



Neutral Citation Number: [2026] EWCOP 31 (T3)

Case No: COP20011587

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2026

Before :

THE HONOURABLE MR. JUSTICE HAYDEN

Between :

A Local Authority

Applicant

- and -

(1) AC

(by her litigation friend, the Official Solicitor)

(2) CA

(3) BC

(4) DD

Respondents

A Local Authority v AC and others (Consent to Marriage)

Barbara Connolly KC and Lindsay Johnson (instructed by **A Local Authority**) for the **Applicant**

Joseph O’Brien KC and Francesca Gardner (instructed by **Irwin Mitchell LLP**) for the **First Respondent**

Julia Cheetham KC and Eliza Sharron (instructed by **MJC Law**) for the **Second Respondent**

Third Respondent appeared remotely and was not represented

Nageena Khalique KC and Gina Allwood (instructed by **Welford Solicitors LLP**) for the **Fourth Respondent**

Victoria Butler-Cole KC (instructed by **the Crown Prosecution Service**) for the **CPS**

Hearing dates: 3rd and 4th June 2026

Approved Judgment

This judgment was handed down remotely at 2pm on 24th July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HONOURABLE MR. JUSTICE HAYDEN

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 Hayden :

1. These proceedings concern AC who is 20 years of age. AC has diagnoses of moderate learning disability; a genetic condition known as microduplication, associated with intellectual disability, developmental delay, speech difficulties; impaired mobility and some visual impairment. It is agreed that between 10th October 2024 and 6th November 2024, AC visited Pakistan with her family, DD (a family friend), BC (AC's maternal grandmother), CA (AC's mother) and her younger children. On 17th October 2024, the family held a gathering, in Pakistan, for people to "*pay their respects*" to AC's grandmother who lives in Pakistan. The proposed husband attended at that gathering and it is understood that he met AC there for the first time.
2. CA accepts that on 2nd November 2024, an Islamic marriage ceremony took place (a Nikah) between AC and the proposed husband at a family home belonging to her aunt. The family's account, about which it is unnecessary for me to make any comment, is that no such ceremony had been planned in advance of the trip and that AC and the proposed husband formed an attraction to each other when they met and quickly wanted to be married. CA states that at the time of the marriage, she believed that AC had the capacity to make the decision.
3. The second stage of the marriage celebrations is the Rukhsati, which is the point at which the bride formally leaves her parents' home and departs to live with her husband. This ceremony, however, was deferred to a later point. AC and the family returned to the UK on 7th November 2024. An anonymous referral had been made on 3rd November 2024 concerning the validity of the marriage. All family members were stopped at the airport. AC was separated from her family and spoken to by officers. The investigating officer, PC Rohel, concluded that AC lacked capacity to make "*her own choice to marry*". On the same date, AC was placed in homeless accommodation by the out of hours team. AC's smartphone and iPad were seized by the police as part of the investigation. CA, BC and DD were each charged with an offence contrary to Section 121 of the Anti-Social Behaviour, Crime and Policing Act 2014, the key provisions of which provide:

"(1) A person commits an offence under the law of England and Wales if he or she—

(a) uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage, and

(b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.

(2)In relation to a victim who lacks capacity to consent to marriage, the offence under subsection (1) is capable of being committed by any conduct carried out for the purpose of causing the victim to enter into a marriage (whether or not the conduct amounts to violence, threats or any other form coercion)."

4. CA, DD and BC appeared before the Magistrates Court on 9th November 2024 and were each remanded into custody. On 13th November 2024, BC was granted bail. On 19th November 2024, CA was granted bail and later DD was also granted bail. On 21st November 2024, the Police made an application pursuant to Part 4 of the Family Law Act 1996 (as amended) for Forced Marriage Protection Order (FMPO) in respect of AC and her siblings. The Orders were granted by HHJ Rowland on 21st November 2024.
5. On 15th January 2025, the Local Authority applied to this Court for declarations relating to capacity and proceedings were commenced. In April 2025, the defence solicitors in the criminal proceedings indicated that they too had arranged for a capacity assessment for AC which was to take place on 8th May 2025. In the correspondence between AC's representatives in these proceedings and the defence solicitors, it was agreed that the assessment in the criminal proceedings would be delayed to enable this Court to consider whether any assessment of AC's capacity, for the purposes of the criminal proceedings, required the authorisation of this Court. The Official Solicitor considered that this raised an important issue as to the interrelationship of the Criminal and Court of Protection proceedings which it was contended raised a complex and novel point of law and wider matters of public interest.
6. The first point to be addressed was: *"Whether any decision for P to undergo a capacity assessment, for the purposes of criminal proceedings, is in itself a best interests decision pursuant to section 4 of the Mental Capacity Act 2005. If so, whether the best interests decision is one which must be taken by the Court of Protection."* The Crown Prosecution Service (CPS) were invited to make representations. They accepted and Ms. Victoria Butler-Cole KC was instructed on their behalf. In her erudite Position Statement, Ms. Butler-Cole considers a wide range of issues and debates a variety of possibilities. Though the document is helpful, it is not necessary for me to rehearse it, as a high level of consensus has emerged between the parties. Ultimately, the CPS distilled the following propositions:

"Ordinarily, no pre-assessment of P's capacity to consent to participate in an assessment of their capacity is required.

Here, the assessment of capacity is being carried out not in order that a best interests decision can be made about P's care or treatment, or to inform the exercise of statutory duties towards P for example duties

to provide care and support. It is being carried out at the request of defendants in criminal proceedings to support their case in those proceedings.

This is an unusual scenario – it arises because the MCA test for capacity to marry is the test used in the criminal proceedings, and because where there is an issue about forced marriage due to mental capacity concerns, there may be CoP proceedings alongside any criminal proceedings.

In those unusual circumstances, it is appropriate for the CoP to require an assessment of P’s capacity to consent to participation in the capacity assessment so that, if she lacks that capacity, the court can determine whether it is in her best interests for the assessment to take place.”

7. To my mind, this broadly settles the question of jurisdiction both in this case and in others, where evidence arises concerning lack of capacity to consent to marriage and where proceedings in the Court of Protection will, almost inevitably, be commenced. However, I agree with Mr. O’Brien KC and Ms. Gardner, instructed on behalf of AC, via her Litigation Friend the Official Solicitor, that on the facts of this case, the assessment is a welfare decision. Where P lacks capacity, the Court must decide whether undergoing an assessment is in P’s best interests (Section 4 MCA 2005) and is, accordingly, a decision to be taken by the Court of Protection. In their Skeleton Argument, Mr. O’Brien and Ms. Gardner have analysed five, summary, reasons why the decision is a best interests decision to be taken by the Court. For convenience, I set these out verbatim:

“(i) First, on the facts of this case, this assessment is a welfare decision and not a case management decision. If the person lacks capacity, the court or decision maker must consider whether undergoing the assessment is in the person’s best interests.

(ii) Second, the closest analogist situation relates to Achieving Best Evidence interviews. In London Borough of Enfield v SA (by her litigation friend the Official Solicitor), FA and KA [2010] EWHC 196, McFarlane J (as he then was), addressed this issue where an ABE interview had already taken place without permission of the court, and in reviewing the circumstances, McFarlane J said as follows: “The list of short points in the previous paragraph makes no reference to what seems to me to be the obvious difficulty from the decision to undertake this interview, which is that [P] was by then the subject of ongoing proceedings in the Court of Protection. In the absence of an absolutely pressing emergency (and given the availability of a High Court Judge every single day of the year to deal urgently at any time

of the day or night with an application, I use the phrase “absolutely pressing” in an extreme sense) where there are extant Court of Protection proceedings relating to an individual’s capacity and best interests, any question of whether or not that individual is to be the subject of an ABE interview must be raised with the Court and be subject to a direction from a Judge. Where the substance of the interview may relate, as here, to allegations that another party to the proceedings (or someone closely connected to the party) has harmed the interviewee then there will be good grounds for the matter being raised, at least initially, without notice to that party. In every case, however, notice should be given to the Official Solicitor or any other person who acts as P’s litigation friend.”

(iii) Third, the Criminal Procedure Rules do not assist. Part 19 of the Rules, which deals with expert evidence, does not require an application to the Crown Court for permission before an expert is instructed. There is no restriction or hurdle that the Defendant must go through before instructing an expert. In the normal course of events, expert evidence in the Crown Court does not involve any examination, assessment or interview of/with the complainant by any defendant in the criminal proceedings.

(iv) Fourth, if the court accepts that this is a welfare decision and made in accordance with a person’s best interests there is no power vested in the Crown Court (indeed any criminal court) to make a best interests decision for a complainant.

(v) Fifth, the Crown Court has no inherent jurisdiction to order or authorise any such assessment. The Crown Court is a creature of statute and lacks any inherent jurisdiction, see: R (on the application of Trinity Mirror PLC) v Croydon Crown Court [2008] 2 Cr.App.R.1).”

8. Ms. Cheetham KC and Ms. Sharron, who appear on behalf of CA, inform me that it appears that the defence team and the Crown Court were initially operating under the assumption that the decision fell within paragraph 19.7 of the Criminal Procedure Rules. As I understand it, at the Pre-Trial Preparation Hearing on 23rd June 2025, in the Crown Court, the solicitor for BC submitted that no assessment could take place without an order from the Court of Protection. The Prosecution did not object to the proposed instruction, and the Judge instructed the CPS to enquire as to whether the Court of Protection had made any ruling in respect of the issue. When the CPS indicated that they wished to be joined as Intervenors in the Court of Protection proceedings, their letter set out the following:

“Our preliminary view is that in the context of this offence type, it being an allegation of forced marriage with a complainant who is said to lack capacity, that the decision as to whether to permit a further capacity assessment on behalf of the defendants in the criminal proceedings is a “Best Interests” decision under s.4 of the Mental Capacity Act 2005.

We also consider that the decision is one which is best taken by the Court of Protection as they are the best placed to make the decision on behalf of P rather than it being a decision to be taken within the Criminal Proceedings.”

9. The first paragraph above is ambiguously drafted. The decision to admit a capacity assessment that has been obtained by a defendant will always be one for the Crown Court judge. The issue here is whether a determination by the Court of Protection is required as to whether such an assessment is in AC’s best interests, if she cannot consent to participate in the assessment herself. It is important to emphasise that this is not *“a capacity assessment per se”*, as Mr. O’Brien puts it, but an assessment specifically focused on the impact on AC of participating in an assessment. There are clearly significant consequences for AC in both outcomes, i.e. whether the assessment takes place or not.
10. An assessment is required because AC’s capacity is an explicit and necessary constituent of the counts on the indictment, brought pursuant to Section 121(2) of the Anti-Social Behaviour, Crime and Policing Act 2014 (see paragraph 3 above). Section 121(5) below, links the meaning of capacity to that set out in the MCA. There is a logical inevitability to this. It also follows, to my mind, that link having been made, the jurisprudence of the Court of Protection, defining capacity in its various spheres, is also, acquired:

“(3A) A person commits an offence under the law of England and Wales if he or she carries out any conduct for the purpose of causing a child to enter into a marriage before the child’s eighteenth birthday (whether or not the conduct amounts to violence, threats, any other form of coercion or deception, and whether or not it is carried out in England and Wales).

(4)“Marriage” means any religious or civil ceremony of marriage (whether or not legally binding).

(5)“Lacks capacity” means lacks capacity within the meaning of the Mental Capacity Act 2005.” [My emphasis]

11. The next question which falls to be asked is: “*What is the relevant information that P needs to understand, retain, use and weigh when making a decision as to whether to undergo a capacity assessment for the purposes of criminal proceedings*”. The approach is prescribed by Section 3 of the MCA. In the context of this judgment, its provisions require to be set out in full:

“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.”

12. Following exchanges during submissions, a consensus emerged as to the defining factors which fall to be considered when considering capacity in this sphere:

*“(i) AC must be able to understand, retain, use or weigh the fact that there are **criminal proceedings** against CA, DD and BC;*

*(ii) AC must be able to understand that there has been a **marriage** between herself and the proposed husband;*

*(iii) AC must be able to understand, retain, use and weigh the fact that she has been assessed as lacking capacity to **marry / engage in sexual relations**;*

*(iv) AC must be able to understand, retain, use and weigh the fact that CA and BC have been **arrested and charged** with **forcing her** to be married;*

*(v) AC must be able to understand, retain, use and weigh the fact that CA and BC's **defence in criminal proceedings** is that AC does have capacity to make **her own decisions** to marry and to enter into sexual relationships [my emphasis];*

(vi) AC must be able to understand, retain, use and weigh the fact that the reasonably foreseeable consequence of her not having a further assessment would be that the conclusions of the current assessment would remain in place;

(vii) AC must be able to understand what further reasonably foreseeable consequences might arise if such an assessment did not take place."

I have highlighted the phrases above to emphasise key features of the capacity test and to bring focus to the scope of the exercise.

13. The Official Solicitor made two further suggestions which it is contended ought also to be included as part of the relevant information for the decision making. I agree with them and endorse them:

*"(i) **The nature of the assessment**... it would be a retrospective assessment of her capacity to enter into marriage, i.e. in 2024; and*

(ii) AC must appreciate that the expert has an overriding duty to the Court, irrespective of who has instructed them."

14. There is one further point which I consider requires particular emphasis:

"AC must understand that the report may be obtained but not disclosed by the defendants."

The importance and subtlety of this needs to be recognised because it involves understanding that AC has no agency as to how the report is deployed (or not) in the criminal proceedings. All

these factors were, sensibly to my mind, distilled into words that AC might more readily understand. They read as follows and I endorse them:

“(i) The police say that Mum [CA], [DD] and Grandma [BC] made you get married to [the proposed husband], and there is a criminal case about that;

(ii) The police say that because of your learning disability you were not able to agree to marry [the proposed husband];

(iii) [Dr. X], who is a psychologist, was asked by the police to meet you, and she thought that you were not able to agree to marry [the proposed husband] because of your learning disability;

(iv) Mum [CA], [DD] and Grandma [BC] want to get another assessment by a different expert because they think that [Dr. X] was wrong and they want to ask a different expert to meet you and ask you about the marriage;

(v) The expert will want to find out whether you understood enough about marriage to be able to agree to marry [the proposed husband] in 2024;

(vi) The expert must tell the judge the truth, not pick a side;

(vii) Mum [CA], [DD] and Grandma [BC] can choose whether to use the report in the criminal case;

(viii) If they choose to rely on the report in the criminal proceedings, it will become evidence in the criminal trial;

(ix) You can choose whether to agree to the assessment and where and when it takes place; and

(x) If you choose not to do the assessment it may affect whether the criminal trial goes ahead.”

15. Ms. Butler-Cole has noted that if a further capacity assessment was not determined as being in AC’s best interests, the defendants might make an ‘abuse of process’ application to the Crown Court judge. She tells me that it is anticipated that the CPS would oppose that application, as their view is that there are good grounds for arguing that the defendants could still have a fair trial. I record this only for completeness, all this would be a matter for the Crown Court judge and not for me.

16. To give further context to the issues in this judgment, it is helpful to know something of the statistical background to prosecutions of this kind. Ms. Butler-Cole elicited data from the CPS HQ, on the request of her instructing solicitors. There are a very small number of forced marriage prosecutions each year. Since 2015, there have been between one and six prosecutions annually. The statistics have some limitations; they do not specifically identify those cases where mental capacity is in issue, i.e. s.121(1)(b) of the Antisocial Behaviour, Crime and Policing Act 2014, rather than violence / threats / coercion (s.121(1)(a)). Thus, it seems the mental capacity element is not monitored separately but incorporated within the s.121 cases as a whole. The clear signal, however, is that the decisions here are unlikely to have significant impact on the volume of work of either the Crown Court or the Court of Protection.
17. This case has once again brought into focus the scope and effectiveness of the criteria for determining a protected party's capacity to marry. I record that many, I suspect most, practitioners consider the case law generates a test which can be overly burdensome and lacking the flexibility required in understanding the different approaches to marriage and / or its obligations in a multicultural society. Moreover, the "*obligations of marriage*" and what constitutes "*the contract of marriage*" are not ubiquitous, they are subtle, nuanced and mutable. There is a real danger that an unnecessarily sophisticated test might operate to the disadvantage of those struggling with capacity, requiring them to evaluate issues which many others might find no need to address at all, or even struggle to address, as capacitous adults. Some couples enter marriage with carefully negotiated prenuptial agreements, contemplating the meticulous division of financial assets in the event of divorce. Others give the matter absolutely no thought at all and are entirely ignorant of the applicable law. It requires to be acknowledged that the authorities are contradictory on some key points. I also note that there has been some discussion in the criminal proceedings as to whether a definitive test for capacity to marry exists in law at all.
18. The danger of a convoluted test may have a particularly adverse impact on women. For many women, in varying cultures and religions, marriage is the only gateway to children and family life. There are sound reasons why the assessment of capacity to marry should not impose overly complex concepts. Central to the exercise must always be recognition of the presumptive premise of the MCA, i.e. capacity is assumed to exist unless and until it is cogently rebutted. Tentatively, and with some diffidence, it strikes me that 'marriage' is, in some respects, conceptually more complex than that of 'consensual sexual relations'. It engages various mutual obligations, altered legal and, in some circumstances, social status; it is long term and status specific. The challenge is to distil these characteristics into a test which is enabling but does not weaken the importance of the status of marriage.

19. It falls to be considered here as part of the capacity assessment for the criminal proceedings. The Official Solicitor also agrees that there are “*sound reasons why the assessment of capacity should not impose overly complex concepts*”. However, she highlights the delicate balance pivoted when evaluating the “*protection of autonomy*”, on the one hand, and the “*significant and potential consequences of marriage*” on the other. I agree with the point the Official Solicitor identifies here and recognise the delicate balance she attributes to them.
20. *Sheffield City Council v E & Anor* [2004] EWHC 2808 (Fam) has been referred to, by each of the advocates, as the leading authority. However, it is perhaps worth noting that it is now 22 years since Munby J (as he then was) handed that judgment down. This has been a period of significant social change. In the intervening years, we have seen: Marriage (Same Sex Couples) Act 2013, granting same-sex couples the same status as opposite-sex couples in marriage and divorce; Civil Partnership (Opposite-sex Couples) Regulations 2019, granting opposite-sex couples the opportunity to choose civil partnership rather than marriage should they prefer to do so; Divorce, Dissolution and Separation Act 2020, permitting couples the opportunity to divorce without attributing blame, applying equally to civil partnerships; Equality Act 2010, consolidating anti-discriminatory legislation, and protecting individuals from discrimination on a wide variety of grounds, e.g. sexual orientation, race, religion or belief, age, sex and many others; Children and Families Act 2014, endeavouring to secure the active involvement of both parents in a child’s life following separation of the adults. All this legislation both has an impact on family life and is reflective of changing attitudes to marriage, children and families.
21. In his characteristically rigorous analysis of the case law, commencing with the classic statement of principle on the test for capacity, in the advice of the judges to the House of Lords in *M’Naghten’s case* (1843) 10 Cl & F 200, Munby J considered that the authorities had been “*quite consistent*” and “*have been so ever since*” Sir James Hannen P’s judgment in *Durham v Durham* (1885) 10 PD 80. He derived the following, at paragraph 68:

“The law, as it is set out in these authorities, can be summed up in four propositions:

(i) It is not enough that someone appreciates that he or she is taking part in a marriage ceremony or understands its words.

(ii) He or she must understand the nature of the marriage contract.

(iii) This means that he or she must be mentally capable of understanding the duties and responsibilities that normally attach to marriage.

(iv) That said, the contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend. The contract of marriage can readily be understood by anyone of normal intelligence.”

22. Society has become a great deal more aware of the range and diversity of neurological functioning and intelligence, generally, since those passages were written and to a degree that even Munby J could not have foreseen. ‘Normal’ is a word which is no longer in the judicial lexicon. He continues:

*“There are thus, in essence, two aspects to the inquiry. The first is whether the person understands the nature of the marriage contract. But this, as the authorities show, merely takes us to the central question: Does he or she understand the duties and responsibilities that normally attach to marriage? This in turn leads on to two further questions: (1) What are the duties and responsibilities that normally attach to marriage? In other words, what are the essential attributes of the contract of marriage that the person has to be mentally capable of “understanding”? To this question, as we have seen, Sir James Hannen P sought to provide an answer in *Durham v Durham*.”*

23. Though seductively phrased, these questions are not as easy to answer as might at first appear, nor of course will they deliver ubiquitous responses. The terms of a contract of marriage will vary in differing cultures, religions, and now, following developments since Munby J’s judgment, in same sex marriages.
24. An intelligent and capacitous adult might at very least hesitate, for some time, with the question, “*what are the duties and responsibilities that normally attach to marriage*”. The second question, “*what are the essential attributes of the contract of marriage*” might prove just as challenging, perhaps even more so.
25. However, it is the fact of the “*contract*” which is the salient and unifying feature of marriage, not its terms. As Treitel (The Law of Contract) stated, “*a contract is an agreement giving rise to obligations...*”. Agreement is a far more accessible word than contract, but it has very similar meaning. Of course, the ‘changing obligations’ of marriage, evolving over time, were recognised by Munby J:

“It seems to me that all these observations about the husband’s duty to protect and maintain and the wife’s duty of submission have now to be read with very considerable caution. Indeed, I doubt that they any longer have any place in our contemporaneous understanding of

marriage – marriage, that is, as a civil institution whose duties and obligations are regulated by the secular courts of an increasingly secular society. For, although we live in a multi-cultural society of many faiths, it must not be forgotten that as a secular judge my concern, to adopt Sir William Scott’s words, is with marriage as a civil contract, not as a religious vow.”

26. That distinction between the ‘religious vow’ and the ‘secular contract’ is manifestly valid. Here, we are investigating whether P was able to consent to a religious ceremony (Nikah) in Pakistan, in which a wife’s duty of submission may remain extant. It also requires to be noted that in some cultures, both women and men may regard the choice of their marriage partner as a parental decision in respect of which it is their duty to submit. I have wondered as to the extent to which these features of different types of marriage require to be evaluated when considering capacity. However, I find myself again revisiting Munby J’s distinction, at paragraph 85:

*“In all the cases, as we have seen, the question has always been formulated in a general and non-specific form: Is there capacity to understand the nature of the contract of marriage? Two things about this formulation are noticeable. The test is capacity to understand the nature of the contract of marriage. The test is not capacity to understand the implications of a particular marriage. Putting the same point somewhat differently, and this is really Mr Whitfield’s core submission, the nature of the contract of marriage is necessarily something **shared in common by all marriages**.” (my emphasis)*

27. To return to my earlier terminology, it is the fact of the ‘agreement’ itself which requires to be understood, not the fairness of the terms or the wisdom of the consent. This is a secular Court; we are not involved in cultural relativism. Munby J puts this in striking language, later in the same paragraph:

“The implications for A of choosing to marry B rather than C may be immense. B may be a loving pauper and C a wife-beating millionaire. But this has nothing to do with the nature of the contract of marriage into which A has chosen to enter. Whether A marries B or marries C, the contract is the same, its nature is the same, and its legal consequences are the same. The emotional, social, financial and other implications for A may be

very different but the nature of the contract is precisely the same in both cases.”

28. The dynamics of a traditional Muslim marriage may be very different from those of a marriage that is “*a civil institution whose duties and obligations are regulated by the secular courts of an increasingly secular society*”, but it is the agreement to marry (“*the contract*”) which is the unifying feature. Expressly, therefore, it is the fact of the agreement which P is required to understand. It is no function of a judge to intervene, paternalistically, to protect a party from a marriage which might seem to some to be regressive, patriarchal or counter feminist. I would note, with some diffidence, that arranged marriages frequently generate happy, successful and enduring relationships. Nor is it necessary or indeed appropriate to evaluate P’s understanding of these differences. That would impose an additional test upon her which would not be imposed on an individual whose capacity was not in question. It would sublimate rather than promote her autonomy, an outcome which would be wholly contrary to the philosophy of the MCA. At risk of repetition, I emphasise, what is required is an understanding that an agreement has been made which changes status and is intended to endure. This, I think, captures the essence of the issue in terms which are simple and accessible.
29. This approach has also threaded through the subsequent authorities. In *PC & Anor v City of York Council* [2013] EWCA Civ 478, McFarlane LJ observed that the question to be asked was limited to “*is there capacity to understand the nature of the contract of marriage*”. Lewison LJ, helpfully, to my mind, went further and considered Munby J’s reference to “*the duties and responsibilities that normally attach to marriage*”, distilling it to “*an agreement to live together with her husband*”, paragraph 63:

“Thus in 2006 PC had the capacity to enter into a contract the essence of which was an agreement to live together with her husband. If she had the capacity to make that promise, she must then have had the capacity to decide to keep her promise.”

30. At paragraph 64, Lewison LJ continued:

“I well understand that all the responsible professionals take the view that it would be extremely unwise for PC to cohabit with her husband. But adult autonomy is such that people are free to

make unwise decisions, provided that they have the capacity to decide.”

31. These last two passages, per Lewison LJ, resonate very strongly with the framework of the MCA, discussed above at paragraph 11. I note that Lewison LJ uses the word “*promise*”. A promise is a unilateral commitment; an agreement requires mutuality. Marriage involves both parties making promises to each other. P must understand both her promise and the fact that her partner is making a promise in return.

32. In *Mundell v Name 1* [2019] EWCOP 50, Mostyn J foreshadowed the exercise upon which this case is now embarked:

“However, in 2019, it is questionable whether the duties and responsibilities as stated by Munby J in 2004 apply as fully as he then believed. I do not believe that it is the essence of a marriage contract that the parties should live together, let alone that they should love one another.”

33. I agree. Though intending to distil a simple test, Sir James Munby’s criteria are deceptively complex. That said, as noted by Mostyn J, Sir James Munby (P) in *In the matter of X (A Child: foreign surrogacy)* [2018] EWFC 15 described marriage in terms which pragmatically navigated sexual relations as a necessary constituent of marriage:

“The applicants were indeed, and remain, married to each other. Their relationship is deep and of long-standing. But, one of them is, as the other [one] has always known, gay, and their relationship and marriage is thus, as Ms Fottrell puts it, platonic and not romantic. Does this in any way affect their ability to satisfy the requirement of section 54(2)(a)? The answer, in my judgment, is a plain and unequivocal No.”

34. For my part, I do not see that as inconsistent with Munby J’s analysis in the *Sheffield* case, though it does signal his evolving thoughts about what constitutes marriage. Also, in parenthesis, I would note that Sir James Munby was there considering marriage in the context of an application for a Parental Order, pursuant to Section 54(2)(a) of the Human Fertilisation and Embryology Act 2008. The following year, that provision was amended to enable applications by single applicants (Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018), introduced on 3rd January 2019. I record this here further to illustrate the extent and pace of change in society’s attitude towards marriage and family life, which gives important context to the evolving jurisprudence in this sphere.

35. Mr. O'Brien has referred me to the observations on marriage made by other judges, including my own in *In Re RS (Forced Marriage Protection Order)* [2015] EWHC 3534 (Fam). The danger is that these comments become accretions to the test, gradually overcomplicating it. Marriage may be built on enduring friendship which falls short of love, it might be sexless or intensely passionate, the parties might live their lives cheek by jowl in every aspect of their daily routines, or they might live most of their lives at opposite ends of the world. There is no paradigm, neither are there universal obligations. As Mostyn J elegantly put it in *NB v MI* [2021] EWHC 224 (Fam):

“The language of obligations and rights is the language of justiciability and enforceability, which are concepts likely to be alien to a marrying couple.”

36. In that judgment, Mostyn J scythed through what many had thought of as the rights and obligations of marriage:

“(i) The contract of marriage is a very simple one, which does not take a high degree of intelligence to comprehend.

(ii) Marriage is status-specific not spouse-specific.

(iii) While capacity to choose to engage in sexual relations and capacity to marry normally function at an equivalent level, they do not stand and fall together; the one is not conditional on the other.

(iv) A sexual relationship is not necessary for a valid marriage.

(v) The procreation of children is not an end of the institution of marriage.

(vi) Marriage bestows on the spouses a particular status. It creates a union of mutual and reciprocal expectations of which the foremost is the enjoyment of each other's society, comfort and assistance. The general end of the institution of marriage is the solace and satisfaction of man and woman.

(vii) There may be financial consequences to a marriage and following its dissolution. But it is not of the essence of the marriage contract for the spouses to know of, let alone understand, those consequences.

(viii) Although most married couples live together and love one another this is not of the essence of the marriage contract.

(ix) The wisdom of a marriage is irrelevant.”

37. At Paragraph 27:

“Therefore, the irreducible mental requirement is that a putative spouse must have the capacity to understand, in broad terms, that marriage confers on the couple the status of a recognised union which gives rise to an expectation to share each other's society, comfort and assistance.”

38. To my mind, Mostyn J ultimately concluded that capacity to marry requires a simple recognition by two people that they are making a commitment for their lives to be joined together, and that they wish that fact to be recognised by others. Though he goes on to talk of *“an expectation to share each other's society, comfort and assistance”*, I do not consider a couple's expectations of what marriage might involve is a pre-requisite to establishing capacity. It is the understanding of an agreed change of status from that of an individual to that of a couple which is the universal essence of any marriage.

39. In *NB v MI* (supra), Mostyn J honed in on Munby J's comments in *X City Council v MB, NM and MAB* [2006] EWHC 168 (Fam), [2006] 2 FLR 96, in particular:

“Generally speaking, capacity to marry must include the capacity to consent to sexual relations.”

40. I agree with Mostyn J that the preface *“generally speaking”* does not amount to a conclusive formulation of Munby J's position on this point, though it is frequently advanced as such in argument. Mostyn J has taken a clear contrary view:

“The authorities have set the standard for capacity to choose to engage in sexual relations at an equivalently low level to that for capacity to marry: see for example D Borough Council v AB [2011] EWHC 101 [COP]; [2011] 2 FLR 72, at [21]. If someone has the capacity to consent to marry then, as a matter of empirical experience, he or she is likely to have the capacity to choose to engage in sexual relations. However, because capacity is always issue-specific, capacity to marry, and

capacity to choose to engage in sexual relations, are legally distinct. They may not necessarily produce the same answer, although typically they will.

15. It therefore does not follow that there is a rule that capacity to marry requires as a precondition capacity to choose to engage in sexual relations. It is possible to envisage a person lacking the mental and physical capacity to choose to engage in sexual relations, perhaps as a result of traumatic injury, but who nonetheless has full capacity to take a wife. Similarly, a couple may marry and live together tanquam soror vel tanquam frater (as sister and brother - see below). In X City Council v MB, NM and MAB Munby J at [62] helpfully reminded us of Briggs v Morgan (1820) 3 Phill Ecc 325 at 331-332, where Sir William Scott said it may be that a marriage "at a time of life when the passions are subdued" is "contracted only for comfortable society", the spouses being "fairly left to just reflection and more placid gratifications". Needless to say, these are all perfectly valid marriages."

41. The examples alighted upon here do not, to my mind, when stripped back, effectively support the proposition advanced. I agree that we are concerned with "*capacity to choose to engage in consensual sexual relations as a precondition to marriage*". However, the individual who cannot engage in sexual relations, "*as a result of traumatic injury*", simply has no choice. He is unable to. The question of capacity does not fall to be considered. The couple who chooses to live together in a sexless relationship, is making a choice, which again, has nothing to do with capacity. Similarly, a marriage later in life for "*companionship*" and "*placid gratifications*" also involves choice. These are all, as Mostyn J says, "*perfectly valid marriages*", but they do not provide a logical springboard to the conclusion that capacity to consent to sexual relations is not a prerequisite of consent to marriage.
42. I agree with Mostyn J that as a matter of empirical experience, someone who has the capacity to consent to marry is likely to have the capacity to engage in sexual relations. I also agree that the framework of the Mental Capacity Act and its central philosophy require capacity to be evaluated on an issue specific basis. Mostyn J concludes that both issues, though they "*normally function at an equivalent level, do not stand and fall together; the one is not conditional on the other*". Manifestly, an individual who is

assessed as unable to contract a marriage, but who is assessed as capacitous to consent to sexual relationships, has every right to a sexual life. In that sense, the two issues are not conditional on the other. However, if the reverse situation were to arise (i.e. capacity to consent to marry but incapacity in respect of sexual relations), which I consider to be vanishingly unlikely, though theoretically possible, can the same be said? In my view, the answer to that must be no, notwithstanding Mostyn J's enticing reasoning.

43. The link between sexual relations and marriage is a theologically consistent tenet of most established religious traditions. Marriage has been, and in many cultures still is, the only gateway to sexual relations. The two have been interlinked for thousands of years. Sex is regarded not merely as something which happens within marriage; rather, it is seen as one of the ways in which the marital relationship may be both expressed and nourished. This may underpin religious perspectives, but it is equally valid in a secular context.
44. Sexual relations are not, for all the reasons Mostyn J discusses, a necessary component of marriage, but in entering into a marriage, an understanding of the nature and mutuality of sexual relations must be. To this degree, it is integral to the construct of marriage and not divisible. The vulnerability of a person who understands, in broad terms, the nature of marriage but lacks an understanding of the essential elements and consequences of a sexual relationship is manifest, particularly where that involves an inability to comprehend the indivisibility of consent to sexual relations. To reason otherwise requires distortion of the objectives and philosophy of the Mental Capacity Act, which is intended to promote the autonomy of the vulnerable, enabling them to take decisions, be they wise or foolish. It would corrode the Act to interpret it in a way which exposed vulnerable and incapacitous adults to abusive situations in which they have no agency to protect themselves.
45. Thus, marriage is a formal agreement between two adults in which the fact of the agreement requires to be understood, not the fairness of the terms nor the wisdom of the decision. It requires a simple recognition by two people that they are making a commitment for their lives to be joined together, and that they wish that status to be

recognised by others. It is necessary to understand that a formal process is required to enter into marriage and to leave it. Further, and for all the reasons set out above, both parties to a marriage must have capacity to engage in sexual relations, whether they choose to do so or not.