

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday 9 December 2021

BEFORE:

MR JUSTICE KEEHAN

Re AA (Capacity: Social Media and Internet Use)

BETWEEN:

A LOCAL AUTHORITY

Applicant

- and -

AA

Respondent

MR N ALLEN appeared on behalf of the Applicant

MS A KELLY appeared on behalf of the Respondent

JUDGMENT
(APPROVED)

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MR JUSTICE KEEHAN:

Introduction

1. In this matter, I am dealing with a 20-year-old young man, AA, who lives in supported living conditions. He has been the subject of proceedings in the Court of Protection for some considerable time and this judgment should be read with the judgment that I gave in this matter on 15 December 2020.
2. The single issue for me to determine at this hearing is whether AA lacks capacity in relation to his use of the internet and social media. In order to assist me determine that issue, I heard evidence from a psychiatrist, Dr Ince, who has been involved in this case for a considerable period of time, and AA's social worker, Ms Y.

The Law

3. I bear in mind that, pursuant to the Mental Capacity Act 2005, there is a presumption that an individual has capacity unless there is evidence to prove the contrary. I also bear in mind that a capacitous individual may well make unwise decisions but the mere fact of making unwise decisions does not lead to the conclusion that an individual lacks capacity to make that decision. In considering capacity in this domain, as in others, it is decision-specific.
4. I am most grateful to counsel for the local authority and for AA for the notable authorities to which they have referred me, in particular to the case of *Re A* [2019] EWCOP 2, a decision of Cobb J, in particular in relation to capacity in relation to the internet and social media, and to the recent decision of the Supreme Court in *JB v A Local Authority* [2021] UKSC 52.

The Evidence

5. Dr Ince has prepared three reports in this matter and he confirmed the contents of those reports at the start of his oral evidence. In his assessment, he emphasised the importance of the context and in particular the diagnosis made in respect of AA that he is on the autistic spectrum, that he has an attachment disorder and he has borderline

cognitive deficits. He told me that, because of that attachment disorder, AA had a very powerful urge and need to form relationships and, in the moment, might not consider the risks to him in entering into a particular relationship.

6. Dr Ince was at pains to emphasise that one should not simply look at a snapshot period of time but to make the analysis and the decision of the lack of capacity or otherwise in the context of the whole of AA's life.
7. It is plain that, in the past, certainly in 2020 and the earlier part of this year, AA has taken actions and made decisions which have clearly put him at real risk of harm. He engaged for a large period of last year in autoerotic asphyxiation, which plainly put his life at risk. Earlier this year, he entered into an online relationship with an individual who called himself MJ, which appears to have lasted for some period of months with online communication, telephone and video calls between AA and MJ. It led to AA sending a naked photograph of himself to MJ and to MJ's current and/or former (as the case may be) partner. AA has told Dr Ince and others that there came a point when MJ was asking him to send more explicit material to him, either photographs or videos, at which point AA made the decision not only to terminate the relationship but to block MJ from contacting him.
8. Dr Ince's opinion was that, looking at the whole history, AA was unable to transpose an acknowledgment of risk in one situation to a different situation. He gave the example that, where AA had recognised that putting a plastic bag over his head in pursuit of autoerotic asphyxiation would cause him risk of death, he did not appreciate that putting a dog collar around his neck and hanging from a radiator carried the same risk.
9. Dr Ince also relied on the fact of the repetitive actions of AA where he did not appreciate that they would have the same outcome and was unable to transpose his knowledge from one set of circumstances to another. That led Dr Ince to form the conclusion that, notwithstanding some progress made by AA, he was unable to weigh the information to make a capacitous decision.

10. Since AA terminated the relationship with MJ, he has, as Dr Ince recognised, not apparently put himself at risk of harm again by his use of the internet or social media.
11. I also heard evidence, as I have mentioned, from AA's social worker, who has filed a number of statements. She confirmed the contents of them and, in answer to Ms Kelly on behalf of AA, acknowledged that he had made very considerable progress over the course of the last year and in particular since August of this year, when various restrictions upon him were stepped down and he was afforded the opportunity of having unsupported and unsupervised time in the community each day. Indeed, the phrase she used was that he had "blossomed", which I accept.

Analysis

12. The local authority urge me to accept the report and opinions of Dr Ince and to make a declaration that AA lacks capacity in relation to his use of the internet and social media. In contrast, Ms Kelly on behalf of AA urges me to find that he is capacitous or, if I find that he is incapacitous, that it is not in his best interests for the daily checks of his electronic devices to be undertaken by the staff at the place where he lives or, as an alternative to that, if those checks are in his best interests, that they are time-limited and reviewed.
13. It is to AA's credit that he has made very real progress over the course of the last year and in particular, I accept, since August. The evidence is that he has reduced his use of social media and the internet. I recognise that he has a number of devices by which he can access the internet but, as Mr Allen on behalf of the local authority acknowledges, absent evidence, I cannot speculate as to whether he is hiding from those around him the extent to which he is accessing the internet and therefore I have to proceed on the basis that the evidence says that he has reduced his use of the internet and social media.
14. He has increased his contact with people in the wider community, he has greater contact with his family, he is learning to drive and he is seeking to get a job. These are all very considerable positives. He has taken advantage of the unsupported time that he now has in the community and, since the time that he blocked MJ contacting him, there is no evidence that he has put himself at risk of harm in his use of the internet, nor is

there any evidence that he has put himself at risk of harm when taking advantage of his unsupervised and unsupported time in the community.

15. He has engaged very positively with the staff who support and supervise him and they all recognise the progress he has made. The checks that they carry out on a daily basis of his electronic devices, because of settings which AA has put on those devices, reveals very little information at all as to the use made by AA of the internet and of social media.
16. Whilst I entirely respect and understand the opinion of Dr Ince, on the basis of the evidence, I reach a different conclusion from him. In the absence of any evidence, for many months now, of AA putting himself at risk of harm in his use of the internet and social media, I am satisfied that there is insufficient evidence for me to conclude that he lacks capacity to make decisions in respect of his use of the internet and of social media.
17. Even if I am wrong in coming to that conclusion and I ought to find that he does lack capacity, I am entirely satisfied that it is not in his best interests for the daily checks to be undertaken of his electronic devices because:
 - (a) they deliver no evidence of any value and afford no protection to AA; and
 - (b) it is contrary to AA's wishes that those checks are undertaken, which causes him some distress and/or at least uneasiness.

Conclusion

18. In those circumstances, I do not make the declaration sought that AA lacks capacity to make decisions in relation to his use of the internet or social media and the checks now made in respect of his electronic devices should cease, save and in so far as AA would wish those devices to be seen by the staff in a supportive way.

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This transcript has been approved by the Judge