Neutral Citation Number: **[2025] EWCOP 6 (T3)**

Case No: COP14251478

IN THE COURT OF PROTECTION
ON APPEAL FROM HHJ BECKLEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 February 2025

Before:

MRS JUSTICE THEIS DBE
VICE PRESIDENT OF THE COURT OF PROTECTION

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Between:

CT (by his Litigation Friend the Official Solicitor)	**Appellant**
- and -	
(1) London Borough of Lambeth	
- and -	
(2) North Central London ICB	**Respondents**
- and -	
Mind	**Intervenor**

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Ms A Bicarregui (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Mr H Harrop-Griffiths for the **First Respondent**
The Second Respondent was not required to attend
The Intervenor provided written submissions

Hearing date: 4th February 2025
Judgment date: 12th February 2025

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Approved Judgment

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This judgment was delivered in public but a transparency order dated **4 February 2025** is in force. 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 CT must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. This is an appeal by the Official Solicitor, CT's litigation friend, from the order of HHJ Beckley dated 5 September 2024 in which he made final declarations that CT lacks capacity to (a) conduct proceedings; (b) make decisions about residence; (c) make decisions about his care needs. This order followed a two day hearing.

2. The appeal is limited to the declarations regarding residence and care. The appeal is supported by the London Borough of Lambeth (the local authority). The North London Central ICB (ICB) were excused attending the hearing below and took no active part in this appeal. The South London and Maudsley NHS Trust (SLAM) attended the hearing below but took no active part in this appeal.

3. HHJ Beckley refused permission to appeal on 5 September 2024. Following the filing of skeleton arguments I granted permission to appeal on 27 January 2025 and heard submissions on 4 February 2025.

4. There is no opposition to the appeal from the other parties.

Relevant background

5. CT, now in his 50's, suffered a head injury at the age of 12 and has had epilepsy since then. Following the death of a close family member he started drinking and using drugs, lost his business and eventually his home. As a consequence, he has had long periods of time being street homeless followed by regular admissions to hospital to treat and manage his physical and mental health needs. This pattern has continued over many years. There is a detailed chronology in the written evidence before the court, which it is not necessary to set out in detail here.

6. CT has significant medical conditions including chronic obstructive pulmonary disease, polysubstance dependency, gastric ulcer, epilepsy secondary to childhood brain injury, pneumothorax, chronic back pain, arthritis, osteoporosis, left femoral head avascular necrosis, he is partially sighted and has a cognitive impairment. He also has a complex psychiatric history which includes post-traumatic stress disorder, suspected antisocial personality disorder, dysexecutive syndrome and polysubstance use for which he has intermittently been prescribed methadone.

7. An application was made to the Court of Protection in May 2024 by King's College Hospital NHS Foundation Trust (the Trust) following a disagreement between the clinicians and the local authority social workers regarding CT's capacity to make decisions about his residence and care on discharge. At that stage CT was in Kings College hospital and was subject to a standard authorisation which was about to expire. CT was medically fit for discharge. While in hospital CT received mental health support through a different Trust, SLAM.

8. The local authority deprivation of liberty (DoL) assessor found CT had capacity to make decisions about his care and residence. The Trust disagreed and in making the application in the Court of Protection the Trust sought safe discharge of CT and in the interim, prior to discharge, to have ongoing authority to deprive him of his liberty.

9. At the time proceedings were commenced CT was expressing a wish to leave hospital to return to being street homeless. Whilst he had experience of supported accommodation and care homes, he had been street homeless for a considerable period of time prior to his hospital admission in 2023 for acute shortness of breath and was assessed by liaison psychiatry due to suicidality and a wish to self-discharge against medical advice.

10. The initial order made interim declarations under s48 Mental Capacity Act 2005 (MCA 2005) and authorised CT's deprivation of liberty at the hospital.

11. Further capacity assessments were undertaken by the local authority and the Trust, including a direction for a report by an independent social worker (ISW), Henry Gilfillan.

12. In July 2024 the Judge made an order providing for the discharge of CT from hospital to a care home. Due to a fire started by CT the following day the residents and staff had to be evacuated and CT was taken back to hospital. Following assessment under the Mental Health Act 1983 (MHA 1983) he was detained under s 2 MHA 1983. On 25 July 2024 CT was assessed as having capacity to stay on the ward as an informal patient and it was concluded he had capacity to make decisions relating to residence and care.

13. Following discharge under the MHA 1983 on 5 August 2024 the hospital put an urgent authorisation in place and applied to the local authority for a standard authorisation. The DoL assessor from the local authority assessed CT as having capacity and therefore a standard authorisation was not granted. The urgent authorisation expired on 18 August 2024.

14. As there remained a dispute regarding CT's capacity between the Trust and the local authority a hearing was fixed on 19 – 20 August 2024. At that time CT remained an informal patient at the hospital.

15. At the time of the hearing the capacity evidence can be summarised in chronological order as follows:

    (1) Capacity assessment by Dr A, Consultant Psychiatrist, dated 25.11.23 for standard authorisation concluded CT **lacked** capacity.

    (2) Assessment by Dr G, Consultant Liaison Psychiatrist, dated 3.5.24 concluded CT **lacked** capacity.

    (3) Written statement Dr M, Consultant Liaison Psychiatrist, dated 9.5.24 concluded CT **lacked** capacity.

    (4) Written statement of Dr S, Consultant Respiratory Physician, dated 9.5.24 concluded CT **lacked** capacity.

    (5) Local authority mental capacity assessment undertaken by social worker and overseen by Ms M, Team manager, started on 29.4.24 and concluded 17.5.24 determined CT **had** capacity.

    (6) Capacity assessment for standard authorisation by Dr ZS, Consultant Psychiatrist, dated 9.6.24 concluded that CT **lacked** capacity.

(7) Joint assessment by Dr S, Dr L (Consultant Liaison Psychiatrist) and Ms M dated 10.6.24 concluded CT **lacked** capacity (Dr S and Dr L) and **had** capacity (Ms M).

(8) ISW report dated 12.6.24 concluded CT **had** capacity.

(9) Local authority mental capacity assessment for standard authorisation dated 16.8.24 concluded CT **had** capacity.

16. At the August hearing the position of both the local authority and the Official Solicitor was that CT had capacity to make decision regarding residence and care, albeit the Official Solicitor wished for the evidence to be tested. SLAM's position was that CT lacked capacity. The court heard oral evidence from CT's social work Team Manager Ms M, the ISW Henry Gilfillan and Dr L, consultant psychiatrist. At the conclusion of the hearing the Official Solicitor's position was that CT had capacity regarding residence and care.

17. The Judge handed down his judgment on 5 September 2024. He concluded CT lacked capacity to make decisions about his residence and care and made an order that it was in CT's best interests for him to be deprived of his liberty at the hospital whilst the local authority searched for a supported living placement.

18. CT moved to a new supported placement in December 2024 and remains living there.

The judgment

19. The Judge sent a draft note of his judgment to the parties on 21 August 2024. Following a request for further detail on behalf of the local authority and the Official Solicitor the judgment handed down on 5 September 2024, contained additional reasoning in italics.

20. In his judgment the Judge identified the decision was whether CT should remain at or leave the hospital. There was no other placement available and if he left the hospital he would be street homeless.

21. At paragraphs [24] to [28] of his judgment the judge set out the relevant information. He adopted the list used for the recently completed DoL assessment, which provided the following information:

a. CT is currently living at the hospital as opposed to visiting.

b. The hospital is a psychiatric hospital and its location.

c. CT was admitted to the hospital under s2 MHA 1983 following the fire incident at the care home.

d. CT had been discharged from his s2 following a review by the Mental Health Review Tribunal.

e. CT was there as an informal patient although the Court of Protection had authorised a deprivation of liberty.

f. CT had several medical issues.

g. CT had refused examination and treatment for the medical issues.

h. The consequences of not having treatment for the medical issues included the need for hospitalisation and potential death.

i. CT is not allowed to leave the ward without staff escort.

j. CT's social worker is seeking an alternative supportive placement.

k. CT's refusal of care and support on the ward could negatively impact initial assessments completed by potential care providers which could extend his stay in the hospital.

l. The potential care providers would likely have rules which would include CT not being allowed to consume alcohol or illegal drugs.

m. Consideration of other discharge options including discharge to street homeless and the potential risks involved.

22. In his judgment the Judge added the following to the list of relevant information at paragraph [24] of his judgment:

'That [CT] has a number of mental impairments (personality disorders, dysexecutive syndrome secondary to brain injury as a child, polysubstance abuse and seizures, and cognitive impairment shown by ACE, FAB and MOC tests) and that those impairments lead to specific care needs and affect [CT's] decision-making in relation to physical care needs and residence'

23. Later on in his judgment at paragraphs [33], [34], [35] and [39] the Judge reiterated that his assessment of capacity was based on awareness of mental impairment being relevant information.

24. In his judgment at paragraphs [29] – [32] he refers to the assessments that have concluded CT has capacity and states he has given weight to those assessments.

25. The Judge concludes CT cannot use or weigh *'the fact that he has mental impairments and that these lead to specific care needs and impact on his wider decision-making ability'* [33], *'his own impulsivity, lack of planning ability and lack of foresight when he is making decisions about his care needs'* [34], *'the knowledge of his mental impairments'* [35], *'the impact of [CT's] mental impairment* [39], that CT is unaware that the impact of his mental impairment *'leads to a lack of foresight when weighing the consequences of refusing treatment'* [40] and *'on his impulsivity means he is unable to weigh that impulsivity when making decisions'* [40], the inability to weigh the likely outcome of the refusal of care [43] and the impact that *'his mental impairment has on his acceptance of care provision explains the history of admission to and self-discharge from previous placements'* [45].

26. The judgment acknowledged that CT had recently been better able to engage with and express himself to social workers.

Legal framework

27. The key principles in assessing capacity have been set out in a number of cases (*Warrington Borough Council v Y* [2023 EWCOP 27 [22 – 34] Hayden J; *Kings College NHA Foundation Trust v C&V* [2015] EWCOP 80 Hayden J and *WBC v Z and Anor* [2016] EWCOP 4 Cobb J) and are summarised as follows in *A Local Authority v H* [2023] EWCOP 4 as follows:

i) An individual is presumed to have capacity pursuant to s 1(2) of the Mental Capacity Act 2005.

ii) The burden of proof lies with the person asserting a lack of capacity and the standard of proof is the balance of probabilities.

iii) The determination of the question capacity is always decision specific. All decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of ss 1 to 3 of the 2005 Act, which requires the court to have regard to 'a matter' requiring 'a decision'. There is neither need nor justification for the plain words of the state to be embellished.

iv) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (Mental Capacity Act 2005 s 1(3).

v) A person is not to be treated as unable to make a decision merely because he or she makes a decision that is unwise.

vi) The outcome of the decision made is not relevant to the question of whether the person taking the decision has capacity for the purposes of the Mental Capacity Act 2005.

vii) In determining the question of capacity, the court must apply the diagnostic and the functional elements of the capacity pursuant to ss 2 and 3 of the Mental Capacity Act 2005. Thus: a) There must be an impairment of, or a disturbance in the functioning of the mind or brain (the diagnostic test); and b) The impairment of, or disturbance in the functioning of the mind or brain must cause an inability to understand the relevant information, retain the relevant information, use or weigh the relevant information as part of the process of making the decision in question or to communicate the decision made.

viii) For a person to be found to lack capacity there must be a causal connection between being unable to make a decision by reason of one or more of the functional elements set out in s 3(1) of the Act and the 'impairment of, or a disturbance in the functioning of, the mind or brain' required by s 2(1) of the Act.

ix) With respect to the diagnostic test, it does not matter whether the impairment or disturbance in the functioning of the mind or brain is permanent or temporary.

x) With respect to the functional test, the question for the court is not whether the person's ability to take the decision is impaired by the impairment of, or

disturbance in the functioning of, the mind or brain but rather whether the person is rendered unable to make the decision by reason thereof.

xi) *An inability to undertake any one of the four aspects of the decision-making process set out in s 3(1) of the 2005 Act will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of, the mind or brain. The information relevant to the decision includes information about the reasonably foreseeable consequences of deciding one way or another.*

28. In *A Local Authority v JB* [2021] UKSC 52 Lord Stephens set out at [66] – [79] that an assessment of capacity requires the court to address two questions

(1) First, whether the person is unable to make a decision in relation to a particular matter; and only if so

(2) Second, whether that inability is caused by an impairment of or disturbance in the functioning of P's mind/brain.

29. Paragraph 4.16 of the Code of Practice provides:

"Understanding information about the decision to be made

It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person to understand. Quick or inadequate explanations are not acceptable unless the situation is urgent (see chapter 3 for some practical steps). Relevant information includes:

• the nature of the decision

• the reason why the decision is needed, and

• the likely effects of deciding one way or another, or making no decision at all".

30. In the recent Court of Appeal case of *Thirumalesh Chellamal Hemachandran and another -v- Sudiksha Thirumalesh and another* [2024] EWCA Civ 896), the Court of Appeal was asked to consider whether an individual could understand or use and weigh information which he/she did not believe.

31. The Court of Appeal held that:

"the judge made an error of law in regarding the absence of belief as determinative of the functional test" [...] where there is an objectively verifiable medical consensus as to the consequences of having or not having medical treatment, if the patient does not believe or accept that information to be true, it may be that they are unable to understand and or use and weigh the information in question".

Grounds of appeal

32. First, the relevant information ground: the Judge set too high a bar in considering the relevant information that CT needed to consider when making decisions about his residence and care needs. In particular the Judge erred in stating that CT's mental impairments are relevant information which he needs to understand and use and weigh.

33. Second, the correct order ground: the Judge appears to start with CT's mental impairments, deciding that they lead to his inability to take decisions rather than starting with whether he can understand/retain/use or weigh/communicate the relevant information and only if he is unable to do so to consider whether that inability is because of his mental impairment(s) contrary to the guidance of the Supreme Court in *A Local Authority v JB* [2021] UKSC 52.

34. Third, the changed facts ground: as capacity assessments are time and decision specific, the Judge erred in not fully acknowledging the change in the factual matrix at the time of the hearing.

35. On behalf of the Official Solicitor, Ms Bicarregui submitted on the first ground that the judgment contained a number of errors in respect of identifying relevant information for the purposes of conducting a capacity assessment about residence and care, in this case whether to remain in hospital or be discharged to be street homeless. She submits paragraph 4.16 of the Code emphasises the need for relevant information about a decision to be provided and that every effort must be made to provide it in a way that is most appropriate to help the person understand. That information includes the nature of the decision, the reasons why the decision is needed, and the likely effects of deciding one way or another, or making no decision at all.

36. Ms Bicarregui submits, the way the Judge took into account CT's mental impairment as affecting his decision making creates a circular approach and results in those who have a mental impairment to inevitably be found to lack capacity. As set out in her skeleton argument *'The circular nature of the inclusion of insight into his/her mental impairment on the list of relevant information is underscored by the fact that once the assessor has concluded that the individual can weigh the relevant information, he has to consider whether the inability to weigh is 'because of, an impairment of, or a disturbance in the functioning of, the mind or brain'. The logical conclusion of the approach adopted in the judgment in this case is that [CT] cannot weigh the impact of his mental impairment because of his mental impairment.'*

37. She submits it sets the bar too high, and dysexecutive syndrome and cognitive decline should not be regarded as synonymous with the functional test for mental capacity. In her written submissions she states *'it is necessary to carry out the functional test without assuming that mental impairments render the person incapacitous. This requires a careful delineation of the relevant information (tailored to the particular case) and then an assessment of whether the individual can understand, retain, use/weigh that relevant information and communicate his/her decision'.* In this case, she submits, the mental impairments that the Judge took into account and how he found it impacted on CT were not provided to CT, nor was he supported to understand that this was considered to be relevant information in his case.

38. Ms Bicarregui submits the Judge erred when he added the requirement for CT to have insight into the effect of his mental impairment to the list of relevant information.

39. Turning to the second ground it is submitted that the intention of the MCA 2005, as explained in the *JB* case, is to focus on the functional assessment in the first instance, without considering the individual's mental impairment. This is an important safeguard for those with mental impairments. The Judge's approach in this case of including in the list of relevant information insight into mental impairment had the effect that he did not conduct the functional test in accordance with the MCA 2005, separately as set out by Lord Stephens in *JB.* Ms Bicarregui submits the Judge's approach in the judgment had the effect of conflating and blurring the two stage test. There was no effective analysis of the relevant information, the Judge's assessment of whether CT could use or weigh the information or engage with the differences in outcome between the assessments undertaken by the social workers and the clinicians. It is submitted the judge erred in carrying out the functional test with reference to CT's mental impairment and in not resolving the key evidential dispute regarding the functional test with those who had assessed CT's capacity.

40. The focus of the third ground of appeal is that assessments of capacity are time and decision specific. The assessments of the clinicians that CT lacked capacity dated from CT's time in hospital, around the time the proceedings were started. The more recent assessments considered CT had capacity. It is submitted whilst this difference is referred to by the Judge at paragraphs [20] and [22], he does not explain why the more recent assessments should not be preferred.

41. In his judgment the Judge set out the following regarding the relevant matters at paragraph [23]

> '*The matters which I consider remain of some relevance, despite [CT's] current position of being unable to live on the streets (for which he gives reasons) are that 'There is also a lack of understanding of how his physical and cognitive state has changed progressively over recent years. He lacks any insight into his increasing frailty or memory problems.' Whilst the 5 examples that [Dr M] gives are no longer directly relevant due to [CT's] reasoned change of position regarding a return to the streets, [CT] continues to refuse care around his incontinence and this has led to an ongoing impact on his soft tissues for which he refuses treatment".*

42. Ms Bicarregui submits the evidence set out that the reasons CT gave for not being able to live on the street included explicit references to how his physical state had changed over recent years, and his increasing frailty. For example, when he spoke to the DoL assessor about returning to live on the street and what he thought about it, CT responded *'I can't do that. I can't do anything without help. That won't work anymore.'*. The ISW reports *'CT told me 'at first all I wanted to so was to go back living [on the street]'. He continued to explain that his body and physical health would make him unable to get around and fend for himself, so he would not be able to manage his personal and health needs independently'.* It is submitted this evidence of the relatively good understanding CT had about the difficulties with his health was not properly reflected in the judgment or the reasoning.

43. Permission was given for the national mental health charity, Mind, to make written representations. The court is extremely grateful to Neil Allen for the written

submissions on behalf of Mind. The submissions make it clear that Mind takes a neutral stance as to whether CT had or lacked capacity to make the relevant decisions. Their focus is on the first two grounds of appeal, which they support.

44. The written submissions set out the risks in requiring those whose capacity is being assessed to be aware of and accept their mental impairment(s), or to use and weigh such knowledge and the impact of them, or to weight the lack of *'foresight'* as it will turn the statutory test on its head. Rather the first focus should be on the person's functional ability to make the decision and then determining whether such inability is because of a mental impairment, as required by ss2-3 MCA 2005 and *JB*. An insight requirement risks unduly influencing the statutory criteria. It also risks undermining s 1(4) MCA 2005 regarding unwise decisions and could conflict with s 2(3)(b) MCA 2005, that aspects of the person's behaviour should not be equated with incapacity. Otherwise they submit *'the person's agreement risks becoming a de facto requirement for capacity'.*

45. Mind submit the Court of Appeal in *Hemachandran* made it clear at [123] – [124] that 'belief' is not part of the statutory capacity test and a lack of belief may be relevant, but not determinative of P's ability to make the decision. As was stated by the Court of Appeal *'All that is required is an application of the statutory words without any gloss'* [124]. Insight must not be conflated with decision-making capacity. A person may lack insight but retain capacity to make various decisions (see *Heart of England NHS Foundation Trust v JB* [2014] EWCOP 342 at [41] per Peter Jackson J).

46. In summary, Mind submit *'when determining a person's ability to make the decision, the five statutory abilities (understand, retain, use, weigh, communicate) in s 3 MCA 2005 must be addressed without any gloss, clinical or otherwise. The relevant information must focus on the salient details of the decision (CC v KK and STCC* [2012] EWHC 2136 (COP) [69]), *including the reasonably foreseeable consequences of deciding one way or another (or failing to make the decision)'.* By taking into account CT's ability to use or weigh the knowledge of his mental impairment is not the statutory issue. Mr Allen submits '*As illustrated by Heart of England NHS Foundation Trust v JB, a necessary correlation would have to be established between a lack of insight and the person's inability to decide the matter. And, as advised by the NICE guidelines, those assessing and determining capacity must clearly record what they mean by lack of insight and how they believe it affects or does not affect the person's ability to make the decision as defined by the statutory criteria'.*

47. Turning to the second ground of appeal Mind recognise that a lack of insight *may* be relevant to, but not determinative of, whether the person has a mental impairment for the purposes of s2 MCA 2005. Equally, however, someone might lack insight for reasons other than mental impairment. For example, it could be caused by P's educational background, language proficiency, lack of familiarity with medical issues and the lack of appropriate support. In support of this Mr Allen refers to a decision of the Supreme Court of Victoria in Australia *PBU and NJE v Mental Health Tribunal* [2018] VSC 564 where the provisions being considered there resemble ss2-3 MCA 2005. Mr Allen submits by including insight into a person's mental impairment as relevant information undermines the importance of proving that P's inability to decide is because of that mental impairment. In supporting ground 2 Mr Allen submits *'Including insight into a person's mental impairment as relevant information undermines the importance of proving that P's inability to decide is because of that mental impairment ('the causative nexus'). It conflates the functional and mental*

impairment tests and waters down the evidential burden on capacity assessors and Judges to demonstrate how and why the inability to decide is because of the mental impairment. In the present case, ultimately the Judge concluded CT lacked capacity because he was unable to weigh the impact of his mental impairments which is entirely circular. The key issue should have been whether CT was unable to decide the matter <u>*because of*</u> *the mental impairment(s).'*

Discussion and decision

48. This was a difficult and complex case, as on the evidence the professionals were divided as to their conclusions on capacity, some referred to their assessment as being finely balanced.

49. In considering issues relating to capacity it is important to keep the structure of any decision making firmly anchored in the statutory framework. This was emphasised in *Hemachandran* at [124] *'All that is required is an application of the statutory words without any gloss'.*

50. *JB* provides clear guidance about the two issues the court is required to address. First, whether the person is unable to make a decision in relation to a particular matter, and only if so, is it necessary to go to the second stage. The second stage is whether the inability is caused by an impairment of or disturbance in the functioning of P's mind or brain.

51. In turning to consider the functional question, as noted in *A Local Authority v H* at [15] *'Lord Stephens emphasised the important of identifying (1) the precise matter upon which the person's decision is required [68] and (2) the information relevant to that decision [69]. An assessor of capacity and the court must therefore ask as a preliminary matter, (1) what is the decision to be made? and (2) what is the information relevant to that decision?'*

52. Section 3 MCA 2005 provides

(1)For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a)to understand the information relevant to the decision,

(b)to retain that information,

(c)to use or weigh that information as part of the process of making the decision, or

(d)to communicate his decision (whether by talking, using sign language or any other means).

(2)A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3)The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4)The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a)deciding one way or another, or

(b)failing to make the decision.

53. In relation to the first ground of appeal, I accept the submissions of the Official Solicitor that the Judge fell into error when he set the bar too high in considering the relevant information for CT on the facts of this case, in particular that CT's mental impairments are relevant information that he needs to understand and use and weigh.

54. The course taken by the Judge conflates the two stage test set out in *JB* and creates a circular approach that risks leading to the inevitable conclusion that those who have a mental impairment lack capacity. Such an approach undermines the principles and safeguards in the MCA 2005.

55. What is required is a careful delineation of the relevant information, relevant to the particular case in question, and then an assessment, in accordance with the statutory framework, whether the individual can understand, retain, use/weigh that relevant information and communicate the decision. It is only when that process concludes that the individual is unable to make a decision within that statutory framework that the court then has to consider whether the inability is *'because of, an impairment of, or a disturbance in the functioning of, the mind or brain'.* In the Judge's judgment that important delineation was not present or clear.

56. Although not necessary for the purposes of the outcome of the appeal, I also accept both grounds two and three are established.

57. The two stage test in *JB* is clear. The approach in this case of including insight into his mental impairment had the effect that the Judge did not conduct the functional test in accordance with the requirements of the MCA 2005. By taking that into account the Judge conflated and risked blurring the two distinct tests. This was caused by not taking the structured approach of going through the list of information identified as being relevant, resolving the relevant issues in the written and oral evidence and setting out the Judge's assessment of whether CT can use/weigh the information. In effect, the Judge's conclusion on the first stage was determined by CT's mental impairment and not by resolving the key evidential dispute in respect of the functional test.

58. In relation to ground three there was evidence from the social work assessments, in particular the more recent ones, that CT had capacity to take decisions about his residence and care. Whilst the Judge refers to these assessments he did not properly take into account the evidence that pointed towards CT having a better understanding that his physical state had changed progressively and had insight into his increasing frailty. Whilst it is accepted that this experienced Judge had the benefit of hearing the

oral evidence it was nevertheless important that he explained why the later assessments fell into error and were not capable of being relied upon.

59. It is a striking feature of this case that the evidential divide on capacity was largely between the clinicians and the social workers. The form used by the local authority in their capacity assessment promoted a structured approach to the assessment in accordance with the statutory framework. It identifies the decision, sets out the relevant information the person must understand, retain, use or weigh in regard to the decision, includes what has been done to enhance the capacity of the person to maximise their ability to make the decision for themselves, and then cross checks the person's ability to communicate. It then requests a summary of the options that have been discussed with the person. The form then structures each stage of the requirements in s3 MCA 2005 (understand, retain, use, weigh, communicate). In terms of structure the capacity assessment of Ms G, the allocated social worker, in May 2024 was an excellent example of providing both relevant detail at each stage, with clear reasoning to underpin conclusions. This high standard was replicated in the management scrutiny of that assessment by Ms M, the interim Team Manager. In comparison some of the assessments by the clinicians were in a less structured format. I recognise this may have been due to the particular circumstances at the time, but future assessments will benefit from more closely following the statutory framework in the way Dr M detailed in her witness statement in May 2024. As capacity assessments are time and decision specific, the relevant dates when the individual was assessed should always be clearly set out and borne in mind.

60. Both Ms Bicarregui and Mr Allen have provided checklists to assist those assessing capacity. Whilst not wanting to add to the growing industry of checklists, I recognise they may be useful and have adapted them as follows:

(1) The first three statutory principles in s 1 MCA 2005 must be applied in a non-discriminatory manner to ensure those with mental impairments are not deprived of their equal right to make decisions where they can be supported to do so.

(2) In respect of the third principle regarding unwise decisions, particular care must be taken to avoid the protection imperative and the risk of pathologising disagreements.

(3) As set out in *A Local Authority v JB* [2021] UKSC 52, whether the person is able to make the decisions must first be addressed. Only if it is proven that one or more of the statutory criteria are not satisfied should the assessor them proceed to consider whether such inability is because of a mental impairment.

(4) Those assessing capacity must vigilantly ensure that the assessment is evidence-based, person-centred, criteria-focussed and non-judgmental, and not made to depend, implicitly or explicitly, upon the identification of a so-called unwise outcome.

(5) Insight is a clinical concept, whereas decision making capacity is a legal concept. Capacity assessors must be aware of the conceptual distinction and that, depending on the evidence, a person may be able to make a particular decision even if they are described as lacking insight into their general condition.

(6) In some cases, a lack of insight may be relevant to, but not determinative of, whether the person has a mental impairment for the purposes of s2 MCA 2005.

(7) When assessing and determining the legal test for mental capacity, all that is required is the application of the statutory words in ss2-3 MCA 2005 without any gloss; having 'insight' into mental impairment is not part of that test.

(8) Relevant information will be different in each case but will include the nature of the decisions, the reason why the decision is needed, and the likely effects of deciding one way or another, or making no decision at all.

(9) The relevant information is to be shared with the individual and the individual should be supported to understand the relevant information. The individual is not required to identify relevant information him/herself.

(10) If a lack of insight is considered to be relevant to the assessment of capacity, the assessor must clearly record what they mean by a lack of insight in this context and how they believe it affects, or does not affect, the person's ability to make the decision as defined by the statutory criteria, for example to use/weigh relevant information.

61. The parties have agreed that in the event of the appeal being allowed the matter should be restored back to HHJ Beckley to consider what, if any, further directions need to be made to determine the issue of capacity.