IN THE COURT OF PROTECTION Neutral Citation Number: [2024] EWCOP 48 (T2)
ON APPEAL FROM DISTRICT JUDGE SIMPSON Case No: 13869239 & 13910506

Newcastle upon Tyne

Date: 22/02/2024

Before:

HER HONOUR JUDGE SMITH

Appellant

MA
(by her litigation friend the Official Solicitor)

- and -

A LOCAL AUTHORITY

-and-

ICB
- and-
AA
(by his litigation friend the Official Solicitor

JUDGMENT

Mr Hadden and Ms Gourley (instructed by BHP Law) appeared on behalf of the appellant

Ms Mahmood (instructed by legal departments) appeared on behalf of the first and second respondents

Mr Garlick (instructed by EMG Solicitors) appeared on behalf of the third respondent

Her Honour Judge Smith:

Introduction

1. This is an appeal against the determination of District Judge Simpson that it is in the best interests of each spouse to a marriage of more than 60 years, that each have no form of contact with the other.

2. This was a final order, made on the basis that the issue of future contact between the couple would be subject to ongoing review by the responsible public bodies away from the court arena. The judge also declined to make declaration sought on behalf of the wife as to breach of her article 8 European Convention rights.

3. I shall refer to the two protected parties as MA and AA. There is no dispute that each lacks capacity to make decisions about their residence, care and support and contact with others. AA and MA each have dementia but require different care provision which means that they can no longer live together. Each is deprived of their liberty in placements located some eight miles apart.

4. This is MA's appeal. It is opposed by AA and by the two public bodies responsible for their care: namely [a local authority] for AA and [an integrated care board] for MA. The official solicitor acts for each of the protected parties, but separate local solicitors are on the court record, advancing separate cases. Each issued separate s21A challenge/review applications which were formally consolidated on the first day of the trial on 18 October 2023, having been listed alongside one another for some time. The interests of each protected party continue to be advanced separately in this appeal.

5. Mr Hadden leads Miss Gourley acting on behalf of MA. Mr Garlick represents AA and Miss Mahmood represents the two public bodies. Mr Garlick and Miss Mahmood contend that permission to appeal should be refused or, to such extent permission is granted, that the appeal should be dismissed.

6. The trial took place in October and the District Judge handed down reserved judgment on 08 December 2023. The order was approved on 20 December 2023. Notice of appeal was lodged on 28 December 2023. Given the ages of each protected party and their degenerative conditions, I accepted that the case should be listed expeditiously and made administrative order providing that the renewed application for leave to appeal (leave having been refused by District Judge Simpson for reasons he set out in Form N460) should be listed, with the substantive appeal, if leave be granted, to follow immediately thereafter.

7. The parties appeared before me in North Shields on 24 January 2024 when I gave reasons for my dismissal of the appellant's preliminary applications; firstly, that this appeal should be determined by a Tier 3 judge and secondly, MA's application that further evidence be admitted.

8. Advocates agreed that the most expeditious approach would be to roll up the hearing to hear all arguments together as to whether permission to appeal should be granted and as to the merits of the substantive appeal. I heard oral submissions from Mr Hadden and Miss Gourley and Miss Mahmood, but additional court time was made available for the submissions of Mr Garlick and any replies from Mr Hadden and Miss Gourley the following week via remote video hearing.

9. I have reviewed the original bundle, transcript of judgment delivered by District Judge Simpson, N460 setting out reasons for refusing permission to appeal, the notice and grounds of appeal, skeleton arguments, and authorities. I am grateful to advocates for their careful presentation of their respective cases.

The order

10. The order under appeal is annexed to this judgment.

The background

11. The background is succinctly set out in the appellant's skeleton argument. MA and AA married over 60 years ago and had long careers in [occupation]. They have a son whose views were set out in the papers, although he did not seek to be joined as a party to the proceedings.

12.VAA's dementia is more advanced, but MA requires more specialist care given her challenging behaviours. AA also suffers from epilepsy, heart disease and cerebrovascular hypertension. They moved as a couple into Placement 1 care home, occupying the same room and sharing a double bed for about a year. AA's health declined and he lost a good deal of weight. This was attributed to MA's resistance to administration of necessary care and help to AA.

13. AA suffered a fall. He was placed on a different floor of the Care Home upon discharge from hospital on 10 January 2023. MA was told a so-called "therapeutic" lie about that. I accept that this is the date from which they were separated. On 24 February 2023, by which time Placement 1 had served MA with notice to leave, District Judge Temple expressed "clear concerns that the decision to separate was taken before a capacity assessment and a best interest's analysis was done and that the decision has implications for MA's article 8 rights".

14. On 09 March 2023, the court sanctioned that MA should be moved to a placement which could better meet her needs. She moved to Placement 2 the following day on the basis a staged plan to reintroduce contact would be implemented and tested by means of telephone, video and face to face contact.

15. On 22 May 2023 at MDT meeting, concerns around the health and safety of both MA and AA were raised and concluded "both video and face to face contact between MA and AA end". In pursuance of that decision, application was issued on 26 May 2023 for order that it would be in the interests of each of the parties to this marriage to terminate any physical or video contact between them. The court called for independent expert evidence from Professor Burns, expert in Old Age Psychiatry.

16. Two additional applications were lodged for consideration by the judge at final hearing. MA sought s15(1) (c) declaration by way of application lodged on 17 October 2023 that the cessation of contact between the couple was a breach of MA's rights under Article 8 ECHR and on 18 October, the LA sought approval of termination of all forms of contact between the couple, including telephone contact and exchange of letters and photographs.

17. By the time the hearing commenced on 18 October 2023 the sum total of contact between this long-married couple after AA's fall (in January 2023) and the October hearing amounted to a telephone contact on 18 March 2023 and video contact on 24 March, 31 March, 07 April and 14 April. Two face to face contacts took place at Placement 2 on 19 April and 17 May (the latter having been rescheduled from 09 May when

AA did not wish to travel to MA's care home by car).

18. The judge heard extensive evidence about these contacts and MA's refusal to engage in video contacts running up to the final hearing. He had a great many papers before him including the full bundle, supplementary bundle and case records, together with the attendance notes of each of the solicitors acting for MA and AA. The views of their adult son were also set out in the written evidence. The report of the single joint expert Professor Burns was before the court, but he was not required for cross examination.

19. The judge called for written submissions after hearing two days of evidence from Michelle Robinson, the social worker allocated to both MA and AA, the manager of Placement 1 and the manager of Placement 2. His written judgment spans thirty-seven pages and, over the course of nine pages set out the applicable law. He heard the cases together in accordance with the authority of *HH v Hywel Dda University Health Board & Ors [2023] EWCOP 18*

The Appeal

20. Eight grounds of appeal are advanced, each supported by extensive written argument. Mr Hadden and Miss Gourley have also helpfully set out the law and procedure applicable to appeals and remind me that the test for considering an appeal is set out in Part 20 of the court of protection rules.

Ground 1: When determining MA's best interests under s.4 MCA 2005, insufficient weight was placed on MA's past and present wishes and feelings;

The appellant particularly contends that the judge fell into error because in balancing the s4 factors, he applied erroneous finding, which he had made contrary to the weight of the evidence that MA's present and more recent desire to see her husband was less strong. Mr Hadden and Miss Gourley contend that the application of this erroneous finding had the effect of affording less than appropriate weight to this very significant s4 factor and thus undermines the judge's overall determination of best interests for each of the protected parties.

Miss Mahmood says that the finding as to MAs' present wishes was sustainable given the totality of the evidence. Mr Garlick concedes that the finding that MA is not strongly requesting contact can be criticised but refutes that it would have made any difference to the overall balancing exercise.

As to *Ground 2* – The appellant contends that Insufficient weight was placed on AA's past and present wishes and feelings and Mr Hadden and Miss Gourley place reliance in their skeleton argument upon views expressed by AA such as yes, he would like to see her, "she is my wife" and also that he expressed an expectation that husband and wife should be together and that he should be with MA. There was further development in submissions of some tender exchanges noted in contacts and criticism of over-focus upon distress or difficulties.

Miss Mahmood responds that there can be no criticism of the approach to AA's wishes and feelings which reflected the evidence which the judge was entitled and bound to accept and weigh in the balance that AA is settled at Placement 1 and not asking for MA. The public bodies contend that AA's remarks as relied upon by the appellant were factored into the overall analysis and his view that a husband and wife should be together were correctly considered as beliefs and values. Mr Garlick for AA also opposes this ground of appeal, contending that the totality of the evidence supports the conclusion that AA has no current wish to see MA. He also cautions against assumptions as to what

AA's capacitous wishes would be if considering the scenario facing the court, namely MA's behaviour (because of her dementia) being harmful to him.

In respect of *Ground 3*, the appellant says that insufficient weight was placed on the mutual beliefs and values of both MA and AA that would be likely to influence their decision if they had capacity. The length of their marriage was compelling evidence of beliefs and values that would likely influence their decisions if capacitous and should have formed an integral part of the court's analysis. There is criticism that when assessing the burdens and benefits of contact the court made unsustainable finding that the answer for AA was "blatant and obvious", failed to give equivalent consideration to MA's beliefs and values in respect of her choice to marry and remain married and that this factor was afforded insufficient weight, rather than the magnetic importance merited. Furthermore, priority was wrongly afforded to present wishes and feelings rather than to the lifelong embodied beliefs and values of this long-married couple.

The respondents refute the contention that the judge failed to consider this aspect, contending that he clearly did factor this in and appropriately conduct the necessary balancing exercise. Furthermore, that it would have been wrong to override AAs current wishes.

As to the *fourth ground*, the appellant contends that the judge's analysis on the benefits/burdens of a move for AA to [placement 3] was wrong in law; The judge arrived at the wrong conclusion when he held "I can see no tangible benefit for AA to move from placement 1 to placement 3". Had he included in his balance sheet that moving AA into the sister home occupied by MA would have the advantage of closer proximity which would be in accordance with AAs' wishes and feelings and his beliefs and values in relation to marriage, he would not have reached the decision he did. They submit that this undermines his overall decision making. Furthermore, that failure to include being eight miles away from MA as a disadvantage in the table of disadvantages demonstrates that he did not sufficiently consider the separation as being contrary to AA's wishes and feelings. This led the judge to the erroneous conclusion that "the outcome is clear and obvious", which in itself further illustrates the limitations of his overall analysis.

The public bodies resist this ground of appeal on the basis that the body of the judgment as a whole amply demonstrates that the judge considered matters properly. Miss Mahmood says that the judge's approach and conclusion do not reveal a failure to consider the factors relevant to a best interest's analysis and indeed demonstrate the very opposite.

The official solicitor resists this ground on behalf of AA because, quite simply, there is a complete lack of evidence that AA has a present wish to live closer to MA. The judge was entitled to accept the evidence from numerous sources that AA presents as much more relaxed and content, has put on weight since separation from MA and is settled in Placement 1. He also found that the closer proximity to MA would make no material difference in terms of promoting face to face contact given it is not an available option, was likely to be of no benefit to AA and potentially harmful. The judge could not have come to any different conclusion given the evidence of Professor Burns that AA is completely disorientated to time and place and that judicial common sense was rightly applied (in accordance with the literature) which militates against moving and disrupting AA when he would not be having any face-to-face contact even if he were closer to MA.

The fifth ground - "The judge's best interests' analysis on the benefits/burdens of contact between MA and AA

was wrong in law as key factors are omitted;"

The appellant contends that the judge was wrong to produce only one table which dealt with both protected parties together. There should have been two separate and person-specific tables within the judgment, before a holistic decision was taken in respect of each protected party. Additionally, the appellant says that the finding that MA would not currently derive benefit from contact was wrong and that there was no weighing of risk of potential physical harm against the risk of near certain emotional harm for MA if all contact is to cease and MA is informed of this. The emotional benefits during contact were also overlooked. Again, the appellant emphasises that in the overall balancing exercise insufficient weight was placed on the fact that contact would accord with past and present wishes and feelings and beliefs and values but furthermore, the judge failed to weigh in the balance the positive words of love and affection exchanged during contact sessions, wrongly approached the painful and false belief that AA has or is having an affair with J who resides at his care home (he has referred to J as his wife or girlfriend) as militating against contact rather than contact being a means of disabusing MA of any affair.

Furthermore, there was a lack of evidence upon which to conclude that the option of exchange of letters and photographs was not available given there had been no proper trial of this means of contact.

Again, in respect of this ground, the respondents resist the suggestion that the approach of the judge was wrong in respect of any of the matters advanced given the body of the judgment. They say the judge was entitled to place weight upon the recent evidence, which he accepted and deemed sufficient to undertake analysis, namely that AA does not recognise MA and that MA was removing photographs of AA from her memory book and his finding that she became upset and anxious. He was thus entitled to reach the conclusion that this form of contact would not be of benefit.

They also contend more generally that the entire appeal itself rests upon out-of-date evidence of some positive interactions whereas the judge was correct to evaluate the most up to date evidence of contacts which had been distressing and emotionally harmful to MA because of her increasing agitation at AA's failure to recognise her or engage as she very naturally wanted him to.

Grounds 6 and 7 set out criticisms which go to overall approach adopted by the judge and raise no separate grounds but go to the balancing exercise. The appellant contends that the approach taken by the judge was overly risk-averse and, in respect of telephone contact, that the judge erred in his application of *Aintree University Hospitals NHS Foundation Trust v James 2013 UKSC 67*, formulating the wrong question.

These grounds are also resisted by the respondents.

Ground 8 - The judge erred in his analysis under Article 8 ECHR and failed to provide adequate reasons for this decision.

The appellant advances that the judge failed to appreciate that the real date of separation was after AA's fall in January and was imposed by Placement 1, prior to any best interest's assessment (as remarked upon by District Judge Temple). Furthermore, the appellant contends that given there are to be no further forms of contact by any means, including those that do not pose any risk of physical harm to either protected par the judge should have set out why this interference was proportionate and necessary. Additionally, the fact the judge failed to consider a goodbye or final contact session is criticised as is the failure to call for further evidence and refusal to retain judicial oversight of the review

of contact.

The respondents also resist this ground of appeal and are critical that it is advanced at all given it was not properly pleaded or advanced.

Permission to appeal.

21. I grant permission to appeal in respect of the first seven grounds. The appellant has demonstrated an arguable case in respect of the overall balancing exercise undertaken by the judge given;

a) the finding as to MA's present wishes and feelings expressed within the judgment did not precisely encapsulate or fully reflect the evidence and thus may have impacted the overall best interest's exercise (document at p96 of the bundle "*Annex A review of care records 12 September to 16 October"* spanning the month before the hearing. This summarizes recordings as to MAs wishes and expectation she should have contact with her husband; expressed repetitively and with some force and indignation).
b) There was mis-formulation of the question under the *Aintree* authority
c) Omissions in respect of balance sheets within the judgment.

22. I refuse permission to appeal on ground 8 but this is more conveniently dealt with at a later stage of this judgment. I emphasise that in dealing with this ground last, I do not regard convention rights merely as bolt-ons. Such rights are continually engaged and form part of any court's evaluation.

23. As for the merits of the substantive appeal and notwithstanding the draconian nature of the decision reached by District Judge Simpson in this difficult case, I have reached the conclusion that the appeal should be dismissed on all grounds. I have done so, notwithstanding the matters which persuaded me to grant leave to appeal. My review of the actual merits of the appeal, having regard to the judgment overall, which was careful and thorough, satisfy me that none of those matters and the grounds advanced amount to reasons sufficient to undermine the decision or give rise to the conclusion that the decision was wrong.

The Law

24. The proper approach of an appellate court to a decision of fact by a court of first instance is set out in the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:

"114.

Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach

are many.

(i)

The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

(ii)

The trial is not a dress rehearsal. It is the first and last night of the show.

(iii)

Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

(iv)

In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

(v)

The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

(vi)

Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115.

It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see Customs and Excise Commissioners v A [2022] EWCA Civ 1039 [2003] Fam 55; Bekoe v Broomes [2005] UKPC 39; Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318; [2006] UKCLR 1135."

More recently, Lewison LJ summarised the principles in *Volpi and another v Volpi [2022] EWCA Civ 464* at paragraph 2*:*

"i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have

reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

Discussion and conclusion

25. An error in findings as to wishes and feelings – past, present or both, has potential to undermine the validity of the overall best interest's analysis given the importance they are afforded in the statute and authorities. However, the finding complained of cannot be said to be wrong rather, it somewhat diminishes the strength of MA's present wishes. I do not accept that the judge mischaracterised MA's wishes nor that he reduced them to such extent that, if more firmly found in terms of strength and consistency and applied in the balance, it would have made any difference to his overall best interest's assessment.

26. As for the contention that the court failed to place sufficient weight upon AA's past and present wishes and feelings, I reject that there is any basis for this. The conceptual desire to see MA as expressed by AA in response to questions posed before the face-to-face contacts cannot be relied upon nor should they be advanced devoid of overall context and the overwhelming evidence of the realities of the difficulties presented in practice in facilitation of the contact.

27. Of course, the first step is for the court is to ascertain wishes and feelings, both past and present, considering each protected party separately – parties to a marriage are autonomous human beings each entitled to their separate wishes and feelings and that is no less the position when incapacitated. The District Judge certainly undertook that exercise, whether or not he drew up two separate balance sheets.

28. The failure to include the wishes and feelings in the balance sheet against the backdrop of lengthy written analysis within the body of the judgment is of little or no consequence and, in terms of any diminution by the judge's finding in terms of the strength of MAs wishes. Even if the judge made the strongest possible finding as to MA's wishes and feelings and consistency of expression, (which would not have been sufficiently nuanced or appropriate in any event) and found them to be the same as her past wishes, I am not persuaded that such a finding would or should have tipped the balance in terms of the balancing exercise under s4 Mental Capacity Act 2005.

29. In assessing and thus ascertaining MA's wishes and feelings the judge was entitled to draw not only upon her expressed words but also her behaviours and conduct which, as he notes, seemed to contradict her

express wishes, and do not include any recognition or understanding of AA's failure to recognise her or the consequent distress this causes her. The District Judge was certainly entitled to conclude on the evidence that MA's requests to see AA were diminishing somewhat. Even if a more nuanced finding that MA's wishes to have contact continue to be daily and sometimes even vehemently and indignantly expressed, "people have pinched my husband", they would have to be placed in proper context. The judge expressly acknowledges the evidence that MA would be devastated if told she could no longer have contact with AA and weighed it in the balance.

30. Mr Garlick makes the point on behalf of AA that AA's established past views could have changed as set out in ***Aintree*** (para 45) – "in the light of the stresses and strains of his current predicament". All sources of evidence including that of the expert emphasised AA's progress since living apart from MA, her behaviour having caused AA harm. In my judgment it is a step too far for the appellant to contend that the court should assume that if he had capacity and was able to weigh up the harm he had suffered, that AA would choose to remain with MA or continue contact, particularly in circumstances where his inability to recognise and respond to MA as she would like him to causes her distress

31. Furthermore, AA's dementia makes him inconsistent, and the judge was entitled to consider and place weight upon the evidence of contradictory statements made by AA only short moments apart.

32. The judge rightly, as in the case of MA, considered words and actions. He was entitled to examine AA's better presentation, the fact he is settled and presenting more happily and does not ask to see MA. His findings as to AA's wishes and feelings were consistent with the evidence before him, and I am not persuaded that any criticism can properly be advanced in terms of the weight the judge afforded AA's wishes and feelings – past or present in the circumstances of this case. It is clear that the judge fully engaged with the competing arguments advanced before him and undertook the necessary evaluative process, in accordance with the evidence.

33. I have been unable to locate finding complained of that MA is no longer distressed at all about being separated from AA. The judge was entitled to accept the evidence that MA's presentation is improving, she is settling in at Placement 2 and becoming more accepting of the fact that she is not with her husband. The evidence in this case was simply overwhelming in terms of the practicalities and AA's lack of recognition of MA, even when reminded of who she is, his inability to engage in ways which felt rewarding or comforting to MA with the attendant consequences of her distress in terms of her emotional and physical responses.

34. The proposition as set out at para 67 of the appellant's skeleton argument that MA's wishes and feelings can be characterised as rational and sensible is far from helpful in the context of this appeal. It is indeed entirely logical for a wife to wish to see her husband with whom she has spent most of her life, but the difficulty facing the learned District Judge was that MA's express wishes differ considerably from her actions in declining video contact and that AA's responses to MA caused her distress and emotional pain which she is unable to approach rationally or logically or with understanding.

35. However often and strongly framed, express wishes cannot be determinative but must be "accommodated only within the court's overall assessment of what is in MA's best interests". There was a great deal of evidence, which was accepted by the judge, which militated against MA's wishes being accommodated.

36. Furthermore, I am not persuaded that the summary at paragraph 68 of the judgment is assailable. I cannot agree that the findings that she did not wish to engage in video contact and would not derive benefit from exchange of letters and photographs were wrong or contrary to the evidence. Those findings, valid as they are, entirely support the conclusions he reached and were in line with the evidence. They cannot be characterised as "risk averse" as advanced by the appellant. Indeed, Miss

Mahmood goes as far as to say that had the judge ordered anything different, this would have been contrary to the weight of the evidence. The judge deals with this at para 73;

"It is put on behalf of MA that to stop all forms of contact is too risk-averse and paternalistic and goes against MA's Article 8 rights, expressed wishes and feelings and her dignity and autonomy as an adult. Such a submission does not sit comfortably with the evidence which is that MA won't engage in video contact and does not derive any benefit from letters and photographs as she becomes anxious actively avoids or removes photographs of AA".

37. I agree with the written submissions of Mr Garlick at paras 14 and 15 of his skeleton argument;

"*In the analysis section of the judgment, the Judge carries out such an analysis. At paragraph 69 the Judge says that he needs to strike a balance between the certain and possible gains and the certain and possible losses. At paragraph 85 the Judge acknowledges that a decision of no contact will cause MA distress but concludes that 'when weighed up with the distress she faces each time any remote type of contact is imposed, that no contact is in her best interests at this time.' This does not demonstrate a risk averse approach, but a balancing of the emotional consequences of either decision.*

The Judge rightly highlights the fact that AA is not able to engage with contact, and that MA does not currently want video contact. A decision that there should not be any contact at this stage is in those circumstances not risk averse."

38. All parties accepted that face to face contact was not an available option given the difficulties and distress it caused MA and the consequential refusal on safeguarding grounds of both placements to facilitate it. Video contact also made MA distressed because AA would wander off. Continuing attempts at video contact at the time the judge heard the case had not got off the ground because MA was refusing it (and getting irritated by the requests which the court found could impact the good relationship between MA and the witness).

39. Telephone contact had served no purpose. The judge was entitled to accept the evidence, as he did, and to reach the conclusion, whatever MA's wishes, that they could not and should not be tried again for the time being. It was also reasonable of the judge to conclude from the evidence, which he accepted, that indirect contact via photographs was not viable given AA does not recognise MA and because MA had removed some of the photographs of AA from her photo album and becomes anxious.

40. In terms of ground 3, I accept that beliefs and values are different from wishes and feelings and should not be conflated. Mr Hadden and Miss Gourley also remind me that the Code of practice at para 5.6 is devoted to beliefs and values.

41. However, I cannot agree that the District Judge merely afforded passing regard, rather than placed proper weight upon this separate statutory factor which demands separate evaluative consideration. I am not persuaded that the judge placed excessive weight on up to date wishes and feelings and minimised beliefs and values. Naturally, wishes and feelings are considered at some length in the judgment – there was much exploration of those in the evidence, but it is clear that far from conflating them or running the two together, the length of the marriage weighed heavily with the judge.

42. It is difficult to think of more compelling evidence of long-lasting engrained beliefs underlying the way in which each of the protected parties conducted their entire lives than a marriage of this length. Although the duration of this marriage certainly represents powerful and compelling evidence of well-

established values and beliefs of both MA and AA, he rightly identified the sad realities of the present situation in terms of options and practicalities and the compelling and overwhelming evidence of distress and responses of both parties to this enduring marriage. He was also entitled to accept the evidence of the Social Worker that AA understands the concept of marriage rather than remembers his own.

43. I am not persuaded by the submission that the District Judge failed to attach sufficient weight to beliefs and values. Nor do I accept, given the totality of the judgment that the District Judge gave consideration only to AA's lifelong choice to marry and remain married but ignored MA's. When two people marry they each make a commitment and the submission that in failing to state the obvious, the judge demonstrates a failure in the overall balancing exercise is entirely without merit. That there is no express equivalent assessment of MA's values is of no consequence given he makes a number of references to the length of the marriage and that MA's past and present views were entirely aligned with her commitment to it. Her views that her husband has been taken from her, complement, if not underline the values she has always held and still currently adheres to.

44. In setting the stage under the heading "*Issue 2: Contact*" the District Judge briefly deals with available options and then, at paragraph 62 makes a powerful introduction to the difficult decision he is asked to make: "*It is universally accepted that the starting point in this matter is that wherever possible, a husband and wife should have contact with each other*". He expressly goes onto state "*That would accord with M's past and present wishes and feelings and to the beliefs and values that would likely influence her decision if she had capacity*". I see no conflation given, in MA's case, the two s4 criteria complement each other.

45. My reading of the judgment is that the judge placed considerable weight on the values of the parties to this marriage, not going quite as far as stating a rebuttable presumption but coming very close to it. It is plain from the entire tenor of the judgement that the court grappled with the issues on the basis that contact was the starting point rather than discounting it lightly as contended by the appellant.

46. As to criticism of the judge's paragraph 85, that the answer for AA is "*blatant and obvious",* this features towards the end of the judgment, after much of the necessary analysis and is a conclusion reached after much deliberation. After setting out the law, he summarises the "*most relevant*" oral evidence from each witness before setting out his analysis at para 46 onwards.

47. As the trial judge having heard the witnesses being cross-examined and their evidence tested, he was in the best position to determine the facts and to identify what was of most relevance to the decisions he had to make. The judge was obliged to be explicit as to this and as to his impression of each witness. He formed a favourable view and accepted their evidence.

48. I am attracted by the submission that subsequent inability to recall pleasant, loving, and affectionate moments should not be taken to demonstrate diminution in their intrinsic value or to negate the need to facilitate contact. However, I cannot agree that the analysis undertaken as to the benefits and burdens of contact between this long-married couple was wrong. I accept the proposition that such moments are intrinsically precious having value in themselves in that very moment, even if memories are not expressed, retained, or formed. I also note the point that MA was distressed when she saw J which gives context to her refusals to engage in video contact. However, the judge was faced with continuing refusals and concern that repeated requests would make MA resentful of those asking. He could not ignore that evidence, nor could he look at the earlier evidence of positives from the Spring without considering the later and more recent evidence given the degenerative and progressive nature of dementia as opined by Professor Burns. The judge rightly had to consider frustration, distress or

anger occasioned by AA's inability to engage and would have been wrong to ignore it.

49. As for placing excessive weight upon risk of potential physical harm against certain emotional harm, this applied to face-to-face contact which was not an option on the evidence which was accepted by the District Judge. The video contact did not present immediate physical risk but did present emotional risk in terms of such distress. MA's current rejection of video contact could not, on the evidence, have been afforded anything other than considerable weight.

50. I agree with the submission of Miss Mahmood that it would have been wrong had the judge reached a different conclusion, given the weight of the evidence. In considering the various forms of contact the judge could not ignore the compelling evidence militating against giving effect to MA's wishes. She wants to see AA in person, which was not an option given the safeguarding risks, and the judge was entitled to find that remote video or photographs was not viable at that time. That evidence of the attempts made, particularly the distress to MA in terms of how it progressed in practice as opposed to the theoretical desirability of contact was accepted by the judge and he afforded it appropriate weight. In keeping with the evidence, he was also careful to not to close the door, recognising that over time things may change.

51. The submissions and criticism of the way in which the judge formulated the ***Aintree*** question in respect of telephone contact do not undermine the overall evaluation in respect of telephone contact, which the couple could not manage, in the context of not recognising each other's voices. The preceding paragraphs of the judgment clearly demonstrate that the judge had fully engaged with beliefs and values and past and present wishes and feelings. Even if the question had been more accurately framed as "*if* MA had capacity, would she choose to speak with her husband on the phone and to maintain contact with him?" giving rise to an affirmative answer, the practicalities and realities again militate against giving effect to such an answer.

52. It is also important and contextually proper in reviewing the judgment to note that the order expressly seeks to accommodate inevitable change as dementia progresses as opined by the unchallenged expert. Paragraph 9 of the order expressly states; *"It is lawful and in AA and MA's best interests for there to be no contact of any form, at this stage".*

The judge was clearly mindful that dementia is a progressive and evolving condition which could mean that risk ameliorates, and that management of that risk could be possible in the future. Having accepted the evidence of unsuccessful attempts to find agencies willing to facilitate contact on the basis of present safeguarding risks as he was entitled to do, the judge rightly sought assurance which was given and is encapsulated in the wording of the order he made – that the contact would be reviewed every three months.

53. In turning to Ground 4 "*the judge's analysis on the benefits/burdens of a move for AA to [Placement 3] was wrong in law*" – this is advanced not because the appellant contends that the couple should live together but rather that a move to the sister home of Placement 2 would, by mere means of convenience better facilitate contact, be in line with wishes and feelings and values and beliefs which the appellant says were not afforded sufficient weight and also have the advantage of removing AA from his friendship with J and reinforcement of any misapprehension held by AA that J is his wife or girlfriend. Of all the points advanced by MA before the District Judge, this one was the least attractive given the compelling evidence from numerous sources that AA is settled and happy where he is.

54. Nevertheless, in his careful and comprehensive judgment, the District Judge dealt with MA's

suggested move for AA to the sister home, as if a bed were available expressly stating that he considered it would be useful in the broader sense of the case. He rightly accepted the contention that those acting for MA can properly make representations as to what MA would consider to be in AAs best interests but goes on to reject the reasons advanced on MA's behalf. He does so, having devoted a paragraph to the length of the marriage.

55. The Official Solicitor on behalf of AA was positively opposed to the move as being contrary to AA's best interests. It would remove the need for a taxi ride for direct contact, given the two homes share gardens but the judge made clear finding that he saw no tangible benefits for AA to move. I reject the criticism that failure to include the advantage in his table that AA would be closer to his wife which would be in accordance with this wishes and feelings and also in accordance with his values and beliefs. I also reject that failure to include as a disadvantage that his being away would be contrary to these statutory factors. To an extent these criticisms are circular and repetitive and close scrutiny of tables do not do justice to the overall thrust of the judgment, given paragraphs 48 to 59 and paras 56 and 57 in particular.

"I accept that when capacitous, AA had chosen to live with MA and remain married for 63 years. I accept this would likely influence his decision had he had capacity. I also accept that AA has made positive reference that he would like to see his wife, that husband and wife should be together, and that she knows he loves her. However, the social worker gave evidence that she does not believe that AA knows who MA is nor has much memory of his marriage, but she believes he holds onto the concept of marriage. The social worker said that AA is settled and does not feel there is any benefit of him moving placements.

The relevant circumstances appear to me to be that both parties have a dementia diagnosis, AA's is more advanced than MA's but her dementia has moved on since residing at placement 2. Moving AA to placement 3 will not at this stage have any impact upon his contact arrangements with MA (which will be determined as part of Issue 2), and but for a change of residence which would according to the social worker unsettle AA when he is settled and remove him from his friendship group there does not appear to be any real benefit to the move.

56. Even if, as contended, he failed to give consideration to the advantage that would be derived from living closer to his wife which would be in better alignment with his values and beliefs, I would not for the compelling reasons advanced on behalf of AA, agree that this was wrong in law or would have made material difference to the balancing exercise in terms of best interests given the evidence of the Social Worker as to AA's recognition of MA.

57. Bluntly, the appellant's approach of minute scrutiny takes no account of the realities which faced the court. All evidence militated against AA being able to appreciate any such proximity or being able to manage MA's unfortunate behaviours in contact (even if a taxi ride were the key impediment to face to face contact) and thirdly, the application of judicial common sense that a move would be disruptive. I guard against any temptation to substitute my own view, but it is also clear that there was no evidence to support the contention that MA would benefit either from AA being geographically closer or that it may or may not increase her distress knowing he is so close but not responding. The

overwhelming evidence was that AA is content, has made friends, including J, is relaxed and positive about his placement. I agree with the submission of Mr Garlick that not one piece of the evidential jigsaw supports such a move other than an assumption as to current wishes and feelings which ignore the realities. Even if it would better reflect long engrained values and beliefs, there was no evidence that AA wished to move in order to live closer to his wife. The District Judge was entitled to find that it was "clear and obvious".

58. I should also deal with the general criticism that the public bodies failed to persist or to work harder in promoting contact. The judge sets out his assessment of professionals, being in the best position having heard from them, as to their approach and commitment. The suggestion that attempts at contact were abandoned if not with alacrity, all too readily does not, Miss Mahmood contends, stand up to scrutiny. The telephone call moved onto video, but AA's lack of recognition led to MA becoming upset and agitated. Two face to face meetings were tried and then attempts were made to move back to video. The judge having accepted the evidence that the protected parties could not manage telephone contact, was entitled to also accept the evidence of MA's response to the memory book, which the judge incorporated into his analysis. He was perfectly entitled to conclude that he had sufficient evidence upon which to determine contact via means of letters and photographs without calling for further evidence by way of further trying out such contact.

59. All respondents to the appeal have emphasised that the judge was careful to embrace possible, indeed likely change as the course of dementia progresses. The judge secured promises of review and this aspect also feeds directly into the Article 8 element of the appeal, which I will come to in a moment.

60. It follows that I am satisfied that the decision made by the judge was proportionate and necessary in the circumstances of this case. This is particularly so, given the court explicitly sought assurance that there would be regular review. I agree that a point is reached where the court should cease oversight and there is no continuing right to have party status in litigation. The overriding objective has clear application to this case, and I do not accept the criticism that the District Judge ended the proceedings precipitously or should have called for any further evidence.

61. The judge had delivered a careful judgement, which demonstrates that he was fully engaged with all competing arguments and reached a well-reasoned and sustainable decision in respect of the options available.

62. The declaration sought in respect of breach of MA's article 8 rights after AA's fall in January when there was no capacity or best interests' assessment in respect of contact was not raised properly before the District Judge and thus cannot give rise to a ground of appeal, notwithstanding the judicial remarks recorded in the order of Judge Temple. My reading is that District Judge Simpson understood that he was being asked to make declaration as to ongoing breach. Defects in pleadings cannot be made good at the stage of appeal.

63. As to breach of MA's article 8 rights, the court sanctioned the separation in March 2023 and approved staged approach to contact about which the judge heard much evidence. At paragraph 31 of the judgment, he addresses article 8 rights which are always accommodated in evaluation of best interests. He expressly sets out that the decision he has made is necessary and proportionate to protect MAs best interests. He need not, in a separate analysis devoted to European Convention rights, repeat all that he has already set out in his lengthy and careful judgment. His reasons had already been clearly stated and were soundly based on the overwhelming evidence.

64. The judge expressly aligns himself, as he was entitled to do having heard evidence, with the views of the single joint expert as to the impressive approach taken by those involved. In securing recitals and assurances, the judge went beyond mere reliance upon the legal and statutory framework which binds

the public bodies. This was in keeping with his clear acknowledgment that dementia will progress as set out by the expert and any changes may thus require a less interventionist approach. His finding that no contact is appropriate "*at this stage"* in no way negates the duty upon the public bodies to review matters and the statutory provisions provide protection and ongoing consideration of proportionality.

65. Having granted permission to appeal in respect of the first seven grounds, I dismiss the appeal on its merits.

66. Permission to appeal on Ground 8 is refused.

The order subject to appeal

SITTING AT the Newcastle Civil and Family Courts and Tribunal Centre, Barras Bridge, Newcastle upon Tyne, NE1 8QF handing down judgment remotely on 8 December 2023, following the contested hearing

WHEREAS a contested hearing took place on 18, 19 and 20 October 2023 and the court consolidated the proceedings of AA (Case No. 13910506) and MA (Case No. 13869239) to proceed under case number 13869239.

UPON the court hearing from Counsel for MA, (Ms Gourley), Counsel for AA (Mr O'Ryan) and Counsel for STC and NENC ICB (Ms Mahmood).

AND UPON the court considering the evidence filed by the parties and hearing oral evidence from MA and AA's social worker, the manager of Placement 1 and the manager of Placement 2.

AND UPON the parties accepting that on the evidence before the court that both MA and AA lack capacity to:

a. Conduct these proceedings;
b. Make decisions as to where they should reside;
c. Make decisions as to the care and support they should receive; and
d. Make decisions about the contact they should have with others

AND UPON the court having considered whether it is in AA and MA's best interests to reside at Placement 1 and Placement 2 respectively, bearing in mind the evidence as to their needs and the care that they require.

AND UPON the court having considered whether it is in AA and MA's best interests to continue to have face-to-face, video or telephone contact, or contact via the exchange of letters and photographs, following the respondents' application to terminate contact by all means between the couple.

AND UPON the court handing down judgment at a remote hearing on 8 December 2023 and determining, *inter alia,* that it is in AA and MA's best interests that they each remain at their current placements and that they do

not have any form of contact, at this stage.

AND UPON the court noting that contact between AA and MA will be kept under review by the respondents in accordance with their duties, with the first review to be undertaken in three months' time when the care needs, behaviour, medication and overall picture of AA and MA will be reconsidered.

AND UPON the court finding that the respondents have not acted in a way which is incompatible with Article 8 ECHR and the court therefore declining to make a declaration that there has been a breach of MA's Article 8 rights.

AND UPON MA's representatives seeking permission to appeal to DISTRICT JUDGE Simpson during the hearing on 8 December 2022 and the same being refused by the first instance judge on the basis that the decision reached was not wrong in law, and that appropriate consideration had been given to MA's wishes and feelings.

AND UPON the court recording that AA continues to be deprived of his liberty at Placement 1 subject to a standard authorisation that came into force on 1 April 2023, and which was subsequently extended to 15 December 2023 by court order.

AND UPON the court recording that MA continues to be deprived of her liberty at Placement 2 subject to a standard authorisation that came into force on 23 March 2023, and which was extended to 15 December 2023 by court order.

IT IS DETERMINED, PURSUANT TO SECTION 21A(2) AND 3(a) OF THE MENTAL CAPACITY ACT 2005 THAT:

1. The mental capacity requirement set out in paragraph 15 of Schedule A1 of the Mental Capacity Act 2005 is met in relation to AA, the court being satisfied that AA lacks capacity in relation to the question of whether or not he should be accommodated at Placement 1 for the purpose of being given the relevant care or treatment.

2. The best interests requirement set out in paragraph 16 of Schedule A1 of the Mental Capacity Act 2005 is met in relation to AA, the court being satisfied that:

a. AA is a detained resident at Placement 1
b. It is in AA's best interests to be a detained resident and to receive care and treatment there in accordance with his current care plan; It is necessary, in order to prevent harm to AA, for him to be a detained resident there; and
c. It is a proportionate response to the likelihood of AA suffering harm, and the seriousness of
d. that harm, for him to be a detained resident there.

3. All of the remaining qualifying requirements as set out in Schedule A1 of the Mental Capacity Act 2005 are met in relation to AA.

4. The extant authorisation in respect of AA's deprivation of liberty at Placement 1 which was extended until 15 December 2023 is varied to remain in force until 31 March 2024.

IT IS DETERMINED, PURSUANT TO SECTION 21A(2) OF THE MENTAL CAPACITY ACT 2005 THAT:

5. The mental capacity requirement set out in paragraph 15 of Schedule A1 of the Mental Capacity Act 2005 is met in relation to MA, the court being satisfied that MA lacks capacity in relation to the question of whether or not she should be accommodated at Placement 2 for the purpose of being given the relevant care or treatment.

6. The best interests requirement set out in paragraph 16 of Schedule A1 of the Mental Capacity Act 2005 is met in relation to MA, the court being satisfied that:

a. AA is a detained resident at Placement 1
b. MA is a detained resident at Placement 2
c. It is in MA's best interests to be a detained resident and to receive care and treatment there in accordance with her current care plan; It is necessary, in order to prevent harm to MA, for her
d. to be a detained resident there; and It is a proportionate response to the likelihood of MA
e. suffering harm, and the seriousness of that harm, for her to be a detained resident there.

7. All of the remaining qualifying requirements as set out in Schedule A1 of the Mental Capacity Act 2005 are met in relation to MA.

8. The extant authorisation in respect of MA's deprivation of liberty at Placement 2 which was extended until15 December 2023 is varied to remain in force until 22 March 2024.

IT IS ORDERED PURSUANT TO SECTIONS 4A (3), (4),AND 16 OF THE MENTAL CAPACITY

ACT 2005 THAT:

9. It is lawful and in AA and MA's best interests for there to be no contact of any form, at this stage.

AND IT IS FURTHER ORDERED THAT:

10. The section 21A proceedings in respect of both AA and MA are hereby determined.

11. The application by the respondents, seeking an order that it is in AA and MA's best interests to not have any contact at this stage, is allowed.

12. There is permission to disclose a copy of this order to Placement 1 and Placement 2.

13. There shall be no order as to costs save for a detailed assessment of the publicly funded costs incurred by the representatives on behalf of AA and MA.