



Neutral Citation Number: [2025] EWCOP 18 (T3)

Case No: COP13258625

IN THE COURT OF PROTECTION
ON A REFERRAL FROM THE COURT OF APPEAL (CA-2024-001185)
ON AN APPEAL FROM POOLE J IN THE COURT OF PROTECTION
(COP13258625)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2025

Before:

MRS JUSTICE THEIS DBE
VICE PRESIDENT OF THE COURT OF PROTECTION

Between:

**Liubov Macpherson (By her litigation friend, the
Official Solicitor)**

Appellant

- and -

Sunderland City Council

Respondent

Oliver Lewis and Beth Grossman (instructed by Burke Niazi Solicitors) for the Appellant
Sam Karim KC and Sophie Hurst (instructed by EMG Solicitors) for the Respondent

Hearing date: 30th April 2025
Judgment date: 22nd May 2025

Approved Judgment

This judgment was delivered in public but a reporting restrictions order dated **17 December 2024** is in force. 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 FP must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. This hearing has been listed on referral from the Court of Appeal to determine two questions:
 - (1) Does Ms Macpherson have capacity to conduct her appeal against the decision of Poole J on 22 January 2024?
 - (2) Did Ms Macpherson have capacity to conduct the contempt proceedings on 22 January 2024?

The reasons and background to this referral are set out by the Court of Appeal in the judgment of King LJ [2024] EWCA Civ 1579.

2. On 30 April 2025 the court heard oral evidence from Dr Prabhakaran, Consultant Psychiatrist, and submissions from Mr Oliver Lewis and Ms Beth Grossman, on behalf of the Official Solicitor, and Mr Sam Karim KC and Ms Sophie Hurst, on behalf of Sunderland City Council ('SCC'). Ms Macpherson attended the hearing in person and had someone to assist and support her in court. At Ms Macpherson's request she asked Dr Prabhakaran some questions directly. Following the conclusion of the evidence directions were made for the parties to set out their closing submissions in writing, which included Ms Macpherson. Directions were also made for the parties to make any further submissions following the handing down on 8 May 2025 of the Court of Appeal decision *Johnston v Financial Ombudsman Service* [2025] EWCA Civ 551.

Relevant background

3. These proceedings are in the context of long running Court of Protection proceedings that concern Ms Macpherson's daughter, FP. FP was diagnosed and is currently being treated for paranoid, treatment resistant schizophrenia. There have been periods of time when FP has been detained under the Mental Health Act and is currently in a placement approved by the Court of Protection that has been judged 'outstanding' by the Care Quality Commission. FP has an Independent Advocate who whilst recognising that FP would prefer to live with her mother, is entirely content with the care and treatment that FP is receiving in the placement.
4. Within those Court of Protection proceedings Poole J made injunctive orders in 2022 which stated Ms Macpherson must not post or, having already posted, must take down material relating to FP which she had placed on the internet.
5. On 16 January 2023 Poole J found Ms Macpherson to be in contempt of court for having breached the injunctive orders made in 2022. Ms Macpherson was represented by counsel, Mr Lewis, at that hearing. Ms Macpherson admitted the relevant breaches and a sentence was imposed of 28 days imprisonment concurrent for each established breach, suspended for 12 months. Poole J's judgment is at [2023] EWCOP 3.
6. On 19 June 2023, in the course of the continuing Court of Protection proceedings, the court made further injunctions supported by a penal notice against Ms Macpherson.

They included a prohibition whereby she should not ‘cause to be publicised on any social media, video or streaming service including YouTube, any video or recording of [FP] recorded at any date’.

7. Ms Macpherson sought permission to appeal against the making of the injunction which was refused as totally without merit.
8. Following the refusal of permission to appeal against the making of the injunctions, Ms Macpherson wrote to the Court of Appeal indicating her intention to post more videos on social media and to reinstall various old posts which had been taken down. Shortly after that in September 2023 Ms Macpherson relocated to France where she remained until shortly just before this hearing, which she attended in person. Ms Macpherson resumed posting videos, articles and audio recordings on X and YouTube in breach of the injunctions. Those breaches, subsequently admitted by Ms Macpherson were committed during the currency of the suspended sentence imposed in January 2023.
9. On 15 November 2023, SCC issued fresh committal proceedings. Poole J was satisfied that Ms Macpherson deliberately breached the injunction after she moved from England to live in France knowing she would be beyond the reach of the law. On 7 December 2023 Poole J issued a bench warrant for Ms Macpherson’s arrest. Ms Macpherson did not return to this country and attended the committal hearing on 22 January 2024 remotely from France. Ms Macpherson was unrepresented at that hearing. Following hearing submissions Poole J imposed an immediate sentence of imprisonment of three months concurrent on each of the breaches that he found she had committed in September 2023. In addition, he imposed the 28 day suspended sentence that he had passed in January 2023 to run consecutively, making a total of four months immediate imprisonment.
10. In his judgment in January 2024 ([2024] EWCOP 8) Poole J recorded that Ms Macpherson ‘believes that her daughter is indeed being persecuted by others, namely healthcare and other professionals and the courts. She describes all healthcare professionals who have dealings with P to be corrupt and that they are part of a conspiracy to torture P’. As Poole J noted, Ms Macpherson had made her position quite clear in numerous previous court hearings, correspondence and complaints, as well as in documentation she had presented to the court at the committal hearing.
11. On 21 March 2024 Ms Macpherson filed an Appellant’s Notice accompanied by three draft Grounds of Appeal. No permission is required to appeal committal proceedings pursuant to section 13(3) of the Administration of Justice Act 1960. There was some delay in the appeal being heard due to delays in securing legal aid and the transcript of the hearing before Poole J. In the event a transcript of the hearing could not be obtained but the Court had the approved transcript of Poole J’s judgment.
12. Following a conference with Ms Macpherson on 6 November 2024 the solicitor and counsel instructed to represent Ms Macpherson had concerns about Ms Macpherson’s capacity to conduct the appeal proceedings. Those concerns were raised with Ms Macpherson and she was invited to participate in a capacity assessment with Dr Prabhakaran, which Ms Macpherson declined. Following consultation with the Bar Council an application was made to the Court of Appeal under Rule 35.4 CPR 1998, seeking permission to instruct an expert to undertake a paper based assessment of Ms

Macpherson's capacity to conduct proceedings. That application was granted and the paper based assessment was undertaken, Dr Prabhakaran's report is dated 26 November 2024.

13. That assessment was described by King LJ as follows:

14. *Acknowledging the limitation of a paper based assessment, Dr Prabhakaran concluded that there was no evidence of a disorder of thought on the Appellant's part, but there was on the balance of probabilities, evidence of persistent persecutory ideation relating to various professionals and institutions. By reference to the material made available to him, he said:*

"This suggests that [the Appellant's] persecutory beliefs persist, even when presented with evidence that could contradict them. Delusions are firmly held beliefs that persist despite evidence disproving or challenging them. For the individual experiencing them, these beliefs feel entirely real and are often resistant to change, regardless of efforts to challenge or disprove them. Based on the information reviewed, it is reasonable to consider, on the balance of probabilities, that [the Appellant's] beliefs may have reached the threshold of delusional intensity."

15. *He concluded:*

"In my opinion, on balance of probabilities, the information available suggests the possibility of a delusional disorder."

16. *So far as the functional test found in section 3 of the Mental Capacity Act is concerned, Dr Prabhakaran concluded that there was no evidence to suggest that the Appellant could not understand or retain information but that: "due to her firmly held beliefs which persist despite evidence against these, on balance, her ability to use and weigh up information relevant to the court proceedings is likely to be affected as a result". Therefore, he said, on the balance of probabilities she was "unable to make decisions regarding the conduct of these proceedings".*

17. *Whilst the report is set out in a rather unorthodox way, it is clear that on the basis of his paper assessment, that Dr Prabhakaran was of the view that on the balance of probability the functional test was satisfied in that the Appellant was unable to make decisions regarding the conduct of the proceedings due to an inability to use and weigh up information relevant to the court proceedings and that on the balance of probabilities the information available suggests the "possibility of a delusional disorder".*

14. At the hearing on 3 December 2024 the Court of Appeal made an interim declaration pursuant to Section 48 of the Mental Capacity act 2005 ('MCA') on the basis that the Court had 'reason to believe that the Appellant lacks capacity', the Court transferred the case to a Tier 3 (High Court) Judge of the Court of Protection in order to determine the matter of capacity before the matter is returned to the Court of Appeal to hear the substantive appeal. Ms Macpherson, who had attended that hearing remotely, opposed that course in strong terms. She informed the Court she was not prepared to undergo any form of capacity assessment and stated the issue about capacity had arisen from

what she described as ‘faulty and lying notes’ made by her legal team at the meeting on 6 November 2024. At [24] King LJ stated *‘For my part I can see no basis for the allegations that the Appellant makes against her legal team. On the contrary, they have acted wholly in accordance with their respective codes of professional practice and having had concerns about the Appellant’s capacity to prosecute her appeal, brought the matter to the Court for directions’*.

15. This hearing was fixed following directions made on 18 February 2025 which included the opportunity for the Official Solicitor and Ms Macpherson to put questions to Dr Prabhakaran. His addendum report is dated 8 April 2025.
16. On 8 May 2025 the Court of Appeal handed down the judgment in *Johnston v Financial Ombudsman Service* [2025] EWCA Civ 551. On 14 May 2025 the parties were directed to provide any written submissions in relation to that decision by 16 May 2025. Mr Lewis, Mr Karim and Ms Macpherson filed their written submissions.

Dr Prabhakaran’s evidence

17. Despite appointments being offered, including before and during this hearing, Ms Macpherson has declined to meet with Dr Prabhakaran. In his November 2024 report at paragraph 69 he stated:

‘Typically, a psychiatric assessment would entail a thorough evaluation designed to identify any underlying mental health conditions and understand the individual’s difficulties. This process involves gathering information about the person’s presenting symptoms, including their onset, duration and impact on daily life. A review of the individual’s medical, personal, and social history is conducted, with particular attention to factors such as substance use, trauma, family background, and occupational history. The assessment also includes a mental state examination, which evaluates aspects such as appearance, behaviour, speech, mood, thought processes, and cognitive function. Standard diagnostic tools may be used, and additional information may be sought from medical records, family members, or other professionals to inform the assessment.’

18. In oral evidence Dr Prabhakaran outlined the advantages of him having the medical records and the opportunity to meet and assess the person who is the subject of the report, which normally takes between 1 ½ to 2 hours. He acknowledged in his oral evidence the limitations of undertaking a paper based assessment, even though he said there was a *‘rich picture’* in the documents, but he had not had the chance to discuss and evaluate that information with Ms Macpherson. He said such a meeting with Ms Macpherson would have helped him understand her views and how fixed they are. He confirmed this was the only occasion where he had conducted a paper based assessment where the person to be assessed was available, as the balance of his other paper based assessments relate to testamentary capacity when the person to be assessed has died.
19. In his November 2024 report he quotes extensively from the written material he had available from Ms Macpherson. He described those documents as representative documents and states from a review of the documents he considers Ms Macpherson *‘is a person of high intellect, who is able to communicate her thoughts in an articulate and structured manner. As such, there is no evidence of a disorder of thought form which manifests with difficulties in the way a person organises and expresses their thoughts,*

which can happen in some psychotic conditions like schizophrenia.’ However, he considered, on the balance of probabilities, there was evidence of persistent persecutory ideations relating to various professionals and institutions. Relying on the written material he stated at paragraph 73 this *‘suggests that LMP’s persecutory beliefs persist, even when presented with evidence that could contradict them. Delusions are firmly held beliefs that persist despite evidence disproving or challenging them. For the individual experiencing them, these beliefs feel entirely real and are often resistant to change, regardless of efforts to challenge or disprove them. Based on the information reviewed, it is reasonable to consider, on the balance of probabilities, that LMP’s beliefs may have reached the threshold of delusional intensity’*. Later in his report at paragraph 76 he states *‘In my opinion, on balance of probabilities, the information available suggests the possibility of a delusional disorder’*. He continues in that paragraph to set out his reasoning for considering and then rejecting other conditions. As he notes in the report *‘The individual’s daily functioning is generally preserved, except in areas directly affected by the delusion. Individuals with delusional disorder often function well in most areas of life, apart from issues directly related to their delusion’*. Having set out the treatment options he then states at paragraph 81 *‘the prognosis for delusional disorder varies, with the condition often following a chronic course, with delusions persisting over time. The intensity and impact of the delusions may also fluctuate.’* Dr Prabhakaran concludes that whilst he could not find evidence that Ms Macpherson was unable to understand or retain information he considered that due to her firmly held beliefs which persist despite evidence against these *‘on balance’* her ability to use and weigh up information relevant is likely to be affected as a result. At paragraphs 86 and 87 he states *‘Therefore, on the balance of probabilities, LMP is unable to make decisions regarding the conduct of these proceedings. It is also possible that LMP lacked litigation capacity at the time of the committal proceedings on 22 January 2024’*.

20. In his second report in April 2025, following further questions, he repeats his conclusion that, on the balance of probabilities, *‘LM’s ability to use and weigh up information relevant to the current proceedings is likely to be affected. Although the appeal concerns her committal sentence, LM continues to include issues related to her daughter, FP’s care which were addressed within the substantial proceedings which concluded in 2023’*. In answer to the question as to whether the delusional beliefs could cause an inability to use or weigh information Dr Prabhakaran stated at paragraph 18 *‘Presence of persecutory beliefs, in themselves, do not necessarily affect decision-making capacity, unless the content of the beliefs affects an individual’s ability to adequately understand, retain, use/weigh up the relevant information. As such, it is difficult to provide a general estimate of likelihood in this regard. I have already discussed the considerations regarding LM’s persecutory beliefs. In my opinion, as stated in my previous report, the evidence suggests persistent persecutory beliefs regarding various professionals and institutions, which, on balance, affect LM’s ability to adequately use and weigh up the information relevant to the current proceedings’*. As regards the position in January 2024 he states *‘It is difficult to clarify the duration that LM has held persecutory beliefs...’* and then refers to documents prepared by Ms Macpherson in November 2021 and April 2022 and continues *‘...on balance, LM would have been unable to use and weigh up information in relation to conducting the appeals on 22 January 2024. This would have been secondary to the persecutory beliefs, as noted in paragraphs 69 to 76 of my previous report’*.

21. He expanded on this view in his oral evidence when he described two themes. First, is Ms Macpherson's deep love and affection for her daughter which leads to a desire to protect her. Second, is her complex persecutory belief system regarding individuals, SCC and the court. That belief system is, he said, fixed, pervasive and not amendable to any evidence against it or that challenges it. It is that feature that makes it a delusional disorder. It is this which affects Ms Macpherson's ability to use and weigh. He considers it is driven by her love for her daughter and want to protect her but her persecutory belief system leads her to believe she is the only one because she doesn't trust anyone else, and as a result her ability to use and weigh is directly affected by this belief system.
22. In response to questions from Mr Karim, Dr Prabhakaran stated he did not consider any further practical steps could be taken in accordance with s1(3) MCA 2005. Also, he said he considered the provisions in s1(4) MCA 2005 regarding unwise decisions in every case. In this case he said the issue of beliefs here leads to the mistrust of all systems which prevents Ms Macpherson being able to weigh and use information. It does not relate to an unwise decision as she is unable to engage in the decision, rather than it being unwise.
23. Mr Karim pressed Dr Prabhakaran about his conclusion regarding Ms Macpherson's capacity in January 2024 and what he based that on. His reference to documents in 2021 and 2022 was to demonstrate that the persecutory belief system was present at that time. He agreed the issue of capacity is time specific but considered the documents he referred to in November 2021, December 2022, January 2023 and January 2024 demonstrated the persecutory belief system was present, those beliefs were in his view largely fixed and held with conviction. When he was taken to the references in Poole J's judgment that Ms Macpherson's legal team considered she had capacity at the hearings in December 2022 and January 2023 he said the themes were present then, no formal capacity assessment was undertaken but he considers, on balance, she lacked capacity in January 2024. He was taken to the observations by Poole J at paragraphs 8 – 12 of his January 2024 judgment and stated if the court considered in January 2024 her belief system prevented her being able to use and weigh then his conclusion that she lacked capacity in January 2024 would be valid. He agreed paper based assessments are even harder when assessing capacity at an earlier date but considers if the court reaches the conclusion that the persecutory belief system is present now then it is more likely it was present in January 2024. He said he did not recall the reference in the January 2023 judgment to the legal advisers considering Ms Macpherson had capacity then, as a result his view about whether Ms Macpherson lacked capacity in January 2024 is '50/50'. He agreed with Mr Lewis that capacity is not only time specific but also decision specific. In January 2023 Ms Macpherson admitted the breaches and had taken down the material, which was an important part of the mitigation that the suspended sentence was based on. He agreed the situation was different in January 2024 as there was more at stake, prison was more likely and he agreed with Mr Lewis that that may impact capacity and fed into why he considered on the balance of probability she lacked capacity in January 2024, although he recognised it was '*very difficult*'. He did not consider it to be congruent that she had capacity in January 2024 but lacked it now as in his view her mental state had not changed very much, as described in paragraphs 8 – 13 of Poole J's January 2024 judgment.

24. Ms Macpherson's questions challenged his description of delusional beliefs, where delusions are fixed beliefs that are held against the evidence as she considered she had material evidence that her daughter has not been protected. She pressed him on how he concluded lack of capacity on the balance of probabilities when in his report and evidence he had referred to 'may' and 'possibly'. He responded that the inability to use and weigh information was largely affected by the delusional belief system, as there was no other explanation. She asked why her decision could not be considered unwise, he responded that it was due to his view on the inability to use and weigh information.
25. I have carefully considered the written submissions submitted by Ms Macpherson. They are comprehensive and she was able to set out her position in relation to the second report from Dr Prabakaran in good time, despite the late filing of his report. Her questions of Dr Prabakaran were mainly relevant and pertinent.

Legal framework

26. The relevant statutory provisions in the Mental Capacity Act 2005 ("MCA 2005") are as follows.

1. The principles

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

2. People who lack capacity

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (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.
- (5) No power which a person ("D") may exercise under this Act—
 - (a) in relation to a person who lacks capacity, or
 - (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

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."

27. The case law regarding capacity has recently been set out by Baker LJ in *Johnston* at [38] – [43]. That was a case that involved capacity to conduct current and past proceedings. He referred to the two stage test in *A Local Authority v JB* [2021] UKSC 52 at [66 - 79]. The first question to be asked is whether P is unable to make a decision for himself in relation to the matter. If so, the second question is whether the inability is because of an impairment of, or a disturbance in the functioning of the mind or brain. The second question 'looks to whether there is a clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain'. The Supreme Court was clear at [79] that the two question should be approached in that sequence.

28. Baker LJ continued in *Johnston* at [39]

39. There are three further relevant general principles, identified in my judgment in *A SCC v P* [2018] EWCOP 10 at paragraph 15, cited by Lewis LJ in his judgment in *Cannon v Bar Standards Board* [2023] EWCA Civ 278 (considered below).

First:

"Capacity is both issue-specific and time-specific. A person may have capacity in respect of certain matters but not in relation to other matters. Equally, a person may have capacity at one time and not at another. The question is whether at the date on which the court is considering the question the person lacks capacity in question."

Secondly,

"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 as Charles J observed in *A County Council v KD and L* [2005] EWHC 144 (Fam) [2005] 1 FLR 851 at paras 39 and 44, "it is important to remember (i) that the roles of the court and the expert are distinct and (ii) it is the court that is in the position to weigh the expert evidence against its findings on the other evidence... the judge must always remember that he or she is the person who makes the final decision."

Thirdly,

"The court must avoid the "protection imperative" – the danger that the court, that all professionals involved with treating and helping P, may feel drawn towards an outcome that is more protective of her and fail to carry out an assessment of capacity that is detached and objective: *CC v KK* [2012] EWHC 2136 (COP)."

40. Prior to the implementation of the MCA 2005, the leading common law authority on capacity to conduct proceedings was *Masterman-Lister v Brutton and Co and another* [2002] EWCA Civ 1889 in which Chadwick LJ said, at paragraph 75:

"For the purposes of ... CPR 21 - the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem (or, as such a person is now described in the Civil Procedure Rules, a litigation friend)."

41. An example of the application of the MCA 2005 principles to a decision whether a person lacks capacity to conduct litigation is the judgment of Burnett J (as he then was) in *V v R* [2011] EWHC 822 (QB). Having set out the statutory provisions, the judge said (at paragraph 10):

"It is common ground in these proceedings that the claimant suffers from an impairment or disturbance in the functioning of the mind or brain. The question is whether she is unable to make decisions for herself in connection with the litigation. In considering that broad question, the statutory scheme requires the presumption of capacity to be displaced on the balance of probabilities. The principles in section 1 distinguish capacity to make a decision from the wisdom of a decision made. The principles also require that all practicable steps are taken to help the person concerned make the relevant decision. The underlying policy of the Act is to avoid concluding that incapacity is established unless, after careful enquiry, it is necessary to do so. That is underpinned by the various cautions found in the Act relating to age, appearance and behaviour, by the requirement to convey information in a way appropriate to the individual's circumstances, and by the recognition that retention of information for but a short period may be sufficient for the purposes of establishing capacity. The underlying policy of the Act is

unsurprising and reflects the earlier common law approach very substantially, given that the finding of incapacity in any environment substantially curtails the individual's right of action. In the context of litigation, a finding of incapacity curtails the right of unimpeded access to the law."

In that case, having carefully considered the medical and other evidence, Burnett J concluded (paragraph 34) that the claimant had "difficulties rather than a straightforward inability to weigh the evidence and make relevant decisions". He concluded that those difficulties were "capable of being ameliorated, if not entirely overcome, by the careful and structured support that the statute contemplates". In those circumstances, he was not satisfied on the balance of probabilities, that the claimant was unable to use and weigh information as part of the process of making litigation decisions. He therefore refused the application for a declaration that she lacked capacity to conduct the litigation.

42. In this case, the Court is considering Mr Johnston's capacity over a number of years. In *Public Guardian v RI and Others* [\[2022\] EWCOP 22](#), a case concerning a donor's capacity to execute a lasting power of attorney, Poole J observed (at paragraph 27):

"... Ideally, where there is a dispute about past capacity which the court is required to determine, it would be helpful to have evidence as to,

- a. The certificate provider's experience ...
- b. Evidence from carers and family members ...
- c. Medical evidence, capacity assessments, assessments for benefits, records from carers or activity centres, or other professional evidence roughly contemporaneous with the relevant date ...
- d. An assessment by a suitably qualified and experienced person of P's current capacity and reasoned opinion as to their capacity ... at the relevant time, such opinion being informed by review of relevant medical records, contemporaneous assessments, and the evidence from carers and family members."

43. In *Cannon v Bar Standards Board* [\[2023\] EWCA Civ 278](#), the appellant sought to appeal against findings of a professional disciplinary tribunal, contending amongst other grounds that she lacked capacity to conduct litigation at the time of the tribunal proceedings. Lewis LJ, in a judgment with which the rest of the Court agreed, noted (at paragraph 25) that the psychiatric reports on which the appellant relied did not address the test, or all the relevant factors, for assessing capacity, that the psychiatrist had access to some but not all of the appellant's medical records, and had not addressed the various actions the appellant had undertaken in relation to the disciplinary proceedings in order to consider whether she was able to understand, retain use, or weigh the relevant information. The psychiatrist's opinion amounted simply to an assertion that because the appellant had post-traumatic stress disorder, she lacked capacity. Lewis LJ concluded (paragraph 27) that the medical evidence did "not itself provide a proper evidential basis for rebutting the presumption that the appellant had capacity to take the decisions necessary to enable her to participate" in the proceedings. He added, at paragraph 34, that there was a difference between questions of capacity and the fairness of proceedings and that a party may have vulnerabilities arising from underlying mental health conditions which required

adjustments to ensure that proceedings are fair. In that case, however, there had been no challenge to the fairness of the proceedings before the tribunal.”

29. Hayden J in *Re Q* [2022] COPLR 315 found that P had capacity to conduct litigation and set out a summary of the law at [24] as follows:

“24. It is necessary to reiterate that the test remains that in *Masterman-Lister v Brutton & Co*; *Masterman-Lister v Jewell* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, (2002) 73 BMLR 1, endorsed in *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18, [2014] 1 WLR 933, [2014] COPLR 199, (2014) 137 BMLR 1. The essence of those judgments is to confirm, unambiguously, that capacity to litigate is addressed by asking whether a party to proceedings is capable of instructing a legal adviser 'with sufficient clarity to enable P to understand the problem and to advise her appropriately' and can 'understand and make decisions based upon, or otherwise give effect to, such advice as she may receive'. It follows that the issue of litigation will always fall to be determined in the context of the particular proceedings: *Sheffield City Council v E and Another* [2004] EWHC 2808 (Fam), [2005] Fam 326, [2005] 2 WLR 953, sub nom *Re E (An Alleged Patient)*; *Sheffield City Council v E and S* [2005] 1 FLR 965. None of this requires P to instruct his advisers in a particular way. Like any other litigant, in any sphere of law, he may instruct his lawyers in a way which might, objectively assessed, be regarded as contrary to the weight of the evidence.”

Submissions

30. Mr Lewis focuses first on the functional test in s3(1) MCA and sets out the relevant information to conducting proceedings in Dr Prabhakaran’s letter of instruction. The expectation had been that Dr Prabhakaran would have had the opportunity to discuss these matters with Ms Macpherson but despite their considerable efforts to arrange appointments for Ms Macpherson, she has maintained her refusal to attend those appointments. Mr Lewis relies upon Dr Prabhakaran’s second report containing his response to written questions about Ms Macpherson’s ability to understand and retain information where he stated ‘*on the balance of probabilities, LM’s ability to use and weigh up information relevant to the current proceedings is likely to be affected. Although the appeal concerns her committal sentence, LM continues to include issues related to her daughter, [FP’s] care which were addressed within the substantial proceedings which concluded in 2023*’.
31. Mr Lewis accepts the court needs to consider the broader canvas, which includes Ms Macpherson’s conduct in the Court of Appeal and in these proceedings. He submits at the heart of this case is the determination as to whether Ms Macpherson is able to understand, retain and use and weigh that information in making the decision about how to conduct the appeal and then communicate those instructions to her solicitor.
32. In his written submissions, he outlines the arguments Ms Macpherson wants to advance in the substantive appeal which include her strongly held views about the outcome of the Court of Protection proceedings regarding her daughter, which she does not accept and is very critical of those involved in that, including SCC and the Court of Protection. He submits Ms Macpherson ‘*has been unable to understand that much of what she wants to put forward in the appeal is irrelevant to it, even after repeated explanations in writing and verbally from her lawyers. This far exceeds the difficulty which a lay client may have in distinguishing relevant and irrelevant information. Usually, a lay*

client would either accept the explanation given, or if they did not, try to draw specific connections between what the lawyer says is relevant and the information which they wish to present. Ms Macpherson's case is markedly different because of the persistency with which she has sought to present such material notwithstanding the lack of any obvious connection.' In the example Mr Lewis sets out in his written submissions he refers to the email from Ms Macpherson's solicitor in October 2024 confirming the appeal was against the committal order only and the court would not be considering other orders and decisions made in the case, which she responds to with detailed legal argument, showing the grounds of appeal must address this and that new evidence has emerged. He submits this evidences her inability to use and weigh information from her solicitor as to what is relevant and what is irrelevant, which results in her being unable to understand and unable to use and weigh legal advice in order to decide on the matter. Here that is engagement in the dynamic and ongoing process of conducting a complex appeal where, he submits, *'explanations take place in conferences and over email, in prior to and in court hearings, requiring the client able to be able to understand (after full explanation, and any reasonable adjustments that are necessary) in order to give instructions on strategic and tactical matters over the course of the proceedings'*. Ms Macpherson characterises the position taken by her legal team *'reflects a systemic disregard of due process and my legal instructions...'*. Mr Lewis submits *'there is an almost total mismatch between the relevant information as set out by her lawyers and litigation friend, and what Ms Macpherson considers to be relevant'* and this is explained by her inability to understand and/or use and weigh the relevant information in providing instructions.

33. Mr Lewis submits the court is permitted to draw inferences from Ms Macpherson's reasons for not engaging with the expert. He submits she has been informed about Dr Prabhakaran's independence from the mental health professionals who treated her daughter, which implies a belief that as an independent psychiatrist found her daughter to lack capacity it follows that another independent psychiatrist would do the same for her regarding litigation capacity and/or it is not possible for Dr Prabhakaran to be independent as a reason for not engaging with him. Both beliefs, Mr Lewis submits, lack logic and are unfounded in reality. He submits her decision not to be assessed is entirely consistent with his conclusion that she has delusional beliefs that cause her to be unable to use or weigh the relevant information.
34. Mr Lewis submits Ms Macpherson is unable to use and weigh information relevant to proceedings to regulate her own conduct as evidenced by the reference at [21] in the judgment of King LJ, which refers to the court being obliged to turn off her microphone on a number of occasions, as she was unable to restrain herself or listen to what was being said. More recently, he submits, she has persistently attempted to reopen the substantive Court of Protection proceedings concerning her daughter at a time when she knew the Official Solicitor had been invited to act as her litigation friend. This evidences, he submits, her inability to use and weigh information in the context of an ongoing process with the need to provide instructions on an ongoing basis.
35. Turning to the second stage in the *JB* test Mr Lewis relies upon Dr Prabhakaran's answers in his second report where he concludes, on balance, that Ms Macpherson has evidence of persistent persecutory ideations relating to various professionals and institutions. Dr Prabhakaran relies on emails in October and November 2024 as they *'...persist, even when presented with evidence that could contradict them...LMPs*

beliefs may have reached the threshold of delusional intensity'. Mr Lewis submits a formal diagnosis is not a pre-requisite (*North Bristol NHS Trust v R* [2023] EWCO 5 at [48] which was approved by the Court of Appeal in *Hemachandran & Anor* [2024] EWCA Civ 896). Mr Lewis submits that Ms Macpherson's denial that she has delusional beliefs is not a relevant consideration, her inability to use and weigh information relevant to appeal proceedings is because of her delusional beliefs, thereby evidencing the causative nexus.

36. As regards Ms Macpherson's capacity to conduct proceedings at the time of the hearing in January 2024 Mr Lewis places reliance on the observations made by Poole J in his January 2024 judgment at [6] and [9 – 11], where he sets out that Ms Macpherson can become angry and unfocussed and her views about the proceedings concerning her daughter. Mr Lewis submits the clarification Dr Prabhakaran provided in his oral evidence demonstrated that Ms Macpherson lacked litigation capacity then too as there is no evidence that her views then are any different than they are now. Mr Lewis places reliance on Ms Macpherson's affidavit dated 7 March 2023 showing what he submits is a '*visceral persecutory reaction*' to the January 2023 hearing. He submits it is relevant that the issues in January 2023 were not as complex as in January 2024, due to the risk of imprisonment. He submits the impairment became more intense over time, more entrenched as the proceedings became more complex. As a consequence she became unable to conduct the second committal proceedings in January 2024.
37. In his submissions in relation to *Johnston* Mr Lewis submits it establishes no new point of law, was determined on its own particular facts and, in that case, for example there many deficiencies in the capacity certificate.
38. Mr Karim, on behalf of SCC, submits the presumption of capacity has not been rebutted in respect of both questions sent to this court for determination. He submits this case raises competing themes. On one side presumption of capacity is a '*fundamental safeguard of human autonomy*' (per Hayden J in *QJ v A SCC & Anor* [2020] EWCO 7 at [23]) and on the other are the concerns raised by the Official Solicitor in relation to fixed ideations exhibited by Ms Macpherson which prevent her, she submits, in making an informed decision about conducting this appeal and the committal hearing in January 2024.
39. Whilst Mr Karim acknowledges the difficult position Dr Prabhakaran was in having only been able to undertake a paper based assessment, he submits his evidence remained unclear, frequently changed with a lack of clarity in the language used. By way of example, his oral evidence in relation to Ms Macpherson's capacity in January 2024 changed from saying she lacked capacity, to then saying he could not say as it was '50/50' and then changed his view again. The weight that can be attached to Dr Prabhakaran's evidence is impacted, he submits, by the fact that he had not seen Ms Macpherson's medical records, had not spoken to any individuals who knew Ms Macpherson, he was unclear what documents he had seen and what he relied upon, no other practicable steps were taken to seek to maximise Ms Macpherson's participation in an examination and the report and oral evidence failed to consider whether Ms Macpherson was making unwise decision or had considered the relevant parts of the Code of Practice at paragraphs 2.10 and 2.11. In particular, he was unable to say whether Ms Macpherson's views were irrational.

40. Mr Karim submits Dr Prabhakaran failed to recognise or place sufficient weight on the fact that Ms Macpherson had been involved in Court of Protection proceedings for over four years when no legal representative, professional or judge had raised issues regarding her capacity until November 2024. This is relevant as Dr Prabhakaran sought to suggest that Ms Macpherson's lack of capacity was static, but then changed that to say that they *'may have evolved over time'* and become *'more entrenched'*. This included the reference in the committal hearing in January 2023, referred to in Poole J's judgment at [16] which Dr Prabhakaran could not recall that he had considered. At the January 2023 hearing Ms Macpherson had agreed to removing content from social media platforms as Poole J recognised. In his judgment in January 2023 at [28] Poole J concluded Ms Macpherson knew what she was doing, knew the consequences and in doing so was openly defying the court.
41. As regards Dr Prabhakaran's views about her mental state Mr Karim submits the persecutory delusional beliefs that he relies upon has not previously prevented Ms Macpherson from compromising previous litigation or been of sufficient concerns to her previous legal representatives from 2020 to 2024. It is of note, he submits, that Ms Macpherson's views have not really changed, she actively participated in the hearing on 30 April 2025, including asking Dr Prabhakaran questions and the court needs to guard against looking at capacity through the prism of behaviour, which might lead others to make unjustified assumption about capacity (s 2(3) MCA). Mr Karim considers the similarities in *Wandsworth Clinical Commissioning Group v IA (by the Official Solicitor as his Litigation Friend)* [2014] EWCOP 990 where Cobb J concluded the presumption of capacity was not rebutted and guarded against interpreting difficult and inconsistent behaviours as necessarily illustrative of a lack of capacity. This was in circumstances where IA's communications with professionals, lawyers and the court revealed a *'profound mistrust of authority'* [8].
42. Mr Karim submits that in his oral evidence Dr Prabhakaran appeared keen in identifying and finding documents that supported his previous conclusions rather than taking a more holistic view of the information in reaching his view about Ms Macpherson's capacity. In particular, when asked to identify documentation between November 2019 and January 2024 he found a skeleton arguments not prepared by Ms Macpherson but by her legal representatives based on valid instructions.
43. Mr Karim submits the burden is on the Official Solicitor to establish the lack of capacity, that having considered the totality of the evidence that burden has not been discharged on either question as Dr Prabhakaran's evidence does not satisfy the rigorous and anxious scrutiny required to demonstrate that she lacks capacity to conduct an appeal that she has mounted based on a position she has taken since 2020. He also submits the evidence does not meet the required standard on either stage to establish lack of capacity in January 2024.
44. Ms Macpherson has provided written submissions which I have considered. In essence, she agrees with the submissions made on behalf of SCC regarding her capacity.

Discussion and decision

45. There is no significant issue between the parties as to the applicable legal framework. It is set out above and can be summarised as including the matters listed below, largely taken from the helpful list in Mr Karim's written submissions:

- (1) An individual is presumed to have capacity pursuant to s2(1) MCA 2005.
 - (2) The burden of proof lies with the person asserting a lack of capacity and the standard is the balance of probabilities.
 - (3) The determination is ‘decision specific’ (*PC v City of York Council* [2014] 2 WLR 1 [35]).
 - (4) The approach to be taken when assessing capacity is the two stage test in *JB* in the following order. First, whether P is unable to make a decision in relation to the matter, having regard to s3(1) MCA. Second, if so, whether that inability is because of an impairment of, or disturbance in the functioning of the mind or brain.
 - (5) Some decisions require grounding in a particular factual context, without which there is ‘nothing for the evaluation of capacity to bite upon’ and therefore the relevant information must include reference to matters specifically relevant to that factual context (*York City Council* at [31] [35] and [38]).
 - (6) The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another (s 3(4)(a) MCA 2005. Paragraph 4.26 of Chapter 4 of the Code of Practice also provides that relevant information includes the likely effects of deciding one way or another or making no decision at all.
 - (7) The outcome of the decision made is not relevant to the question of whether a person taking the decision has capacity (*York City Council* at [53-54]).
 - (8) It is not necessary for a person to use and weigh every detail of the respective options available to demonstrate capacity, merely the salient factors (*Heart of England NHS Foundation Trust v JB* [2024] EWHC 342 per Peter Jackson J (as he then was) at [25]).
 - (9) 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 weight other elements sufficiently to be able to make a capacitous decision (see *Re SB* [2013] EWHC 1417 (CoP)).
 - (10) In assessing capacity consideration should be given to the matters set out in *CT (by his litigation Friend the Official Solicitor) v London Borough of Lambeth and Others* [2025] EWCOP 6 (T3) at [60].
 - (11) The decision as to capacity is a judgment for the court to make (*PH v A SCC* [2011] EWHC 1704 (COP) at [16]).
46. The leading case providing guidance on assessments of capacity to conduct proceedings remains *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 per Chadwick LJ at [75] and [79]

47. This approach was approved by the Supreme Court in *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18 at [13].
48. In considering whether a person has capacity to conduct the proceedings it is important to focus on the particular proceedings in relation to which the issues arise, the complexity of that litigation and of the issues to be determined. In *TB v KB and LH (Capacity to Conduct Proceedings)* [2019] EWCOP 14 MacDonald J at [29] where he accepted the evidence from the expert about the dynamic nature of conducting legal proceedings.
49. In relation to the functional test the letter of instruction to Dr Prabhakaran set out the information relevant to conducting proceedings. It is a very detailed list that focuses on the extant appeal:
1. *The proceedings are about whether Mr Justice Poole on 22 January 2024 applied the law correctly in determining the contempt proceedings and imposing a sentence of three months' imprisonment;*
 2. *The proceedings are not in relation to FP's residence, care or treatment;*
 3. *The videos of FP continuing to remain online is a continuous breach of the court's injunction;*
 4. *Uploading more videos risks more committal applications and a longer prison sentence;*
 5. *As a Judge of the Court of Protection, Mr Justice Poole had the authority to make the injunctions against Ms MacPherson and had the authority to sentence her to prison for contempt of court;*
 6. *Her campaign for justice for FP (as Ms MacPherson sees it) which includes uploading the videos in breach of injunctions, has not helped FP or exposed any wrong-doing, and the only outcome has been a prison sentence for Ms MacPherson;*
 7. *The grounds of appeal developed by Ms MacPherson's lawyers include*
 - a) *Judge incorrectly balanced FP's right to family life with Ms MacPherson;*
 - b) *Judge incorrectly balanced FP's right to privacy against Ms MacPherson's freedom of expression;*
 - c) *If FP had capacity to do so, she could write to Google/Meta asking them to remove the videos (irrespective of Ms MacPherson's views), and given that FP lacks such capacity, the Judge was wrong to fail to consider making an order against Google/Meta directing them to remove videos on FP's behalf;*
 - d) *Judge was wrong to proceed given Ms Macpherson said she wanted legal representation but could not arrange it;*
 - e) *Judge was wrong to fail to consider the possibility that Ms MacPherson lacked capacity to conduct proceedings;*

8. *The reasonably foreseeable consequences that:*

 - a) *Accepting the arguments suggested by her lawyers may increase her chances of succeeding at appeal; and;*
 - b) *Dismissing them out of hand may limit her chances of success.*

9. *Her lawyers are acting for her and acting in her best interests, and are not in league with the other parties.*
10. *If her lawyers inform her that a point is unarguable, they are not permitted pursuant to their regulatory duties to advance that argument, irrespective of what the client thinks about the argument.*
50. The subsequent questions to Dr Prabakaran about capacity in January 2024 wrongly referred to it being in relation to conducting an appeal, which it was not, which error continued into Dr Prabakaran's second report, albeit corrected in his oral evidence.
51. In my judgment the written and oral evidence from Dr Prabakaran was undermined in a number of respects, with the result that the court can only place limited weight on his conclusions:
 - (1) The relatively limited material he had to base his conclusions on, namely the letter of instruction and the documents submitted;
 - (2) He did not have access to Ms Macpherson's medical records;
 - (3) He was not able to assess Ms Macpherson in person;
 - (4) His first report in November 2024 failed to properly address the issues relating to capacity in the order set out in *JB* as requested in the letter of instruction, and his second report had limited structured balanced analysis;
 - (5) There was a lack of effective balance or analysis of the extensive material that he quoted from in his two reports, both in relation to his conclusions regarding capacity to conduct the current appeal and the proceedings in January 2024. For example, there was no analysis of the impact of the history of the litigation where Ms Macpherson had effectively participated in proceedings over an extended period of time, both represented and unrepresented. I agree with Mr Karim that it was surprising Dr Prabhakaran did not appear to have considered the references in Poole J's judgment in January 2023 that Ms Macpherson's legal representatives at that hearing, and the earlier hearing in December 2022, were satisfied she had capacity, and the impact of that on litigation capacity in January 2024. Also references in Ms Macpherson's favour were not properly drawn out, such as in paragraph 45 of his first report the reference to Ms Macpherson in September 2024 making it clear she will let Mr Lewis decide the best way forward in regards to bringing an appeal or a fresh court of protection application, demonstrating a degree of understanding about the options in the appeal process.

- (6) There was a general lack of clarity and rationale in his written and oral evidence with regard to his description of the mental impairment, and how that fitted into the history of her involvement and participation in the historical hearings and the nexus of that to the inability to use and weigh information. Also, the interchange of terms in his oral and written evidence such as ‘may’, ‘possibly’, ‘possibility’, ‘suggest’, ‘50/50’ with ‘balance of probabilities’ in relation to both of the *JB* steps in assessing capacity now and in January 2024, with no consistent view being expressed which significantly undermines his conclusions.
- (7) In his reports and oral evidence Dr Prabhakaran failed to adequately address the issue of what, if any, steps could be taken to support Ms Macpherson, properly analyse the position regarding unwise decisions or guard against the risk of pathologising disagreements (see *CT* [60]).
52. I have to consider the evidence of Dr Prabhakaran within the broader evidential canvas the court has. That broader evidence canvas includes the following matters:
- (1) The proceedings relating to Ms Macpherson’s daughter have been going on for a very long time and have involved considerable delays. The judgment of HHJ Moir in October 2020 ([2020] EWCOP 75) charts the course of the nine day hearing over a period of 11 months, the delay caused in part by Covid. Ms Macpherson was represented throughout that hearing and HHJ Moir’s conclusions make it clear that many of the views held by Ms Macpherson then regarding the proceedings relating to her daughter reflect those held by her now (see for example paragraphs 81, 85 and 90 of that judgment).
- (2) The two day hearing before Poole J in June 2022, which resulted in the judgment reported at [2022] EWCOP 30 when Ms Macpherson was unrepresented. In that judgment Poole J referred to Ms Macpherson’s strongly held views. She was able to engage in the hearing, for example deal with issues raised by the court (for example see [7]) and gave oral evidence (as described at [15]). Poole J was able to make the findings he did at [19] which included his findings in relation to what Ms Macpherson characterised as an abduction. In many respects, this again reflects the views expressed by her in January 2024 and now. He referred at [24] and [34] to Ms Macpherson’s irrational and unjustifiable views and at [32] dismissed her application regarding her daughter’s medication. At [34] Poole J stated, *‘I do not have the medical qualifications to speculate as to why RT labours under this erroneous belief [that her daughter is a victim of a conspiracy of professionals to harm her] or why it is so entrenched that no evidence of facts will change it. RT herself vehemently resists any suggestion that she might benefit from an assessment of her own mental health or personality. However, this belief is what causes her to make complaints against all manner of professionals who become involved in FP’s care and these proceedings.’*
- (3) At the hearings in December 2022 and January 2023, during the first committal application, Ms Macpherson was legally represented at both hearings and the court was informed that at each hearing her legal representatives were satisfied Ms Macpherson had capacity to give instructions (see judgment of Poole J on 20 January 2023 [2023] EWCOP 3 at [16]).

- (4) Ms Macpherson appealed the suspended committal order made on 20 January 2023 and represented herself at the hearing in the Court of Appeal on 4 May 2023 [2023] EWCA Civ 574. She had drafted and submitted grounds of appeal, as set out at [13], and made ‘*comprehensive*’ oral submissions, as set out at [14]. In the judgment of Dingemans LJ there is no suggestion that Ms Macpherson lacked capacity to conduct that appeal. As Peter Jackson LJ observed at [34] ‘*The orders which the Appellant admitted breaching were clearly necessary in FP’s best interests. The Appellant’s disagreement with those orders has been carefully considered by the Court of Protection on several occasions in decisions upheld by this court when refusing permission to appeal. **The Appellant maintains her entrenched opinions which have repeatedly been found to be gravely misguided.***’ (emphasis added).
53. Although Ms Macpherson’s behaviour in each of the judgments listed above was variously described at no stage was her capacity to conduct those different, difficult and varied hearings raised in circumstances where it could be said her behaviour and views are strikingly similar to her behaviour and conduct in January 2024, as described in Poole J’s judgment reported at [2024] EWCOP 8 at [6] and [9 – 12] and now, as set out in the submissions by Mr Lewis. So it is difficult to understand on what evidential foundation Dr Prabhakaran has for his oral evidence that Ms Macpherson’s beliefs ‘*may have evolved over time*’ and become ‘*more entrenched*’ to support his view regarding both her ability to use and weigh information and her mental impairment.
54. Whilst it is important in this wide canvas to consider that assessment of capacity is both time and decision specific, and I fully recognise and factor in the dynamic nature of the decisions involved in assessing litigation capacity, as detailed in the letter of instruction, but it needs to be in the context of understanding the salient features. I can’t ignore the evidence that in each of these hearings Ms Macpherson has been able to conduct them either with the assistance of legal representation or not with what has been described as her misguided and entrenched opinions. It is right that her behaviour has been difficult and, at times, difficult for the court to manage (such as described by King LJ in the Court of Appeal) but that does not and should not be used against her in assessing capacity to conduct the proceedings now or in January 2024. Many litigants can be difficult to manage in hearings or within proceedings, and often express very strongly held views about one or more aspects of the proceedings. In many cases that type of behaviour can be managed by effective and proportionate case management, such as limiting the length of any documents submitted, the volume of any documents in a court bundle, the time for any submissions, to ensure any parties’ right to a fair trial protected by Article 6 of the European Convention on Human Rights are respected within the confines of what is relevant and proportionate to the issues being determined by the court. This accords with the overriding objective in the relevant procedural rules. In these proceedings it is rule 1.1 Court of Protection Rules 2017. In assessing litigation capacity it is important not to conflate this type of behaviour, coupled with strongly held views as evidence of lack of capacity. Each situation is, by definition, very fact specific.
55. In relation to Ms Macpherson’s capacity to conduct the proceedings in January 2024 in my judgment the Official Solicitor has not established to the required

standard of the balance of probabilities that Ms Macpherson lacked capacity to conduct those proceedings. As Poole J set out in the January 2024 judgment Ms Macpherson's strongly held beliefs remained but he was satisfied that at that hearing '*She was prepared to argue her case and did not ask for an adjournment to seek representation or otherwise. Ms Macpherson was keen to make her arguments and I gave her ample opportunity to do so. I have a long experience of Ms Macpherson appearing before me remotely and she can become angry and unfocussed. I repeat that she had been notified of her rights in the notice and summons served upon her...*' [6]. At [10] he referred to Ms Macpherson's deeply entrenched views. It is recorded at [28] the findings he made and the rationale. There is nothing to suggest that Ms Macpherson was not able to use or weigh relevant information, understand or engage with those proceedings and that hearing. This was in the context of her deeply held entrenched views which have been held for some time, during a number of court hearings where, on the evidence, the court has proceeded on the basis she had capacity to conduct those proceedings at those times, not just before Poole J but also the Court of Appeal, most recently in May 2023. In this context the somewhat hesitant and inchoate conclusions regarding Ms Macpherson's capacity in Dr Prabhakaran's evidence is not accepted and does not discharge the burden of proof regarding either stage of the *JB* test in January 2024.

56. Turning to consider Ms Macpherson's current capacity to conduct the extant appeal. In my judgment the Official Solicitor has not discharged the burden of proof for the following reasons:

- (1) I agree with Hayden J the presumption of capacity is a fundamental safeguard of human autonomy. It requires cogent, clear and carefully analysed information before it can be rebutted.
- (2) The court needs to guard against finding a lack of capacity based on reference to a person's condition or an aspect of their behaviour which might lead others to make unjustified assumptions (s2(3) MCA). An aspect of Ms Macpherson's behaviour are her entrenched and strongly held views, yet it has been shown over an extended period of time when those views have not significantly changed, she has been able to effectively conduct and be involved in litigation concerning directly or indirectly the Court of Protection proceedings regarding her daughter, both with and without legal representation. She is, on the balance of probabilities, able to use and weigh information even in the context of those longstanding fixed views. The existence of them does not, in my judgment, amount to a mental impairment. The evidence does not support any suggestion that they have evolved over time and become more entrenched. They have been there for a long period of time and even with those strongly held views she has been able to participate in different hearings, including an appeal from a committal order.
- (3) Whilst her capacity to conduct this appeal is decision and time specific that wider evidential context cannot be ignored. For example, she was able to conduct the appeal in May 2023 as a litigant in person that involved similar issues, namely committal, where the Court of Appeal did not raise issues regarding her capacity to conduct that appeal, even though she was

unrepresented. Although the order she is appealing is more serious than the one in January 2023 the issues are largely the same.

- (4) There is only limited weight the court can attach to Dr Prabhakaran's assessment in relation to both parts of the test due to the fact that it was based only on the papers. As he observed, this was the first time he had undertaken a paper based assessment in such circumstances, where the person being assessed was still alive. He had not seen the medical records, did not interview anyone else who knew Ms Macpherson and was unable to assess Ms Macpherson in person. Despite his experience and expertise set out in his report Dr Prabhakaran's written and oral evidence was hesitant, somewhat superficial and lacked any considered analysis or underlying rationale. For example, his first report failed to undertake the *JB* two stage test, despite being asked to do so in the letter of instruction. He quoted extensively from documents but provided no reasoned and balanced analysis of that information in the context of capacity to conduct the proceedings. Such analysis as he gave lacked sufficient balance or consideration of the relevant history, for example the position regarding Ms Macpherson's capacity at the hearing in December 2022 and January 2023. Finally, his reports and oral evidence lacked any real consideration of the presumption of capacity, what steps could be taken to support capacity and consideration of unwise decisions. He failed to consider adequately, or at all, the history where Ms Macpherson had been able to conduct similar proceedings, despite her fixed and firmly held beliefs.
- (5) During the proceedings before this court Ms Macpherson has largely complied with directions made following the referral from the Court of Appeal and participated in the hearing on 30 April 2025, with the support of the person present with her in court and accepted decision I made to manage the issues she could raise and the questions she asked.
- (6) I have weighed in the balance the point made by Mr Lewis that Ms Macpherson has continued to make applications. That is not unusual behaviour with litigants who, like Ms Macpherson hold strongly held beliefs. It does not equate with lack of capacity on its own and can be managed by the court through the exercise of appropriate case management powers.

57. Therefore, for the reasons set out above, the answers to the two questions referred to this court by the Court of Appeal is that (1) Ms Macpherson has capacity to conduct her appeal against the decision of Poole J on 22 January 2024, and (2) had capacity to conduct the contempt proceedings on 22 January 2024.