[2023] EWCOP 61

Case No: 13919068

IN THE COURT OF PROTECTION

The Sessions House,
Lancaster Road,
PRESTON
PR1 6PD

Date: 1 August 2023

Before :

HIS HONOUR JUDGE BURROWS

- -

Between :

LOCAL AUTHORITY A	**Applicant**
- and -	
ZZ	**Respondent**
(by his litigation friend, the Official Solicitor)	

- -
- -

Lucinda France-Hayhurst (instructed by **Local Authority Solicitor**) for the **Local Authority**
Oliver Lewis (instructed by **Peter Edwards Law on behalf of the Official Solicitor**) for the **Respondent**

Hearing dates: 12 &13 June 2023

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JUDGMENT

This judgment was delivered in private. The proceedings are subject to the Transparency Order. The Court has given permission for this version of the judgment to be published. The anonymity of ZZ must be strictly preserved, and nothing must be published that would identify ZZ or JX, either directly or indirectly. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HIS HONOUR JUDGE BURROWS :

INTRODUCTION

1. This case is about a young man who I will refer to as Peter (or ZZ). He is nearly 20. As I shall outline below, he has had a troubled and abused life and he presents as a significant risk to children and vulnerable adults as a result of his history of sexual offending.

2. This judgment is concerned only with the issue of his mental capacity over a range of decisions. In order for me to be able to reach conclusions on these issues, I have read a considerable amount of evidence, I have heard directly from Peter, and I have heard evidence from Dr Lisa Rippon, Consultant Psychiatrist, who was extensively questioned and cross examined by counsel as well as by me. That took place at an in-person hearing, although for reasons that were not entirely satisfactory, Dr Rippon attended only by way of video link.

3. Below, I will explain the conclusions I have reached. I will also provide a letter with an explanation intended exclusively for Peter. That will be between Peter and his lawyers and me. That letter will not be published.

BACKGROUND: HISTORY AND RISK PROFILE

4. In order to protect Peter, I shall not name the local authority responsible for his welfare, and the Applicant in these proceedings. Furthermore, I will not give any references to the geographical area in which he lives. There is also a vulnerable young woman who plays a significant role in this case, and I shall not name her either, but will refer to her simply as Jenny (or JX).

5. While Peter was still a teenager, he was convicted of committing a serious sexual offence against a young child. For this he was made the subject of a Sexual Harm Prevention Order. This prohibits Peter from being in the same premises as a child without supervision. Peter was then made subject to s. 20 of the Children Act 1989, in that he was accommodated by Local Authority A. He was placed and resided in a residential and educational setting. He then moved to his current supported living setting, which I will refer to as Placement 1.

6. Unfortunately, at the time of the hearing, Peter was awaiting a further hearing in the criminal courts as a result of an allegation of an offence of indecency.

7. Peter is also in a relationship with Jenny. She is a young woman who he met at college. She is also a vulnerable person, and she has a social worker from Local Authority B. They are never on their own, and their contact with each other is supervised for her protection. They do however, cuddle and hold hands, with, it seems, possibly a sneaky kiss on one occasion. The relationship would, under normal circumstances, probably be a sexual one. Certainly, Peter wishes to have a sexual relationship with Jenny.

8. This has caused some difficulties for Local Authority A. They are concerned about Jenny's safety in light of Peter's risk profile. One of the issues they asked this court to determine was whether I would authorise them to disclose Peter's history to Local Authority B, in the form of an agreed script. I took the view that it was a matter for LA A to make that decision under their safeguarding duties, and that this court would only do so if it was in Peter's best interests and that would presuppose that Peter lacked the capacity to make that decision for himself. This issue appeared to have been resolved at the time of the hearing because Peter informed Local Authority A

that he had told Jenny about his past. There appears still to be some doubt about whether that is correct, however, I am now quite sure that Jenny and her social workers know about Peter's history.

BACKGROUND: MENTAL HEALTH & CAPACITY

9. Before I consider the core evidence of Dr Rippon, it is important for me to outline much of the other evidence there is concerning Peter's mental health and psychiatric history.

10. There are a number of mental health and capacity assessments with the papers, all of which have been seen by the Court and Dr Rippon.

11. There was a detailed capacity assessment carried out by Dr M, a Consultant Clinical Neuropsychiatrist in July 2021. It was the product of a review of Peter's medical records as well as a Psychological Assessment by Dr O, a Chartered and Registered Consultant Forensic Psychologist from earlier in 2021. Dr O's report is important. It is the product of an assessment in which Peter fully and perhaps even enthusiastically engaged. It concluded that Peter is in the extremely low range of global cognitive ability, and verbal comprehension, visual spatial, and processing speed. He is at a low adaptive level, which means he "displays fewer adaptive behaviours and skills necessary to take care of himself when compared to others of his age". His socialisation skills are equally low. Furthermore, his receptive language had very low adaptive levels, but his expressive language was his "personal strength".

12. It was interesting also to note when Peter's maladaptive behaviours were assessed, his scores indicated internal distress and externalising behaviours (such as aggression and other conduct difficulties) were high. In particular, it was noted [5.10]: "he becomes

fixated on objects or parts of objects, can harm himself, engages in compulsive behaviour, becomes so fixated on a topic that it annoys others, can threaten to hurt others, can be tricked or coerced into doing something that could cause harm, can become fixated on a person in a way that is unwanted and engages in unwanted sexual behaviour".

13. The overall conclusion of the psychological report is [6.2]:

> "In my opinion, it is important that [Peter] receives on-going support, particularly in terms of communication, socialisation and daily living skills, to support him with his adaptive functioning. It is my opinion that his low scores in terms of both his IQ and adaptive functioning and indicative of mild learning disability. I note that he has an existing diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) for which he receives pharmacological treatment, He has also undergone an assessment for Autistic Spectrum Condition (ASD), yet did not fully satisfy diagnostic criteria".

14. It was recorded that Peter has been and remains motivated and engages in his own care planning and with staff, teachers and therapists in education. He has also benefitted "from the increased structure, supervision, routines and stability within his current home and educational setting". Dr O further states [7.5]: "[Peter] is actively engaged in therapeutic work with placement psychologists, teachers and care staff, to address his identified individual needs in respect of his historical experiences of abuse, his risks and presenting behaviours of concern, and to increase his resiliency for the future. However, it is my opinion that due to his individual learning needs and presenting difficulties, it is likely that it will take [Peter] much longer to acquire the knowledge and new stills and strategies needed to function within the community". It seems to me this is important because in order for Peter to understand his needs he must understand how his learning disability impacts on how his needs are to be met as well as the limitations on his ability to engage with others in a conventional, or "normal" way.

15. Dr M's reports and assessments record other observations. His support worker told Mr M that Peter is "very friendly and extremely manipulative". He was said to be "sexually inappropriate towards other boys". Furthermore, Peter was said to insert his penis into objects, such as his mattress, teddy bear, water bottles and clothing, in which he drills holes and "pleasures himself to orgasm". Worryingly, there are reports that he has masturbated whilst talking with or watching other boys. He misinterprets the behaviours of others. If a woman smiles at him, he believes she wants to have sex with him. This is concerning because in another part of the assessment he is asked what he would do if someone asked him for sex, and he replied that he would have sex with them. Certainly, he appeared "extremely preoccupied with sex". This was confirmed when Peter told Dr M that if he had unlimited access to the internet (which he does not have) he would watch pornography all the time. He becomes aroused by seeing women on TV and he has "thoughts of doing the things that he sees watching pornography". He has no control over his urge to masturbate and has modified his clothes by cutting holes in his pockets to make masturbation easier.

16. Dr M considers these recurrent intrusive thoughts and images as being suggestive of obsessive-compulsive disorder. Peter "recognises the thoughts as his own thoughts and that they are irrational. He spends a lot of time preoccupied with the thoughts.". Dr M includes in his report a table of the various types of paraphilia. In that table, Peter expresses interest in women in their 20s, but there are reports he will "look" at girls of 6. He is also confused about his sexuality. There is also some history of him being aroused by guinea pigs and horses. Dr M considers Peter to be extremely vulnerable to all forms of sexual exploitation. He also poses a very high risk of committing harmful sexual acts towards others.

17. Although Dr M carried out capacity assessment in respect of all the domains with which I am concerned, and I will refer to them in places below, I will consider Dr Rippon's assessments primarily since she was the jointly instructed expert in this case.

DR RIPPON'S EVIDENCE

18. Dr Rippon is an experienced developmental psychiatrist and is particularly well used to preparing reports for this court and giving evidence before it. She was instructed to provide her opinion on Peter's capacity in the following areas:

    (a) To conduct these proceedings

    (b) To make decisions as to the care and support he received

    (c) To make decisions concerning the use of the internet and social media

    (d) To consent to engage in sexual relations

    (e) Making decisions about his contact with others

    (f) Making decisions concerning his property and affairs

    (g) To enter into a tenancy

    (h) To make decisions about where he shall reside

    (i) To decide to enter into a marriage.

    (j) Making decisions about the use of contraception

    (k) Making decisions concerning the sharing of his offending information.

This was later expanded to include other non-capacity issues:

(l) Peter's diagnoses, specifically addressing the diagnosis of Obsessive Compulsive Disorder (OCD);

(m) Whether Peter can distinguish fact from fiction;

(n) Whether he can distinguish between a person who is old enough to consent to sex and one who is not;

(o) What (if anything) can be done to promote empathy towards victims of previous sexual offending;

(p) An updating assessment of his risk.

19. Dr Rippon produced two reports and answered a series of questions. I will focus for present purposes on the issue of sex. She interviewed Peter face to face twice. They discussed the issues that related to the areas of decision making Dr Rippon has to explore. This included the critically important issue of sexual relations, including whether he understood that his proposed sexual partner had the right to refuse sex, and for that right to be respected by him whatever he wanted to do. There was quite an involved conversation about his previous sexual behaviour and his criminal conduct and whether and what he would want Jenny to know. The discussion was focused on Jenny primarily and whether or not she would wish to have sexual intercourse with Peter. He seemed clear that Jenny would have the right to say no, and he would respect that. When Dr Rippon asked Peter whether it would be possible to have sex with a person who was unconscious, he replied "No. They have to be able to say yes". He was also aware of the age below which one could not have sex with a person. They also discussed marriage as a partnership.

20. Applying the test in ss 1, 2 and 3 of the Mental Capacity Act 2005, Dr Rippon reached the following decisions on capacity.

21. First, Dr Rippon concludes that Peter suffers from a Mild Learning Disability and Attention Deficit Hyperactivity Disorder (ADHD). She also considered him to present with executive functioning difficulties. This is a term used "for a range of cognitive, emotional and behavioural difficulties and include impairments with planning and organisation, flexible thinking, monitoring performance, multi taking, solving unusual problems, self-awareness, learning rules, social behaviour, making decisions, motivation, initiating appropriate behaviour, inhibiting inappropriate behaviour, controlling of emotions and concentration and processing information". She also considered a diagnosis of OCD as being one that could not be ruled out and should be kept under review, very much for the same reason Dr M felt that way.

22. Dr Rippon concluded that Peter lacks the capacity to conduct these proceedings. I will not revisit this, as it is not a matter of issue between the parties.

23. Dr Rippon also concluded that Peter lacked the capacity to make decisions about the care he should receive. This is primarily because he lacked any real understanding of why he needed support and how he was at risk without adequate supervision.

24. She also considered he lacked the capacity to make decisions about using social media, this was to do with his inability to understand the risk associated with unknown people both as initiators and recipients of contact. She did later clarify that she had used what was referred to as the Cobb J guidance in the case of Re A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2, upheld by the Court of Appeal in B v A Local Authority [2019] EWCA Civ 913.

25. When it came to Peter's capacity to consent to or rather engage in sexual relations (or activity), in her first report, Dr Rippon considered Peter to have capacity. In her Addendum report, following questions Dr Rippon revisited this issue. She was asked by the local authority to focus on victim empathy and the extent to which his executive functioning difficulties impacted on his ability to estimate the risks of his behaviour. She concluded [3.3]:

> "However, I believe that [Peter] does lack insight into his ability to control his behaviour and stop himself from engaging in behaviour which he knows is wrong.
>
> Therefore, on balance, I believe that this prevents [Peter] from using and weighing information with regards to engaging in sexual activity and he therefore lacks capacity in this area".

In the answer in [3.4], referring to Peter's inability to control his urges which is secondary to his learning disability and ADHD he lacks capacity to consent to sexual relations. Importantly, she concluded that he was both at significant risk of sexual exploitation and reprisals because of his own behaviour.

26. Critically, at [3.9] (question in bold):

> "**Are you able to provide a view about what impact [Peter's] executive functioning, obsessional thoughts and sexual urges might have on his capacity to use contraception before and during sex?**
>
> Given [Peter's] sexual urges and his limited ability to control these, I believe that they may override him using contraception and, when having sex, his ability to use and weigh information may be over-ridden by his urges to have sex without contraception".

THE LAW & EVIDENCE AT TRIAL

Generally

27. At the time of the capacity hearing areas of agreement between the parties over Dr Rippon's evidence were as follows. I will incorporate Dr Rippon's oral evidence where relevant as we go along.

28. There was no dispute that Dr Rippon was correct that Peter lacked capacity to:

    (a) Conduct these proceedings

    (b) What care to receive: this is a vital but sensible concession for the Official Solicitor to make. It is plain from Dr Rippon's evidence and all the other evidence that Peter lacks the capacity to decide over the care (if any) he should receive.

    (c) The use of the internet and social media.

29. There was dispute in that, contrary to Dr Rippon's conclusions Peter may have capacity to:

    (a) Decide where he should live.

    (b) Decide with who to have contact. In this there should be a difference between his contact with Jenny and his contact with other people.

    (c) Decide on engaging in sexual activity/ relations. Again, there should be a distinction between sex with Jenny and sex with other people.

    (d) His ability to enter into a marriage.

    (e) To use contraception.

(f) To manage his property and affairs.

(g) To enter into and terminate a tenancy.

(h) To share information about his offending history.

30. The general law can be summarised simply.

(a) Everyone is presumed to have capacity, and that presumption may only be rebutted with evidence on the balance of probabilities. The burden of rebutting that presumption rests with those asserting incapacity.

(b) A person must not be assessed as lacking capacity until all practical steps have been taken to enable him to make the decision, without success.

(c) A person cannot be assessed as lacking capacity to make a decision just because he has made an unwise decision.

(d) Capacity is decision and time specific.

(e) In order to lack capacity a person must be suffering from an impairment of or a disturbance in the functioning of the mind or brain, and that must cause the person to be unable to make the decision. That is the diagnostic test in s. 2 MCA

(f) Section 3 MCA then outlines the functional test. The person must either not be able to understand information relevant to the decision, or be unable to retain that information, or to be unable to use and weigh that information in order to make a decision, or be unable, howsoever, to communicate his decision. If any one of those features is absent, the person lacks capacity.

31. It is very important for the Court to realise that it must consider all the evidence in the case. Although an expert, particularly a jointly instructed one will be of great significance to the Court, the decision is one for the Court alone to make. Obviously, if a Court does not follow a single expert, it must give a good reasons for not doing so: see for instance, the family cases Re B (a minor)(rejection of expert evidence) [1996] 3 FLR 272, Re D (Grant of a care order: refusal of freeing order) [2001] 1 FCR 501 and Re MW (a child)(care order: expert evidence) [2010] 1 FCR 227.

32. Also, the level of understanding required for a person to have capacity must not be set too high, so that it is virtually impossible for them to have capacity. The formulation of the decision that needs to be made is another way in which the hurdle that needs to be overcome can be too high, it can also remove any reality from the decision by removing its context. This is often referred to as placing the decision in "silos" so that the decision that has to be made is bereft of any other related decisions, thereby removing the reality of the decision: see B (by the OS) v A LA [2019] EWCA Civ 913.

33. I have been reminded by the Local Authority of the issue of executive dysfunction. The judgment of MacDonald, J in TB v KB & LH [2019] EWCOP 14 has recently (and since the hearing in this case) been joined by Warrington Borough Council v Y (by the OS), AB and CD [2023] EWCOP 27 (Hayden, J.). particularly at [45].

Conducting proceedings

34. There is no dispute over this. In any event, where, as here there is a lack of capacity to make certain decisions, it is highly unlikely that the person concerned will have capacity to litigate over that issue.

Residence

35. The starting point with residence is the well-known case of LBX v K [2013] EWHC 3230 (Theis, J.). In that case, the Judge outlined a set of points as to what was the information relevant for the decision. The issue in this case concerns the last of those points. It seems clear that Peter is able to understand the first seven: which are about the type of property, the difference between visiting and living in a place, the area in which it is, nearness to family friends, activities available, whether he would have to pay for the place himself. Dr Rippon accepts Peter can understand all those. The contentious issue concerns care. Does Peter understand that care is an important aspect of the place he would have to live in? Or, put another way, that Peter knows he has to reside in a place where care is available, and that would rule out places where that care was not available, whether because of unsuitability or because no commissioned service would be available there.

36. This is important in this case because it is clear to me that although Peter realises that he is required to live where he is at present, he would ideally like to live with Jenny and her mother. The Local Authority refers to Peter's consistently expressed view that he does not consider himself to be a risk and that he does not require the level of support he has from the staff at Placement 1. This, they submit, means that he does not understand an essential feature of the residence he has to live in, namely the need for that level of support and supervision. For the Official Solicitor, this is not part of the relevant information in Peter's case. In his written submissions, Mr Lewis says that the Local Authority's case brings into the mix another placement that Peter has to consider, viz. one without the proper level of support, and that simply is not an option at the present time. If one removes the "care" point from the LBX list as it applies to

this case, there is no doubt Peter has the capacity to decide on residence. Or, perhaps, put another way, he has the capacity to make a decision about residence where care is not an issue, because the only option is a placement with care provided.

37. This is a difficult and common point. I have concluded that Peter has the capacity to make the decision he has to make over residence, and that is because he does not actually have a decision to make over whether he lives in a care setting. That being said, if in the near future Peter were to want to move to a place without an adequate level of care, support and supervision, the matter would have to be revisited. If the option was between Placement Q (similar to Placement 1) and Placement R (just an ordinary flat with Jenny, but without any adequate supervision) the issues of residence and care would be closely related and the Court may well conclude that he lacks the capacity to make that decision.

Tenancy Agreement & Property and Affairs

38. I agree with the submissions made by the Official Solicitor on these issues. It seems clear that Peter was not asked about the sorts of issues that are regularly considered when determining whether a person has the capacity to enter into a tenancy agreement. I am not clear in my mind whether Peter would be unable to make that sort of decision with the assistance of a support worker or someone else. I am not in a position to conclude that he lacks capacity. I am with the Official Solicitor, a capacity assessment for that issue ought to be prepared.

39. Property and affairs is similar. Peter is able to manage his rather limited income and expenditure on a weekly basis. He is able to account for his expenditure by taking receipts to the staff. He has an appointee who deals with his benefits. His usual spending decisions are not regularly overridden. I am not satisfied that the evidence in

this case displaces the presumption that Peter has the capacity to manage his relatively straightforward financial affairs. The argument deployed by the Local Authority against this I cannot accept. Ms France-Hayhurst states that if the Court were to find that Peter had capacity to make decisions about those parts of his property and affairs that do not concern his appointee it would create an irrational precedent. I do not agree. I look at the issue this way. If Peter did not have an appointee, his property and affairs decision making would become more complex for him. I doubt he would then have capacity to deal with the more complex part of his property and affairs. He would then need a deputy or, as it happens, an appointee to enable him to have capacity of the parts of his financial affairs he can manage.

Using the Internet and social media

40. There seems little doubt that Peter's inability to assess the risks that arise out of social media/internet use make him incapable of making decisions as to its use, for the reasons that are very clear in Dr Rippon's evidence. The Official Solicitor agrees. I am also satisfied that the presumption of capacity is displaced in this regard.

Contact with persons other than Jenny and Peter's mother

41. The issue the Official Solicitor addresses here is that Peter poses a risk to other people, people he does not know and it unable to understand that he poses that risk. This is particularly so because of the sexual nature of the harm he poses. The Official Solicitor agrees with Dr Rippon and the Local Authority that Peter lacks the capacity to make decisions about contact with other people (except his mother and Jenny). I am satisfied for the reasons they give and which I have touched upon earlier in this paragraph that he lacks capacity in this domain.

Contact with Jenny and Peter's mother

42. I am invited by the Official Solicitor to determine that Peter does have capacity to make decisions about contact with his mother and Jenny. I am invited to determine that the capacity to decide on contact here depends on with whom that contact is when that person is well known to P. I am asked to take seriously what the Court of Appeal said in PC v City of York [2013] EWCA Civ 478, when they emphasised that the decision about which capacity was being assessed should be considered within its proper factual context, rather than without that context. I was also urged to consider SF v A Local Authority in Yorkshire [2020] EWCOP 15 (Cobb, J.) cited by me in A LA v ZK (No.2) [2021] EWCOP 61. In those cases, there was a clear evidence-based reason to distinguish between contact (and sexual relations) between P and other people in general on the one hand and her husband on the other. That was because in that case P's deeper semantic memory was not so affected by her cognitive problems as her shallower more recent memory. She knew her husband and could assess the risk (or not) that he posed to her. She did not know the opportunistic and probably coercive visitor who came for sex when her husband was away.

43. Dr Rippon did consider that Peter was able to make decisions about contact with Jenny because he knows her so well and has a strong emotional attachment to her. Her concerns about Jenny were about Peter's sexual impulsivity and what she considered to be his lack of insight into that aspect of his thinking. That impulsivity equally applies to strangers as it does to Jenny, it seems to me. That is because Peter, whilst recognising that he is liable to be sexually disinhibited, is unable to do anything about it. That is the essence of the risk that makes him lack capacity when deciding whether to have contact with the world in general. I am unable to see how that situation is any

different when it comes to contact with Jenny. Since Peter lacks capacity to make decisions about his contact with people in general because of his inability to understand the risks he poses to others, and his inability, therefore, to mitigate those risks, I am persuaded that he lacks the capacity to make decisions about contact with his mother and Jenny.

SEXUAL RELATIONS, CONTRACEPTION & MARRIAGE

44. In so far as the legal test for sexual relations is concerned the position is now reasonably clear in the wake of A Local Authority v JB [2021] UKSC 52. It is important to preface what I say on this issue with the following explanation of why this issue is different from most of the others I have considered. For historical reasons, sex and marriage are decisions that the law dictates cannot be made on behalf of a person unable to make the decision for himself. If Peter lacks capacity to consent to sexual relations, no one, this Court included can make a best interests decision on his behalf. He is simply unable to have sex. The Local Authority will have to use their best efforts to ensure that he does not have sex. The same is true of marriage. This is because consent is simply a basic prerequisite for both sex and marriage, and substitute consent is seen as repugnant.

45. Since the implications of a lack of capacity are so drastic, it is unsurprising that the caselaw has been so complex. The JB case brings clarity to the issue of capacity to consent to sexual relations and that test must be applied faithfully and scrupulously by this Court. The focus must be on the personal ability of the individual concerned to make the (indeed, any) particular decision and the processes followed by him in arriving at the decision. The focus must be on the actual decision that has to be made, and that involves an assessment of unique circumstances of the person concerned. By

focusing on the individual circumstances of the person concerned, the prescriptive approach taken by the earlier case law has to be approached with considerable concern (see Lord Stephens' judgment).

46. Therefore, it seems that the approach I must take is to ask myself whether Peter is able to understand the information relevant to the decision whether to engage in sexual activity to Jenny. Dr Rippon went through the classic tests with him. He understands what the physical act of sexual relations consists in. He understands that where there is sexual intercourse between a man and a woman there is a risk that the woman could become pregnant without adequate protection. He also understands that sexually transmitted diseases exist and can be spread from the infected partner to the other. This too can be ameliorated by the use of condoms. Peter also understands that consent is necessary on both sides. He need not have sex if he does not wish to. Equally, neither should his partner. Here Dr Rippon has vacillated. As Mr Lewis points out in his written case, she started to focus on Peter's lack of what she calls "insight into his ability to control his behaviour and stop himself from engaging in behaviour he knows is wrong". In her oral evidence on questioning from Mr Lewis and me, Dr Rippon focused on situations Peter may find himself in where he may find it difficult to stop himself because of his sexual urges. This has caused some difficulty for the court. Clearly, urges are, by their very nature, difficult to control, and it would be setting the bar too high if capacity to consent to sexual relations were to be ruled out because a person was unable to control an urge (for instance) to carry on with the sexual act. Having said that, Peter is a sexual offender who is unable to control his urges to engage in very harmful and criminal sexual behaviour, as I have already found.

47. All that being said, I agree with the Official Solicitor's submissions on this. I do not accept that a sixth factor or limb ought to be introduced into the JB test, namely, to have insight into and the ability to control one's urges. I also agree the conclusion I have reached, namely that Peter has capacity in this area, fits in with Cobb J's statement in Re Z [2016] EWCOP 4, namely that ordinary risk taking, which may be unwise does not render the decision incapacitous. I would go further. A person can have the capacity to engage in sexual relations, understanding that his partner may withdraw her consent at any moment, and that with that he must stop the sexual act. If, however, when that withdrawal of consent happens the person is unable to overcome his urges, that is nothing to do with capacity to consent to sexual relations.

48. I appreciate this finding places an onerous burden on those responsible for Peter's care, the Local Authority. Unfortunately, this is one of those very difficult cases illustrated in Manchester City Council v LC & KR [2018] EWCOP 30, where difficult care planning is required for a person who lacks capacity in one domain (say care) which then has implications on his ability to make decisions in another domain in which he has capacity (say, consenting to sexual activity).

49. One other important matter is Jenny's status as a vulnerable person, where there are possible questions over her capacity to make decisions about contact and maybe even sexual relations. Although the protection of the public is a relevant consideration in MCA and Court of Protection cases, it is not the primary purpose of this jurisdiction. Peter is subject to a criminal order designed to protect vulnerable would-be victims. The fundamental principle of the MCA is to enable people whose decision-making abilities are restricted by their mental health difficulties to enjoy autonomy and to

make decisions, even where those decisions are unwise and wrong. That is the upshot of Re Z, and my decision, above.

50. Marriage was the subject of debate between counsel in this case. Mr Lewis and Ms France-Hayhurst both make reference to London Borough of Southwark v KA [2016] EWCOP 20 (Parker, J.) and the relevant knowledge required in order for a person to enter into a marriage. I agree that the focus should primarily be on the broad nature of the marriage contract, the duties and responsibilities (including financial), and the need for a marriage to be seen as two people to live with and love one another. I do not think anyone disputes that Peter understands these matters. The wisdom of the marriage is naturally irrelevant. Its prospects of success or longevity equally so. The only area of dispute there may have been is whether Parker J was right to specify that in order to marry the party must not lack capacity to consent to sexual relations. In NB v MI [2021] EWHC 224 (Fam.), Mostyn J disagreed that a sexual relationship was necessary in order for there to be a valid marriage, hence there is no need for capacity to consent to sexual relations in order for a person to enter into a marriage. Mr Lewis rightly states that this conflict of first instance decisions awaits resolution in the Court of Appeal. Fortunately, in view of my decision on capacity to consent to sexual relations above, I do not need to decide which of these High Court decisions I should follow. In my judgment, Peter has capacity to enter into a marriage.

51. Finally, contraception. The issue in this case is not Peter's ability to understand the so called "proximate medical issues surrounding the use or otherwise of contraceptive, as outlined by Bodey J in ALA v A (by the Official Solicitor) [2010] EWHC 1549. The issue is whether, at the point at which contraception of a particular type (i.e. a condom) would be used Peter would be so overcome with the imperative for sex that

he would not decide to use a condom. I agree with Mr Lewis that Dr Rippon appeared in her oral evidence to agree that the impediment to a decision here would be the overwhelming feelings of sexual desire rather than the product of a malfunctioning mind or brain. That would be enough to rule out a finding of incapacity under the MCA. However, there is no reason why, with planning, proper contraception cannot be put in place for Peter's partner, be that Jenny or anyone else. There is no reason to believe Peter cannot do this, even if he requires support with the planning and execution of the plan.

52. That completes this judgment. I will discuss with the parties what orders need to follow and what further hearings are required.