



Neutral Citation Number: [2024] EWCA Civ 1579

Case No: CA 2024 001185

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM COURT OF PROTECTION**  
**Mr Justice Poole**  
**[2024] EWCOP 8**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/12/2024

**Before:**

**LADY JUSTICE KING**  
**LADY JUSTICE ASPLIN**  
and  
**LORD JUSTICE BIRSS**

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**Between:**

**Liubov MacPherson**

**Defendant/  
Appellant**

**- and -**

**Sunderland City Council**

**Claimant/  
Respondent**

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

Hearing date: 3 December 2024  
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**Approved Judgment**

This judgment was handed down remotely at 11.00am on 18 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lady Justice King:**

1. The issues dealt with in this judgment arose as a preliminary issue in a substantive appeal by Lioubov MacPherson (the Appellant) from an order made by Poole J sitting in the Court of Protection in Newcastle on 22 January 2024. By his order the judge sentenced the Appellant to an immediate custodial sentence for a total of four months for contempt of court. His judgment can be found at [2024] EWCOP 8.

*Background in brief*

2. P is the Appellant's daughter and a protected person who was until recently, the subject of Court of Protection proceedings which had lasted for a number of years. P was diagnosed and is currently treated for paranoid, treatment resistant schizophrenia, which causes her amongst other problems, to have delusions about being persecuted by others. There have been periods of time when P has been detained under the Mental Health Act and is currently in a placement judged "outstanding" by the Care quality Commission. P has the benefit of an Independent Advocate who whilst recognising that P would prefer to be living with the Appellant, is entirely content with the care and treatment that P is receiving in her placement.
3. In January 2023, the judge had found the Appellant to be in contempt of court ("the 2023 contempt proceedings") for having breached injunctive orders made in 2022 in the Court of Protection proceedings. These orders said that the Appellant must not post or, having already posted, must take down, material relating to P which she had placed on the internet. The Appellant admitted the relevant breaches and a sentence was imposed of 28 days imprisonment concurrent for each established breach suspended for 12 months. It follows that the currency of the suspended sentence passed on 16 January 2023 expired on 15 January 2024. Poole J's judgment in relation to the 2023 committal proceedings can be found at [2023] EWCOP 3.
4. On 19 June 2023 in the course of the continuing Court of Protection proceedings the court made further injunctions supported by a penal notice against the Appellant. The injunctions included a prohibition whereby the Appellant should not "cause to be publicised on any social media, video or streaming service including YouTube, any video or recording of P recorded at any date."
5. The Appellant appealed against the making of the injunction. Permission was refused as totally without merit.
6. Following the refusal of permission to appeal against the making of the injunctions, the Appellant wrote to the Court of Appeal indicating her intention to post more videos on social media and to reinstall various old posts which had been taken down. Shortly thereafter the Appellant relocated to France where she has remained since and from where she attended Court for the hearing of her appeal by remote link. Having left the jurisdiction in early September 2023, the Appellant resumed posting videos, articles and audio recordings on X and YouTube in breach of the injunctions. It follows therefore that these breaches to the injunctions, subsequently admitted by the Appellant, were committed during the currency of the suspended sentence imposed in January 2023.

7. On 15 November 2023, the Local Authority issued fresh committal proceedings. The judge was satisfied that the Appellant deliberately breached the injunction after she moved from England to live in France knowing she would be beyond the reach of the law. On 7 December 2023 the judge issued a bench warrant for the Appellant's arrest. In the event the Appellant did not return to this country and on 22 January 2024 she attended the committal hearing remotely from France ("the 2024 committal proceedings"). The judge imposed an immediate sentence of imprisonment of three months concurrent for each of the breaches that he found she had committed in September 2023. In addition he imposed the 28 day suspended sentence of imprisonment that he had passed in the 2023 contempt proceedings to run consecutively making a total of four months immediate imprisonment.
8. As recorded by the judge, the Appellant "believes that her daughter is indeed being persecuted by others, namely healthcare and other professionals and the courts. She describes all healthcare professionals who have dealings with P to be corrupt and that they are part of a conspiracy to torture P." The judge went on to note that the Appellant had made her position quite clear in numerous previous court hearings and correspondence and complaints as well as in in documentation she had presented to the court at the committal hearing.
9. On 21 March 2024 the Appellant filed an Appellant's Notice accompanied by three draft Grounds of Appeal. Pursuant to section 13(3) of the Administration of Justice Act 1960, permission to appeal is not required in order to appeal committal proceedings.
10. Unfortunately, there has been some considerable delay in the appeal being heard. This was partly as a result of difficulties in obtaining legal aid for the Appellant, but also an earlier listing had to be adjourned as a transcript of a hearing had been sought and not obtained. In the event no such transcription will be obtained as the quality of the audio was too poor to enable a transcription to be effective. The Court has however had the benefit of an approved transcript of the judge's judgment.

*The current position*

11. On 6 November 2024, Mr Micheal Barrett, an experienced Court of Protection solicitor together with counsel Mr Oliver Lewis, a specialist Court of Protection counsel, and Beth Grossman, specialist media counsel, had a remote conference with the Appellant. During the course of the conference each of the three lawyers had concerns about the Appellant's capacity to conduct the appeal proceedings. As required under their professional obligation, those concerns were raised with the Appellant and she was invited to participate in a capacity assessment which was arranged for 18 November 2024 with Dr Pramod Prabhakaran a psychiatrist experienced in conducting capacity assessments for the Court of Protection. The Appellant declined to co-operate with such an assessment in strong terms.
12. Mr Lewis consulted the Bar Council guidance on incapacity and spoke also to their ethics advisors. Acting on that advice, an application was made by Mr Barrett for permission to instruct Dr Prabhakaran under Rule 35.4 CPR 1998 (Permission to instruct an expert) to permit him to undertake a paper based assessment of the Appellant's capacity to conduct proceedings.

13. Accordingly on 15 November 2024, I gave case management directions for the drafting of a letter of instruction and the preparation of a paper assessment. Dr Prabhakaran filed a report on 26 November 2024. In that report he set out his instructions and details of the relevant information he obtained from the documents which accompanied his instructions, including emails from the Appellant written by her in somewhat bizarre terms, as recently as 22 November 2024.
14. Acknowledging the limitation of a paper based assessment, Dr Prabhakaran concluded that there was no evidence of a disorder of thought on the Appellant's part, but there was on the balance of probabilities, evidence of persistent persecutory ideation relating to various professionals and institutions. By reference to the material made available to him, he said:

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

“In my opinion, on balance of probabilities, the information available suggests the possibility of a delusional disorder.”
16. So far as the functional test found in section 3 of the Mental Capacity Act is concerned, Dr Prabhakaran concluded that there was no evidence to suggest that the Appellant could not understand or retain information but that: “due to her firmly held beliefs which persist despite evidence against these, on balance, her ability to use and weigh up information relevant to the court proceedings is likely to be affected as a result”. Therefore, he said, on the balance of probabilities she was “unable to make decisions regarding the conduct of these proceedings”.
17. Whilst the report is set out in a rather unorthodox way, it is clear that on the basis of his paper assessment, that Dr Prabhakaran was of the view that on the balance of probability the functional test was satisfied in that the Appellant was unable to make decisions regarding the conduct of the proceedings due to an inability to use and weigh up information relevant to the court proceedings and that on the balance of probabilities the information available suggests the “possibility of a delusional disorder”.

*Hearing on 3 December 2024*

18. The Court had the benefit of a note by counsel for the Appellant drafted by Mr Lewis setting out the background and presenting the Court with three possible options which it may have felt were available to it. It should be noted that Mr Lewis, and those instructing him, were at all times diligent in reminding the Court that they did not act upon the Appellant's instructions and were not making submissions to the Court, but

merely assisting by way of providing information and presenting the Court with a number of alternative ways to progress the matter.

19. Options 1 and 2 were that the Court at the listed hearing of the appeal on 3 December 2024 either (Option 1); declared that the Appellant had litigation capacity or (Option 2); declared that she lacked litigation capacity. Both of these options were quickly dismissed, there being no sufficient evidential basis upon which this Court could have concluded either way. The focus of the hearing was therefore on Mr Lewis' "Option 3" an option favoured also by the Local Authority.
20. Option 3 was that that Court could make an interim declaration pursuant to Section 48 of the Mental Capacity Act 2005 ("MCA 2005") on the basis that the Court had "reasons to believe that the Appellant lacks capacity". Option 3 envisioned the Court of Appeal then transferring the case to a Tier 3 (High Court) Judge of the Court of Protection in order to determine the matter of capacity before the matter was returned to the Court of Appeal to hear the substantive appeal on a "firmer capacity footing".
21. The Appellant expressed her views about Option 3 clearly and strongly over a remote link. She became at times agitated and unsurprisingly, had difficulty in limiting her submissions to the issue of the necessity (or otherwise) for there to be a capacity assessment and determination. The Court was obliged to turn off the Appellant's microphone on a number of occasions during the hearing when she was unable to restrain herself or to listen to what was being said by others.
22. The Appellant told the Court that she was not prepared to undergo any form of capacity assessment in England. At one stage she seemed to suggest that she may be willing to co-operate with an assessment in France. It was unclear to me whether, given the provisions of the MCA 2005 she envisaged that such an assessment would be conducted remotely by a UK psychiatrist, as it would need to be, or whether she was suggesting an assessment by a French psychiatrist which clearly would not be of assistance as such an assessment would not be based on the UK law on mental capacity.
23. The Appellant said that the issue about capacity arose from "faulty and lying notes" which her legal team had made following the conference in November. She said that her adamant refusal to be assessed stemmed from the fact that her daughter had been wrongly assessed as lacking capacity by a "so called independent psychiatrist". She indicated that the issue of her daughter's capacity is before the European Court of Human Rights. She repeated her anger and upset about the alleged treatment of her by her lawyers saying that they were not fit to be instructed and had "shamelessly lied and made false notes". The Appellant quite understandably and with some justification regarded a further delay to the determination of her appeal as "intolerable".
24. For my part I can see no basis for the allegations that the Appellant makes against her legal team. On the contrary, they have acted wholly in accordance with their respective codes of professional practice and having had concerns about the Appellant's capacity to prosecute her appeal, brought the matter to the Court for directions.
25. Having read not only the psychiatric report, but also the evidence in support and having heard the submissions of the Appellant together with the observations from Mr Lewis and Mr Karim KC on behalf of the local authority the Court rose to consider the position. We had in mind the limitations of the paper psychiatric assessment but having

considered all the evidence, we concluded that we had reason to believe that the Appellant lacked capacity in relation to the appeal and that accordingly, Option 3 was the appropriate course to adopt. I set out below the legal route by which we reached that conclusion.

*The Legal Context: Mental Capacity Act 2005*

26. Section 48 of MCA 2005 provides that:

“The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if—

(a) there is reason to believe that P lacks capacity in relation to the matter,

(b) the matter is one to which its powers under this Act extend, and

(c) it is in P's best interests to make the order, or give the directions, without delay.”

27. Rule 10.10 of the Court of Protection Rules 2017 provides, so far as relevant:

1. The court may grant the following interim remedies-

a) ...

b) an interim declaration.

28. Those powers are routinely used by courts of first instance pending the carrying out of a full capacity assessment or if one has already been carried out and is the subject of dispute, the hearing of the contested issue. The question arises however as to the powers of the Court of Appeal to make such an interim declaration should it conclude, as it has done in this case, that there is reason to believe that the Appellant lacks capacity in relation to this appeal and that it is in her best interest to make an interim declaration.

29. Part 20 of the Court of Protection Rules 2017 applies to appeals against any decision of the Court of Protection. Rule 20.2(1)(a) provides that an “appeal judge” means a judge of the court to whom an appeal is made.

30. Rule 20.13 of the Court of Protection Rules 2017 provides as follows:

i) In relation to an appeal, an appeal judge has all the powers of the first instance judge whose decision is being appealed.

ii) In particular, the appeal judge has the power to-

a) affirm, set aside or vary any order made by the first instance judge;

b) refer any claim or issue to that judge for consideration;

c) order a new hearing;

d) make a cost order.

- iii) The appeal judge’s power may be exercised in relation in whole or part of an order made by the first instance judge.
31. It follows therefore that under the Court of Protection Rules, this court has all the powers of the court of the first instance judge and in particular may refer any issue to that, or indeed any other, Court of Protection judge for determination.
32. It should be said for completeness sake that whilst this appeal has been determined by reference to the Court of Protection, all appeals in the Court of Appeal are governed by the Civil Procedure Rules 1998 (“CPR 1998”) and the same outcome could be achieved in the following way where the issue of capacity is raised in an appeal which has come to the court other than from the Court of Protection:
- i) Part 25 CPR 1998 Interim Remedies: Rule 25.1(1)(b) states that the court may grant an interim declaration.
  - ii) Part 52 CPR 1998 Appeals: Rule 52.20 states:
    - (1) In relation to an appeal the appeal court has all the powers of the lower court.
    - (2) The appeal court has power to—
      - (a) affirm, set aside or vary any order or judgment made or given by the lower court;
      - (b) refer any claim or issue for determination by the lower court;
      - (c) order a new trial or hearing;
      - (d) make orders for the payment of interest;
      - (e) make a costs order.
  - iii) Rule 52.1(3)(c) states that lower court means the court or tribunal from whose decision an appeal is brought.
33. Therefore, given the CPR 1998 provide that the Court of Appeal has all the powers of a lower court (whether that be the Court of Protection or otherwise) in relation to an appeal, it can both make an interim declaration and refer any issue for determination by that lower court.

### *Outcome*

34. Having considered the psychiatric report and having heard the submissions in particular of the Appellant, I have unhesitatingly come to the conclusion that there is reason to believe that the Appellant lacks capacity in relation to this appeal. Although that is the case, on the evidence presently before the Court, it would not be in a position to make a final declaration of litigation incapacity. Not only is it critical that she is given further opportunity to be involved directly in any assessment, but also that any report prepared in preparation for the determination of the issue approaches the question of whether the Appellant is unable to make a decision “about a matter” for the purposes of section 2 MCA 2005 by reference to the judgment of the Supreme Court in *A Local Authority v JB* [2021] UKSC 52; [2022] AC 1322. Lord Stephens said in his judgment at [66] and

[79] that the proper approach to the determination of capacity should be considered in the following order namely:

- i) Whether P is unable to make a decision for himself in relation to the matter [65-77] (s.3 MCA 2005– the functional test).
- ii) The inability to make a decision is “because of” an impairment of, or disturbance of the functioning of, the mind or brain (s.2(1) MCA 2005– the diagnostic or mental impairment test).

35. Importantly at paragraph 79 Lord Stephens said:

“The second question looks to whether there is a clear causative nexus between P’s inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P’s mind or brain.”

36. It should be noted that the MCA 2005 Code of Practice at para. 4.11 is in direct contradiction to the judgment in *Re JB* and stipulates the two-stage test of capacity should be approached with the first stage being to establish whether someone has an impairment (i.e. the diagnostic test) and only then to move onto the functional test. A new draft Code dated June 2022 but yet to be implemented, adopts the *Re JB* approach. Regardless of the fact that the new Code has not yet been implemented, all assessments should comply with the Supreme Court approach (*see Hemachandran v University Hospitals Birmingham NHS Foundation Trust* [2024] EWCA Civ 896 para.[140] (iii)).

37. The issue of capacity having been raised it must be determined. That does not mean that there must inevitably be an interim declaration. It is a requirement of Section 48 MCA 2005 that the court not only has reason to believe that the Appellant lacks capacity in relation to this appeal, but also that it is in her best interest to make the order. Conscious as I am of the considerable delay that there has already been in the hearing of this appeal through no fault of the Appellant’s own, I am nevertheless satisfied that Option 3 is in her best interests notwithstanding that it will lead to further delay. The appeal relates to the Appellant’s liberty. Should she fail in her appeal she will remain subject to an immediate sentence of imprisonment. If she lacks capacity, it is vital that she has the benefit of representation through the Official Solicitor regardless of whether she ultimately feels able to co-operate with the process.

38. Option 3 when considered against the backdrop of the legislation will result in the following orders:

- i) There will be an interim declaration that there is a reason to believe that the Appellant lacks capacity in relation to the conduct of her appeal against the committal order made by Mr Justice Poole 22. January 2024.
- ii) Pursuant to Rule 20.13(2)(b) of the Court of Protection Rules the following issues will be referred to a Tier 3 (High Court) Judge for determination:
  1. The Appellant’s current capacity
  2. Consideration of the Appellant’s capacity as of 22 January 2024.



- iii) The Official Solicitor is invited to act as litigation friend on an interim basis.
39. In the meantime, the stay of the sentence of imprisonment imposed at the committal hearing will continue until further order, the bench warrant will be discharged and this appeal will stand adjourned.
40. As emphasised in open court and repeated here, the injunctions imposed by Poole J in June 2023 will remain in force and the Appellant should therefore continue to regard herself as bound by the terms of those injunctions and to remember that any breaches or further breaches of them will, once again, place her in contempt of court.
41. Once the issue of the Appellant's capacity has been determined the matter will be referred back to the Court of Appeal for further directions in relation to the appeal.

**Lady Justice Asplin:**

42. I agree.

**Lord Justice Birss:**

43. I also agree.