



Neutral Citation Number: [2020] EWCOP 24

Case No: 13490242

**IN THE COURT OF PROTECTION**  
**SITTING IN SHEFFIELD [REMOTELY]**

As from:  
Sheffield Combined Court  
West Bar  
Sheffield

Date: 20/05/2020

**Before:**

**THE HONOURABLE MR JUSTICE COBB**

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**Between:**

**A Local Authority**  
**- and -**  
**AW**  
**(by the Official Solicitor as his Litigation Friend)**

**Applicant**  
**Respondent**

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**Miss Jacqueline Thomas QC and Mr Brett Davies** (instructed by **Community Law Manager**) for the Applicant (Local Authority)  
**Mr Parishil Patel QC** (instructed by **Simpson Millar**) for the Respondent (AW)

Hearing date: 7 May 2020  
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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**THE HONOURABLE MR JUSTICE COBB**

This judgment was delivered in public. 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 children 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.

## **The Honourable Mr Justice Cobb:**

### *Introduction*

1. This judgment does not establish any great or new point of legal principle. It sets out my reasoning in reaching conclusions in a case which has the characteristics of many which come before the Court of Protection: namely, where the subject of the application is believed to have capacity in making decisions in relation to certain aspects of their life, but not in others; where there are, in such cases, inevitably ‘grey areas’ in between. It recognises the importance of treating each capacity issue as decision-specific and time-specific, as the judicial guidance in *PC v City of York Council* [2014] 2 WLR 1<sup>1</sup> and *B v A Local Authority* [2019] EWCA Civ 913; [2019] 3 WLR 685<sup>2</sup> makes clear. Where there are true ‘grey areas’, it illustrates the value of giving the parties and the court the chance, while at all times maintaining an eye on the key objectives laid out in the *Court of Protection Rules 2017*<sup>3</sup>, to examine the evidence forensically, test the assessments and expert views, and achieve, where possible, a degree of clarity in the best interests of the subject. In cases such as this, the “right of every individual to dignity and self-determination” compete hard with the “need to protect individuals and safeguard their interests where their individual qualities or situation place them in a particularly vulnerable situation” (*B v A Local Authority* at [35]).
2. This hearing has been conducted remotely using Skype for Business. It was, I am satisfied, a lawfully constituted hearing<sup>4</sup>. It was rightly listed to be in ‘Open Court’ and at the outset of the hearing I raised with counsel the question whether they were satisfied that relevant steps had been taken to ensure that the proceedings were sufficiently accessible to those who may have a wish to attend. I had in mind the terms of the ‘Guidance on Remote Hearings’ (31.3.2020):

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<sup>1</sup> At [35]: “The determination of capacity under MCA 2005, Part 1 is decision specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person specific. But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of MCA 2005, ss 1 to 3 which requires the court to have regard to ‘a matter’ requiring ‘a decision’.”

<sup>2</sup> “Capacity determinations are specific to particular matters that arise for decision at the time a determination is required to be made about a person’s capacity” at [7], and see also [36]; see also *A Local Authority v TZ* [2014] EWHC 973 (COP) at [25] “A person may have capacity in respect of certain matters but not in relation to other matters. Equally, a person may have capacity at one time and not at another. The question is whether, at the date on which the court is considering capacity, the person lacks the capacity in issue”.

<sup>3</sup> *Rule 1.1(3) Court of Protection Rules 2017*, notably having regard to the issues of proportionality, fairness, and expense.

<sup>4</sup> Pursuant to *Court of Protection Rules 2017 r 3.1(2)(d)*: “hold a hearing and receive evidence by telephone or any other method of direct oral communication”.

“Transparency is central to the philosophy of the Court of Protection. Whilst it will be difficult to ensure that a Skype hearing is as accessible to the public as an ‘Open Court’, this does not mean that transparency can become a casualty of our present public health emergency”.

Although the default position for an attended hearing is that the court will sit in public (per *rule 4.3(1)(a)*), I am also alive to the fact that where there is a good reason, the court may order that the hearing is in private. It is acknowledged that presently it is not practical to follow the ‘default’ practice, and the essential tenets of *Practice Direction 4C* are unworkable. I asked the parties whether any member of the press had indicated an intention to attend, and was told that they had not. I was satisfied, with the concurrence of the parties, that it was appropriate to proceed. In this regard, Hayden J’s guidance offers the reassurance that:

“... to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having regard in particular to the public health situation which has arisen”.

3. The hearing has, of course, been electronically recorded.

#### *The parties*

4. This application concerns the respondent, AW. Within these proceedings he is represented by the Official Solicitor as his litigation friend. He is a 35-year old man, and is currently living in a residential care placement for adults with learning disabilities, which I shall call Windmill House. He has been there for about 7 years. AW suffers from learning disabilities, and an autistic spectrum disorder.
5. AW has not personally attended or observed the hearing, nor has he met me; I note that some months ago, Ms Hurst, his solicitor, raised both options with AW and he indicated that he did not wish to engage in this process in either way.
6. The application was brought by the Local Authority (the ‘Local Authority’) on 21 August 2019, seeking declarations and orders to enable it properly to safeguard AW, whilst respecting his autonomy under the *Mental Capacity Act 2005* (‘MCA 2005’).
7. AW’s mother, LJ, is aware of the proceedings but has played no direct part in the hearing. At an earlier hearing in February 2020, I directed that she should or could be invited to apply for party status. She did not do so, but advised the solicitor-advocate for the Local Authority, with whom she discussed the issue, that she wished to “*leave it to the LA and the court...[I] just want AW to be protected.*” She was clear that AW has become “*...shutdown...*” by the litigation which was having an adverse impact upon her son. As it happens, I noted in the filed papers a record of the fact that AW had earlier taken a view that he would not wish his mother to be a party to the proceedings as “*it’s about private stuff*”.

*Background facts*

8. As I said above ([4]), AW has a diagnosis of mild learning disability and autistic spectrum disorder. He is described<sup>5</sup> as having “many skills”, and is assessed as someone who:

“... can appear very able and without further examination would commonly appear more able than he is. This is due to his keenness to engage with others, relatively good self-presentation skills, verbal skills, and ability to learn phrases. He is a very likeable man. It is easy to underestimate his vulnerability and difficulty to apply abstract concepts of safety in relationships due to his autism.”

He is socially vulnerable, and prone to aggressive outbursts.

9. AW was raised through his childhood and into adulthood at home with his mother (his parents were separated) until 2013. As a child he had attended mainstream primary school, but was transferred to a series of ‘special schools’ thereafter, attaining no academic qualifications. I am told that he can read and write, and has worked as a charity volunteer, and in a sandwich shop.
10. As an adult, AW has pursued gay relationships. He spends much time, and derives pleasure, from accessing gay websites, gay chat rooms and dating sites; he enjoys watching others performing sexual acts in the chat rooms, which he finds sexually arousing. While his mother was accepting of this when he was living at home, it nonetheless raised concerns for her and those caring for him, particularly given his social vulnerability. The concerns focussed in the main on the matters on which I commented in *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 at [4] and [6]:

“[4] ... dating ‘apps’ and social media sites may feel safe to some because they pose no immediate threat of violence; however, it is well-recognised that the more insidious threats posed by sexual predators, and those who prey on the wider vulnerabilities of the young, the learning disabled, the needy and the incautious, are no less harmful (indeed they are potentially *more* harmful) at least in part because of their pervasive nature.

[6] ... ‘mate crime’ — where internet users are befriended online with the intention exploiting them financially, physically or sexually — is a particular issue for adults with learning disabilities, as it is for children and other susceptible classes of internet user. Social media and online dating sites have increased the exposure of vulnerable disabled people to those who might exploit them. The learning disabled and other vulnerable users may readily find themselves the victims of such behaviours, which cause

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<sup>5</sup> By Dr. N (Consultant Applied Psychologist): report October 2018.

potentially lasting damage to their health. Those with learning disabilities may find themselves unwittingly initiating social media or internet activity which turns out to be harmful or hurtful to themselves or others; this activity is far less likely to be calculated than impulsive – indeed, many may be unaware of the consequences of their actions, confused, naïve, but perhaps surprisingly digitally savvy”.

In this case, the concerns became all too real in 2009 when AW was seriously sexually assaulted by a man who he had met on the internet; the police became involved, although no prosecution followed. A further safeguarding referral followed in 2012, when he moved in with another man who he had met on the Internet. More recently he engaged in inappropriate behaviour with a minor, which unsurprisingly led to police involvement.

11. The social worker has provided a detailed chronology which contains numerous incidents describing AW placing himself at very considerable risk in the company of men whom he has met through dating sites on the Internet. When these relationships have run into difficulties, or have soured (as inevitably has been the case), AW has often responded aggressively, and has verbally and physically assaulted those around him, sometimes indiscriminately. At Christmas 2018, he assaulted his mother, when she stopped him from using her laptop to access the Internet. He himself has been assaulted, on occasions seriously. He has not been able to assess the ulterior motives of others, and this has rendered him vulnerable to exploitation. He has assaulted staff members at Windmill House. Additionally, he has run up significant debt through his excessive phone and Internet use.
12. On at least two occasions AW displayed inappropriate behaviour to members of the community. The first was an allegation that AW was aggressive to a woman at a bingo event. The second was an allegation that he followed a woman home from the bus stop to her home; the woman’s husband threatened to involve the police unless the care home managed AW’s behaviour.
13. Even the short extracts of AW’s relevant history above give an indication of AW’s poor understanding of social boundaries and the risks involved in him meeting strangers, particularly after a very short introduction on the web, without having made any rudimentary assessment of those risks. AW’s vulnerability is further underlined by him sending inappropriate pictures of himself to strangers. Unsurprisingly perhaps he is assessed by his carers as being “vulnerable to exploitation”.
14. When AW moved to Windmill House in 2013, and routinely since, his care needs have been assessed; he is considered to be unable without support and supervision to maintain a habitable home environment, unable to manage and maintain nutrition, maintain his personal hygiene, be appropriately clothed, develop and maintain family or personal relationships, make use of necessary facilities or services in the community. Such is his level of need that he now has forty hours of one-to-one support per week, including specifically times when he is accessing the community. He is said generally to be very happy at Windmill Lodge, though because he has spent many hours at night on the Internet and on his phone, he tends to sleep all day, missing activities; this has caused him to become somewhat socially isolated.

15. I have three detailed statements from the key social worker. She has been commended by LJ for her sensitive work with AW. She has commented as follows:

“AW is driven by a desire to have a relationship; he will often view people he has only just made contact with briefly as being a “friend” or “boyfriend”. This desire has often led him to engage in risky behaviour... Without consideration of his own welfare or other possible consequences of his actions.

Another risk associated with AW’s use of the Internet is that he will become upset and aggressive if he feels he has been rejected by someone he has just met who he views as a boyfriend or potential boyfriend. ... AW is not able to understand social cues and lacks insight into the emotions and intentions of others.

It is clear that due to his “social blindness” AW is unable to understand other people’s motives or social cues. He has no understanding of the possible implications of his behaviour in the community as well as understanding the risks on the use of the Internet to seek out sexual relationships.”

16. When accessing the chat rooms, staff keep an eye on what AW is doing; there have been occasions when staff have helped AW to protect him from others from sending offensive messages to AW.

17. AW’s access to, and use of, the internet and social media is limited and is restricted by the care staff at the care home. He has been subject to 1:1 supervision when accessing the internet (which is permitted once per day) and at all other times, he has not had access to internet enabled devices. The Local Authority maintains, as it has set it out in its Internet Safety Protocol and accompanying risk assessments, that due to the risks associated with AW’s behaviour when using the internet, it is in his best interests to be supervised to access websites, including dating websites. The protocol includes the following:

“Capacity in relation to engaging in sexual relations is presumed. [AW] has the right to establish relationships with others and has a desire to meet other men with whom he may have sexual relations...

[AW] lacks capacity to decide whether or not an individual with whom he may wish to have sexual relations is safe and the capacity to make a decision as to the support he requires when having contact with such an individual.

There is a positive duty on behalf of the Local Authority and the state to ensure that [AW] is supported in having a sexual relationship and do all that it can to promote the right to private and family life”.

18. The Local Authority accepts that AW is able to engage with men on dating sites and should he wish to take the step of meeting someone in person, then (subject to the restrictions in place as a result of the COVID-19 pandemic) the care plan will be followed, and that individual would be risk assessed. This follows the recommendations of Dr Rippon (see below). Subject to the outcome of any such assessment, arrangements for direct contact would be made. I am told that the care staff have accompanied AW to clubs and events which would enable him to engage with other men. They want to continue to discuss his need for a relationship with him in an open manner, whilst at the same balancing his needs for safety and protection from exploitation.
19. In late 2019 (and until the end of February 2020), AW had become fixated on a man (who I shall refer to as Trevor), who lives at a separate residential placement (which I shall refer to as Thornley House). At the time of his assessment by Dr Rippon, AW was intent on moving to Thornley House to take that relationship further. This brought into sharp relief the issue of AW's capacity to decide on his residence. However, on 26 February 2020, AW contacted the social worker to say that as Trevor no longer wanted to progress that relationship, he did not want to move; at the date of the hearing that remains AW's position.

*Expert assessment*

20. Earlier in this litigation, and with the permission of the court, the parties jointly instructed Dr. Lisa Rippon MBBS, FRCPscyh (a consultant developmental psychiatrist, with particular experience in the assessment and treatment of individuals with learning difficulties and developmental disorders) to prepare an assessment of AW, and to advise on issues affecting his capacity. She prepared a report dated 15 January 2020.
21. Dr. Rippon formed the clear view, confirmed in her oral evidence, that AW's learning disability and autistic spectrum disorder satisfied the 'diagnostic' test in *section 2 MCA 2005* ("impairment of, or disturbance in the functioning of, the mind or brain").
22. She expressed the view that:

"AW's presentation is characterised by impulsivity and a limited ability to plan and think through the consequences of his actions, in addition to lack of understanding of social cues in situations. I also believe that AW struggles with theory of mind - i.e. he lacks the ability to put himself in another person's shoes and view a situation from their perspective. This makes it very difficult for him to interpret the motivations of others. I also believe that AW's thinking can be very rigid and 'black and white'".

Adding that:

"... it is apparent that he has an obsessional drive to be in a relationship, even if this was with someone who was entirely unsuitable, and that being with someone is 'better than nothing'. I believe that this is linked to his Autism

which results in obsessional interests and very fixed beliefs. I believe that AW's obsessional use of the internet, and the excitement which being in contact with men in chatrooms provokes, has a significant impact on his weighing of information when he is making a decision."

23. Dr. Rippon felt that AW had relatively good expressive language skills and a number of 'learned phrases' which he used in interview, and which tended to give the impression that he had a greater level of understanding of the issues than was revealed on gentle probing. This, I should add, entirely corresponded with an earlier assessment of Dr. N (October 2018), which I have read in its entirety, which was summarised by the social worker thus:

"Dr. [N] explained that [AW] has learned the words or phrases but did not understand what they meant, and it was only when you drill down further that this becomes apparent. He would use key phrases and words like "vulnerable" but did not understand the meaning, and did not know how to apply them to himself..."

24. Clearly, the opinion of an independently-instructed expert is not determinative of the issue before the court, but is likely to be of very considerable importance in my evaluation (per Baker J as he then was in *PH v A Local Authority* [2011] EWHC 1704 (COP) at [16]) and so I find.
25. I address her more detailed conclusions on the key issues in the paragraphs which follow.

*Resolution of issues: February 2020 Orders*

26. At a hearing on 25 February 2020, I had the opportunity to consider the written evidence from Dr. Rippon and the submissions of the parties. There was no challenge that AW's learning disability and autism met the 'diagnostic' test. The evidence was focused on the 'functionality' element of *section 3*, requiring me to consider whether AW can (a) understand the information relevant to each decision, (b) retain that information, (c) use or weigh that information as part of the process of making the decision or (d) communicate his decision. On the issues then presented, Dr. Rippon expressed herself clearly in the following respects:

- i) On capacity to litigate (applying the test in *Masterman-Lister v Brutton & Co (No1)* (2002) EWCA Civ 1889; (2003) 1 WLR 1511):

"I do not believe AW understood the consequences of arguing that he had capacity and would therefore be able to make decisions around his contact with individuals and use of the internet. It is my view that AW did not understand the relevant information and could not weigh-up the positives and negatives of issuing a particular set of instructions";



- ii) On contact with others (applying the guideline factors – “expanded or contracted or otherwise adapted to the facts of the particular case”<sup>6</sup> – outlined by Theis J in *LBX v K & Ors* [2013] EWHC 3230 (Fam) at [45]):

“I do not believe that he understood his own vulnerabilities in relationships. Other than asking staff, AW could not describe how he would make a judgement as to whether another individual would be a risk to him and could not outline strategies to keep himself safe in relationships. I do not believe that AW understands that he has a significant drive to be with a partner, has rigid beliefs regarding this area and cannot accurately assess the risk which others may pose to him ... It is also my opinion that he fails to understand the impact of his behaviour on others, particularly his mother, and this may result in a negative impact on their relationship”;

- iii) On use of social media and the internet (applying *Re A (capacity: social media and internet)* [2019] EWCOP 3):

“... although AW understood some of the relevant information in the area, I do not believe he understood how vulnerable his behaviour makes him on the internet. He has limited strategies to keep himself safe and has no insight into the impact that being on the internet for hours will have on his mental well-being ... AW’s overwhelming need to use the internet has an adverse impact on his ability to weigh-up the positives and negatives of using the internet”;

- iv) On making decisions about sharing personal information:

“It is my opinion that AW failed to understand the risks associated with sharing personal information and could not weigh-up the positives and negatives of doing this”;

- v) On consent to sexual relations (Dr. Rippon considered AW’s capacity to understand the sexual nature and character of the act of sexual intercourse, the mechanics of the act, the reasonably foreseeable consequences of sexual intercourse, the health risks, and the relevance, appropriateness, and application of precautions, and expressly indicated that she had applied the test in *D Borough Council v AB* [2011] EWHC 101 (COP)<sup>7</sup>):

“AW was able to demonstrate an understanding of the relevant information in this area and therefore has capacity to engage in sexual relationships”.

27. On the basis of the filed evidence, the submissions of the parties, and specifically the *agreement* of the parties, I made *section 15 MCA 2005* declarations as follows:

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<sup>6</sup> *B v A Local Authority* at [62]

<sup>7</sup> I was satisfied that Dr. Rippon had applied the right test in this area, having considered a wider range of relevant case law including the Court of Appeal’s decision in *IM v LM and others* [2014] EWCA Civ 37, (per [79]), Munby J (as he then was) in *X City Council v MB & NB* [2006] EWHC 168 (Fam) and *Re MM, Local Authority X v MM* [2007] EWHC 2003 (Fam), Mostyn J in *D Borough Council v AB* [2011] EWHC 101 (Fam), Baker J’s decision in *A Local Authority v TZ* [2013] EWHC 2322 (COP), and *A Local Authority v P and Others* [2018] EWCOP 10.

- i) AW lacks capacity to conduct these proceedings;
  - ii) AW lacks capacity to make decisions about his contact with others;
  - iii) AW lacks capacity to use social medial and the internet;
  - iv) AW lacks capacity to make decisions about disclosure of personal information to others; and
  - v) AW *has* capacity to consent to sexual relations.
28. This suite of conclusions reflects a potential anomaly (as Hayden J reflected in *Manchester City Council Legal Services v LC & Anor* [2018] EWCOP 30 at [10]) namely the “decision making facility to embark on sexual relations whilst, at the same time, he is not able to judge with whom it is safe to have those relations”.
29. It is accepted by the parties, in accordance with Dr. Rippon’s evidence, that AW is unable accurately to assess the risks which others might pose to him; that inability would apply specifically (but not exclusively) in AW’s ability to judge whether an individual with whom he may wish to have sexual relations is safe. I note that the development by the Local Authority of a ‘sexual relationships care and support plan’ has been premised on the basis that, although AW has capacity to consent to sexual relations, he lacks capacity to make decisions whether an individual with whom he may wish to have sexual relations is safe; it sets out the support which he requires when having contact with an individual with whom he wishes to have sexual relations. By oversight, I failed to make a declaration in this respect at the February 2020 hearing as I could have done (there being no opposition to it), and will do so now.
30. At the hearing on 25 February, I adjourned determination of the issues of whether AW lacks capacity to make decisions regarding (a) where to reside; (b) his care and support arrangements, as these were to a greater or lesser extent contentious; specifically, the report on these issues from Dr. Rippon was open to challenge. In adjourning the case, I was invited also to consider what decisions should be made as to the restrictions on AW’s access to and use of the internet and social media, and the support provided to allow AW to develop sexual relationships if that is what he wishes.

*Contested issues: May 2020*

31. The parties accept that, at present, AW does not wish to leave Windmill House. To that end, the issue of capacity to decide on residence has become somewhat academic. Miss Thomas QC submitted as follows:

“The local authority consider it prudent however that the Court continues to consider the question at this time, given AW’s propensity to identify a potential relationship and to make decisions on that basis. They would wish to avoid a swift return of the case to court if AW meets another male in the near future and wishes to move again. It is of course

recognised that capacity is specific as to time, and that any decision will need to be kept under review”.

Mr Patel QC supports this approach.

32. Dr. Rippon had expressed herself in writing thus on the issues before the court:

- i) “AW did not think that moving away from [Windmill House] would cause him any difficulties”;
- ii) “He said that he is happy to have staff supporting him, but he did not think he needed them twenty-four hours a day, although could not describe what level of staffing he believed he would require. AW appeared to have some insight into the fact that there would be dangers if staff were not with him and people might take advantage of him. I believe that, when AW was calm and supported, he had a reasonable understanding of his own care needs ... I do not believe that he can use this information when weighing up the positives and negatives of accepting support or could understand the level of staff support he needs”;
- iii) AW “struggled to answer open questions about the support he requires”;
- iv) AW “had an understanding of the relevant information in relation to residence” but Dr Rippon was of the view that his ability to use and weigh the positives and negatives of a move was impaired;
- v) “It is my view that AW had an understanding of the relevant information in relation to residence, but I believe that his ability to weigh up the positives and negatives of remaining in his current placement or moving to the placement [at Thornley House] was impaired. I do not believe that AW understood the implications of moving from an environment in which staff know him well, and have done so for several years, into an environment where the staff team would have limited knowledge of him and may not be able to offer him the same degree of support. I also believe AW’s motivation to move to a new placement is linked to his need to be closer to [Trevor] and the possibility of commencing a relationship with him. I believe that AW’s overwhelming need to be in a relationship is driven by his autistic thinking and that he is driven to trying to be as close to [Trevor] as possible.”
- vi) “At interview, AW could acknowledge the support which he receives from staff on a day-to-day basis, including support with activities of daily living and he was also aware that staff accompany him in the community. AW was able to tell me what he would do should a staff member do something which he was not happy about. He said that he is happy to have staff supporting him, but he did not think that he needed them twenty-four hours a day, although could not describe what level of staffing he believed he would require. AW appeared to have some insight into the fact that there would be dangers if staff were not with him and people might take advantage of him. I believe, when calm and supported, he had a reasonable understanding of his own care needs. However, I do not believe that he can use this information when weighing up the positives and negatives of accepting support or could understand the level

of support he needs. I believe that AW lacks understanding that, when he becomes so driven to either access the internet or meet people with whom he wishes to commence a relationship, there would be a significant risk that he would refuse support if the decision was his. I do not believe that he could think through the consequences to himself of doing this.”

33. To some extent this evidence raised a number of questions:
- i) Is this a case in which “practicable steps” should be taken to assist him in his decision making?
  - ii) Does AW demonstrate *fluctuating* capacity with regard to these aspects of this life?
  - iii) Is this a case in which it is necessary to consider the grant of *anticipatory* declarations of incapacity under *section 15(1)(c) MCA 2005* (i.e. “the lawfulness or otherwise of any act done, or *yet to be done*, in relation to that person”) per Hayden J in *Guys and St Thomas’ NHS Foundation Trust & South London and Maudsley NHS Foundation Trust v R* [2020] EWCOP 4 at [36]<sup>8</sup>?
  - iv) When obsessed or fixated with the pursuit of a relationship, is he simply demonstrating “unwise” decision-making?
34. In answer to the question at [33](i) above, Dr Rippon was specifically asked whether any “practicable steps” could be taken now to assist AW to attain capacity in this area; she replied:

“I tried to provide him with education, but it didn’t improve his understanding... It is a fundamental aspect of his autistic spectrum disorder and I don’t think that it could be improved by education”.

This echoed an earlier passage from her report:

“I am aware that a considerable amount of work has been undertaken with AW by his current care team and this has had no impact on his capacity in the areas which I have been asked to consider. At interview, AW himself acknowledged that nothing which staff had done had stopped him wanting to use the internet and meet men. I cannot suggest any therapeutic intervention or educational package that would result in him gaining capacity.”

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<sup>8</sup> “Any declaration relating to an act '*yet to be done*' must, it seems to me, contemplate a factual scenario occurring at some future point. It does not strain the wording of this provision, in any way, to extrapolate that it is apt to apply to circumstances which are foreseeable as well as to those which are current. There is no need at all to diverge from the plain language of the section. In making a declaration that is contingent upon a person losing capacity in the future, the Court is doing no more than emphasising that the anticipated relief will be lawful when and only when P becomes incapacitous. It is at that stage that the full protective regime of the MCA is activated, not before”

AW could not explain why he had such a high level of support at Windmill House; although he said that it would be “dangerous” if support was withdrawn, he could not explain what he meant by that word; this was one of his learned phrases.

35. Dr. Rippon described AW as someone who thinks in “concrete terms” and in shades only of black and white, oscillating between the two. He has a strong “obsessional” trait which is “secondary to his autism”, and this plays out with “repetitive types of behaviour”, and “repetitive patterns of thoughts”. In spite of his concrete thinking, he does not seem to learn from his mistakes, and by reason of his autism he is unable to understand the negatives of any particular decision.
36. In relation to [33](ii) (above), Miss Thomas submitted that any fluctuation in AW’s ability or coherence to make decisions about his residence and/or care played out on a spectrum, but that (drawing *inter alia* on the opinions of Dr. Rippon recited in the paragraph above) on *all* points of that spectrum AW lacked sufficient understanding or the ability to use or weigh information such that he lacked capacity. When AW is most fixated on, and obsessed with, the pursuit of a relationship, he is at one end of that spectrum, evincing a very low level of capacity to understand, use or weigh that information. Even when not so fixated, he still lacks that capacity to understand, use or weigh. At this other end of the spectrum, Miss Thomas acknowledges that it is *particularly* important that “so far as reasonably practicable” those who care for him should “permit and encourage [AW] to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him” (*section 4(4) MCA 2005*), and must attach *particular* weight to AW’s “past and present wishes and feelings” (*section 4(6) ibid.*).
37. This submission drew from the evidence of Dr. Rippon:

“[AW]’s ability to weigh information is *better* when [the fixation] taken away<sup>9</sup>... Even then he really struggles with the consequences of the decision [in relation to residence]. He does not understand consequence of moving from his current support package.... He still struggled to assess and the implications of decisions he makes.... He struggled to understand abstracts, and this is secondary to his autism disorder. The positives [of a given situation] are more obvious than the risks, and he struggles with these more.”  
(my emphasis by italics).

She added later:

“... even when he’s at his best, his ability to assess risk is impaired. Individuals on the autistic spectrum have an inability to deploy executive functioning... In order to estimate risk, you have to have a degree of being able to understand abstract concepts.”

And this chimed with her report:

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<sup>9</sup> When Dr. Rippon interviewed AW, he was “fixated” with Trevor.

“... his understanding is *further* hampered when his levels of arousals increase when using the computer” (emphasis added by italics).

38. In relation to [33](iii) (above), Dr. Rippon was of the view (to some extent embedded in the answers given above) that even if there was some fluctuation in his level of understanding or ability to use or weigh the relevant information, there was still a *persistent* underlying lack of understanding of the issues which deprived him of the capacity to make decisions in relation to his residence and care. There was, in short, *not* a time when he *had* capacity to make these decisions.
39. In relation to [33](iv) (above), it was the absence of “executive functioning” (the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we've learned in the past, and use this information to solve problems of everyday life), which rendered his decision making not just “unwise” but incapacitous. It was this lack of ‘understanding’ of the information relevant to a change of residence, and in change of care, particularly the negative consequences of a change, which caused Dr. Rippon to conclude in the end that AW *lacked capacity* in decision-making on residence and indeed on care. This emphasis on ‘lack of understanding’ had not been so apparent in the report, as it was in Dr. Rippon’s oral evidence
40. Mr Patel added specifically in relation to AW’s choice of sexual partner that as AW is unable accurately to assess the risks which others may pose to him, he is unlikely to be able to (i) assess the support which he requires in having (sexual) contact with others, and (ii) the consequences if he does not have that support. The consequence is that AW is likely to lack capacity to make decisions about his care and support arrangements in this regard. This is all the more germane in light of Dr. Rippon’s evidence that AW does not ‘understand’ the negative consequences of his actions.

### *Conclusion*

41. In reaching my conclusions on the limited disputes in this case, I have applied faithfully the core statutory principles of the *MCA 2005*, adopting the statutory assumption that AW has capacity in relation to each aspect of his decision-making unless it is shown on the balance of probabilities that he does not. I have been careful to check the causal connection between AW’s apparent or asserted inability to make a decision by reason of one or more of the ‘functional’ elements set out in *section 3(1)* of the *MCA 2005*, and the ‘impairment of, or a disturbance in the functioning of, [his] mind or brain’, which is the necessary ‘diagnostic’ element required by *section 2(1)* of the *Act*.
42. I have already found, on the evidence and applying the relevant legal principles, that AW has capacity to consent to, and enter into, sexual relations. This permits him to establish relationships with others, and it supports his wish to meet other men with whom he may have sexual relationships. I have, of course, also concluded that AW lacks capacity to make decisions as to contact with others, and to access and use the internet and social media. This creates potentially difficult challenges for the Local Authority, and the court, in balancing the positive obligations to ensure that AW is supported in having a sexual relationship should he wish to do so, while also ensuring, as far as possible, that he is kept safe from harm.

43. A detailed ‘best interests’ care package has been drawn up which defines the support which AW will receive so that he can safely meet in person (when able to do so<sup>10</sup>) those ‘friends’ who he has ‘met’ online; this care package seeks to strike a balance between offering AW protection, while affording him privacy and a degree of autonomy. The Local Authority clearly understands that it is not its role to vet AW’s partners, or to deny him time with proposed sexual partners simply because the local authority considers them to be unsuitable. A person-specific contact assessment will be undertaken to establish whether AW has the capacity to have contact with an individual, and a specific support plan drawn up as appropriate, in line with the decision in *A Local Authority v TZ* [2014] EWHC 973 (COP)<sup>11</sup>. The staff at Windmill House have been prepared to accommodate AW in entertaining visitors provided that his request has been properly risk assessed; provision has also been made in the care plan for an overnight stay with a partner albeit away from Windmill House.
44. It is accepted by the parties that the ‘diagnostic test’ in relation to AW is met on the disputed areas. In relation to the ‘functional’ test, there are no issues identified in AW’s ability to retain or communicate information. The issues revolve around his understanding of certain specific information and his ability to use and weigh the information relevant to residence and care.
45. The suggested information relevant to these decisions (residence and care) is discussed in the judgment of Theis J in *LBX v K, L, M* [2013] EWHC 3230 (Fam) at [43] and [48] *ibid.*; I see no need to reproduce the full paragraphs of the judgment here. On these facts, I have particularly focused on the difficulties which AW has in considering “the difference between living somewhere and visiting it”, and “what sort of care he would receive in each placement in broad terms” (see [32] above). Dr. Rippon is of the view that while AW has some understanding of such information, he is *not* able to use or weigh it (he did not understand “the implications”, “the consequences of moving”), and that his decision-making about residence is and has been wholly driven by other factors, most notably at the time of her assessment, his fixation to pursue a relationship with Trevor.
46. Nor, in Dr. Rippon’s view, was AW able to understand, use or weigh, with what areas of his life he needs support, and what sort of support he needs (“he did not think he needed [support staff] twenty-four hours a day, although could not describe what level of staffing he believed he would require”; he “struggled to answer open questions about the support he requires” [32] above). AW was unable, on assessment, to understand that those who would be providing him with support at Thornley House (should he move there) would not be familiar with him, and he was unable to predict what would happen if he did not have any support or he refused it. It is noted that is a degree of overlap in the information relevant to the two questions, and I am conscious that they should not be considered in separate ‘silos’ (*Re B*).
47. I accept the evidence of Dr. Rippon that AW struggles to understand abstracts, and this is secondary to his autism disorder. In relation to both residence and care, this particularly means that AW is unable to see the risks attendant in any situation; he can see the positives but not the negatives. I am further satisfied, from what I have read

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<sup>10</sup> At the time of writing the judgment, the Government Guidelines on social distancing in the COVID-19 pandemic would prohibit this.

<sup>11</sup> See [18]

and heard, that no practicable steps can be offered to AW to assist him to change this way of functioning, and assist him to attain capacity.

48. Although the written material may have suggested otherwise, having heard the oral evidence and submissions I have reached the conclusion that this is not a case in which AW *fluctuates* in his capacity to decide on the issues under consideration. I accept that there is a *basic* and profound lack of understanding, and that, by reason of the deficits in his executive functioning, he has a pervasive inability to use or weigh the information. I accept Miss Thomas' submission that his levels of understanding and engagement with relevant issues do vary from time to time, but never to a point where it could be said that he is capacitous. When he *is* engaged, and not distracted by his obsessions, particular care should be taken by those who care for him to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him and must (as Miss Thomas accepts: see [36] above) attach particular weight to AW's "past and present wishes and feelings".
49. The care and support arrangements which are reflected in AW's care package satisfy the objective element of a deprivation of liberty within the meaning of *Article 5 ECHR* – I am satisfied on the evidence that AW is not free to leave Windmill House and he is under continuous supervision and control. The arrangements are clearly imputable to the state. The subjective element is satisfied as he lacks capacity to consent to the arrangements. I will make a further declaration authorising the Local Authority to deprive AW of his liberty, such order being in AW's best interests and being necessary and proportionate.
50. I am satisfied from all that I have read that AW is becoming adversely affected by the proceedings. He has expressed a wish not to see his solicitor or social worker, and he has had little contact with his advocate. His mother agrees with this, expressing her concern (see [7] above) that the proceedings are causing him to become 'shut down'. It is patently in his interests that the proceedings come to an end, and the orders I shall make shall therefore be *final* orders.
51. I propose therefore to declare, pursuant to *section 15* of the *Mental Capacity Act 2005* that:
  - i) AW lacks capacity to make a decision whether an individual with whom he may want to have sexual relations is safe and what support he requires in having contact with that person;
  - ii) AW lacks capacity to make decisions about his residence;
  - iii) AW lacks capacity to make decisions about his care and support.
52. I further find, and shall so order, that:
  - i) It is in AW's best interests to receive care and support in accordance with his assessed needs at [Windmill House];



- ii) It is in AW's best interests to receive care and support in accordance with his care and support plan dated 10 March 2020 and the protocol to support his use of the internet;
- iii) The deprivation of AW's liberty arising from his care and support plan is lawful and is hereby authorised by the court as being necessary, proportionate and being in his best interests. This authorisation will expire at 23.59 on 6 November 2020 or upon completion of the standard authorisation process, whichever is the earlier event.

53. That is my judgment.