Neutral Citation Number: [2021] EWCA Civ 1527

Case No: B4/2021/0879

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
Mr Justice Hayden
[2021] EWCOP 25

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 22/10/2021

Before:
THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE KING
and
LORD JUSTICE BAKER

- -

Between:

THE SECRETARY OF STATE FOR JUSTICE	**Appellant**
- and -	
(1) A LOCAL AUTHORITY	
(2) C (by his litigation friend, AB)	**Respondents**
(3) A CLINICAL COMMISSIONING GROUP	
-and-	**First**
INSTITUTE OF REGISTERED CASE MANAGERS	**Intervener**
-and-	
NIA	**Second Joint**
WOMEN@THEWELL	**Interveners**

- -
- -

Sir James Eadie QC, Sarah Hannett QC and Fiona Paterson (instructed by **The Treasury Solicitor**) for the **Appellant**
Parishil Patel QC and Neil Allen (instructed by **A Local Authority**) for the **First Respondent**
Victoria Butler-Cole QC and Ben McCormack (instructed by **Odonnells Solicitors**) for the **Second Respondent**
Sam Karim QC and Aisling Campbell (instructed by **Hill Dickinson LLP**) for the **Third Respondent**
Gerard Martin QC and Matthew Stockwell (instructed by **Irwin Mitchell LLP**) for the **First Intervener**
Anthony Metzer QC and Charlotte Proudman (instructed by **The Centre for Women's Justice**) for the **Second Joint Interveners**

Hearing date: 29 July 2021

Approved Judgment

LORD BURNETT OF MALDON CJ:

1. Hayden J, sitting in the Court of Protection, decided that care workers would not commit a criminal offence under section 39 of the Sexual Offences Act 2003 ("the 2003 Act") were they to make the practical arrangements for a 27 year old man ("C") to visit a sex worker in circumstances where he has capacity (within the meaning of the Mental Capacity Act 2005 ("the 2005 Act")) to consent to sexual relations and decide to have contact with a sex worker but not to make the arrangements himself.

2. Section 39 provides:

> "**39. Care workers: causing or inciting sexual activity**
>
> (1) A person (A) commits an offence if—
>
> (a) he intentionally causes or incites another person (B) to engage in an activity,
>
> (b) the activity is sexual,
>
> (c) B has a mental disorder,
>
> (d) A knows or could reasonably be expected to know that B has a mental disorder, and
>
> (e) A is involved in B's care in a way that falls within section 42.
>
> (2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.
>
> (3) A person guilty of an offence under this section, if the activity caused or incited involved—
>
> (a) penetration of B's anus or vagina,
>
> (b) penetration of B's mouth with a person's penis,
>
> (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or
>
> (d) penetration of a person's mouth with B's penis,
>
> is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

> (4) Unless subsection (3) applies, a person guilty of an offence under this section is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years."

3. The practical arrangements envisaged would involve care workers booking the sex worker, making the necessary arrangements for C to visit her and paying her. The circumstances would not engage the concept of incitement, because they would be acting to make C's wishes come to fruition, but rather the issue was whether by making all the arrangements the care workers would "cause" C to engage in sexual activity. The judge concluded they would not.

4. C does not have capacity to conduct these proceedings; to decide where to live; to decide upon his care and treatment; to manage his financial affairs or to decide to use the internet or social media. Hayden J dealt with the question concerning section 39 as a preliminary issue in advance of considering a care plan but made no order under the 2005 Act and made no declaration. Nonetheless, it is common ground before us that he made a "decision" which is the proper subject of an appeal by the Secretary of State for Justice who had been added as a respondent below. We proceed on that basis.

5. The Secretary of State advances three grounds of appeal. First, that the judge misinterpreted section 39 of the 2003 Act. Secondly, that to sanction the use of a sex worker is contrary to public policy; and thirdly that the judge erred in concluding that articles 8 and 14 of the European Convention on Human Rights ("the Convention") required his favoured interpretation. The second ground has been raised by way of a proposed amendment to the grounds of appeal. The amendment is opposed; and the third is conditional, in the sense that the judge reached his conclusion on statutory interpretation without recourse to section 3 of the Human Rights Act 1998 ("the 1998 Act").

6. C has been diagnosed with Klinefelter Syndrome (XXY syndrome). That is a genetic disorder where a male has an additional X chromosome. In C's case, the disorder has resulted in developmental delays and other social communication difficulties. C needs significant assistance with independent living which requires the deprivation of his liberty. The Court of Protection has authorised his deprivation of liberty since 2017. In August 2018 C expressed a desire to have a girlfriend but considered his prospects of finding one to be very limited. He had unsuccessfully tried conventional methods of meeting people but to no avail. C told his Care Act advocate that he wanted to have sex and wished to know whether he could have contact with a prostitute. C's Care Act advocate raised the matter with his social worker, and in due course, proceedings were commenced by the Local Authority to address the lawfulness of such contact.

7. It is unnecessary to go into great detail about the difficulties faced by C save to note that for a period of three years up to October 2017 he was detained under section 3 of the Mental Health Act 1983 due to the risk he presented of sexual and physical violence to others. Since that time C has been subject to a deprivation of liberty order, made in

part because of the risk of sexual and violent deviancy he presents when he suffers from intrusive thoughts. Given some of the behaviour he has exhibited, there is a serious question mark over whether he could safely be left alone with a sex worker. No doubt a duty of care would be owed to such a sex worker by those who commissioned her services and extensive disclosure of C's previous behaviour would be required. Alternatively, if C objected or there were overriding privacy concerns the project might anyway flounder. The judge recognised this when he said that there would have to be a careful risk assessment at a later stage and a further best interests hearing if section 39 of the 2003 Act was not an impediment: para [15]. Whether in the light of the disclosure that would be required it is realistic to contemplate a prostitute willingly becoming involved is a moot point; so too is whether public bodies, through the commissioning of care workers, could responsibly expose such a person to risk. As the parties before us recognised, even if the judge were to conclude at a later hearing that it was in the best interests of C to be provided with the services of a sex worker it would not necessarily happen. Indeed, the position of the Clinical Commissioning Group is that the risks to C and the sex worker may be too great for this potential scheme to be implemented whatever the correct approach to the 2003 Act may be

8. The judge received detailed evidence about the hypothetical practical steps that could be taken were C's wishes translated into reality through a care plan. It was envisaged that the services of a sex worker would be engaged with assistance from a charity known as The Outsiders Trust, a social charity providing support for disabled people. Many disabled people (whether or not they lack capacity to make particular decisions) find difficulty in forming intimate relationships. The charity vets sex workers before allowing them to advertise their services on its website. Anyone may then contact a sex worker to book a service. The judge observed "vetting really implies nothing more, or indeed less, than ascertaining that the sex worker is both respectful to and understanding of the needs and challenges faced by those with disabilities."

The Sexual Offences Act 2003

9. The 2003 Act brought about a complete revision of the criminal law relating to sexual offending. Sections 38 to 41 are concerned with offences by care workers for persons with a mental disorder. Section 79 adopts the definition of "mental disorder" found in section 1 of the Mental Health Act 1983.

10. A suite of offences was also created between sections 30 and 33 entitled "offences against persons with a mental disorder impeding choice" (sexual activity with a person with a mental disorder impeding choice, causing or inciting sexual activity by such a person, engaging in sexual activity in the presence of such a person, and causing such a person to watch a sexual act). It is not suggested that C's condition is such that the concept of "impeding choice" applies to him, namely that the person "is unable to refuse because of or by reason related to a mental disorder." The concept of "impeding choice" and capacity under the 2005 Act are not the same.

11. Sections 34 to 37 create offences of inducing persons with a mental disorder to engage in or watch sexual activity. The offences relating to inducing a person with a mental disorder to do something sexual require the agreement of the person concerned to have been obtained by means of "an inducement offered or given, a threat made or a deception practised by [the accused] for that purpose."

12. Section 38 criminalises sexual activity between a care worker and a person with a mental disorder in his care:

> "**38. Care workers: sexual activity with a person with a mental disorder**
>
> (1) A person (A) commits an offence if—
>
> (a) he intentionally touches another person (B),
>
> (b) the touching is sexual,
>
> (c) B has a mental disorder,
>
> (d) A knows or could reasonably be expected to know that B has a mental disorder, and
>
> (e) A is involved in B's care in a way that falls within section 42.
>
> (2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.
>
> (3) A person guilty of an offence under this section, if the touching involved—
>
> (a) penetration of B's anus or vagina with a part of A's body or anything else,
>
> (b) penetration of B's mouth with A's penis,
>
> (c) penetration of A's anus or vagina with a part of B's body, or
>
> (d) penetration of A's mouth with B's penis,
>
> is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.
>
> (4) Unless subsection (3) applies, a person guilty of an offence under this section is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years."

13. I have already set out Section 39.

14. Section 40 is entitled "Care workers: sexual activity in the presence of a person with a mental disorder":

> "**40. Care workers: sexual activity in the presence of a person with a mental disorder**
>
> (1) A person (A) commits an offence if—
>
> (a) he intentionally engages in an activity,
>
> (b) the activity is sexual,
>
> (c) for the purpose of obtaining sexual gratification, he engages in it—
>
> (i) when another person (B) is present or is in a place from which A can be observed, and
>
> (ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it,
>
> (d) B has a mental disorder,
>
> (e) A knows or could reasonably be expected to know that B has a mental disorder, and
>
> (f) A is involved in B's care in a way that falls within section 42.
>
> (2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.
>
> (3) A person guilty of an offence under this section is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years."

15. Section 41 concerns "Care workers: causing a person with a mental disorder to watch a sexual act":

> "**41. Care workers: causing a person with a mental disorder to watch a sexual act**
>
> (1) A person (A) commits an offence if—
>
> (a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,
>
> (b) the activity is sexual,
>
> (c) B has a mental disorder,
>
> (d) A knows or could reasonably be expected to know that B has a mental disorder, and
>
> (e) A is involved in B's care in a way that falls within section 42.
>
> (2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.
>
> (3) A person guilty of an offence under this section is liable—
>
> (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years."

16. Care workers are defined in section 42:

> "**42. Care workers: interpretation**
>
> (1) For the purposes of sections 38 to 41, a person (A) is involved in the care of another person (B) in a way that falls within this section if any of subsections (2) to (4) applies.
>
> (2) This subsection applies if—
>
> (a) B is accommodated and cared for in a care home, community home, voluntary home [children's home, or

> premises in Wales at which a secure accommodation service is provided], and
>
> (b) A has functions to perform in the course of employment [in the home or the premises] which have brought him or are likely to bring him into regular face to face contact with B.
>
> (3) This subsection applies if B is a patient for whom services are provided—
>
> (a) by a National Health Service body or an independent medical agency;
>
> (b) in an independent hospital; or
>
> (c) in Wales, in an independent clinic,
>
> and A has functions to perform for the body or agency or in the hospital or clinic in the course of employment which have brought A or are likely to bring A into regular face to face contact with B.
>
> (4) This subsection applies if A—
>
> (a) is, whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder, and
>
> (b) as such, has had or is likely to have regular face to face contact with B.
>
> (5) …"

It is section 42(4) that is engaged in the circumstances of this case.

17. The provisions of the 2003 Act fashioned to protect those with mental disorders replicate the statutory scheme to protect those under 18 from abuse by adults in a position of trust over them. A person aged 18 or older in a position of trust may not engage in sexual activity with a child, including a child aged 16 or 17 (section 16); cause or incite such a child to engage in sexual activity (section 17); engage in sexual activity in the presence of such a child (section 18) or cause such a child to watch a sexual act (section 19). Section 17 and section 39 of the 2003 Act are in materially the same terms. Very similar provisions cover familial child sex offences (sections 25 to 27). All have what is described as a "marriage exception" (see sections 23, 28 and 43) so that no offence is committed if the parties are married, in circumstances which otherwise would be criminal. If the sexual relationship pre-dated the assumption of a position of trust (section 24), predated the familial relationship (section 29) or predated the care relationship (section 44) there is no criminality.

18. The term "causes or incites" appears throughout the 2003 Act (as does the term "causes") beyond the three groups of sections to which I have referred. For example, it

is an offence to cause or incite a child under 13 to engage in sexual activity (section 8), to cause or incite another person to engage in sexual activity with a child (section 10) and to cause or incite someone to become a prostitute for gain (section 52).

The judge's conclusions on section 39 of the 2003 Act

19. The judge accepted the submission that making all the arrangements for C to visit and have sex with a prostitute would not amount to "causing" C to engage in sexual activity. It was common ground that C has a mental disorder and that the hypothetical conduct of the care worker would be "intentional". He also accepted as "axiomatic" that "it is imperative that any package of care is lawful so as not to place any carers liable to criminal prosecution" para [44]. He set out his conclusions from para [86]. The judge noted that he was not considering a plan for C to visit a sex worker and repeated the need for a future risk assessment given C's condition and characteristics. At [88] he identified "the central philosophy" of the 2003 Act as being to "protect those where the relationship itself elevates vulnerability". The legislation did not constrict the life opportunities of those with mental disorders and sought "to empower, libertate and promote the autonomy of those with mental disorders." At [90] he recognised that the 2003 Act brings professionals within the ambit of the criminal law,

> "if they abuse the power bestowed on them by the unequal nature of their relationships with vulnerable adults or children. As such the [2003 Act] is both promoting free and independent decision taking by adults with mental disabilities, whilst protecting them from harm in relationships where independent choices are occluded by an imbalance of power. It is tailored to promoting the right to enjoy a private life, it is not structured in a way that is intended to curtail it … in effect striking a balance between protecting those with mental disorders whilst enabling independent choices, in this most important sphere of human interaction. It follows, of course, that such choices are not confined to those which might be characterised as good or virtuous but extend to those which may be regarded, by some, as morally distasteful or dubious. Protection from discrimination facilitates informed decision taking. Those decisions may be bad ones as well as good. This is the essence of autonomy."

20. The judge continued at para [92] by noting that while section 39 criminalises care workers who cause or incite sexual activity, the activity contemplated here was desired by C who had capacity to decide whether or not to have sex but not to organise it with a sex worker. His core reasoning is at para [93]:

> "The mischief of Section 39 … as elsewhere in the legislation, is exploitation of the vulnerable. The provision is perhaps not drafted with pellucid clarity, but its objectives are identifiable. It is intended to signal unambiguous disapprobation of people employed in caring roles (i.e. care workers) who cause or incite sexual activity by a person for whom they are professionally responsible. The legislative objective is to criminalise a serious breach of trust and, as I have commented, attracts a significant custodial sentence. The words of the statute need to be given

> their natural and obvious meaning. They are intending to criminalise those in a position of authority and trust whose actions are calculated to repress the autonomy of those with a mental disorder, in the sphere of sexual relations. Section 39 is structured to protect vulnerable adults from others, not from themselves. It is concerned to reduce the risk of sexual exploitation, not to repress autonomous sexual expression. The language of the section is not apt to criminalise carers motivated to facilitate such expression."

21. The underlined sentence encapsulates the essence of the judge's interpretation of section 39 of the 2003 Act. A care worker who made all the arrangements for someone with a mental disorder in his care to have sex with a prostitute, in the way envisaged, would not have "caused" that person to engage in sexual activity because the actions would have been calculated to give voice to his autonomy in the sphere of sexual relations. There would have been no abuse by the care worker who had facilitated the person's independent choice.

22. The judge's conclusion on the interpretation of section 39 meant that it was unnecessary for him to consider section 3 of the Human Rights Act. That provision gives the court a power to interpret statutory provisions to avoid incompatibility with the Convention. He added that "it is important to record … that had I been required to have recourse to section 3, I would have had little hesitation in concluding that the Convention required the construction I had already arrived at." para [95]

Civil Courts and Declarations of the meaning of criminal statutes

23. The proceedings in the Court of Protection were unusual. Hayden J was not invited to make a best interests decision but was invited to express a view on the application of section 39 of the 2003 Act to a hypothetical set of facts. That view depended upon assumed facts of which there was detailed evidence. After giving judgment, the judge was invited to make a declaration but declined to do so. In the result, there is no "order" which is the subject of an appeal. The proceedings below were seen by all as a steppingstone. A further hearing considering a fully worked up care plan was envisaged. The judge himself recognised at more than one point in the judgment that the whole debate had a further hypothetical air. The characteristics of C raised a serious question about whether it would be appropriate to expose a sex worker to the risks of spending time alone with him.

24. It is well recognised that a civil court may grant a declaration clarifying the meaning of a criminal statutory provision or, if rarely, that future conduct would not be unlawful and, more rarely still, that future conduct would amount to a criminal offence. The circumstances in which a civil court should involve itself in these matters were discussed in the House of Lords in *R v. Her Majesty's Attorney General ex parte Rusbridger and another* [2004] 1 AC 357. The first question before the Appellate Committee was: what are the principles that determine whether a civil court should entertain a claim for declaratory relief on a question of criminal law?

25. In answering the question Lord Steyn at para [16] explained that the general principle was that "save in exceptional circumstances, it is not appropriate for a member of the public to bring proceedings against the Crown for a declaration that certain proposed

conduct is lawful and name the Attorney General as the formal defendant to the claim." He referred to *Imperial Tobacco Limited v. Attorney General* [1981] AC 718 which concerned an attempt to obtain a declaration in the face of pending criminal proceedings and continued:

> "All that need be said about the actual decision of the House in *Imperial Tobacco* is that it was based on the paradigm for the application of the restrictive principle. Viscount Dilhorne did, however, express himself more generally. He observed (742C-D):
>
> > 'My Lords, it is not necessary in this case to decide whether a declaration as to the criminality or otherwise of future conduct can ever properly be made by a civil court. In my opinion it would be a very exceptional case in which it would be right to do so.'"

26. Lord Steyn recognised that since 1951 it had become well established that there is jurisdiction for a civil court to make such a declaration. He referred to *Zamir and Woolf, The Declaratory Judgment,* 3rd ed., 2002, para 4.201 and *R v. Director of Public Prosecutions, Ex parte Camelot plc* [1997] 10 Adm. LR 93. He added, "[b]ut the exceptional nature of such a declaration by a civil court has on a number of occasions been emphasised." At para [19] Lord Steyn concluded:

> "Normally, the seeking of a declaration in a civil case about the lawfulness of future conduct will not be permitted. But in truly exceptional cases the court may allow such a claim to proceed."

27. In examining the criteria which should be applied in deciding whether a case was truly exceptional Lord Steyn observed at para [21] that "the starting point must be that the relief claimed may as a matter of jurisdiction be granted." He noted at para [23] that whether a case was fact sensitive or not was:

> "a factor of great importance and most claims for a declaration that particular conduct is unlawful will founder on this ground …[I]t has always been recognised that a question of pure law may more readily be made the subject-matter of a declaration: see *Munnich v. Godstone Rural District Council* [1966] 1 WLR 427, cited with approval by Lord Lane (with whom Lord Edmund-Davies and Lord Scarman agreed) in *Imperial Tobacco v Attorney General,* at 751F-752A."

28. At para [24] Lord Steyn accepted that there must be a cogent public or individual interest which could be advanced by the grant of a declaration. He cited *Airedale NHS Trust v. Bland* [1993] AC 789 as an example of an overwhelming interest of an individual in the grant of a declaration that the cessation of life-sustaining medical support was lawful but recognised that the jurisdiction was not limited to life and death issues: *Royal College of Nursing of the UK v. Department of Health and Social Security* [1981] AC 800.

29. The need for a cogent reason to grant a declaration that future conduct would or would not be criminal was explained further by Leggatt LJ in *R (Bus and Coach Association) v. Secretary of State for Transport* [2019] EWHC 3319 (Admin) at para [47] on the basis that "questions of criminal law are most appropriately decided by criminal courts in cases where the question whether a criminal offence has been committed has actually arisen." Woolf J had referred to the danger of usurping the jurisdiction of the criminal courts in *Attorney General v. Able* [1984] QB 795 at 807 to 808 dealing with an application for a declaration that certain conduct was criminal. More recently in *R (Hampstead Heath Winter Swimming Club) v. Corporation of London* [2005] 1 WLR 2930 at para [23] Stanley Burnton J warned:

> "The Court must exercise caution whenever it is asked to decide whether hypothetical acts may infringe the criminal law. Even greater caution is appropriate where the decision is to be made without the benefit of the representations of the body responsible for enforcing that law, in the present case the [Health and Safety Executive]. The Court must be particularly astute as to collusive litigation, but caution will be appropriate whenever there is a real possibility that not all relevant points have been argued or that relevant material is not before it."

30. By virtue of section 15 of the 2005 Act, the Court of Protection appears to have power to make declarations about the lawfulness of specific provisions in a care plan. The use of that power to declare lawful conduct which has the potential to be criminal should be confined to cases where the circumstances are exceptional and the reasons cogent. But the Court of Protection did not make a declaration in this case. Nonetheless, the principles I have summarised apply with equal force in circumstances where the court made a decision reflected in its judgment that certain hypothetical conduct would not amount to a criminal offence. Given all the circumstances of this case it is doubtful that it was appropriate to entertain this application and determine it. It is nonetheless necessary to deal with the substance of the matter not least because in coming to his decision, the judge took a different view of the law from Keehan J in *Lincolnshire County Council v. AB* [2019] EWCOP 43. He had concluded that involvement by care workers of the sort envisaged in this case would probably fall foul of section 39 of the 2003 Act. He decided that, in those circumstances, it would be contrary to AB's best interests "to have sexual relations with prostitutes [or for] the court to sanction the same."

The Interpretation of the 2003 Act

31. The Secretary of State for Justice has advanced arguments which might otherwise have been for the Director of Public Prosecutions ("DPP"). The Secretary of State is involved because of the way the issues developed before the Court of Protection. The original application was brought by the Local Authority, with C and the Clinical Commissioning Group as respondents. Even though the interpretation of a criminal statute was at the heart of the application, the DPP was originally neither served nor joined. The matter proceeded towards a hearing but then those representing C indicated that if their favoured interpretation of section 39 of the 2003 Act were rejected, they would seek a declaration of incompatibility with articles 8 and 14 of the Convention, pursuant to section 4 of the 1998 Act. It was in those circumstances that the Crown was notified in accordance with the rules and the Secretary of State for Justice was joined

as a respondent. In November 2020 the DPP was notified of the proceedings but declined to be joined.

32. Section 53A of the 2003 Act was also discussed below:

> "**53A Paying for sexual services of a prostitute subjected to force etc.**
>
> (1) A person (A) commits an offence if—
>
> (a) A makes or promises payment for the sexual services of a prostitute (B),
>
> (b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
>
> (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).
>
> (2) The following are irrelevant—
>
> (a) where in the world the sexual services are to be provided and whether those services are provided,
>
> (b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.
>
> (3) C engages in exploitative conduct if—
>
> (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
>
> (b) C practises any form of deception.
>
> (4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale."

33. This provision was inserted into the 2003 Act by the Policing and Crime Act 2009. It creates a strict liability offence for anyone who makes or promises payment to a prostitute who has in fact been exploited in the way described by the section. It followed a Home Office Report entitled "Tackling the demand for prostitution: a review" in November 2008 which explained the rationale:

> "Under the offence it will be irrelevant whether the sex buyer knew that the prostitute was controlled or not. It is argued that those who pay for sex will know that they could be paying for sex with a person who is controlled, and therefore they will think twice about what they are doing and their attitude towards those selling sex. This will also help to achieve the goal of reducing

> the size of the sex market by sending a clear message that those who pay for sex should consider the potential implications of their actions." p.15

34. It is an undoubted fact that many of those working as prostitutes have been exploited, for example as victims of modern slavery or trafficked to the United Kingdom. It is the regular experience of the courts to come across such cases in both the criminal and immigration contexts. Interveners before this court (charities called Nia and women@thewell) attest to its prevalence. It is irrelevant to liability under this section whether a defendant knew or had reason to believe that the prostitute in question had been exploited. The section was the subject of debate in these proceedings because although checks made before engaging the services of a sex worker might reduce the risk of committing the offence, they can rarely eradicate them altogether. Based on the arrangements contemplated there would necessarily be a risk that both C and his carers might commit an offence under section 53A.

35. Before returning to the terms of section 39 of the 2003 Act, I should note a recent decision of the Supreme Court, *In the matter of T (A Child)* [2021] UKSC 35, [2021] 3 WLR 643. It concerned a child whose characteristics required confinement in secure accommodation, but none was available. One question in the appeal concerned the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of his or her liberty in a restrictive placement other than in an approved secure children's home. Regulations provide that a children's home must only be used as secure accommodation if it has been approved for that purpose by the Secretary of State for Education (in England) or by the Welsh Ministers (in Wales); and that children's homes must be registered with Ofsted (in England) and Care Inspectorate Wales (in Wales). A person who carries on or manages a children's home without being registered commits an offence. At para [145] to [147] Lady Black considered the question whether the inherent jurisdiction should ever be used to sanction a placement which would involve the commission of a criminal offence. She considered that doing so would be the least bad option but emphasised that it should only ever happen if there were no alternative and immediate steps were taken to register the home. Lord Stephens dealt with this question at para [166] and following with his detailed consideration in the factual context of that case at [168] and [169]. He agreed with Lady Black and added at [173]:

> "The judgment of Lady Black is confined to the permissible use of the inherent jurisdiction in the context of the commission of an offence under section 11 of the Care Standards Act 2000. On that basis the decision in this case should not be taken as a wider-ranging precedent for the use of the inherent jurisdiction notwithstanding that the court is aware that some other criminal offence may be committed."

36. Although that case was concerned with the inherent jurisdiction relating to children the same approach applies in the context of "best interests" decisions made in the Court of Protection. The judge recognised as much in para [44] of his judgment quoted above at [19].

37. The starting point in interpreting any statute is the language itself. Causation is a common ingredient of a criminal offence. Moreover, a word or phrase that appears on

more than one occasion in a statute will be given a consistent meaning unless the context dictates otherwise.

38. Causation is often an issue in homicide cases. It has been the subject of much judicial consideration in that context and in connection with driving offences (causing death by dangerous or careless driving). There may be concurrent causes of an event or outcome. A defendant's action need not be the sole or even dominant cause of the event but must have been more than negligible or minimal. It follows that the defendant may be held to have caused a result even if his conduct was not the sole cause or could not by itself have brought about the result. Where there are multiple causes including where, for example, the deceased has contributed to the result, a defendant will remain liable if his act is a continuing and operative cause.

39. In *R v L* [2009] EWCA Crim 1249 (a case of causing death by careless driving) Toulson LJ, summarised the state of the law of causation by reference to *R v. Hennigan* [1971] 55 Cr App R 262, [1971] 3 All ER 133, *R v. Skelton* (1995) Crim LR 635 and *R v. Barnes* [2008] EWCA Crim 635 at para [9]:

> "Those authorities establish or recognise these principles: First, the defendant's driving must have played a part not simply in creating the occasion for the fatal accident, i.e. causation in the "but for" sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the later event to have been the cause of it, and should accordingly withdraw the case from the jury."

40. Then at para [16], having drawn the critical distinction between creating the circumstances in which something occurred and causing it in a legal sense, he continued at para [16]:

> "In short, it is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should fairly be regarded as having brought about the death of the victim by his careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury."

41. Causation was considered in an unusual context in *R v. Hughes* [2013] UKSC 56, [2013] 1 WLR 246. The case concerned the offence under section 3ZB of the Road Traffic Act 1988 of "[causing] the death of another person by driving a motor vehicle on a road" without a valid licence, while disqualified or uninsured. The defendant did not have a full driving licence and was uninsured. He was driving normally when an oncoming vehicle veered across the road and collided with his vehicle. The driver of the oncoming vehicle was killed. The defendant was prosecuted and convicted. Beyond being the driver of a vehicle on the road the defendant did nothing to cause the accident or death. The Supreme Court (Lord Hughes and Lord Toulson giving the only judgment) referred to the distinction between a cause "in the sense of a *sine qua non*" and a legally effective cause: para [23]. This echoed what Lord Toulson has said in *R v. L*. They concluded that the driving of Mr Hughes created the opportunity for his car

to be run into by the oncoming driver (para [25]) but that for the offence to be made out the defendant "must be shown to have done something other than simply putting his vehicle on the road so that it was there to be struck" (para [28]). They had earlier (para [19]) explained that Parliament could have used much clearer language if its intention had been to fix criminal liability on a simple "but for" or "*sine qua non*" basis.

42. It cannot be suggested that the many offences in the 2003 Act which import the ingredient of causation are concerned only with a "but for" test. The 2003 Act requires the conduct of the defendant to be an operative cause of the prohibited activity.

43. In my judgment the language of the 2003 Act, when it speaks of causation, is at first blush using the term in its ordinarily understood meaning in the criminal law. The question, then, is whether the extensive reading of language into the word "causes" in section 39 undertaken by the judge (see para [19] and [20] above) to restrict its ordinary meaning was correct. I am unable to agree that it was.

44. The legislative technique of the 2003 Act is to draw bright lines to reduce the risk of the abuse of those who are vulnerable and elsewhere to draw bright lines because it is necessary for certainty. An example of the latter is the age of consent itself. A line must be drawn which in one sense is arbitrary because it does not concern itself with harm or possible exploitation in the individual case or with an individual's physical or psychological maturity. Yet it provides certainty and reflects Parliament's view of the correct balance to strike in a sensitive matter of morality as well as reduction of risk to young people.

45. Examples of the former abound in the 2003 Act.

46. It is an offence under section 38 for a care worker to engage in sexual activity with a mentally disordered person in his or her care. That is so even if the person has capacity, is keen to engage in sexual activity and consents. The care worker and person cared for may have developed a deep emotional relationship that both wish to become sexually fulfilled but the law forbids it. It would be no defence for the care worker to argue that the person had capacity and had consented. Parliament has chosen this legislative technique to reduce risk to a group of vulnerable people. In doing so it has restricted the freedom of some who otherwise would be at liberty to have a sexual relationship, but it has done so in the wider interest of protecting the group. The same can be said of section 40 in the case of care workers engaging in sexual activity in the presence of a mentally disordered person (see para [14] above). The full agreement of the cared for person would not be a defence. Nor would it be for the purposes of section 25 concerning sexual activity with a child family member. That criminalises sexual activity with a consenting 16 or 17 year old child by a range of people within the relationships set out in section 27. It is possible to envisage in all these cases that there might be genuine, indeed considered and enthusiastic consent and that the potential defendant was acting at the bidding of the "victim". To paraphrase the judge, the actions would neither repress the autonomous sexual expression of that person nor involve a breach of trust, an abuse of power or exploitation. Yet exploration of such matters with a resulting burden of proof on the prosecution form no part of the ingredients of these offences. If the judge's interpretation of section 39 is correct it is difficult to see why it should not have a much wider application across a range of offences created by the 2003 Act which criminalise activity between people who would be free to engage in that sexual conduct but for the existence of the relevant relationship.

47. I have referred to the offences created by sections 16 to 19 of the 2003 Act relating to abuse of positions of trust: see para [17] above. It is difficult to conceive that it would be a defence to a charge under section 16 (sexual activity with a child) for the adult in a relevant position of trust to say that a 16 or 17 year old child was a consenting participant in the sexual activity who actively desired the sexual contact. Once more, Parliament has chosen to protect a group of people who are vulnerable by drawing bright lines which reduce risk to the cohort generally. There have been many instances of teachers and pupils falling in love, running away together and the like. It is immaterial that if the adult were not in a position of trust no offence would be committed.

48. Section 17 is the precise analogue of section 39. A person over 18 in a position of trust commits an offence if he intentionally causes or incites a child to engage in sexual activity. That is so even where the child is over the age of consent. Would a teacher who engaged a sex worker at the request of one of his 17 year old students, made all the arrangements including for payment and transport be able to avoid a conviction on the basis that there was no breach of trust and that he was not repressing the student's autonomous sexual expression but advancing it? Unless the word "causes" means different things in sections 17 and 39 that line of defence would be open to him on the judge's interpretation. No argument was advanced to the effect that the words "causes or incites" should mean different things in different places in Part 1 of the 2003 Act.

49. It follows that in my opinion the words "causes or incites" found in section 39 of the 2003 Act carry their ordinary meaning and do not import the qualifications identified by the judge which led him to conclude that the arrangements contemplated for C to engage with a sex worker would necessarily not result in criminal liability under section 39 of the 2003 Act. The litmus test for causation is that identified in the authorities. Do the acts in question create the circumstances in which something might happen, or do they cause it in a legal sense? Applying the approach of the Supreme Court in *Hughes* the care workers would clearly be at risk of committing a criminal offence contrary to section 39 of the 2003. By contrast care workers who arrange contact between a mentally disordered person and spouse or partner aware that sexual activity may take place would more naturally be creating the circumstances for that activity rather than causing it in a legal sense.

The Convention and the 1998 Act

50. It therefore becomes necessary to consider whether the Convention and 1998 Act require a different outcome using section 3 of that Act.

51. The argument advanced by the Local Authority and by C is that section 39 of the 2003 Act interferes with C's private life under article 8 of the Convention. It interferes because he is unable to make the arrangements with a sex worker himself and, although individuals not within the definition of "care worker" in section 42 might make the arrangements for him, the scope for his achieving his sexual desires is much reduced if his care workers cannot make them. The argument under article 14 proceeds on two bases: first, that C will be treated differently from a person without a mental disability who can make his own arrangements; or secondly that C suffers discrimination by reason of his mental disability by comparison with those without. A care worker could make these arrangements for someone in his care not suffering from a mental disorder.

52. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

53. The argument advanced under article 8 with reference to section 39 entails the underlying proposition that there is a positive obligation on the state to allow care workers to make arrangements for sexual contact with prostitutes for those in its care over the age of consent (or at least over 18) who are unable to make the arrangements themselves, at least in circumstances where contact with prostitutes is not generally prohibited. There is no sign of such a positive obligation having been recognised by the Strasbourg Court, nor of that court having recognised that article 8 entails a positive obligation on the state to allow the purchase of sex without fear of criminal sanction.

54. The Supreme Court has recently restated the correct approach where arguments under the Convention invite the domestic courts to march ahead of the Strasbourg Court: *R (AB) v. Secretary of State for Justice* [2021] UKSC 28, [2021] 3 WLR 494.

55. Lord Reed, with whom all members of the court agreed, discussed the principles between paras [54] and [59] of his judgment. He restated the general approach first enunciated by Lord Bingham of Cornhill in *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para [20] expressing the unanimous view of the House that domestic courts were required "to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less". In *R (SB) v. Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100, para [29] Lord Bingham observed that "the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies available to those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts and not only by recourse to Strasbourg". An additional rationale was identified by Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2008] AC 153, para [106] who referred to Lord Bingham's statement that domestic courts should keep pace with the Strasbourg jurisprudence, "no more, but certainly no less". He commented:

> "I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more'. There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a

> construction, the aggrieved individual *can* have the decision corrected in Strasbourg."

56. Lord Reed explained that

> "if domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them. But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected."

He also referred to *Smith v Ministry of Defence* [2013] UKSC 41, [2014] AC 52, in which Lord Hope, with whom Lord Walker, Lady Hale and Lord Kerr agreed, summarised the position at para [43]:

> "Lord Bingham's point [in *Ullah*, para 20] was that Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the Treaty obligation, into free-standing rights of the court's own creation."

57. At para [59] Lord Reed concluded:

> "It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. Indeed, that is the exercise which the High Court and the Court of Appeal undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court."

58. It is far from surprising that no case of the Strasbourg Court has been cited to us that recognises a human right to purchase the services of the prostitute or to be provided with such services by the state. The approach to prostitution across the Council of Europe states varies considerably. It ranges from closely regulated prostitution with neither prostitute nor client committing a criminal offence to outright illegality. Almost all Council of Europe states criminalise some aspects of the sex trade. The approach of both Sweden and Norway is notable. Prostitution is not an offence. An individual

selling sexual services commits no offence but a person who purchases such services does. Similarly, since 2017 in Ireland it has been an offence to purchase sex: see part 4 of the Criminal Law (Sexual Offences) Act 2017 amending earlier legislation.

59. The regulation, including criminalisation, of various aspects of the sex trade is a paradigm example of a sphere of activity redolent with complex and controversial moral judgments. It calls for generic risk assessments with the need for legislatures to strike difficult balances. The Strasbourg Court would allow a wide margin of appreciation to the parties to the Convention in this area. There is no sign in the Strasbourg case law of a recognition of positive obligations of the sort which underpin the argument that section 39, interpreted according to ordinary canons of statutory construction, would give rise to a violation of C's rights under article 8. That is sufficient to support the conclusion that article 8 of the Convention does not require these sections to be interpreted differently if that were possible using section 3 of the 1998 Act. Nonetheless the context of this argument is such that it must be regarded as unlikely in the highest degree that the Strasbourg Court would recognise a positive obligation of the type contended for in these proceedings.

60. Section 39 of the 2003 Act does not entail an interference with rights guaranteed by article 8 of the Convention but, in any event, it would satisfy article 8.2 were it necessary to do so.

61. Article 14 of the Convention provides:

> "**Prohibition of Discrimination**
>
> The enjoyment of the right and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion. National or social origin, association with a national minority, property, birth or other status."

62. It is common ground that a person with a mental disability falls within the concept of "other status" for the purposes of article 14. It is also clear that the effect of section 39 of the 2003 Act places C in a different position from others being looked after by care workers because of his mental disorder. Someone whose physical disability prevented him from making the practical arrangements to secure the services of a prostitute could enlist the assistance of a care worker without the potential of falling foul of section 39. In my view that is the appropriate comparator although for the purposes of article 14 in this case the decisive issue is that of justification.

63. The Supreme Court has recently reviewed the applicable principles when considering a challenge under article 14 of the Convention to social welfare provisions: *R (SC, CB and others) v. Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428. Lord Reed gave the sole judgment. He discussed article 14 between paras [157] and [162]. A low intensity of review was generally appropriate in cases which concerned judgements on social and economic policy, including welfare benefits. The judgement of the legislature or executive would be accepted unless it was manifestly unreasonable. At para [160] he said:

> "It may also be helpful to observe that the phrase 'manifestly without reasonable foundation', as used by the European court, is merely a way of describing a wide margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues."

64. Section 39 of the 2003 Act is concerned with sensitive moral and ethical issues in the field of penal policy. One of its purposes is to throw a general cloak of protection around a large number of vulnerable people in society with a view to reducing the risk of harm to them. To the extent that the provision discriminates against people in C's position by comparison with others in the care of the state (or more broadly) it represents the considered view of Parliament striking balances in these difficult areas. Such a view should ordinarily be respected. In my judgment, the discriminatory effect of section 39 cannot be stigmatised as being manifestly without reasonable foundation. The statutory provision is clearly justified.

65. There is no basis for concluding that compliance with the Convention requires the interpretation of section 39 of the 2003 Act to be read down by using section 3 of the 1998 Act.

66. It follows that the arrangements for securing the services of a sex worker envisaged in the evidence before the judge would place the care workers in peril of committing an offence contrary to section 39.

67. In view of that conclusion on the interpretation of section 39 of the 2003 Act it is unnecessary to consider the wider argument which the Secretary of State seeks to advance in his amended grounds of appeal, namely that any involvement by care workers in facilitating C's use of a prostitute would be contrary to public policy and on that basis should never be sanctioned by a court. The point was not, in any event, argued fully before the judge. In these circumstances I would refuse permission to amend the grounds of appeal.

Conclusion

68. For the reasons I have given I would allow the appeal on the basis that the arrangements envisaged for securing the services of a sex worker would place the care workers concerned in peril of committing an offence contrary to section 39 of the Sexual Offences Act 2003. C's care plan cannot proceed based on such arrangements for the reason identified by the judge, namely "it is imperative that any package of care is lawful so as not to place any carers liable to criminal prosecution."

LADY JUSTICE KING:

69. I would allow the appeal for the reasons given by the Lord Chief Justice.

70. As Baker LJ explains, achieving autonomy for an incapacitated adult lies at the heart of the Mental Capacity Act 2005. It is not however the role of the Court of Protection to endorse an act which would be unlawful. Under the 2003 Act, the motive of the care worker, no matter how laudable, and the consent of the person with a mental disorder

who wishes to engage in sexual activity are each irrelevant. In those circumstances, I cannot see how on any plain reading of the statute, the extensive arrangements necessary in order for C to engage in sexual relations with a sex worker, and without which sexual activity with a third party would be impossible for him, can be held to be outside the terms of section 39(1) of the 2003 Act.

71. There are, however, many less extreme and benign situations which day in and day out touch on the lives of people up and down the country; Baker LJ gives the example of a care worker arranging private time for a long married couple which she knows is likely to include sexual activity in those circumstances. Such a case is wholly different from that of C and the question of whether it is appropriate to make a declaration under s15 of the 2005 Act in such cases is something to be left open for argument in the appropriate case.

LORD JUSTICE BAKER:

72. I agree that the appeal must be allowed for the reasons given by the Lord Chief Justice. The powers invested in the Court of Protection under the Mental Capacity Act 2005 do not include the power to "decide" whether or not a proposed course of action is criminal and a declaration under s.15 of that Act that the course of action proposed in this case was lawful would be contrary to established authority and wrong in law. As the cases cited by my Lord demonstrate, the circumstances in which such a declaration would be justified must be exceptional and the reasons for making the declaration cogent. In this case I see no cogent reasons for making such a declaration and indeed every reason to refrain from doing so. The course of action proposed in this case would not only place the care workers at jeopardy of prosecution under s.39 of the Sexual Offences Act 2003 but would also expose C to the risk of prosecution under s.53A.

73. Underpinning Hayden J's judgment was what he described (at para [59]) as the "evolved and evolving understanding of the importance of respecting the autonomy of adults with learning disabilities." The principle of autonomy is indeed part of the bedrock of the Mental Capacity Act. But it is not the only principle guiding decisions of the Court of Protection. In *Re JB (Capacity: Sexual Relations)* [2020] EWCA Civ 2691, this court was required to consider the question whether a person, in order to have capacity to consent to or engage in sexual relations, must understand that the other person must consent. Answering the question required the court to balance what I described as "three fundamental principles":

> "4. The first is the principle of autonomy. This principle lies the heart of the Mental Capacity Act 2005 and the case law under that Act. It underpins the purpose of the UN Convention on the Rights of Persons with Disabilities 2006, as defined in article 1:
>
> > "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

> 5. The second is the principle that vulnerable people in society must be protected. As this court observed in *B v A Local Authority* [2019] EWCA Civ 913 (at para 35):
>
> > " … there is a need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation."
>
> Striking a balance between the first and second principles is often the most important aspect of decision-making in the Court of Protection. The Mental Capacity Act Code of Practice expresses this in simple terms (at para 2.4):
>
> > "It is important to balance people's right to make a decision with their right to safety and protection when they can't make decisions to protect themselves."
>
> 6. There is, however, a third principle that arises in this case. The Mental Capacity Act and the Court of Protection do not exist in a vacuum. They are part of a wider system of law and justice. Sexual relations between two people can only take place with the full and ongoing consent of both parties. This principle has acquired greater recognition in recent years within society at large and within the justice system. The greater recognition has occurred principally in the criminal and family courts, but it must extend across the whole justice system. The Court of Protection is concerned first and foremost with the individual who is the subject of proceedings, "P". But as part of the wider system for the administration of justice, it must adhere to general principles of law …."

74. The same three principles apply in the present case. The Court of Protection strives to promote the autonomy of incapacitated adults to enable them as far as possible to live with the same degree of freedom enjoyed by those who have capacity whilst having regard to their need for safety and protection. I agree with Hayden J that understanding about the importance of respecting the autonomy of adults with learning disabilities has evolved and is still evolving. But as part of the wider system for the administration of justice, the Court has to adhere to general principles of law. Alongside the growing awareness of the autonomy of people with learning disabilities there has been an evolution of thinking about the treatment of people who sell sexual services. Where Parliament has expressly decided that certain conduct should be a criminal offence, it is no part of the Court of Protection's role to declare that it is lawful.

75. I stress, however, that we are only concerned with the judge's decision in this case, namely that care workers would not commit a criminal offence under s.39 by making practical arrangements for C, a man with a mental disorder, to visit a sex worker. I recognise that there are other situations where care workers are asked to assist people who have the capacity to consent to or engage in sexual relations but lack capacity in other respects, for example to make decisions about their care, treatment or contact with other people. One example is where a person with dementia living in a care home wishes to spend time with his or her partner at the family home. Another example is where a

young person wishes to meet people of their own age and make friends. In both cases, one consequence may be that the incapacitated adult engages in sexual relations. I envisage that it might be appropriate in those circumstances for the Court of Protection to endorse a care plan under which care workers facilitate or support such contact and to make a declaration under s.15 of the Mental Capacity Act that the care plan is both lawful and in P's best interests. But in making these observations I emphasise three important points. First, the merits of making such a declaration will turn on a thorough analysis of the specific facts of the individual case. Secondly, in making such a declaration, the court may have to consider carefully whether the steps proposed under the care plan have the potential to amount to a criminal offence under s.39. Thirdly, as set out in the cases cited above, any declaration would not be binding on the prosecuting authorities, although no doubt it would be taken into consideration in the event of any subsequent criminal investigation.