



Neutral Citation Number: [2019] EWCOP 17

Case No: COP 13321617

**IN THE COURT OF PROTECTION**  
**IN THE MATTER OF THE MENTAL CAPACITY ACT 2005**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/05/2019

Before :

**THE HONOURABLE MR JUSTICE HAYDEN**  
**VICE PRESIDENT OF THE COURT OF PROTECTION**

-----

Between :

London Borough of Tower Hamlets

**Applicant**

-

and -

**1<sup>ST</sup> Respondent**

NB

- and -

AU

**2<sup>nd</sup> Respondent**

-----

-----

-----

**Mr Walsh** (instructed by **London Borough of Tower Hamlets**) for the **Applicant**  
**Mr Bagchi QC, Ms Anna Lavelle** (instructed by **Official Solicitor**) for the **2<sup>nd</sup> Respondent**

Hearing date: 7 May 2019

-----

**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 HAYDEN

This judgment was delivered in public.

## Mr Justice Hayden :

1. This case last came before me on the 29 March 2019. The proceedings concern NB. She came to live in the UK in 1985 and married her husband in 1992. The marriage was contracted abroad. When NB first came to live in the United Kingdom she did so without her husband (AU). There was a period in which the couple were separated whilst AU made an application for permission to enter the UK, but in May 1996 NB travelled abroad to return to live with her husband. Following a series of applications to the Home Office throughout 1997 the couple came, eventually, to live together here in London. They lived with NB's parents. A daughter was born a year later (1998).
2. Mr Bagchi QC, who appears on NB's behalf, instructed by the Official Solicitor, has taken me through some of the records in this case which illuminate something of the evolution of the couple's relationship. Of particular note is a letter to the Immigration Appeals department, dated March 1996, in which a clinical psychologist, Ms Suzanne Wilson, states:

*'I believe NB's experience of AU's absence is stressful due to her attachment and affection towards him which has developed during their periods together in [Country C]. In her daily life NB consistently demonstrates her intense attachment to her husband. She often says his name with affection. She repeatedly asks where he is and pleads that he should be with her. [NB] appears to understand the lasting nature of marriage, including that of marriage as a committed sexual bond between a man and a woman. It is my view that [NB] would be very unlikely to have such an affectionate attachment to her husband if this were not on a mutual basis and I therefore believe that her attachment can be taken as evidence of AU's positive attention and caring towards her when they are together'.*

3. NB suffers from what is referred to as 'general global learning difficulty' and 'an impairment' in relation to her facility to communicate with others. She has been, at least historically, assisted by the use of Makaton sign language and her sentences are limited.
4. In consequence of a number of remarks NB made to her dentist, in October 2014, a safeguarding enquiry was instigated. There is no record of what it was that she said to the dentist, or at least none which has been presented to this court, but it is clear that it had something to do with the quality of her relationship with her husband and it was such as to give rise to a concern that she might be vulnerable to sexual exploitation. Very quickly, an education programme was put in place focusing on sex education, relationships, contraception, sexually transmitted diseases as well as more general issues relating to NB's health.
5. Following that work a further assessment was undertaken by a clinical psychologist to consider NB's range of understanding on those key issues. The conclusions of the assessment were that NB was unable to demonstrate an appreciation of why people got married, separated or divorced. It was concluded that she lacked the mental capacity to marry. In respect of her capacity to consent to sexual relations it was considered that

she lacked an understanding of the association between sexual intercourse and pregnancy. Inevitably, it followed, that she could not link various forms of contraception to the concept of averting pregnancy. She did not have the capacity to retain information in relation to these issues. It was also considered that she was unable to communicate the concept of refusal of sex to her husband. These different facets of the test reflect the development of the applicable case law. See: **X City Council v MB, NM and MAB [2006] 2 FLR 968; CH v A Metropolitan Council [2017] EWCOP 12; Re RS, (Forced Marriage Protection Order) [2015] EWHC 3534 (Fam) (03 December 2015).**

6. There is also evidence that indicates that NB very much enjoys the status of marriage, is affectionate to her husband and, on occasion, initiates sexual relations. This appears consistent with Ms Wilson's observations as long ago as 1996. The primary issue before the Court is whether NB truly has the capacity to consent to sexual relations. On the 29 March I indicated that I wanted the matter to be fully argued because I was concerned about the arrangements that were being made (see para 8 below).
7. On 29 March NB was represented by Mr Bagchi via the Official Solicitor and the Local Authority was represented by Mr Walsh. The husband, AU, appeared but was unrepresented. It was immediately obvious that he was highly anxious. All the professionals in the case have noted that. He is a man in his early 50's who has never been in any trouble with the police. It is agreed that there have been no concerns expressed by any of the professionals in relation to his behaviour either recently or historically.
8. This couple found themselves in a challenging situation in which their private and sexual life was being scrutinised by a variety of professionals. For entirely understandable reasons AU was, in my assessment, both frightened and embarrassed when he came to court. When this case came before me on 29 March there had been an agreement between AU, Mr Walsh and Mr Bagchi that the case would proceed by way of AU giving an undertaking to the court not to sleep with his wife. In particular and, for the avoidance of any ambiguity, AU was being invited to give a formal undertaking not to have sexual intercourse with his wife. It is, of course, the case that the breach of a formal undertaking to the Court is punishable in contempt proceedings and may, if appropriate, result in a period of imprisonment. My concern was that if these were the proposed answers to the challenges presented by this situation it may be that the wrong questions were being asked.
9. Throughout the investigative process the couple have continued to live together. NB's daughter who is 20 years old lived at the flat with them. The proposal was that this arrangement should continue, albeit all agreed that NB did not have capacity to marry.
10. On 29 March the case was only listed for a Directions hearing. I was sufficiently concerned by what I heard to take the decision to further adjourn the case and to encourage the Official Solicitor to use his best endeavours to enable AU to get legal representation. I have no doubt that those best endeavours were deployed. A solicitor was identified, she made numerous attempts to speak with AU and offered to attend at his home to take instructions.
11. Unfortunately, the case attracted a great deal of media coverage, this notwithstanding that no argument had been heard and no Judgment delivered. A great deal of the

comment was sententious and, in some instances, irresponsible. It is considered, by the Official Solicitor and the applicant Local Authority, that the impact of that publicity frightened AU very considerably, leading him to believe that he was likely to be sent to prison. He has left the party's flat and disengaged with these proceedings. It seems that he visited a solicitor, local to where he lived, who may have given him poor advice.

12. It is self-evident that these are difficult and sensitive issues. During the course of today, I have listened to detailed, helpful and very interactive submissions on behalf of the Official Solicitor and the Local Authority, considering the case law and seeking to evaluate the reach and ambit of the relevant test. Mr Bagchi submits that the test articulated by Sir Brian Leveson in *Re: M (an Adult) (Capacity: Consent to Sexual Relations)* [2014] EWCA Civ 37 should properly be construed as a general test in which the Court of Protection has, prospectively, to assess an individual's capacity to have a sexual relationship with any other individual. In other words, he submits it is a 'general' or 'issue-specific' test rather than a partner-specific one. If Mr Bagchi is correct, the difficulty that presents in this case is that there is only one individual with whom it is really contemplated that NB is likely to have a sexual relationship i.e. her husband of 27 years. It seems entirely artificial therefore to be assessing her capacity in general terms when the reality is entirely specific.
13. On the facts of the case, for example, it may be that her lack of understanding of sexually transmitted disease and pregnancy may not serve to vitiate her consent to sex with her husband. There is no reason to suggest that AU has had sexual relations outside his marriage. There is no history of sexually transmitted disease. There is one child who, as I have said, is 20 years old.
14. As I said on the last occasion, these issues are integral to the couple's basic human rights. There is a crucial social, ethical and moral principle in focus. It is important that the relevant test is not framed in such a restrictive way that it serves to discriminate against those with disabilities, in particular those with low intelligence or border line capacity. See: *Re: E; Sheffield City Council v E and S* [2005] 1 FLR 965.
15. Mr Bagchi has accepted that if a person-specific test were applied here then the outcome, in terms of assessment of NB's capacity may be different. However, he says for the law to impose a person-specific test would be to render a state of uncertainty of outcome in every case, which is, he submits, essentially inimical to the effective administration of the Court of Protection in these cases. It seems to me, the consequence of this approach may be to give insufficient priority to the individual in a legislative framework which prioritises the vulnerable.
16. In the context of the criminal law, it is entirely clear that consent is and can only ever be a person or partner-specific test. As Baroness Hale said in *R v Cooper* [2009] 1 WLR 1786 '*it is difficult to think of an activity which is more person and situation specific than sexual relations.*' I am bound to say I find this to be a very forceful point. Mr Bagchi submits that the test for consent in the Criminal Law and that which applies in the Court of Protection is different. In this Mr Bagchi is plainly right. However, as I have indicated in exchanges with counsel, I do not necessarily consider that the applicable test in the Court of Protection necessarily excludes the 'person specific approach'.

17. I am reserving my Judgment in order that I can take the time to look carefully and in some detail at the case law and its applicability to the facts of this case. It would appear, that it requires to be said, in clear and unambiguous terms that I do so in order to explore fully NB's right to a sexual life with her husband and he with her, if that is at all possible. I have delivered this short interim ex-tempore Judgment in order that AU may receive a copy of it and better understand the focus of the Court's enquiry. I also want to afford him the opportunity to make submissions, through counsel, if he wishes to do so.