Neutral Citation Number: [2020] EWCOP 29

Case No: 13448414

IN THE COURT OF PROTECTION

Sitting Remotely

Date: 22/06/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

A Local Authority	**Applicant**
- and –	
RS	**Respondent**
(By his Litigation Friend the Official Solicitor)	

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- -

Mr Sam Karim QC (instructed by the **Local Authority Solicitor**) for the **Applicant**
Ms Sophia Roper (instructed by the **MJC Law**) for the **Respondent**

Hearing dates: 2 and 3 June 2020

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Approved Judgment

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

Mr Justice MacDonald:

INTRODUCTION

1. In this matter the question before the court is whether RS, a man in his mid-twenties, has capacity to make the following decisions concerning his welfare:

    i) To decide where he resides.

    ii) To decide on the care he receives.

    iii) To decide to have contact with others.

    iv) To decide on accessing the Internet and social media.

2. If RS is found by the court to lack capacity to make one or more of these decisions, the court is invited by the local authority to go on to determine:

    i) Whether it is in RS's best interests to reside at his current placement under the arrangements set out in the local authority's evidence.

    ii) Whether it is in RS's best interests to receive care at his current placement pursuant to the arrangements set out in the local authority's evidence.

    iii) Whether it is in RS's best interests to the subject of monitory by local authority and his care provider with respect to his contact with others for the purposes of assessment of risk.

3. The application under the Mental Capacity Act 2005 with respect to RS, dated 17 June 2019, is brought by the local authority, represented by Mr Sam Karim QC. The application is resisted on RS's behalf by the Official Solicitor, represented by Ms Sophia Roper of counsel At the outset of these proceedings, and having heard evidence from the jointly instructed expert Dr Lawson on the issue, I satisfied myself that RS continues to lack capacity to conduct these proceedings and that, accordingly, it remained appropriate for the Official Solicitor to act. Dr Lawson had originally opined that, in addition to having capacity in all of the decision making domains with which the court is concerned, RS had capacity to conduct these proceedings. However, having seen an attendance note dated 13 May 2020 and a statement dated 29 May 2020 provided by RS's solicitor, Dr Lawson changed his position in oral evidence. The local authority does not dispute that RS lacks capacity to conduct these proceedings. The local authority also seeks a declaration that it is lawful to deprive RS of his liberty, asserting that the regime applicable in RS's current placement amounts to a deprivation of liberty.

4. To determine the question of RS's capacity with respect to the decisions set out at paragraph 1 above I have had the benefit of reading the bundle of documentary evidence prepared for this hearing and of hearing oral evidence from Dr Lawson, the jointly instructed expert psychiatrist, and from Ms G, the allocated social worker for RS. At his request, I also had the opportunity to meet RS (via a remote connection) prior to the hearing and to hear his views during the course of the hearing itself. Finally, I have had the benefit of extensive and helpful written submissions from Mr Karim and Ms Roper.

5. During the course of the hearing the local authority also sought to advance an oral application for a declaration under the Mental Capacity Act 2005 concerning RS's capacity to manage his financial affairs and an oral application for relief under the Inherent Jurisdiction of the High Court should the court conclude that RS is capacitous with respect to the decisions in issue but nonetheless is a vulnerable adult. Having heard submissions I declined to deal with either of these applications. In respect of both applications no formal application had been issued on notice to the Official Solicitor by the local authority, with respect to both applications the jointly instructed expert had not been asked to assess capacity to manage finances or to address the question of RS's vulnerability to exploitation. Within this context, I was satisfied that it would not be appropriate to embark on determining the oral applications the local authority sought to advance at this hearing. In the circumstances, the issue before the court remains that articulated in paragraph 1 above.

BACKGROUND

6. RS is in his mid-twenties. He has a diagnosis of autism and mild learning disability. During the course of his childhood, RS was exposed to a number of difficult life events, including domestic and alcohol abuse, bereavement and inappropriate sexual activity. RS has been known to social services since 2012 and to mental health services prior to that. RS currently resides in a supported placement funded by the local authority.

7. RS has a sexual fetish, namely paraphilic infantilism, also referred to as ABDL (an acronym for adult baby / diaper lovers). This fetish involves adults role-playing a regression to an infant-like state, including the wearing of nappies. Such conduct is not, subject to the ordinary boundaries delineated by the criminal law, unlawful. The local authority contends however, and the Official Solicitor accepts that his fetish leads RS, in the exploration of his sexuality, to engage in risky behaviour, including contacting males on the Internet and thereafter going to meet them. The local authority relies on a number of instances of such alleged behaviour as evidence that RS lacks capacity to make decisions with respect to his contact with others. In particular:

   i) On 26 February 2018 RS went to stay with a male in Scotland and revealed, some weeks later, that the man was a registered sex offender who had forced RS to engage in sex.

   ii) Between April and May 2018 RS made contact with a number of men not previously known to him and expressed a wish to visit them. RS does not appeared to have visited any of those men but did purchase tickets with a view to doing so.

   iii) In July 2018 RS went to stay with a male and engaged in further contact with unknown men.

   iv) In August 2018 RS was the victim of alleged financial abuse, sending money to men that he had met online.

   v) In January 2019 RS brought a sixteen year old young man back to his flat.

vi) On 14 February 2019 it was discovered that RS had been scammed resulting in him handing over a substantial amount of money to a couple via a fetish website, continuing to send money without receiving a service in return. RS reported the matter to the police and attempted to locate the couple but without success.

vii) On 27 April 2019 concerns were raised by support staff that RS was the subject of financial abuse online by persons he had not met. RS conceded he had paid money in return for pictures relating to his sexual fetish.

viii) On 15 June 2019 RS informed a support worker that he intended to go to the north of England for a week after messaging a person on Facebook. RS later confirmed that he went with the intention of doing 'adult baby minding' and had done that once.

ix) On 24 June 2019 RS was the subject of a safeguarding alert arising out of an allegation that he was involved in child sex offences with the male he was staying with in the north of England. RS was arrested but released without charge. The male with whom RS was staying was alleged to have been messaging a 13 year old girl.

x) On 31 July 2019 RS went to Darwen to stay with a male with whom he had stayed before. He gave support staff details of his whereabouts and returned later having been asked by the man to leave.

8. It will be noted that it has now been nearly a year since an incident relied on by the local authority as demonstrating that RS lacks capacity with respect to decisions about contact with others has taken place, albeit that the statement of the allocated social worker dated 20 August 2019 does make the unparticularised assertion that RS continues to meet men via the Internet in connection with his fetish. During cross-examination by Ms Roper, the allocated social worker Ms G stated that there had been some further incidents since the lockdown consequent upon the COVID-19 pandemic had come into force (which incidents related to financial conduct) but conceded that there had been a long gap between the last incident in July 2019 and these recent concerns about RS's management of his finances.

9. In 2014 a specialist psychological assessment was completed on RS by Dr Lesley Taylor, Chartered Clinical Psychologist, a copy of which is in the bundle. Dr Taylor noted that RS's "ability to offer information with absolute certainty means that he presents with a cloak of competence" and that RS "sometimes misunderstands what is happening around him and does not always understand the requirements of him." However, it is clear from the report that Dr Taylor did not assess RS with a view to considering his capacity to make identified decisions within the criteria set out in the Mental Capacity Act 2005. Within this context, I note in particular that Dr Taylor came to the following conclusions:

> "Throughout his childhood, RS has had to experience some extremely difficult life events, such as domestic violence, bereavement, loss and inappropriate sexual experiences. It is likely that he has coped with these events without appropriate care and direction and he may not have realised that some of his experiences have been abusive or inappropriate. As a result

> he may have an altered sense or benchmark for what is acceptable behaviour, especially masturbation, sexuality and in coping strategies. He may have been reliant on extreme family views, behaviour or the media as a guide to what is acceptable and as a result may be misinformed."

And:

> "RS understands sexual abuse as being physically hurt by someone; he appears to find the more subtle concepts of abuse difficult to conceptualise if they do not involve force or injury. Therefore, he may not recognise that he is not being abused in situations where it is more abstract, such as emotional, neglectful, coercive or financial abuse."

10. A risk assessment completed in February 2015 suggested that RS was experiencing suicidal thoughts. In June 2018 the local authority obtained a report from Dr Lisa Rippon, consultant developmental psychiatrist. Dr Rippon was asked to opine on whether RS had capacity to make a decision in relation to consent to sexual relations and whether he had capacity to make a decision in relation to contact with others. Whilst a capacity assessment by reference to the criteria set out in the 2005 Act, Dr Rippon's report is now two years old and deals with only two of the aspects of RS's decision making that are in issue before the court.

11. With respect to the question of whether RS suffered from an impairment of or disturbance in the function of the mind or brain, Dr Rippon noted RS's diagnosis of a mild learning disability and autism. Within this context, she considered that those conditions resulted in RS struggling to understand particularly abstract concepts.

12. Within this context, Dr Rippon opined that RS had capacity to consent to sexual relations (in that he understands the mechanics, the potential for pregnancy, the risks of STDs and that they can be prevented by the use of condoms). No party now seeks to suggest that RS lacks capacity to consent to sexual relations. However, Dr Rippon also expressed some concern regarding RS being coerced into sex, stating that RS under-estimated his vulnerability and over-estimated his ability to protect himself.

13. Dr Rippon further opined that RS lacked capacity to make decisions about contact with others. Dr Rippon considered that to have capacity to make decisions concerning contact with others RS would need to (a) to understand the benefits of contact with a range of individuals, including family members, friends, carers and professionals (including the information that family members can provide him with emotional support, day-to-day support in his everyday life and some degree of advocacy for him), (b) to understand the risks that others may pose to him and whether their influence may prevent him from making appropriate decisions in his everyday life and (c) weigh-up the positives and negatives of contact with others. Within this context, Dr Rippon concluded as follows:

> "During the course of my interview with [RS], we discussed a number of different types of relationships. He could identify a number of positives in the relationships which he has with others, including family members and also his care team. [RS] understands that these relationships are beneficial for his emotional well-being and the staff that he works with provide him with support in many areas of his life, which is a benefit to him. However,

in relation to particularly potential sexual partners, in my opinion [RS] under-estimated his own vulnerability and over-estimated his ability to keep himself safe. I believe he has limited insight into why others may target him because of his interest in nappies and also because of his own vulnerability. Although [RS] could acknowledge that going to stay with a strange man could put him at risk, I believe that his understanding of how potentially dangerous this situation was is lacking, with him believing that he can keep himself safe. It is my opinion that [RS] would not be able to understand if another person was a risk to him and would struggle to say 'no' to a sexual advance from another person, even if he did not wish this act to occur, as was seen in his time at [Scotland]. It is my view that [RS] lacked understanding of the information necessary to make decisions around contact with others and was unable to weigh-up the positives and negatives of contact particularly with sexual partners. It is therefore my opinion that [RS] lacks capacity in this area. I believe that this is a consequence of his learning disability and Autism Spectrum Disorder."

14. Dr Rippon was pessimistic about the possibility of RS regaining capacity to make decisions concerning contact with others but did note that the holistic approach then being used by RS's placement to support him to develop insight into the intentions of others offered the best chance of effecting change, albeit Dr Rippon considered this would take several years. Following the report of Dr Rippon, RS agreed to abide by rules governing his meeting strangers, a copy of which rules are contained in the bundle. As I have set out, it is the local authority's case that RS has not been able consistently to abide by those rules.

15. With respect to the other evidence relevant to the questions of capacity, in addition to the assessments of Dr Taylor and Dr Rippon and evidence of the jointly instructed expert to which I shall come below, the court has before it the following evidence:

    i) The assessment of the allocated social worker dated 21 February 2018 which concluded that RS lacked capacity to manage his finances.

    ii) A COP 3 assessment of capacity of the allocated social worker dated 11 April 2019 in which the allocated social worker concluded that RS lacks capacity to make decisions about his residence and care, in which the allocated social worker concludes that RS does not have an understanding of his support needs, can act impulsively and is unable to retain or weigh up relevant information.

    iii) The statement of the allocated social worker Ms G dated 18 June 2019.

    iv) The statement of the allocated social worker Ms G dated 27 August 2019.

    v) The statement of the allocated social worker Ms G dated 4 December 2019.

    vi) The statement of the allocated social worker Ms G dated 16 December 2019.

    vii) The statement of the allocated social worker Ms G dated 25 March 2020.

16. Within the COP3 assessment of capacity (which is now well over a year old), Ms G states that the local authority seeks a declaration that RS lacks capacity around his

care accommodation and support. However, the order sought by the local authority is expressed in the COP3 in terms wider than this, namely an order "allowing the Local Authority to restrict/monitor [RS's] access to the internet, manage [RS's] contact with others and decide where he should live in his best interests and insofar as it amounts to a deprivation of liberty it is lawful." Within this context, in COP3 Ms G states as follows regarding RS's understanding of relevant information:

> "RS does not have awareness of his support needs and will consistently say he is independent and does not require any support. For example RS has previously lived in his own flat with patch support, this deteriorated and resulted in a number of police incidences and his personal care needs not being met. More recently RS decided impulsively to go to [Scotland] to meet a man whom he had met over the internet. See additional addendum."

And in relation to retaining information:

> "We have given RS the information he needs to retain but on him communicating the information back to us he once again demonstrates a lack of understanding. This demonstrate that RS can verbally explain how he can act in a situation but cannot follow this through physically once he is in a situation without support being in place."

And in relation to using or weighing the relevant information:

> "RS is unable to weigh up the information due to him not being able to understand or retain the information. RS is able to talk through a process but is unable to understand the scaffolding beneath that process."

And in relation to communicating his decision:

> "RS is a verbal communicator and information has been presented in simplistic terms that RS understands. RS is unable to understand, weigh up or retain the relevant decision and therefore could not communicate his decision because of this. RS will relay information he has heard and appear he has understood but when probed further it is evident he has not fully understood the information."

17. In her statement of 18 June 2019 Ms G notes her assessment in 2018 that concluded that RS lacked capacity to manage his finances. Ms G further provides an extensive narrative account of the incidents summarised at paragraph 7 above. Ms G's statement, however, contains no meaningful analysis of capacity by reference to the criteria set out in the Mental Capacity Act 2005. In her statement of 27 August 2019, Ms G again provides a narrative account of one of the incidents summarised at paragraph 7 above but her analysis of capacity is limited to contending that "RS continues to meet men from the internet in relation to his ABDL fetish and does not weigh up the risks towards him or others when doing this". In her statement of 4 December 2019 Ms G sets out the proposed interim plan of restrictions on RS's contact with others and her interim best interests analysis. Ms G's statement of 16 December 2019 again contains a highly detailed account of the events summarised at paragraph 7 above. However, once again, there is *no* detailed analysis of why it is said that RS lacks capacity to make the decisions in issue by reference to the criteria

set out in the 2005 Act. Ms G's next statement is dated 25 March 2020. Once again, Ms G's analysis of the question of capacity is limited to stating that "RS lacks capacity around contact, internet and social media usage as well as residence and care." Ms G's final statement is dated 13 May 2020 and deals with RS's capacity to manage his finances and once again contains a highly detailed account of the events summarised at paragraph 7 above. Once again however, there is *no* detailed analysis of why it is said that RS lacks capacity to make the decisions in issue by reference to the criteria set out in the 2005 Act.

18. On 16 December 2019 RS's solicitor, Lauren Crow, visited him in his placement. Ms Crow visited RS again on 4 May 2020 and 13 May 2020. Ms Crow has prepared detailed attendance notes in respect of each of these visits, exhibited to witness statements, which notes have been provided to Dr Lawson.

EXPERT EVIDENCE

19. The jointly instructed expert in this case is Dr Lawson. In his report dated 13 January 2020 Dr Lawson concludes that, with respect to the diagnostic test under the Mental Capacity Act 2005, RS suffers from a mild learning disability and autism. Within this context, Dr Lawson notes as follows with respect to RS's learning disability (emphasis added):

> "It is noted that the learning disability is also associated with evidence of abnormally impulsive behaviour that likely reflects an impairment in [RS's] executive brain function, as formulated by the Chartered Psychologist, Dr Taylor. Associated with the diagnoses of mild learning disability is a significant childhood history of emotional and social deprivation, and likely trauma. *These early formative experiences likely further contribute therefore to [RS's] behavioural and emotional difficulties and the impairment of his general ability to understand the world, and to appreciate nuances of complex social situations and of the motivation of others*."

And (emphasis added):

> "The behaviours around the fetish and the related use of the internet and social media are associated with abnormally impulsive behaviour that *may* be a consequence of his learning disability and impairment in his executive brain function, as formulated by the Chartered Psychologist, Dr Taylor."

20. Within this context, Dr Lawson concluded that RS lacked capacity to conduct these proceedings, had capacity with respect to decisions about his residence, had capacity with respect to decisions regarding his care, lacked capacity with respect to decisions concerning his contact with others and lacked capacity to make decisions regarding the use of the Internet and social media. In this regard, Dr Lawson concluded as follows (emphasis added):

> "[RS] can understand relevant information about who he would like to have contact with and can recall relevant information, including information about the benefits and risks associated with meeting men he has just met on the internet. He has intellectual understanding of the relevant information

and can appear able to reason with others in discussion the information. However, his repeated behaviour of putting himself at significant risk of serious harm by arranging to meet men he knows little about and for sexual or ABDL activities, indicates that he acts in an abnormally impulsive way, or cannot truly weigh the risks. *I consider that this abnormal impulsivity is caused by his learning disability and contributed to by the autism. The impairment in executive function, as described in the psychology report (and quoted in paragraph 151 of this, my report), mean that [RS's] ability to integrate complex information and to consider this is a challenge to him, and so he acts in an abnormally impulsive fashion - rather than thinking through information and making an informed choice.* This impulsivity is more likely to affect decision-making in relation to his fetish-related activities, and contact with unknown men and women on social media and unfamiliar surroundings in unknown places, is one such activity. On balance, it is my opinion that [RS] lacks capacity to make decisions about contact with others."

21. Dr Lawson further opined that RS lacked capacity to make decisions concerning the use of social media (emphasis added):

> "[RS's] ability to use the relevant information and to weigh it up in order to decide how to behave when using the internet and social media is impaired by his learning disability and the autism he suffers from. He shows intellectual understanding of relevant information to an extent, as he appears able to discuss and reason with assessors the risks associated with his use of social media to contact and arrange meetings with men. This appears to be simply that he is aware of what professionals want to hear. It is my view that on balance, he lacks the ability to genuinely appreciate the nature of the risks associated with his online activities and of his vulnerability to exploitation and abuse. *This inability to weigh and judge risks is likely caused by the fact of his learning disability and autism. The impairment in executive function, as described in the psychology report, mean that [RS's] ability to integrate complex information and to consider this, is a challenge to him. So, he acts in an abnormally impulsive fashion - rather than thinking through information and making an informed choice.* This impulsivity is more likely to affect decision-making in relation to [RS's] fetish-related activities, (and access to internet and use of social media in order to contact and meet with unknown ABDL in unknown situations and places is one such activity)."

22. It can be seen that in his initial report Dr Lawson was satisfied, on balance, that the inability to use or weigh information and the impulsivity shown by RS in consequence in the decision making domains concerning contact and use of the Internet and social media derived from his learning disability and autism and that thus the two limbs of the test for capacity provided by the 2005 Act were met. However, it is also important to note that Dr Lawson was further clear in his substantive report that, in light of his conclusion that RS's early formative experiences of significant childhood history of emotional and social deprivation likely contribute to RS's ability to understand and use or weigh information, it was important for professionals to be

clearer about the clinical formulation for RS, in order to better understand his behaviour and the motivations behind them.

23. Within this context, Dr Lawson provided an addendum report dated 24 April 2020 following a further interview with and examination of RS on 10 April 2020. Based on that further information, Dr Lawson revised his opinion to the extent that he concluded that RS also *has* capacity to make decisions about his contact with others and has capacity to make decisions about accessing the Internet and social media. In his addendum report, with respect to RS's capacity to make decisions concerning contact with others, Dr Lawson stated as follows:

> "In my original report I suggested that [RS's] behaviour, rather than what he says that demonstrates an inability to make decisions about contact. However. his reports to me at the second interview suggests that even in situations where this may appear to be so, [RS] is aware of what is going on, as he can recall the details of instances when he, for example, made decisions to meet with men he had recently met online. With my further understanding of him from the second assessment, it is my view now that he makes unwise decisions at those moments rather than his capacity being impaired. The chronology of his history, presented in my first report indicates that he has behaved in similar ways and for many years... my view as already stated above, is that [RS] understands and can use relevant information about the risk but is making unwise decisions, similar to reckless behaviour that other young adult may show (as per Cobb J in *Re Z & Ors* [2016] EWCOP - a case I was directed to in the Additional Questions)."

And:

> "In my first report, I was of the view that [RS's] behaviour indicated abnormally impulsive behaviour. However, my current view, following the second interview and evidence of change reported by [RS] and indicated in the 5th statement of the social worker, suggest that [RS] can modify his tendency to act impulsively, including deferring impulses to meet with people he chats with online, (in part with the support of his support plan, staff and others). There is evidence from the second interview and from the 5th statement of the social worker that despite frequent access to the internet and social media, [RS] is reported to make only a few arrangements a year to meet with strangers he chats with online, and he has not acted in this way for some time. To this extent, while he can be impulsive in his behaviour, he appears to have some control over it ('encouraged' in part by his concerns that the court may place restrictions on his access to social media if he is judged unable to make relevant decisions). [RS] is able to make wise decisions and resist his impulsive tendencies when he chooses to (with or without the support of others). I cannot currently therefore consider his impulsive behaviour to be abnormally impulsive. My view is that [RS] shows impulsive behaviour that may be risky, poorly thought through and prematurely acted on; he chooses to satisfy his short-term goals perhaps over long-term ones. This behavioural tendency can be considered to be understandable in the context of an adolescent or young adult showing poor

> judgement on occasions, including choosing to act recklessly. My current view is that [RS] makes unwise decisions."

24. With respect to RS's capacity to make decisions concerning the use of the Internet and social media, in his addendum report Dr Lawson expressed the basis for his revised formulation as follows:

> "I consider [RS] is able to understand and weigh the risks related to his access to the internet and use of social media - including risks of financial abuse, sexual and physical abuse, (and he was able to discuss these risks with me satisfactorily at the second interview particularly). [RS] reported he has developed a better understanding of the concerns of others about the risks he could face as a result of his behaviour of contacting and staying with strangers he met online. At the second interview, he was able to describe the risks to himself, the benefits of the support plans and he reflected on the consequences of his past behaviour of flouting rules he has himself set or agreed to. He described his changed attitude to his risk behaviours, explaining how the period of social isolation / 'lockdown', instructed by the government as a response to the Covid-19 pandemic, has given him time to reflect. [RS] appeared to show improved insight, in part related to his reported anxiety that if he did not change, he risked consequences such as possible court-sanctioned restrictions on his risk behaviours. He was particularly concerned that he may lose unsupervised access to the internet and social media - and that this would limit his opportunities to engage in his online activities. It is not improbable that [RS's] concerns about consequences has 'focused' his mind and has led to a change in attitude to risks and recognition of the need to work with others to mitigate risk associated with his need for gratification."

25. Within the context of the foregoing revised formulation, Dr Lawson also set out in his report his rational for revising his opinion with respect to RS's capacity to take decisions as to contact and as to the use of the Internet and social media, stating as follows:

> "[97] My current stated opinions and views are based on a more recent interview of [RS] on 10 April 2020. I have described in detail the information and observations from the second interview and the impact this has had on my current views of his abilities to understand and use/weigh information, The second interview also gave me the opportunity to 'experience' [RS] further and develop a deeper understanding of his psychological and emotional functioning, as well as his psychiatric mental state, These further understanding had significant impact on my revised opinions.
>
> [98] The nature of the additional questions and information I was invited to consider in the caselaw materials provided with the additional questions prompted me to reflect further on the Act and to reconsider my interpretation and understanding of the legal nuances of the evidence. I paid particular attention to the phrase "broad terms", as used repeatedly in the questions with regards to my consideration of the threshold of [RS's]

> capacity to understand information relevant to the decisions to be made, (including weighing up the pros and cons of the decisions).
>
> [99] Finally, I reminded myself again of the danger of the "protection imperative" identified by Ryder J in *Oldham MBC v GW and PW*. I have invariably guarded myself again this error but I will not consider it unfair, if others suggest that perhaps in this case, I might possibly have been so influenced, consciously or otherwise. In any event, I affirm that unless [RS] is found by the court to lack capacity to make decisions for himself, then as an autonomous person, he can freely make decisions, even if those decisions are considered unwise by others, and if by exercising his rights, he may put himself in danger."

26. Within a further addendum report dated 30 April 2020, provided in response to further written questions put to him by the local authority, Dr Lawson reiterated his views regarding RS's capacity to make decisions concerning his care.

27. During the course of his oral evidence, Dr Lawson was, understandably, pressed to explain his change of opinion with respect to RS's capacity to make decisions about his contact with others and his capacity to make decisions regarding the use of the Internet and social media. Whilst appropriately challenged by Mr Karim, Dr Lawson maintained his opinion and, in particular, re-emphasised the following matters:

    i) The significance of the impact of RS's learning disability and autism on his executive function articulated in Dr Lawson's first report was highlighted in an attempt to draw a causative nexus between the first and second stage of the capacity case and it may have been the bridge. Later analysis, including his second interview with RS, caused Dr Lawson to conclude that it is not possible to say RS's difficulties with decision making result from an impairment in the functioning of his mind and brain, as opposed to from his psychological makeup, his sexual proclivities and desire and the fact he is a young man with a level of impulsivity commonly seen at his age, which factors cause him to make unwise but capacitous decision. This was because of a number of factors.

    ii) It is important not to use repetitive risky behaviour to justify an assessment of lack of capacity (Dr Lawson using the example of a doctor who continues to smoke despite being fully cognisant of, and able to weigh up the risks of lung cancer, develops lung cancer and then goes back to smoking after the operation to remove the cancer). Repeated risk taking behaviour may simply mean that the risk has been understood, weighed up and a decision made to take the risk again. Why RS continues to behave in a risky manner is complex. If stemmed from his learning disability and autism it would be seen in all areas, but it is not.

    iii) It was clear to Dr Lawson that further consideration had to be given to the significant issues of RS's maturity, the issue of his age and gave it more weight in coming to balanced view as to why he makes unwise decisions. Given those considerations, Dr Lawson stated that he had to acknowledge young people may act recklessly and that whilst RS's learning disability may

mean he is less mature the question remained one of whether RS understands and can weigh or use the relevant information.

iv) Dr Lawson pointed out that he had deliberately stated that RS's learning disability and autism *may* cause abnormally impulsive behaviour due to a lack of understanding of RS's detailed history and to acknowledge that there could be other factors that contribute to reckless decision making. Within this context Dr Lawson cautioned against making the mistake of attributing RS's impulsive decision making to his learning disability and accepted the need to consider whether it in fact is motivated by elements of RS's history and development and falls within the ordinary recklessness demonstrated by young people.

v) The sexual element is a powerful drive for RS and Dr Lawson had not considered the sexual element a disorder. RS's mild learning disability and autism are not the driving force behind his fetish and ABDL behaviour.

vi) On the totality of the evidence Dr Lawson could not consider RS to have an abnormal level of impulsivity. RS's fetish is not abnormal impulsivity.

vii) Within this context, whilst the possibility cannot be excluded that RS's impulsive and reckless decision making is linked to his learning disability and autism, following the second interview and reviewing RS's history, his decision making could also represent a normal level of impulsivity and recklessness for a young person of his age.

viii) On balance, and having regard to the information made available to Dr Lawson between his substantive and addendum reports, it is not possible to say RS's difficulties with decision making result from an impairment in the functioning of his mind and brain, as opposed to from his psychological makeup, his sexual proclivities and desire and the fact he is a young man with a level of impulsivity commonly seen at his age, which factors cause him to make unwise but capacitous decisions.

28. In the circumstances, and in the context of him being aware of the matters relied on by the local authority as summarised at paragraph 7 above, Dr Lawson maintained his expert opinion that RS has capacity in all of the decision making domains with which the court is concerned. Dr Lawson did not demur from the proposition that RS is a vulnerable person although he rightly declined to give a further opinion in this regard in circumstances where he had not been asked to assess that question.

LAW

29. The Mental Capacity Act 2005 provides as follows with respect to the question of whether a person lacks capacity for the purposes of the Act:

> **"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.
…/

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.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(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."

30. From this statutory regime and the case law dealing with the statutory test the following principles can be drawn, as summarised in my decision in *Kings College NHS Foundation Trust v C & V* [2015] EWCOP 80 and the decision of Cobb J in *WBC v Z and Anor* [2016] EWCOP 4. Those principles are as follows:

    i) An individual is presumed to have capacity pursuant to s 1(2) of the Mental Capacity Act 2005.

    ii) The burden of proof lies with the person asserting a lack of capacity and the standard of proof is the balance of probabilities.

    iii) The determination of the question capacity is always decision specific. All decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of ss 1 to 3 of the 2005 Act, which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the state to be embellished.

    iv) 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 (Mental Capacity Act 2005 s 1(3).

    v) A person is not to be treated as unable to make a decision merely because he or she makes a decision that is unwise.

    vi) The outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Mental Capacity Act 2005.

    vii) In determining the question of capacity, the court must apply the diagnostic and the functional elements of the capacity pursuant to ss 2 and 3 of the Mental Capacity Act 2005. Thus:

        a) There must be an impairment of, or a disturbance in the functioning of the mind or brain (the diagnostic test); and

        b) The impairment of, or disturbance in the functioning of the mind or brain must cause an inability to understand the relevant information, retain the relevant information, use or weigh the relevant information as part of the process of making the decision in question or to communicate the decision made.

viii) For a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in s 3(1) of the Act and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s 2(1) of the Act.

ix) With respect to the diagnostic test, it does not matter whether the impairment or disturbance in the functioning of the mind or brain is permanent or temporary.

x) With respect to the functional test, the question for the court is not whether the person's ability to take the decision is *impaired* by the impairment of, or disturbance in the functioning of, the mind or brain but rather whether the person is rendered *unable* to make the decision by reason thereof.

xi) An inability to undertake any one of the four aspects of the decision making process set out in s 3(1) of the 2005 Act will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain. The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another.

31. With respect to the requirement for a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in s 3(1) of the Act and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s 2(1) of the Act, the question is whether the 'impairment of, or a disturbance in the functioning of, the mind or brain' is operative on P's decision making. Does it cause the incapacity, even if other factors come into play? (see *Re PB* [2014] EWCOP14). Within this context, the court must be astute to be alive to other factors that may be more significant in this respect (see *Re B (Capacity: Social Media, Care and Contact)* [2019] EWCOP 3). The order in which the tests are in fact applied must be carefully considered. In *York City Council v C* [2014] 2 WLR 1 at [58] and [59] McFarlane LJ (with whom Richards and Lewison LLJ agreed) held as follows:

> "It would be going too far to hold that in approaching matters in this way Hedley J plainly erred in applying the law. His judgment refers to the key provisions and twice refers to the nexus between the elements of an inability to make decisions set out in s 3(1) and mental impairment or disturbance required by s 2(1). There is, however, a danger in structuring the decision by looking to s 2(1) primarily as requiring a finding of mental impairment and nothing more and in considering s 2(1) first before then going on to look at s 3(1) as requiring a finding of inability to make a decision. The danger is that the strength of the causative nexus between mental impairment and inability to decide is watered down. That sequence - 'mental impairment' and then 'inability to make a decision' - is the reverse of that in s 2(1) – 'unable to make a decision … because of an impairment of, or a disturbance in the functioning of, the mind or brain' [emphasis added]. The danger in using s 2(1) simply to collect the mental health element is that the key words 'because of' in s 2(1) may lose their prominence and be replaced by words such as those deployed by Hedley J: 'referable to' or

> 'significantly relates to'…Approaching the issue in the case in the sequence set out in s 2(1), the first question is whether PC is 'unable to make a decision for herself in relation to the matter', the matter being re-establishing cohabitation with NC now that he is her husband and now that he is has regained his liberty.".

32. In *PCT v P, AH & the Local Authority* [2009] COPLR Con Vol 956, Hedley J (as he then was) described the ability to use or weigh information as, "capacity actually to engage in the decision making process itself and to be able to see the various parts of the argument and to relate to one to another" at [35]... Within the context of s 3(1)(c) it is not necessary for a person to use and weigh every detail of the respective options available to them in order to demonstrate capacity, merely the salient factors (see *CC v KK and STCC* [2012] EWHC 2136 (COP) at [69]). Even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision (see *Re SB* [2013] EWHC 1417 (COP)). Further, in *Re C* I observed as follows at [38] (having concluded at [34] that as the disjunctive 'or' comes after the negative, 'unable to' in s 3(1)(c) the subsection requires the person asserting a lack of capacity to demonstrate an inability on the part of the individual to use and weigh the relevant information):

> "It is important to note that s 3(1)(c) is engaged where a person is *unable* to use and weigh the relevant information as part of the process of making the decision. What is required is that the person is able to employ the relevant information in the decision making process and determine what weight to give it relative to other information required to make the decision. Where a court is satisfied that a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision making process is a matter for the decision maker. Thus, where a person is able to use and weigh the relevant information but chooses to give that information no weight when reaching the decision in question, the element of the functional test comprised by s 3(1)(c) will not be satisfied. Within this context, a person cannot be considered to be unable to use and weigh information simply on the basis that he or she has applied his or her own values or outlook to that information in making the decision in question and chosen to attach no weight to that information in the decision making process."

33. With respect to the relevant information to be understood, retained, and used or weighed with respect to each domain of decision making with which the court is concerned the court must bear in mind (a) that there may be an overlap between the various different decisions to be made and (b) that relevant information outlined in lists contained in the authorities is to be treated and applied as no more than guidance to be adapted to the facts of the particular case, to be expanded or contracted or otherwise adapted as the facts of the particular case require (see *Re B* [2019] EWCA Civ 91).

34. With those clear caveats firmly in mind, I note that in relation to residence in *LBX v K and L* [2013] EWHC 3230 (Fam) at [43] Theis J listed the relevant considerations as including (a) what the options are, including information about what they are, what sort of property they are and what sort of facilities they have; (b) in broad terms, what

sort of area the properties are in (and any specific known risks beyond the usual risks faced by people living in an area if any such specific risks exist); (c) the difference between living somewhere and visiting it; (d) what activities P would be able to do if he lived in each place; (e) whether and how P would be able to see his family and friends if he lived in each place; (f) in relation to the proposed placement, the financial arrangements and the rules of the placement; (g) who he would be living with at each placement and (h) what sort of care P would receive in each placement in broad terms. With respect to care, in *LBX v K and L* [48] Theis J listed the relevant considerations as including (a) what areas P needs support with; (b) what sort of support P needs; (c) who will be providing P with support; (d) what would happen if P did not have any support or P refused it; and (e) that carers might not always treat P properly and that P can complain if he is not happy about his care.

35. With respect to decisions concerning contact in *LBX v K and L* Theis J listed relevant information to be understood, retained, and used or weighed as including (a) who they are and in broad terms the nature of P's relationship with them; (b) what sort of contact P could have with each of them, including different locations, differing durations and differing arrangements regarding the presence of a support worker; (c) the positive and negative aspects of having contact with each person; (d) what might be the impact of deciding to have or not to have contact of a particular sort with a particular person and (e) what a family relationship is (family being in a different category of contact).

36. With respect to decisions concerning the use of the Internet and social media, *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 Cobb J listed relevant information to be understood, retained, and used or weighed as including (a) the fact that information and images (including videos) which P shares on the internet or through social media could be shared more widely, including with people P doesn't know, without P knowing or being able to stop it; (b) it is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites; (c) if P places material or images (including videos) on social media sites which are rude or offensive, or shares those images, other people might be upset or offended; (d) some people P meets or communicates with online, who P doesn't otherwise know, may not be who they say they are and someone who calls themselves a 'friend' on social media may not be friendly; (e) some people P meets or communicates with on the internet or through social media, who P doesn't otherwise know, may pose a risk to P; may lie to P, or exploit or take advantage of P sexually, financially, emotionally and/or physically and may want to cause P harm; and (f) if P looks at or shares extremely rude or offensive images, messages or videos online P may get into trouble with the police, because P may have committed a crime.

37. With respect to the need to undertake the evaluation of capacity by reference to the totality of the evidence before the court in in *PH v A Local Authority* [2011] EWHC 1704 (COP) Baker J (as he then was) observed at [16]:

> "In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in

> some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P. In Oldham MBC v GW and PW [2007] EWHC136 (Fam) [2007] 2 FLR 597, a case brought under Part IV of the Children Act 1989, Ryder J referred to a "child protection imperative", meaning "the need to protect a vulnerable child" that for perfectly understandable reasons may lead to a lack of objectivity on the part of a treating clinician or other professional involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person – including, of course, a judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective."

38. Finally, as set out above, pursuant to s 1(4) of the Mental Capacity Act 2005 a person is not to be treated as unable to make a decision merely because he makes an unwise decision. Within this context, the outcome of the decision made (as distinct from the ability to understand the possible outcomes and use or weigh that information in making the decision) is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Mental Capacity Act 2005. Within this context, repeatedly engaging in behaviour that is unwise or risky will not be evidence of lack of capacity *per se*. Repeated risk taking behaviour may simply mean that the risk has been understood, weighed up and a decision made to take the risk again. Even where the same unwise or risky decision is made over and over again, the question for the court still remains whether the relevant information can be understood, retained, and used or weighed by the person repeatedly making that decision. In this regard, and the context of young people, it is important to recall the words of Cobb J in Re Z [2016] EWCOP 4 at [1] and [67]:

> "[1] 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"

And:

> "[67] As indicated at the outset of this judgment, some risk-taking in adolescents and young adults can be perfectly healthy, such as in sporting activities, or artistic and creative pursuits, travelling, making new friends (including internet dating and friendship groups), or entering competitions. Healthy risk-taking helps young people to learn. Some adolescent risk-taking can be unhealthy and dangerous – casual sexual relationships, unprotected sex, driving too fast on the roads, excessive consumption of alcohol, consumption of non-prescribed drugs, dealing with anger and confrontation. These forms of risk-taking are inherently unwise and unsafe. In dealing with risk issues in relation to a young person in the context of assessment under the MCA 2005, it is necessary to separate out as far as is possible the evidence which indicates that second category of risk taking (unhealthy, dangerous, unwise) from that which reveals or may reveal a lack of capacity. As Lewison LJ said in PC v City of York (above) "adult

autonomy" includes the freedom "to make unwise decisions, provided that they have the capacity to decide" (see [64]).”

DISCUSSION

39. Having considered the totality of the evidence in this matter and applying the legal principles I have summarised above, I am satisfied in this case that, on balance, RS has capacity to make the following decisions concerning his welfare:

    i) To decide where he resides.

    ii) To decide on the care he receives.

    iii) To decide on accessing the Internet and social media.

    iv) To decide to have contact with others.

    My reasons for so deciding that RS has capacity in these decision making domains are as follows.

40. The local authority has provided very limited evidence as to the question of capacity with respect to the decision making domains with which the court is concerned. Ms G’s statements contain *no* detailed analysis of capacity with respect to any of the decision making domains with which the court is now concerned. When giving oral evidence, Ms G did not expand in any meaningful way on her analysis of RS’s capacity in relation to each decision making domain by reference to the criteria under the 2005 Act. Where she did descend into detail, Ms G had a tendency to gravitate back to her assessment of RS’s capacity to manage his financial affairs when challenged to justify her assessment of capacity in the other decision making domains before the court. There are examples in her statements of it being unclear whether, in assessing RS’s capacity, Ms G applied the criteria in the 2005 Act, she for example telling Dr Lawson that RS lacked capacity to make decisions about accessing the Internet and using social media because although he could understand the relevant information he could not act on his understanding. At a number of points in her oral evidence Ms G gave the impression that an application had been made to the Court of Protection less on the basis of considerations of capacity and more because of a view that steps needed to be taken to protect RS.

41. In the circumstances, with respect to RS’s capacity in the relevant decision making domains, the evidence of the local authority is limited to the capacity assessment undertaken by Ms G on 21 February 2018, which relates only to RS’s capacity to manage his finances, and the COP 3 assessment of capacity undertaken by Ms G that I have summarised above, completed over a year ago in April 2019. Insofar as the local authority also seeks to rely on the assessment undertaken by Dr Rippon in 2018 which, as I have noted, deals with only two of the decision making domains before the court and is now over two years old, I am satisfied in the circumstances the court cannot place any significant weight on that assessment.

42. Further, and within this context, beyond a series of generic assertions in the COP3 that RS demonstrates a lack of understanding upon being asked to repeat information and that he is “unable to weigh up the information due to him not being able to

understand or retain the information" and "and therefore could not communicate his decision because of this", there is again no real analysis by Ms G of the extent to which he can understand, retain and use or weigh the information relevant to making decisions in relation to each of the domains of decision making by reference to the examples of relevant information summarised above or otherwise. Ms G did seek to deploy the fact that RS has repeated the risky behaviour associated with his fetish as indicative of his lack of understanding of the information comprising the nature and extent of the risk. However, considerable caution is needed with this contention. As I have noted, risky behaviour is not inevitably evidence of a failure to understand the risk being taken or evidence of an inability to weigh that risk when deciding whether to act despite it. The repetition of risky behaviour can also indicate that a person has understood the risk, weighed it and decided to take it anyway notwithstanding the dangers.

43. Without any detailed analysis, Ms G's statements essentially amount to a list of past occasions on which RS has made objectively risky or unwise decisions about a wide range of activities, sometimes choosing to disregard advice from professionals in the process. Beyond their contended for irrationality, at no point does Ms G depose to *why* these incidents demonstrate that RS is unable to understand, retain, use or weigh the information relevant to each decision as distinct from other possible reasons for his unwise and risky behaviour. In this latter context, with respect to the question of causation, whilst Ms G gave evidence that, contrary to the evidence of Dr Lawson, RS's decision making is impaired by his mild learning disability and his autism as opposed to any aspect of his personality, her rationale for reaching this conclusion was unclear.

44. Within this context, by far the most reliable evidence before the court regarding RS's capacity is that of Dr Lawson. Dr Lawson's reports contain a detailed and nuanced analysis based on his interviews with RS and a careful review of the documentary evidence available, including the reports of Dr Taylor and Dr Rippon. Dr Lawson is clear on his evaluation of capacity in each of the decision making domains that is before the court. In oral evidence Dr Lawson stated that following his second assessment of RS he "could not have come to any conclusion other than [RS] has capacity."

45. Within this context, I accept Dr Lawson's evidence that RS is able to make decisions for himself in relation to residence. Having regard to the reports of Dr Lawson, there is cogent evidence that he understands, retains and can use or weigh relevant information concerning his residence. RS understood the difference between living in a place and visiting it, the differences between options and the advantages and disadvantages of the same. He was clear about his history with respect to his residence and as to his current wishes in terms of residence. He likewise was able to detail the support he would receive, the activities he would undertake and the rules applicable to his placement. He was likewise able to detail some of the obligations owed to him by his landlord and understood the reciprocal nature of contracts. RS had given consideration to the extent that the area in which he now resides is safe and had had no bad experiences in his current placement. He did report negatively in respect of local noise. RS demonstrated knowledge of what to do if he felt maltreated or abused by staff members. During the course of his second interview with Dr Lawson, RS explained the advantages of his current residence.

46. I likewise accept Dr Lawson's evidence that RS is able to make decisions for himself in relation to his care. Once again, having regard to the reports of Dr Lawson, there is cogent evidence that he understands, retains and can use or weigh relevant information concerning his care. RS described the relevant information during his interviews with Dr Lawson. He was able to set out the care he can give himself and the support he is given with his care and by whom, including support with managing his finances, in respect of which he acknowledged his own difficulties, and his medical needs. RS expressed himself content with these arrangements.

47. With respect to decision making concerning contact and the use of the Internet and social media, I acknowledge that Dr Lawson changed his opinion with respect to RS's capacity to make decisions about his contact with others and his capacity to make decisions regarding the use of the Internet and social media. I am however satisfied that, appropriately challenged in cross-examination by Mr Karim, Dr Lawson provided to the court a clear and persuasive rationale for this change.

48. With respect to the question of contact, the evidence before the court does demonstrate that RS is able to understand, retain and can use or weigh relevant information concerning his contact with others. Dr Lawson's conclusion in his report is clear and is informed by the further interview he had with RS. In that interview, RS was able to articulate his reasons for not contacting strangers, the need to get to know people who he was talking to and not to exchanges addresses until this has been achieved. RS was able to state why those caring for him were worried about his contacts in the past and was able to explain to Dr Lawson, without prompting, the nature of the risks associated with such contact. Within this context, it is of note that the last incident of concern regarding RS having contact with men he had met on the Internet is over a year ago. Further, when pressed by Mr Karim in cross-examination Dr Lawson reiterated that:

> "I don't have evidence to say that his capacity to decide on contact is impaired. He knows the nature of the people, he is aware of the nature of act, he is aware that if he gives his money away... he knows who they are, he knows they are a risk. He is also aware of those who have a positive impact on him."

49. For the reasons I have articulated above, nothing in Ms G's evidence is sufficiently cogent to gainsay this conclusion. Moreover, I note that with respect to the occasion in February 2018 when RS went to stay with a male in [Scotland] and revealed, some weeks later, that the man was a registered sex offender who had forced RS to engage in sex, Ms G states that when RS was asked if he knew why professionals were worried about him, "RS said yes because he met a stranger who he didn't know, RS said he could have been a rapist, murderer, child molester or paedo". RS informed her that having been told by professionals that the male in question was "not a nice man" RS said he did not want to go back to [Scotland] because of that. With respect to the men that RS made contact with during April and May 2018, when asked why professionals were worried RS replied that it was because "he doesn't really know" the men in question. RS was also able to explain that one of the men in question was safer because he was in a similar situation to RS with support, with which proposition Ms G agreed. Whilst Ms G concentrated heavily on the welfare consequences for RS of having contact with men he had contacted via the Internet or social media, as noted, the outcome of the decision made is not relevant to the question of whether the

person taking the decision has capacity for the purposes of the Mental Capacity Act 2005. The fact that a decision to make contact with a man to satisfy fetish urge may be considered risky is not of itself evidence of a lack of capacity to take that decision. The question remains whether RS can understand, retain and use or weigh information when making a decision whether to contact others. The balance of the evidence before the court indicates that he can.

50. With respect to the question of using the Internet and social media, once again I am satisfied that that RS is able to understand, retain and can use or weigh relevant information concerning his use of the Internet and social media. During his second interview with Dr Lawson, RS was able to articulate an understanding of the risks of using the Internet and social media. He was aware that he should not post or access offensive material online and retained his awareness of information relating to privacy online and recalled relevant information about sharing. He was aware, for example, that privacy settings do not prevent screenshots being taken and shared more widely. He was clear in his understanding that others he may meet online may not be who they say they are and that those who appeared to have his interests at heart may not do so. He was able to articulate the risks to himself of using the Internet, including sexual, financial, emotional and/or physical harm.

51. Further, having had a further opportunity to interview RS, to consider the legal authorities relevant to the domains of decision making with which the court is concerned and to think further about the impact of RS's age, Dr Lawson concluded that it is not possible to say that such difficulties RS *does* have with decision making in relation to contact and the use of the Internet and social media result from an impairment in the functioning of his mind and brain, as opposed to from his psychological makeup, his sexual proclivities and desire and the fact he is a young man with a level of impulsivity commonly seen at his age, which factors cause him to make unwise but capacitous decisions.

52. Dr Lawson clearly articulated in cross examination the factors that led him to this revised conclusion. First, that it is important not to use, as the local authority had sought to use, repetitive risky behaviour to justify an assessment of lack of capacity. If RS's risky behaviour stemmed from his learning disability and autism it would be seen in all areas but it is not. Second, further consideration had to be given to the significant issues of RS's maturity and his actual age and he gave these more weight in coming to a balanced view as to why he makes unwise decisions. Third, and within this context, caution was required against making the mistake of attributing RS's impulsive decision making to his learning disability and autism where elements of RS's history and development may explain that conduct, which falls within the ordinary recklessness demonstrated by young people. Fourth, the sexual element is a powerful drive and RS's mild learning disability and autism are not the driving force behind his fetish and ABDL behaviour. Fifth, on the totality of the evidence Dr Lawson could not consider RS to have an abnormal level of impulsivity. Sixth, whilst the possibility cannot be excluded that RS's impulsive and reckless decision making is linked to his learning disability and autism, his decision making could also represent a normal level of impulsivity and recklessness for a young person of his age.

53. Within this context, I accept the evidence of Dr Lawson that, on balance, and having regard to the information made available to Dr Lawson between his substantive and addendum reports, it is not possible to say RS's decision making with respect to

contact and the use of the Internet and social media result, as repetitively risky and unwise as it is, results from an impairment in the functioning of his mind and brain, as opposed to from his psychological makeup, his sexual proclivities and desire and the fact he is a young man with a level of impulsivity commonly seen at his age, which factors cause him to make unwise but capacitous decisions (within this context, and as I noted during the course of the hearing, the behaviour of RS in meeting up with strangers after only limited contact with them online, which the local authority seeks to characterise as *so* fundamentally irrational that it must demonstrate that RS lacks capacity, is now also the basis of some widely used social media applications).

54. For a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in s 3(1) of the Act and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s 2(1) of the Act. Within this context, even were the court to accept (which I cannot) that the fact that RS has made a series of risky and unwise decisions with respect to contacting others and with respect to his use of the Internet and social media means he is unable to understand, retain and use or weigh relevant information as to contact and the use of the Internet and social media, there is no cogent evidence that the impairment of, or a disturbance in the functioning of, RS's mind or brain is operative on this aspect of his decision making.

55. Finally, I am not satisfied that there is any evidence before the court to suggest that RS is currently deprived of his liberty for the purposes of Art 5 of the ECHR such that the court is required to give consideration to a declaration in that regard.

CONCLUSION

56. In his closing submissions, Mr Karim acknowledges "the borderline nature of this case". Having regard to the totality of the evidence before the court, I am satisfied that RS does have capacity to make decisions about his residence, his care, his contact with others and his use of the Internet and social media. In the circumstances, I refuse the declarations sought by the local authority with respect to RS's capacity and I decline to make any declaration concerning deprivation of liberty. In the circumstances, I have no jurisdiction to go on to consider the question of best interests. There is no suggestion that the support provided to RS in his current placement will change as the result of the court's decision. Ms G confirmed to the court that RS will continue to receive appropriate support as currently constituted in his placement.

57. The evidence before the court does raise concerns regarding RS's vulnerability to financial exploitation. If, in light of the court's decision with respect to capacity, the local authority determines to issue a properly constituted application under the Mental Capacity Act 2005 with respect to RS's capacity to manage his financial affairs, then that application should be made on notice to the Official Solicitor be placed before me for consideration of appropriate directions. If such a course is taken it should be taken *urgently* as I agree with Ms Roper that it cannot be in RS's best interests for these proceedings to be dragged out further than necessary. The same applies to any application that the local authority may make for relief under the inherent jurisdiction of the High Court.

58. That is my judgment.