Neutral Citation Number: [2014] EWCOP 53

Case No: 11795774-03

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2014

Before :

MR JUSTICE MOSTYN

- -

Between :

THE LONDON BOROUGH OF TOWER HAMLETS	**Applicant**
- and -	
TB (by her litigation friend, the Official Solicitor)	**1st Respondent**
- and -	
SA	**2nd Respondent**

- -
- -

Bryan McGuire QC (instructed by **London Borough of Tower Hamlets**) for the **Applicant**
Nicola Greaney (instructed by **Miles and Partners Solicitors**) for the **1st Respondent**
John McKendrick (instructed by **Bindmans Solicitors**) for the **2nd Respondent**

Hearing dates: 1-4 December 2014

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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 MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn:

1. I am concerned with the future of TB, who is a 41-year-old lady of Bangladeshi origin born on 10 May 1973. All are agreed that this is a singularly complex and challenging case.

2. I gave a fairly full interim judgment in this case on 23 August 2012. In paras 2 and 3 of that judgment I stated:

> "2. [TB] is incapacitated within the terms of s.2 of the Mental Capacity Act 2005. The opinion of Dr. Thomas in this regard has not been challenged. He states in his principal report of 17 April 2012 as follows (para.73):
>
> > "It is my opinion that TB suffers from a moderate mental retardation, almost certainly genetic in aetiology. Mental retardation is better known in the United Kingdom as 'learning disability' or 'intellectual disability' and this describes a permanent condition affecting the brain/mind arising in childhood and resulting in an impaired ability to learn or acquire new or complex skills, accompanied by a significant impairment of adaptive functioning in some or all of the following domains: communication, self-care, home living, social interpersonal skills, self-direction, functional academic skills, work, leisure, health and safety. A Moderate Learning Disability is a significant and permanent impairment of the functioning of his mind. This is a mental disorder that satisfies the requirement of the first stage of the two-stage capacity test as set out in the Mental Capacity Act. An adult with a moderate learning disability would possess a range of cognitive skills and abilities typically found in a child between the age of 4 to 8 years. A learning disability is a lifelong condition for which there is no known cure, although the impact of cognitive impairment may be significantly lessened with specific therapeutic intervention and support so as to improve adaptive functioning."
>
> 3. Dr. Thomas then went on to consider the specific capacity of TB in certain fields or realms. He concluded as follows:
>
> > '(1) I do not consider TB to have the capacity to make decisions about her residence.
> >
> > (2) TB currently lacks the capacity to make a decision about the nature and frequency of her contact with SA and also whether or not to remain living with SA, move away from the marital home herself or require him to move away. I believe that TB is not likely to acquire the capacity to make these decisions in the short to medium term.

> (3) TB does not have the capacity to understand the nature, implications and consequences of a divorce from SA and, as such, lacks the capacity to make any such decision.
>
> (4) I do not consider TB to have the capacity to make a decision about whether SSB should remain in the household."

> I should explain that SA is her husband, and I will describe how she married him and the events in their marriage a little later. Her husband, SA, is, in fact, her first cousin. SSB is also her first cousin and her husband has taken her as a polygamous second wife. That marriage is valid under the laws of Islam but is completely invalid under the laws of England and Wales. As I will explain, by virtue of that second marriage, a child has been born to SSB, YSY, who is nine weeks old."

3. Since my first judgment a further daughter, ISS, has been born to SSB on 3 March 2014 of whom SA is the father.

4. In my first judgment I found that it would not be in TB's best interests to return to live in her home at 9 Emerald Mansions[1], London E1 with SA, SSB and YSY. She should instead live in supported accommodation provided by the applicant local authority ("LA"). Contrary to the submissions of both the LA, and the Official Solicitor ("OS"), who represents TB, I allowed SA to have limited interim contact with her.

5. In my first judgment I set out at paras 8 – 15 the history up to August 2012 as follows:

> "8. At all events, the parties began in 1999 or 2000 their married life, this man and this incapacitated woman, and they had four children: STH, born on 1 October 2001, a girl; STM, born on 17 March 2003, a girl; SSM, born on 7 January 2009, a boy; and SHT, born on 22 January 2010, a boy. All these children were the subject of care proceedings mounted by the London Borough of Tower Hamlets against this mother and this father. Those proceedings were heard over many days and many occasions by Judge O'Dwyer and resulted in a fact finding judgment on 29 January 2010 and two further judgments on 20 July 2010 and 17 January 2011. The consequence of those three judgments were that all the children were removed permanently from these parents and have been placed for adoption, if not already adopted. In the course of his first judgment on 29 January 2010, the judge made what he described as grave findings against both parents but principally against the father, he having recognised in relation to the mother that she had disability, was unable to represent herself, that she has always lacked capacity to care for her children, and she is in receipt of a great deal of support from the local authority.

[1] This is a fictitious name for the property.

9. In his fact finding judgment the judge made, by reference to a schedule produced by the local authority, numerous findings, but for my purposes what is relevant are the findings in relation to allegation 1 made by the local authority, which was that the relationship between the parents was and at all times has been volatile. In that regard, the volatility was expressed by numerous instances, according to the allegation, of domestic violence meted out to the mother at the hands of the father. That case was proved by the testimony of a witness, Ms. B, whose evidence was accepted as being generally truthful by the judge. As a result, a number of instances of domestic violence were found proved. I refer to para.87 of the judgement where Judge O'Dwyer made the findings clear. He said, by reference to the assaults which he found proved:

> "I am satisfied that the assaults and the evidence of Ms. B establishes the local authority a case that there is a volatility in the relationship between TB and the father. He is very fond of his wife, but he is under immense strain. He does lose his temper. It is also the case that he has much affection for his wife. I could see that, as he gave evidence before me, the strain of living with somebody in the position of TB cannot be underestimated. Although there is much input from the local authority and practical help, nonetheless, there are many aspects of emotional, day-to-day care that are very difficult. SA feels a very strong sense of duty, but the pressure upon him and the lack of support from any network of friends and family in this country, partly no doubt as a result of his own character, leads him at times to lose his temper and to resort to physical and verbal abuse."

Following that hearing, all the children were removed. I think the third child had already by that stage been removed. As I say, there were further judgments issued in 2011 which resulted in the permanence orders which I have referred to.

10. At the time of Judge O'Dwyer's first judgment, the mother/wife, TB, was, in fact, out of the property of the parties, 9 Emerald Mansions, in circumstances which the judge found extraordinary, but at some point she returned. She returned to a regime whereby there is 24-hour, 7 day a week, 52 week a year care in 9 Emerald Mansions, which is but a two-bedroom housing association property. So the position that endured from that point onwards was that the husband and wife were living in the property but that the carers were present in the living room 24 hours a day helping with the care of the severely incapacitated TB.

11. To add to the complications, in the summer of 2011, as I have mentioned, SA married his first cousin SSB. She was initially refused leave to enter this country by the entry

clearance officer in Dhaka, but an appeal against that decision allowed her to enter for a strict six-month period on her representation that she would be financially independent and that she would assuredly leave at the end of the six-month period. As so often happens, those promises have turned out to be false and she remains in this country. Shortly after their marriage, she fell pregnant, and nine weeks ago the child I have mentioned, YSY, was born. So YSY is TB's first cousin, once removed, as well as being her stepdaughter, and the husband and both of his wives are all first cousins.

12. These proceedings were mounted at the earlier part of this year. By virtue of the order Bodey J. made, I think, in May, the issues were defined as to whether it was in TB's best interests to live in 9 Emerald Mansions; if it was in her best interests to leave, where it was in her best interests to go; if she should remain, whether it is in her best interests to reside there with her husband and/or with her husband and his second wife; and whether an order should be made under s.33 of the Family Law Act requiring SA and SSB to leave and not return. So since the early part of this year this local authority has been advancing a case that a separation was needed between this husband and this wife.

13. At an early stage experts were appointed, and I have heard oral evidence from both Dr. Thomas and Mr. Watkins, the independent social worker. They have both been consistent in their advices they have given - they have each filed more than one report - that there should be a separation between this man and this woman in her best interests in circumstances where she is incapacitated. Both gave evidence at some considerable length before me. Mr. Watkins described a life which he described as extremely impoverished, lived by TB at 9 Emerald Mansions. He described it to me as being a wholly oppressive environment where there is a sense of containment and monotony, where her life generally revolved only about -- by watching television. It was a life which was obviously one where she was wholly subservient to her husband and, as Judge O'Dwyer has found, where from time to time that subservience would nonetheless result in the meting out to her of domestic violence. He described how she would lie in bed all morning, that there was nothing in her life apart from watching TV and having care done to her by the carers. There were no skills being developed.

14. As to this empty life that she was leading, the husband, SA, places the responsibility for that squarely at the door of the local authority and the caring agency to which they have delegated her care. Although the opinion of the independent social worker and the psychiatrist have been, consistently, there

> should be a separation, it is fair, as Mr. McKendrick has demonstrated through his skilful, if somewhat lengthy, cross-examination, that the wishes and feelings of TB have varied and seem to be the product of the environment in which she is presently sited. This is perhaps not altogether surprising, bearing in mind that she has, to use shorthand, a mental age of between 4 and 8, even if that is perhaps a somewhat inaccurate way of describing her general capacity because, of course, she is 39 years old and has life experiences far longer than a child of 4 to 8 years old. But it is perfectly true that from time to time, as Mr. McKendrick's schedule has demonstrated, her views have varied between expressing a wish to live with her husband, sometimes expressing a wish to live with her co-wife and her co-wife's child, to the present time when she is, now that she has been separated in circumstances which I have described, expressing very strongly the view that she wishes to live alone in her own independent accommodation and not to have contact with, let alone to cohabit with, her husband SA.
>
> 15. The cohabitation of the husband and the wife, which had involved, as I say, them engaging in normal marital relations, even though there has, as I have explained, been a question mark over TB's capacity to consent to that, came to an end on 27 July when, pursuant to an order made by me a few days earlier than that, she was removed from 9 Emerald Mansions and taken to BL House, which is where she has been before but which would not ever be appropriate as a permanent placement for her, in circumstances where evidence was put before me *ex parte* of further domestic violence having been inflicted by SA on her. The statement of Carol Nicholson that on 23 July this assault had taken place and that she had been hit on the head was not actually disputed, although I am not fixing either SA or Mr. McKendrick with an acceptance that the events there described happened. But, at all events, the consequence of the *ex parte* application and the order made by me was that on 27 July, I having made the order that day, she was removed."

6. These passages do not fully describe the very great difficulties that have existed in this marriage from its inception, or for that matter TB's difficulties generally. SA accepted in evidence that from childhood TB has had very serious problems; he put it down to a bout of malaria (which is unlikely to be the case). Almost from the moment of her arrival here TB has needed intensive professional support. Suzanne Wilson, a clinical psychologist, told me that she had worked with her since 2001 since the birth of STH. She told me that she was always concerned for her emotional wellbeing and mental health. She was invariably very withdrawn and very unhappy. Her quality of family life was poor and it was riven with tension.

Events since August 2012

7. Since my first judgment there have been a number of developments.

8. So far as TB is concerned after about 6 months she moved from BL House to a self-contained flat in SS House where she receives 24 hour care, which is bought and brought in. She has not prospered there as much as everyone hoped. She seems to lead a rather isolated and lonely life, spending hours lying on the sofa watching TV. Although there are common rooms she does not mingle much with other residents. Dr Joyce, the jointly instructed clinical psychologist, who was an excellent witness, considers that she ought to move to a more focussed supported placement where she is not isolated in her own flat and where she is positively helped to socialise and to undertake everyday human activities. If this is not possible then there ought to be a change in the caring team so that the carers more proactively seek to get her to engage with the other residents and with worldly activities.

9. So far as SA is concerned he remains living at 9 Emerald Mansions. There he is visited on 2 or 3 occasions each week for 4 to 5 hours by SSB, YSY and ISS. If SSB goes out he looks after his daughters unaided. Additionally he socialises in public places with SSB, doing things like shopping. He intends to play a full part in the upbringing of his daughters.

10. He has regular sex with SSB. He told me that this had occurred the previous week, and happened about every two weeks. He regards it as his right to have sex with her and her duty to submit to it. This is a tenet of his culture and religion.

11. The operative order for contact is that it should take place every two weeks for two hours and should be supervised. It has not in fact happened as often as that. The LA has suggested that at the contact SA has behaved inappropriately, and certainly on at least one occasion it ended with TB in tears. Further, there have been occasions where SA has criticised the translators who attend the sessions. However I take the view that generally the contact has been worthwhile for TB and certainly it has been important to SA who has, after all, been married to her for 18 years. There is nothing untoward in him showing her photographs of their four children on his telephone or for that matter in him showing her photographs of YSY and ISS. However he sails close to the wind when he says to TB, as he admits, that they should pray that their children are returned to them and that he will be able to take her on holiday to Bangladesh. Prayer for a person like TB is not the abstract mystery that people of full capacity understand it to be. For her I think that these suggestions come close to an inducement and I judge it to be a contributing if not the dominant factor why she has recently said that she wishes to return "home" to 9 Emerald Mansions.

12. SA told me that if TB were to return "home" and if I declare her to have sexual capacity he would expect to have sex with her if she consents. Again, he explained that according to his religion and culture he regards himself as entitled to do this and he regards it as her duty to submit. He accepted that he could be sleeping with his two wives on consecutive days.

13. The four children of TB and SA are all in care. STH (13) and STM (11) are in the same placement and the plan for them is long term fostering. SA has contact with them once every four months for 1½ hours. The plan for SSM (nearly 6) and SHT (nearly 5) was adoption. It has not been possible to find adopters for SHT, and so he being matched with his current carers for long term foster care. SSM has been placed with adopters and an adoption application has been made. Pursuant to section 47(5) Adoption and Children Act 2002 SA seeks leave to oppose the application. By an

order made by Judge O'Dwyer, with my consent, dated 4 December 2014 that application and the adoption application itself are allocated to be heard by me, and will be in the New Year. Obviously I say nothing about the likely result of those applications other than to observe that SSM has been with his current carers since he was 5 days old.

14. There is inter-sibling contact and this will continue if SSM is adopted.

15. As is apparent from what I have just written SSM was removed from TB and SA on his birth. Yet within three months SA had impregnated TB again. Inevitably when SHT was born he was immediately removed also. It was a very heartless thing for SA to impregnate TB when he must have known that the baby would be removed instantly on birth.

16. SSB lives with YSY and ISS in a bed and breakfast refuge. Care proceedings were commenced in relation to YSY. On 13 September 2013 I gave a judgment where I made a supervision order in respect of YSY for 12 months. That order has now expired. In that judgment I said this:

> "The mother here [SSB] entered this country on 16th August 2011 as a family visitor and was granted leave to remain here for six months. Whether that was a deceptive entry, I am in no position to judge, nor would it be appropriate for me to say anything more on that matter given that that may be the subject of further proceedings in the immigration sphere."

17. In fact it is clear that it was a deceptive entry. SA admitted that he lied to the immigration authorities. He even lied to his own GP Dr Beer. My judgment records that the mother was mounting an application for leave to remain. I said this:

> "In relation to the mother's immigration status, there have been two opinions by a jointly instructed expert, Katherine Cronin, who has explained that the mother is going to be making an application on a derivative basis for leave to remain pursuant to and by virtue of the decision of the Court of Justice of the European Union in *Ruiz Zambrano v Office National de l'Emploi* [2011] All ER (EC) 491. That decision has caused amendment to be made the Immigration EEA Regulations 2006 to insert Regulation 15A, and there have been domestic decisions concerning *Zambrano* subsequently."

18. It would appear that her application has been denied and that she has mounted an appeal. The appeal is to be heard on 12 December 2014. If that fails she will make a different application within the Immigration Rules for leave to remain. As with immigration law and procedure generally the picture is extremely murky. However, on any view she and the children have a good prospect of being allowed to stay here.

The issues

19. All parties are agreed that TB lacks capacity to make decisions concerning her residence, her care and her contact with SA. The issues that I have to decide are these:

i) Where should TB live in her best interests? SA says she should return home with 24/7 domiciliary care; the LA and OS say she should not. The LA says that ideally she should move from SS House to the supported placement recommended by Dr Joyce. If unfeasible her care regime at SS House should be improved in the way I have mentioned. The OS would prefer to see if her present placement can be improved before a move to an alternative placement is investigated.

ii) If TB does not return to 9 Emerald Mansions what should her contact be with SA, in her best interests?

iii) Does SA have the capacity to consent to sex? This is an abstract question if she does not return to 9 Emerald Mansions, but a very real one if she does.

iv) Whatever I decide about residence does her care regime amount to a deprivation of liberty within the terms of Article 5 of the European Convention on Human Rights 1950 (as incorporated domestically by the Human Rights Act 1998) having regard to the majority decision of the Supreme Court in the combined appeals in the *Cheshire West* and *MIG and MEG* cases (reported sub nom *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19, [2014] 1 AC 896)?

Best interests

20. Section 1(5) MCA 2005 provides that "an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests." Section 4 sets out a number of matters that the decision maker must, and some which he must not, take into account when determining the best interests of the protected person ("P"). In particular by virtue of section 4(6)(a) he must take into account P's person's past and present wishes and feelings and by section 4(6)(b) P's beliefs and values that would be likely to influence her decision if she had capacity (although this latter consideration is counter-factual because of course if P had capacity no-one would be making a decision on her behalf). Further, by virtue of section 4(7)(b) he must take into account, if it is practicable and appropriate to consult them, the views of anyone engaged in caring for P or interested in her welfare. In this case that would extend to SA, obviously.

21. It is interesting that best interests is the sole criterion, in contrast to section 1(1) Children Act 1989 and section 1(2) Adoption and Children Act 2002 where the best interests of the child is the paramount (but not sole) consideration, and to section 25(1) Matrimonial Causes Act 1973 where the best interests of the child is the first consideration. However, although it is the sole criterion best interests must be construed compatibly with Convention rights, particularly the article 8 right to a private and family life (see section 3(1) Human Rights Act 1998). These rights include those of SA as well as those of TB.

22. The evidence I have heard, including that from the two clinical psychologists Ms Wilson and Dr Joyce as well as that from the senior practitioner in the Community Health and Wellbeing Team Leslie Snowden and the Speech and Language Therapist Niah Gaynair was unanimous. In their view a return of TB to 9 Emerald Mansions to

live with SA would be directly contrary to her interests. The OS, who represents her, unequivocally agrees.

23. Mr McGuire summarises the evidence and the arguments in his closing submissions as follows:

> "The court cannot and should not find that TB should return to Emerald Mansions in her best interests:
>
> a) The proposal is inchoate. It is not known who will be there: whether SSB will be there, or how much of the time she will be there; whether she will stay overnight; whether that will be a long term or a short term arrangement; whether the children will be staying overnight; whether carers would be present, for how long.
>
> b) The dangers are plain: see the judgment of Judge O'Dwyer at para 87. Stress, and the risk of physical violence. There would be too many people in the flat, and too many sources of tension between those present.
>
> c) There are reasons not to place trust in SA having improved his behaviour: see the Sainsburys incident and the 4th July incident
>
> d) There is a consistent failure to put others before himself. Most tellingly, his failure to use contraception after the second and third children.
>
> e) He cannot be trusted. He admits lying to the immigration authorities, and the Dr Beer letter speaks for itself.
>
> f) See the incidents listed in Finding 1 a) to g)
>
> g) See the findings listed in Finding 3.
>
> h) the findings on capacity to consent to sexual relations are highly material to this issue as explained by Suzanne Wilson"

24. For my part I do not find it necessary to make findings as to Mr McGuire's points (c), (f) and (g). The other points are amply proved by the evidence I have heard and taken together point inexorably to my determining that it is in TB's best interests that she should not return to live with SA at 9 Emerald Mansions. This is notwithstanding that she has expressed a wish to return "home" and notwithstanding that in one sense it involves an interference with her family life. The right to family life is a qualified right and the evidence overwhelmingly suggests that it is in her best interests that she should live apart from SA. For this reason also it is necessary that SA's right to a family life is compromised.

25. I direct that the LA should use its best endeavours to find an alternative placement for TB in line with Dr Joyce's recommendations, which I found persuasive. If this is not possible then they must seek to replace the current care team with carers who are

better able to promote TB's social life and integration into the community at SS House and in the wider world.

26. As for contact all are agreed (including Mr McKendrick on the footing that I reject SA's primary contention) that contact for be for shorter periods. I consider it should be fortnightly for one hour on each occasion. Such contact is important to TB and it is very important to SA, whose rights and interests in this regard are significant. It should be supported contact and may take place in the community.

Capacity to consent to sex

27. Before I turn to the statutory provisions there are three very obvious preliminary observations to be made:

    i) Sex is a, if not the, basic animal instinct. It is a very powerful instinct. Without it animal (or any) life would not exist. Nature has made it intensely pleasurable in order to seek to ensure the propagation of the species.

    ii) Most physically fit humans are mechanically capable of engaging in sex irrespective of their mental capacity.

    iii) Although it is a powerful instinct (I myself would not describe it as visceral) it still requires a positive choice and society demands that that choice is freely exercised by both parties. Our modern society views with repugnance and amazement those barbarous relics that once said, for example, that a man can force sex on his wife.

28. There have been a number of decisions on this subject, including one of my own. However the question is governed from first to last by sections 1 - 3 Mental Capacity Act 2005. These provide, so far as is material:

> **1. The principles**
>
> (1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as

> effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
>
> **2. People who lack capacity**
>
> (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. …
>
> **3. Inability to make decisions**
>
> (1)… 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.

29. So, what the literal words say are:

    i) There is a presumption in favour of capacity. No-one has to prove that P has capacity.

    ii) P can lack capacity in relation to some particular matters while at the same time have capacity in relation to another. That is said to be the case here.

iii) P lacks capacity if she suffers from a malfunctioning mind or brain and as a result cannot make a decision about the particular matter in question.

iv) P will not be able to make a decision about the particular matter in question if she cannot mentally process the information relevant to that decision.

v) The relevant information includes what might reasonably happen if P were to make the decision one way or the other or not at all.

vi) P will only be able to mentally process the relevant information if she can:

a) understand it; and

b) retain it in her mind, even if only for a short period; and

c) weigh it and use it when making the decision or not, and

d) communicate the decision, by any means.

30. Before I look at the authorities I remind myself of the recent important dictum of Jackson LJ in *RB v Brighton and Hove CC* [2014] EWCA Civ 561 at paras 39 and 40:

> "39. I have set out the relevant provisions of the MCA in Part 1 above. Those provisions are lengthy because their subject matter is intractable. Nevertheless the statute is drafted in plain English. Judges have rightly cautioned against glossing the statute with judicial dicta and paraphrases: see *A Local Authority v FG* [2011] EWHC 3932 (COP) at [21] per Hedley J; *York City Council v C* [2013] EWCA Civ 478; [2014] 2 WLR 1 at [37] per McFarlane LJ with whom Lewison and Richards LJJ agreed.
>
> 40. The cases which arise for decision under Part 1 of the MCA (including the present case) tend to be acutely difficult, not admitting of any obviously right answer. The task of the court is to apply the statutory provisions, paying close heed to the language of the statute. Nevertheless, as judges tread their way through this treacherous terrain, it is helpful to look sideways and see how the courts have applied those statutory provisions to other factual scenarios. This has nothing to do with either the doctrine of precedent or the principles of statutory interpretation. The purpose is simply to see how other judicial decisions have exposed the issues or attempted to reconcile the irreconcilable."

31. However, the statutory provisions and the language of the statute tell me nothing about what is "the relevant information" when wrestling with the thorny question of sexual capacity. It is therefore necessary to look with some care at the decided cases.

32. The first thing that the cases have decided is that the test for capacity to consent to sexual relationships is, to use rather laboured language, general and issue specific, rather than person or event specific: see *IM v LM* [2014] EWCA Civ 37 at para 79. In

canonical language the incapacity must be *quoad omnes* not *quoad hunc/hanc*, in contrast to the position under section 12(a) Matrimonial Causes Act 1973 where the incapacity to consummate may be on either basis[2].

33. In my own decision of *D Borough Council v AB* [2011] EWCOP 101 I suggested that the "relevant information" would have to be relatively simple if the level of understanding for sexual capacity was to be set at an equivalent level to that needed to enter into a marriage : see paras 15 and 22. At para 42 I concluded that that sexual capacity requires an understanding and awareness of (i) the mechanics of the act; (ii) that there are health risks involved, particularly the acquisition of sexually transmitted and sexually transmissible infections; and (iii) that sex between a man and a woman may result in the woman becoming pregnant. At paras 39 – 41 I did not accept the evidence of Dr Hall that the relevant information should extend to an awareness that both (or all) parties to the act need to consent to it. Further, as to the third criterion (pregnancy) I accepted that this would arguably not apply to sexual practices other than heterosexual vaginal sex: see para 43.

34. Although I am not going so far as figuratively to hold my hand in the flames like Cranmer I have had cause to reconsider my previous opinion.

35. I deal first with the pregnancy element. In *A Local Authority v TZ* [2013] EWCOP 2322 Baker J concluded at para 31 that in the case of a person clearly established to be homosexual it is ordinarily unnecessary to establish that he or she has an understanding or awareness that sexual activity between a man and a woman may result in pregnancy. In this case Mr McKendrick argues that because TB has had an IUD inserted she is in an equivalent position. The argument became increasingly far-fetched. We discussed a man who has had a vasectomy. A woman who is beyond childbearing. A man wearing a condom. Mr McGuire QC rightly captured the unreality of this debate in his final submissions when he said:

> "But following this link produces nonsensical results. What if a woman happens to have fertility issues? Or is already pregnant? Or is beyond childbearing age? Would knowledge of this link be irrelevant for a man? "

36. I have come to the conclusion that the third element of risk of pregnancy should not be a separate one. Rather it should be subsumed into the second which should simply be expressed as: "that there are health risks involved". All sexual activity has some health risks. The most obvious ones are pregnancy or STDs. But over-robust sexual activity can cause wounding or bruising, external or internal. Any sexual activity can cause psychological harm. A simple criterion as I have suggested would resolve the dilemma I expressed in para 43 of *D Borough Council v AB* [2011] EWCOP 101,

[2] The doctrine of impotency *quoad hunc/hanc* was a long time in its evolution: a majority in the House of Lords accepted it in the case of *The Countess of Essex* (1613) 2 St. Tr. 786. Following that decision there is no case in the law reports accepting it for 240 years: see *N v M* (1853) 2 Rob. Ecc. 625, per Dr Lushington; *G v. M* (1885) 10 App. Cas. 171, 196 per Lord Selbourne LC; and *C v C* [1921] P 399, 401 – 412 per Lord Birkenhead LC, where he said that "the charge made, though physical and not moral, is nevertheless a grave and wounding imputation that the respondent is lacking, at least quoad hanc, in the power of reproducing his species, a power which is commonly and rightly considered to be the most characteristic quality of manhood." For a more contemporary application see *Kalsie v Kalsie* (1975) DLT 92 [1975] RLR 52, decided on appeal by Avadh Behari J in the Delhi High Court.

which on reflection came perilously close to introducing a *quoad hunc/hanc* dimension when I had been at pains to repudiate that.

37. I now turn to the question whether the relevant information should include as a separate element an awareness that lawful sex requires the consent of all parties and that that consent can be withdrawn at any time. In my previous decision of *D Borough Council v AB* I accepted at para 35 that I should not conflate the capacity to consent to sex and the exercise of that capacity. Therefore I rejected Dr Hall's third head of capacity.

38. In this case the OS agrees that being able to say yes or no to sexual relations is part of the weighing process under section 3(1)(c), and that this is made explicit by the terms of section 3(4)(a). Notwithstanding this concession Ms Greaney disputes that it should be an independent head of awareness because to do so would conflate capacity with the necessary exercise of free will. She argues that consent is the product of capacity and the exercise of free will.

39. However, in *A Local Authority v H* [2012] EWHC 49 (COP) Hedley J with his customary erudition, sensitivity, lucidity and eloquence convincingly persuades me that I was wrong then, and that the OS is wrong now. At para 25 he said this:

> "And so one turns to the emotional component. It remains in my view an important, some might argue the most important, component; certainly it is the source of the greatest damage when sexual relations are abused. The act of intercourse is often understood as having an element of self-giving qualitatively different from any other human contact. Nevertheless, the challenge remains: can it be articulated into a workable test? Again I have thought long and hard about this and acknowledge the difficulty inherent in the task. In my judgment one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse? That seems to me an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component. "

40. In my judgment this simply cannot be gainsaid. It was accepted by everyone in this case that sex between humans must involve more than mere animalistic coupling. It is psychologically a big deal, to use the vernacular. Hedley J's formulation captures perfectly why and how that extra ingredient should be defined.

41. Therefore I conclude that when determining the question of sexual capacity under the MCA the relevant information as referred to in section 3(1)(a) comprises an awareness of the following elements on the part of P:

    i) the mechanics of the act; and

    ii) that there are health risks involved; and

    iii) that he or she has a choice and can refuse.

I would add that the excellent witness Dr Joyce was of the firm view that this third element was very important. I would also suggest, with all due humility, that the test as formulated by me has the merit of simplicity.

42. This formulation would align the civil with the criminal law. Section 74 of the Sexual Offences Act 2003 provides that "a person consents [to participate in sexual acts] if he agrees by choice, and has the freedom and capacity to make that choice". Taken alone, this definition would lend some support Miss Greaney's argument. However, the 2003 Act introduced a range of offences specific to persons suffering from a mental disorder. Sections 30-33 criminalise sexual acts with persons who are "unable to refuse because of or for a reason related to a mental disorder". Section 30(2)(b) defines a person as "unable to refuse" if:

i) He lacks the capacity to choose whether to agree to the touching (whether because he lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done or for any other reason), or

ii) He is unable to communicate such a choice to [the alleged perpetrator].

43. In *Regina v A(G)* [2014] EWCA 299 [2014] 1 WLR 2469 it was stated:

> "18. The judgment of the Court of Appeal recognises and adopts the principle of the obvious desirability that civil and criminal jurisdictions should adopt the same test for capacity to consent to sexual relations by reference to various first instance judgments, amongst others *Re MM; Local Authority X v MM* [2009] 1 FLR 443 .
>
> 19. We agree. The approach should be the same necessarily informed by the definition and guidance contained in sections 2 and 3 of the Mental Capacity Act 2005 . That is not to say that a jury will not need to be directed in strict accordance with the language used by and steps to be adopted in accordance with proceedings brought pursuant to the 2005 Act."

44. In my opinion the test would only be the same if the third element as suggested by Hedley J and as adopted by me is introduced.

45. So I turn to this case. The evidence clearly shows that TB has barely an inkling of the health risks involved. She was unable to link sex to pregnancy. Indeed she had virtually no idea how her babies came to be in her tummy (as she put it). Although she found sex enjoyable and comfortable she had no idea that she had a choice and could refuse. Indeed the attitude of SA, based, as he told me on his culture and religion, was that he had a right to seek sex from her and that it was her duty to submit. The evidence clearly showed that TB comprehensively failed the second and third criteria as formulated by me. Specifically she is unable to understand that information or to use or to weigh it as part of the process of making the decision.

46. Mr McKendrick refers to section 1(3) which says that "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." He argues that not enough practical steps have been taken. He accepts that the notion of practicability encompasses reasonableness. Therefore he argues that the furthest I can go is to make an interim declaration under section 48 rather than a "final" one under section 15. Of course a declaration under section 15 is not final in the sense that it cannot be revisited if circumstances change. He argues that TB should receive more sex education and the matter should be reviewed in a few months at yet another publicly funded hearing. He points out that I made just such an order in *D Borough Council v AB.* I firmly disagree that I should adopt such a course here. The evidence here, which I do not need to spell out in detail, clearly shows that much effort has been made to enlighten TB about the relevant information. It is plain that the attempts have failed, and it is equally plain that further work would be futile. I agree with Suzanne Wilson that it is doubtful that TB has ever had the capacity to decide to have sex, notwithstanding that she has had four children.

47. I therefore declare that TB does not have the capacity to make the decision to have sex.

Deprivation of Liberty

48. My decision of *Rochdale Metropolitan Borough Council v KW* [2014] EWCOP 45 has aroused a certain amount of criticism. For example, Sarah Lambert, the head of policy for the National Autistic Society has stated that:

> "This decision appears to directly contravene the Supreme Court's ruling that liberty must mean the same for all, regardless of disability.
>
> Any move to revisit or unpick this definition would be a huge step back. NAS is deeply concerned that this decision will create avoidable confusion and uncertainty among health and social care professionals, potentially undermining essential protections for people with autism."

49. The appeal in *Rochdale Metropolitan Borough Council v KW* will be heard by the Court of Appeal on 4 or 5 February 2015.

50. If nothing else, I think it is important that I meet the criticism that I have sought to encroach on essential protections for disabled people, and amplify my reasoning.

51. In para 17 of my decision I said this:

> "It is clear that the driving theme of the majority opinions is a denunciation of any form of discrimination against the disabled. With that sentiment I naturally wholeheartedly agree. Discrimination is found where like cases are not treated alike. However, when making Lord Kerr's comparison you do not have two like cases. You are comparing, on the one hand, a case where an 18 year old does not need protection and, on the other, a case where the 18 year old does. They are fundamentally dissimilar. The dissimilarity justifies differential treatment in the nature of protective measures. For me, it is

> simply impossible to see how such protective measures can linguistically be characterised as a "deprivation of liberty". The protected person is, as Mill says, merely "in a state to require being taken care of by others, [and] must be protected against their own actions as well as against external injury". And nothing more than that. In fact it seems to me to be an implementation of the right to security found in Article 5. ”

52. The suggestion that "the dissimilarity justifies differential treatment in the nature of protective measures" was not a personal idiosyncrasy. It is justified by high authority.

53. In *Price v. The United Kingdom* [2001] ECHR 458 (2002) 5 CCL Rep 306, [2001] ECHR 458, 11 BHRC 401, (2002) 34 EHRR 53, [2001] Prison LR 359, [2001] Crim LR 916, [2001] Po LR 245 Judge Greve from Norway gave a most compelling judgment in a case concerning the treatment of a thalidomide victim in prison to where she had been committed for contempt. She cited *Thlimmenos v. Greece* ([GC], no. 34369/97, § 44, ECHR 2000-IV) where it was said "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different". She went on to say:

> “In a civilised country like the United Kingdom, society considers it not only appropriate but *a basic humane concern* to try to improve and compensate for the disabilities faced by a person in the applicant’s situation. In my opinion, these compensatory measures come to form part of the disabled person’s physical integrity. … The applicant’s disabilities are not hidden or easily overlooked. It requires no special qualification, *only a minimum of ordinary human empathy*, to appreciate her situation and to understand that to avoid unnecessary hardship – that is, hardship not implicit in the imprisonment of an able-bodied person – she has to be treated differently from other people because her situation is significantly different.” (emphasis in original)

54. That is exactly what I decided in the Rochdale case. Far from Katherine being subjected to state detention, she was cared for in her own home with basic humane concern and ordinary human empathy by the local authority, because her situation was significantly different to someone who was able bodied and of sound mind.

55. In *R (on the application of) A & Ors, v East Sussex County Council & Anor* [2003] EWHC 167 (Admin) Munby J, as he then was, determined judicial review proceedings concerning the care package given by a local authority to two adult sisters who had profound physical and learning disabilities. At para 86 he said this:

> “The first [particularly important concept] is human dignity. True it is that the phrase is not used in the Convention but it is surely immanent in article 8, indeed in almost every one of the Convention's provisions. The recognition and protection of human dignity is one of the core values – in truth *the* core value

> – of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. It is a core value of the common law, long pre-dating the Convention and the Charter. The invocation of the dignity of the patient in the form of declaration habitually used when the court is exercising its inherent declaratory jurisdiction in relation to the gravely ill or dying is not some meaningless incantation designed to comfort the living or to assuage the consciences of those involved in making life and death decisions: it is a solemn affirmation of the law's and of society's recognition of our humanity and of human dignity as something fundamental. Not surprisingly, human dignity is extolled in article 1 of the Charter, just as it is in article 1 of the Universal Declaration. And the latter's call to us to "act towards one another in a spirit of brotherhood" is nothing new. It reflects the fourth Earl of Chesterfield's injunction, "Do as you would be done by" and, for the Christian, the biblical call (Matthew ch 7, v 12): "all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets". ”

56. He then cited Judge Greve's judgment in *Price v United Kingdom,* as well *as Keenan v United Kingdom* (2001) 33 EHRR 913, and then said this at para 93:

> “This brings out the enhanced degree of protection which may be called for when the human dignity at stake is that of someone who is, as A and B are in the present case, so disabled as to be critically dependent on the help of others for even the simplest and most basic tasks of day to day living. In order to avoid discriminating against the disabled – something prohibited by article 21(1) of the Charter – one may, as Judge Greve recognised, need to treat the disabled differently precisely because their situation is significantly different from that of the able-bodied. Moreover, the positive obligation of the State to take reasonable and appropriate measures to secure the rights of the disabled under article 8 of the Convention (and, I would add, under articles 1, 3(1), 7 and 26 of the Charter) and, in particular, the positive obligation of the State to secure their essential human dignity, calls for human empathy and humane concern as society, in Judge Greve's words, seeks to try to ameliorate and *compensate* for the disabilities faced by persons in A and B's situation (my emphasis). ”

57. This is exactly the point I was trying to make in para 17 of the Rochdale case although, unsurprisingly, Munby J puts it very much better than I did (or could). The state is obliged to secure the human dignity of the disabled by recognising that "their situation is significantly different from that of the able-bodied". Thus measures should be taken "to ameliorate and compensate for [those] disabilities."

58. But to characterise those measures as state detention is to my mind unreal. I referred to the historical context in which Article 5 of the ECHR 1950 came to be formulated.

It followed the Universal Declaration of Human Rights of 10 December 1948 which in its preamble referred to "the disregard and contempt for human rights [which] have resulted in barbarous acts which have outraged the conscience of mankind"; which in article 3 guaranteed liberty; and which in article 9 proscribed "arbitrary arrest, detention or exile." It was aimed at the midnight knock on the door; the sudden disappearance; the prolonged detention. Article 5 was not aimed at Katherine, seriously physically and mentally disabled, who is living in her own home and cared for round the clock by carers paid for by an organ of the state.

59. In this case TB will not be cared for at a place which she understands to be her home. Further, she has the motor functions to achieve a departure in a meaningful sense. She will be monitored round the clock and were she to leave to try to go "home" she would be brought back. Her situation is therefore very different to Katherine's, and the acid test is met. Although I personally cannot see that her situation amounts to state detention in any sense other than by reference to the term of art devised by the majority in the Supreme Court, I must loyally follow that decision. I therefore declare that TB's care regime does involve detention under Article 5. Accordingly there must be at least six-monthly reviews by this Court, no doubt at some considerable expense to the public purse.

60. At para 1 of my decision in *Rochdale Metropolitan Borough Council v KW* I referred to the very serious resource implications to local authorities and the state generally if periodical court reviews are required in such cases. Notwithstanding the arrival of the streamlined procedure recently promulgated by the Court of Protection Practice Direction 10AA there will still be tens if not hundreds of thousands of such cases and hundreds of thousands if not millions of documents to be processed. The streamlined procedure itself requires the deployment of much man and womanpower in order to identify, monitor and process the cases. Plainly all this will cost huge sums, sums which I would respectfully suggest are better spent on the front line rather than on lawyers.
