexual urges. In the balance sheet analysis in the papers, it refers to JI's frustration and aggressive reaction if he considers he is not able to undertake activities that someone with capacity could.
14. His mother has said she finds this lack of certainty in relation to what can and cannot be done difficult to manage on the ground, and when she has stepped in to either express her concerns or her views in relation to any activity, it has caused difficulty.
15. In the position statement filed on behalf of the official solicitor at paragraph 24, the official solicitor sought to invite the Court to make declarations under section 15 of the Mental Capacity Act 2005 as follows:

- 1) That it is lawful for JI's support workers to continue to support him to attend Adult World for the two further visits planned by the Integrated Care Board and the Local Authority.
 - 2) Also to declare, as would inevitably follow, it will be lawful for them to continue to provide the same on a longer term basis in line with the proposal set out by Mr P in his statement, namely the management of such visits as I have just summarised, and then at the end of the declaration it would say if the Integrated Care Board are willing to commission that support.
16. Mr Patel KC on behalf of the Integrated Care Board and the Local Authority does not take issue with the declaration sought in paragraph 24(1) because that is effectively what is happening now in relation to the position, but does in relation to the declaration that seeks to lay the ground for any position in the future. He submits that making that declaration goes too far. It amounts to pressure, and that if there is any challenge to the funding decision made by the Integrated Care Board and/or the Local Authority, it should be challenged by way of judicial review.
17. Mr Brownhill does not take a position on the law, but submits that the uncertainty on the ground for the mother is about what is and what is not permitted creates real difficulties for her, and that that is detrimental to JI's best interests. Mr Fernando for the NHS Trust submits the evidence and balance sheet supports this continuing to be in JI's best interests, and he agrees with the analysis on behalf of the official solicitor that clarity is required on this issue.
18. Mr Harrison in his detailed submissions draws the Court's attention to the evidence at paragraph 8 of his skeleton argument from Dr T, the divisional medical director for the learning disability division of the Trust, where he sets out as follows, quoting from that statement:
- “A care plan developed by the multi-disciplinary team is in place, has been reviewed when required. The care plan was developed in 2019 and since then our notes show that there has only been one incident, JI thought a dancer would meet him in a restaurant following a dance. JI's treating team responded to this incident by providing additional support for JI. There is a risk that restricting JI's access to Adult World would be a significant loss to him due to his limited access to meaningful activities. JI has accessed Adult World for a significant period of time and therefore the risk of agitation and behaviours of concern is likely to be greater if he is no longer able to access Adult World. JI only accesses Adult World once a month.”
19. The official solicitor relies on that evidence and the Trust's support for this activity, and Mr Harrison submits on behalf of the official solicitor that when properly analysed, *Re C* does not prevent this, and the Court can make a declaration as he has sought in paragraph 24(2) of his position statement. He relies on what is said by Baker LJ at paragraph 75 of *Re C*, when Baker LJ helpfully gives a steer about other situations when care workers are asked to assist people who have the capacity *to* consent to or engage in sexual relations, but lack the capacity in other respects as JI does in this case, for example to make decisions about their care, treatment or contact with other people.

20. He gives in paragraph 75 a couple of examples. He says one example is where a person with dementia living in a care home wishes to spend time with his or her partner at the family home, or another example is when a young person wishes to meet people of their own age and make friends, and then importantly he says this:

“In both cases one consequence may be that the incapacitated adult engages in sexual relations. I envisage that it might be appropriate in those circumstances for the Court of Protection to endorse a care plan under which care workers facilitate or support such contact, and to make a declaration under section 15 of the Mental Capacity Act that the care plan is both lawful and in P’s best interests,”

21. He observes that in making those observations he emphasises three important points:

“Firstly, the merits of making such a declaration will turn on a thorough analysis of the specific facts of the individual case. Secondly, in making such a declaration the Court may have to consider carefully whether the steps proposed under the care plan have the potential to amount to a criminal offence under section 39. Thirdly, as set out in the cases cited above, any declaration would not be binding on the prosecuting authority although no doubt it would be taken into consideration in the event of any subsequent criminal investigation.”

22. Having heard these helpful submissions of the parties, and having had the opportunity to be able to read their very full and comprehensive written position statements, I concluded that the Court should not accept the invitation of the official solicitor to make the declaration sought in paragraph 24(2) of the official solicitor’s position statement, and I do so for the following reasons.
23. Firstly, the Integrated Care Board have made their decision in the context of other services they are going to put in place as set out in Mr G’s statement. Those are at the very early stages of being put in place and will be reviewed at the 12 weekly review that is going to take place in February.
24. Secondly, that review may result in changes to the current care plan so that the visits to Adult World may be reinstated, may be less frequent, or may not occur at all. Mr Patel has rightly been clear that the door in relation to consideration of these matters is not closed.
25. Thirdly, any decision about best interests is multifaceted, and it is important that the most up to date factors and relevant evidence to best interests are taken into account in considering whether the Court should take the step that the official solicitor invited the Court to do.
26. Fourthly, the declaration being sought by the official solicitor is being made in what I consider to be an evidential vacuum. It may no longer be an issue in March, I do not know, there may be other ways JI can explore his sexual identity or urges, and as I had indicated in the documents that the Court has got, JI chose not to pursue that activity in November as a result of him prioritising his financial resources in a different direction.

27. Fifthly, this is a different situation at this moment in time than that envisaged by Baker LJ in paragraph 75 of *Re C*. The situation he was envisaging is that there was an actual care plan in place. In relation to the future declaration sought on behalf of the official solicitor, that care plan is not yet in place, and that will be the position when the Court reconsiders this case in March.
28. Finally, generally the evidence and analysis that supports the various positions needs updating, particularly in the light of the additional support that is going to be put in place. Mr G, the allocated social worker, has just taken over, and Mr A has only just taken over from Mr P who has been involved for a significant period of time, so for those very brief reasons I decline to determine the issue in relation to the declaration sought on behalf of the official solicitor at paragraph 24(2) of the position statement.
29. There are three short matters I just want to deal with. Firstly, in relation to the TZ plan. I absolutely endorse the submissions that have been made by Mr Brownhill in relation to that. He has rightly directed the Court to the decision of *A Local Authority v TZ (No. 2)* [2014] EWCOP 973, where the Court there at paragraph 55 gave very careful guidance about the essential elements that there should be in this care plan.
30. I cannot emphasise enough in this particular case, and because of JI's particular circumstances, the importance of there being a meaningful TZ care plan that is produced and used and regularly reviewed to be able to help support JI, having identified what the basic principles are, but also providing tangible support in relation to education and empowerment for him. Support and intervention to enable JI to be able to break the cycle that seems to have appeared in this case of him being unable to be able to manage and make decisions in relation to the social and other needs that he has.
31. I will endorse, as I have suggested in exchanges with Mr Brownhill, a structure that provides sufficient time for a such a plan to be produced in a meaningful way, but also if it can be accommodated within the timeframe, for there to be a short hearing that would be listed before me at some point I guess in mid-February or early February, that would just make sure that this issue is kept on track and it can be vacated if no further directions are needed in relation to that.
32. The second matter is the Cyber Spider plan. What is proposed is that the matters raised in paragraph 50 of the official solicitor's position statement have been put to Cyber Spider as there is no dispute that this matter needs to be in place and ready to start in January, and meetings can be arranged early next week with the hope that there can be a finalised plan that can be put to the Court for approval.
33. The third matter is communication of the Court's decision and where we are with JI. It has rightly been raised, and as I have indicated again in exchanges with Counsel, it just needs to be clear in the order and there needs to be a consensus and an understanding as to how that is going to be done and who is going to do it, and what the basic structure of the communication is going to be, so everybody has an understanding about that.
34. The final matter I just do not want to lose sight of in this short judgment is the Court's displeasure, put shortly but I hope with sufficient force to convey the level of displeasure at directions not being complied with in these cases. They are not optional extras that can just be complied with or not at will. It has caused enormous

inconvenience, no doubt to the parties in the case, but also to the Court to be able to have to manage the reading and getting back on top of the difficult issues in this case.

35. I just need to say that the bundle is 1,232 pages long, and whilst there was a reading list that was provided, the Court also needed to do some background reading and remind itself of the detailed position statements that were before the Court on 3 November, and read the position statements, detailed and helpful though they were quite long, in relation to this, and have time just to stand back, think and reflect in relation what actually is the right thing to be able to do.
36. It has been very difficult to manage as I am sure it would have been for the official solicitor and others. The directions were made on the basis that the bulk of the material would have come in by the end of last week which would have left time for everybody to be able to read and do any preparation *probably* over the weekend, and then for the official solicitor's document to come in on Monday, when there would have been one working day before the hearing.
37. It has been very frustrating, made more so by the fact, once again, my clerk has had to be chasing the position in relation to documents that should have been filed. So all I am doing at this stage, because of the experience of Counsel in front of me, is putting down a very clear marker in the hope that the message will go out to all of those in your chambers and your solicitors. If there is very good reason not to comply with a direction the Court, of course, will always consider any request, but it is causing real problems in managing cases, managing Court lists and managing hearing times caused by a culture of casual non-compliance with court orders.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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