Neutral Citation Number: [2026] EWCA Civ 1184

Case No: CA-2025-002505

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KING'S BENCH DIVISION
ADMINISTRATIVE COURT
HH Judge Bird
AC-LON-2025-000755

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 September 2026

Before:

LORD JUSTICE BEAN (Vice President, Court of Appeal, Civil Division)
LORD JUSTICE BAKER
and
LADY JUSTICE MAY

- -

Between :

THE KING (ON THE APPLICATION OF TDB, by his litigation friend, NP)	**Appellant**
- and -	
LONDON BOROUGH OF HARINGEY	**Respondent**
-and-	
MIND	**Intervenor**

- -

Victoria Butler-Cole KC, Gráinne Mellon and Isaac Ricca-Richardson (instructed by **TV Edwards**) for the **Appellant**
Hilton Harrop-Griffiths (instructed by **Haringey Legal Services**) for the **Respondent**
Alex Ruck Keene KC (Hon) and Annabel Lee (instructed by **Mind (the National Association for Mental Health)**) for the **Intervenor**

Hearing date: 16 June 2026

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Judgment Approved by the court

LORD JUSTICE BAKER:

1. This is an appeal against a judge's dismissal of an application for judicial review of a local authority's assessment of the appellant's social care needs under the Care Act 2014 ("the Care Act").

2. The principal issue arising on the appeal is whether the local authority was required to carry out an assessment of the appellant's capacity under the Mental Capacity Act 2005 ("the MCA") prior to completing the Care Act assessment.

Background

3. T is now aged 25. When he was three years old, he was adopted after suffering severe neglect by his birth parents. He is a young man with a very troubling history and a range of complex needs. His background is described in detail in a statement filed in these proceedings by his adoptive mother, who with her partner has devoted a large part of her life to caring for their son. From that extensive and moving account, I set out only a brief summary for the purposes of this appeal.

4. T has several mental and developmental impairments, including autism, speech and language disorder, ADHD, and personality disorder. He also suffers from severe anxiety, is prone to self-harm and violent outbursts, and has recognised difficulties with relationships, in particular sexual relationships. His dysregulation when distressed and his struggles to understand sex and relationships have given rise to risks to other people. There have been instances of aggressive and sometimes sexually inappropriate behaviour and he has been arrested for various offences including serious sexual offences. He has a long history of cutting himself, putting ligatures around his neck and threatening to take his own life. He is unable to manage his own medication and on occasions has gone missing from his placement, without money or a phone or medication, putting himself at significant risk.

5. There has been a long-running issue as to whether T has a learning disability. Regardless of that dispute, he has consistently required extensive specialised support under the Children Act 1989 while he was a child and under the Care Act since attaining adulthood. The London Borough of Haringey ("the local authority") has been responsible for meeting his needs as a child and latterly as an adult.

6. At the age of four, T received his first statement of special educational needs. Between the ages of four and eight he received specialist psychotherapy. On leaving primary school, he transferred to a special education needs secondary school. As a teenager, he displayed high levels of anxiety and violence, including towards other members of his family. He was made subject to a child in need plan, which included monthly weekend residential respite care for T and non-violent resistance training for the family. For a while, T's behaviour became more settled, but it worsened again and he began absconding from home at night. In July 2018, T moved to a residential placement in Gloucestershire but his mental health deteriorated and he started threatening suicide. At this stage, concerns also arose about his understanding about sexual relationships.

7. When T reached the age of 18, the question arose as to whether he was eligible for support from the Haringey Learning Disability Partnership ("HLDP"), an integrated health and social care resource for adults with learning disabilities which provides a

range of health and social care including psychiatry, nursing, psychology, occupational therapy and speech and language therapy. As part of the process of assessing his eligibility for HLDP services, a cognitive assessment was carried out in May 2019 which concluded that he did not have a learning disability. The assessor wrote:

> "it has been demonstrated that with the appropriate support and information delivery [he] is able to learn skills and attain academic achievement that are above a level we would expect in someone with a learning disability. Additionally, difficulties with certain daily living skills are more likely related to [the claimant's] early experiences of abuse, anxiety, and fine motor skill difficulties, and not due to a learning disability."

As a result of this assessment, it was decided that he was not eligible for support by the HLDP. A complaint by T's parents about this decision was rejected.

8. In September 2019, T was arrested for an offence of criminal damage. Ultimately it was decided that he should not be prosecuted, but in preparation for possible proceedings he underwent an independent forensic psychiatric analysis which found that his full-score IQ was at 59 and concluded that he was in the range of learning disability. T's parents sent the report to the local authority with a request that his eligibility for HLDP support be reviewed.

9. In January 2020, T was diagnosed with autistic spectrum disorder. In February 2020, he moved to another residential college in the West Midlands. In May 2020, following an incident of alleged stalking, a capacity assessment conducted by T's social worker concluded that he lacked the capacity to make decisions about the use of social media. Following this assessment, a best interests decision was taken to remove his phone for 30 days. No further capacity assessment was carried out but after these developments in January 2021 the local authority informed T's parents that he would be allocated to the HLDP.

10. In May 2022, T was moved into supported living accommodation, again in the West Midlands. He attended college in the same area. His behaviour continued to cause serious problems. He regularly went missing from the accommodation, and he was arrested by the police on several occasions. In November 2023 he was placed in another residential unit in the same area, but in February 2024 moved back to London, staying at various addresses. In May 2024, following arrest for a serious sexual offence, he was bailed to his parents' house in North London.

11. In June 2024, a multi-disciplinary team meeting concluded that he was not eligible for support from HLDP and that his needs could be met through mainstream services. T's parents immediately lodged a complaint and asked the local authority to reverse this decision.

12. On 1 July 2024, T was moved to a specialist learning disability placement in North London. He had one-to-one support throughout the day and night and was accompanied whenever out in the community.

13. By an email dated 13 September 2024, the local authority rejected T's parents' request that the decision in June 2024 be reversed, stating:

> "The collective agreement among the clinicians is that an alternative to the learning disability team would be more appropriate to address and manage the specific requirements of your son. This conclusion was reached after careful consideration of all pertinent information. The recommendation is for your son to receive support tailored to his health needs, which his allocated social worker will assist in coordinating. It's important to ensure that the services provided align with his individual requirements to support his well-being and development effectively."

14. Meanwhile, in September 2024, a care plan review had been carried out at T's North London residential placement in the course of which it was recorded:

> "T can come across as very articulate and people overestimate his ability to accurately communicate his needs [but he has] a learning disability which impacts his ability to complete most activities of daily living."

With regard to relationships and social media activity, the review recorded:

> "T lacks capacity in understanding relationships/ sexual relationships and boundaries of relationships. He also finds it difficult to build up healthy relationships, that will keep him safe and others. Most relationships that he builds are based on association of social media influence. He can also easily be manipulated and exploited by others due to his vulnerability in social media safety."

15. In October 2024, a solicitor acting on T's behalf wrote to the local authority challenging the decision to withdraw HLDP support. The local authority was urged to undertake an assessment of T's needs and a review of his Education, Health and Care Plan ("EHCP", which has replaced the Statement of Special Educational Needs). In the letter, the solicitor raised a number of detailed concerns. These included:

> "It is of concern that the issue of difficulty in understanding boundaries in relationships generally, in sexual relationships and with woman was identified as a need in his April 2019 assessment and May 2019 care plan. Yet he is currently receiving no specialist support from any health, learning disability, mental health or autism services to meet these needs."

Later in the letter the solicitor returned to this issue:

> "It has been particularly damaging for him that he has been arrested for alleged sexual offences. The joint assessment needs to consider how he can be supported to understand sexual relationships and have healthy relationships with partners and others. This is a particular area of difficulty for him and he would like support with this aspect of his life. As a victim of very

> serious childhood abuse and a person with a learning disability, he needs very specialist and/or skilled input."

At the end of the letter the solicitor asked:

> "Please confirm that T's needs will be assessed through a joint assessment, which incorporates a Care Act assessment, a review of his EHCP and a review of his Pathway Plan. Please confirm this assessment will include specialist input from a psychologist, from a learning disability specialist and an autism specialist."

16. The local authority responded by saying that a further Care Act assessment was being conducted. That assessment, completed on 13 December 2024, is the assessment under challenge in these proceedings.

17. The assessment, headed "Long-term Strength Based Assessment", is on a standard, presumably digitised, form extending over nine pages. After recording formal details about T and the assessment process, there is an extended section headed "My story" with sub-headings of background; placement history; interactions with staff; mental health and behavioural issues; offending history; education and employment; communication; eligibility criteria; managing nutrition; maintaining personal hygiene; making use of the home safely; relationships and social interaction; sex and relationships; family relationships and being part of my community.

18. The document continues with a "wellbeing scale" which records the individual's responses to a series of questions including "How independent do I feel?" "How much social interaction do I get?" "How safe do I feel?" The scores are also expressed diagrammatically. It then records T's health conditions. Then, under the heading "My outcomes", it records "Outcomes/goals I wish to achieve" and "How will I utilise my individual community and family strengths?" Finally, under the heading "Next Steps", it sets out a summary and recommendations, a conclusion as to eligibility, and the "primary support reason".

19. In the extensive section headed "My story", the assessor identified various difficulties T faces – for example that he "does not understand the implications of eating unhealthy [food]", he is "unable to complete his personal hygiene without support", and he "always needs staff support to maintain a safe living environment". Under the heading "Relationships and social interaction":

> "T lacks capacity in understanding relationships/sexual relationships and boundaries of relationships. He also finds it difficult to build up healthy relationships, that will keep him safe and others. Most relationships that he builds are based on association of social media influence. He can easily be manipulated and exploited by others due to his vulnerability online…. He needs constant advice/ talking on healthy relationships, sexual relationships and use of Internet/ social media safely."

As confirmed in a statement filed in the judicial review proceedings by the social worker who carried out the assessment, this passage was "information shared" by the

agency managing T's placement. The social worker confirmed that she herself had not carried out a capacity assessment.

20. Our attention was also drawn to various passages in the section headed "My outcomes", in particular the following passage under the sub-heading "Developing and maintaining relationships":

> "T is highly sociable and enjoys being in groups but he lacks the awareness and ability to manage and maintain most daily living skills such relationships/sexual relationships.
>
> My Desired Outcomes: Positive Behaviour Support (PBS) working in partnership with people, and treating me with dignity and respect and enabling me to have a better quality of life and working towards identifying and exploring my strengths. This will empower me to make informed decisions about my care and support, improve my personal relationships with others."

The corresponding section headed "How will I utilise my individual, community and family strengths?" reads:

> "Provider to make a psychology referral to T's GP for PBS input. Family and [provider agency] staff will continue to advice and support T to maintain healthy relationships in person and online."

21. The section headed "Next steps" includes the following paragraph:

> "On 9 May 2024 a multi-disciplinary meeting was held to discuss T's care and the appropriate service to meet his needs. Representatives from Psychology, Psychiatry, Nursing and Social Work disciplines attended and was made aware of the decision of the HLDP that T does not have a learning disability and therefore is not able to receive support through HLDP. However, the support regarding the identified issues around sex/relationships/challenging behaviour will be explored through a referral to psychology/psychiatry services via his GP".

22. The assessment concluded by recording that T was "eligible" for support and that the "support reason" was "physical support – personal care support (primary)"

23. On 17 February 2025, T's solicitor sent a letter before action under the Pre-Action Protocol, raising potential grounds for judicial review as set out below and requesting a new Care Act assessment with input from a psychologist and an expert in autism and a detailed assessment of T's mental capacity. A supplementary letter was sent a few days later. No substantive response was received and on 11 March 2025 judicial review proceedings were issued on T's behalf, with his mother acting as litigation friend, challenging the legality of the Care Act assessment carried out in December 2024. Three grounds were advanced:

(1) The assessment was unlawfully conducted without the requisite skills, knowledge, and competence.

(2) The assessment arrived at irrational and/or unreasonable conclusions in relation to learning disability and primary support.

(3) The local authority was unlawfully fettering its discretion by continuing to apply an inflexible policy and/or criteria.

24. On 17 March 2025, a deputy judge ordered expedition of the application because of T's "significant vulnerability". On 14 April 2025, HH Judge Plimmer, sitting as a judge of the High Court, granted permission to bring the proceedings on all grounds and renewed the direction for expedition.

25. Meanwhile, T continued to go missing from his placement on several occasions and made repeated threats to kill himself. On 28 April 2025, T was arrested for offences of rape and assault and breach of bail conditions. He was again released on bail.

26. On 8 May 2025, at the instigation of T's parents, proceedings in respect of T were issued in the Court of Protection, with the Official Solicitor acting as his litigation friend. At the first hearing on 4 June 2025, Senior Judge Hilder made an interim declaration under s.48 of the MCA that there was reason to believe that T lacked capacity to conduct proceedings and make decisions about his residence and care. In a series of case management directions, the local authority was substituted as applicant and the parties were given permission to jointly instruct Dr. Lisa Rippon, consultant psychiatrist, to produce a report addressing TDB's capacity to make decisions about his residence and care, to engage in sexual relations, to use the internet and social media, and to enter into a tenancy.

27. On 7 July 2025, T was remanded in custody by magistrates on charges of rape, stalking, coercive and controlling behaviour, actual bodily harm, common assault and breach of bail conditions.

28. At a further hearing in the Court of Protection on 24 July 2025, the court made an interim order under s.48 that, if and when T was released on bail, he should return to be accommodated at his previous 24-hour supported living placement. This would be subject to certain defined restrictions amounting to a deprivation of his liberty which the court authorised as being "in his best interests, necessary to prevent harm to him and proportionate to the likelihood of him suffering harm and the seriousness of that harm". Extensive further directions were given including directing the local authority to file a statement including a narrative explanation of what arrangements can be put in place for T in the long-term to provide specialist input for him in the community.

29. The judicial review claim was heard by HH Judge Bird on 3 July 2025. On 1 August 2025, the judge dismissed the claim on all grounds. On 5 September, he dismissed an application for permission to appeal.

30. On 13 October 2025, a notice of appeal to this Court was filed on T's behalf against the dismissal of the judicial review claim. On 19 November 2025, permission to appeal was granted on all grounds.

31. At the hearing we were informed of various developments since the first instance judgment. None of this information was the subject of a formal application to admit fresh evidence but no objection was raised to it being put before the Court.

32. In January 2026, T was acquitted at the Crown Court of all charges (including rape) for which he had been remanded in custody in July 2025. He had, however, been charged with another offence of robbery to which he had pleaded guilty and therefore remained remanded in custody. On 30 March 2026, he was given a 16-month custodial sentence for that offence, suspended for two years. This is his only criminal conviction. He was released from prison having spent eight months in custody, during which he was treated at all times as a vulnerable prisoner. On 12 February 2026, T was charged with an offence of coercive control, to which he has pleaded not guilty and for which he has been granted bail. This arose from the police investigation in relation to the robbery in 2024 and relates to coercive control of a co-defendant in those proceedings, who is his ex-girlfriend.

33. In accordance with the orders made in the Court of Protection, on his release T was accommodated by the local authority in new supported accommodation in North London run by the same provider as for his previous supported accommodation. He receives extensive care and support outlined in a new care plan under the Care Act dated 10 February 2026.

34. On 9 April 2026, T was assessed by Dr. Lisa Marie Rippon, consultant psychiatrist in his supported accommodation. As set out above, this report had been ordered by Senior Judge Hilder in the Court of Protection on 4 June 2025 but was delayed due to T being on remand. Dr. Rippon had access to T's medical and social care records and interviewed T, his mother, and staff at his current placement.

35. Dr Rippon concluded that T has impaired cognitive and adaptive functioning, and he fulfils the ICD-11 criteria for a Mild Intellectual Disability, in addition to his diagnoses of ADHD and ASD. His diagnosis of ASD has a significant impact on his understanding of relationships, and his history of abuse and neglect makes him extremely vulnerable to exploitation. Dr Rippon found that T lacks capacity in the following domains: (1) to conduct proceedings; (2) to take decisions as to his residence; (3) to make decisions about his care; (4) to make decisions regarding contact with others; (5) to use the internet and social media, and (6) to enter into a tenancy agreement. Although he has capacity to engage in sexual relations, he is unable to accurately assess the age of others including whether they are over the age of sixteen — but this is reflective of his lack of capacity in relation to contact rather than sex. In relation to contact with others, he does not understand his vulnerability to exploitation from others and over-estimates his ability to keep himself safe in relationships. He also could not outline the risks he has posed to others in the past. In relation to social media and the internet, he cannot make a judgment whether a person is over the age of sixteen years, he over-estimates his ability to keep himself safe online and his behaviour on the internet can place him at risk.

36. The proceedings in the Court of Protection are continuing. We were told that Dr Rippon's capacity assessment had only recently been received and that the parties are yet to formulate a response. It is anticipated that Senior Judge Hilder will in due course make final declarations as to T's capacity and best interests decisions about his welfare, including as to his residence and care. Within those proceedings there remain issues

between T's representatives and parents and the local authority as to the level and source of the support to be offered to T.

37. On 5 June 2026, Mind (the National Association for Mental Health) was given leave to intervene in the appeal by way of written submissions by Mr Alex Ruck Keene KC (Hon) and Ms Annabel Lee, and a witness statement from Ms Kulthum Dambatta, a senior lawyer at the charity.

The Law

(a) *The Care Act and regulations thereunder*

38. S.1 of the Care Act is headed "Promoting individual well-being". Subsections (1) to (3) provide:

> "(1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.
>
> (2) "Well-being", in relation to an individual, means that individual's well-being so far as relating to any of the following—
>
> (a) personal dignity (including treatment of the individual with respect);
>
> (b) physical and mental health and emotional well-being;
>
> (c) protection from abuse and neglect;
>
> (d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);
>
> (e) participation in work, education, training or recreation;
>
> (f) social and economic well-being;
>
> (g) domestic, family and personal relationships;
>
> (h) suitability of living accommodation;
>
> (i) the individual's contribution to society.
>
> (3) In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular—
>
> (a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;

> (b) the individual's views, wishes, feelings and beliefs;
>
> (c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;
>
> (d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);
>
> (e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;
>
> (f) the importance of achieving a balance between the individual's wellbeing and that of any friends or relatives who are involved in caring for the individual;
>
> (g) the need to protect people from abuse and neglect;
>
> (h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised."

39. S.9(1) of the Care Act, headed "Assessment of an adult's needs for care and support", provides:

> "(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—
>
> (a) whether the adult does have needs for care and support, and
>
> (b) if the adult does, what those needs are.
>
> (2) An assessment under subsection (1) is referred to in this Part as a "needs assessment".
>
> (3) The duty to carry out a needs assessment applies regardless of the authority's view of—
>
> (a) the level of the adult's needs for care and support, or

> (b) the level of the adult's financial resources.
>
> (4) A needs assessment must include an assessment of—
>
> (a) the impact of the adult's needs for care and support on the matters specified in section 1(2),
>
> (b) the outcomes that the adult wishes to achieve in day-to-day life, and
>
> (c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.
>
> (5) A local authority, in carrying out a needs assessment, must involve—
>
> (a) the adult,
>
> (b) any carer that the adult has, and
>
> (c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.
>
> …."

40. Under s.11(1), a local authority is not required to carry out a needs assessment where the adult refuses it, but under s.11(2)(a) a local authority may not rely on s.11(1) and therefore must carry out an assessment where the adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out the assessment would be in the adult's best interests.

41. Under s.13(1), where a local authority is satisfied on the basis of a needs or carer's assessment that an adult has needs for care and support or that a carer has needs for support, it must determine whether any of the needs meet the eligibility criteria specified in the Care and Support (Eligibility Criteria) Regulations 2015 ("the 2015 Regulations"). Regulation 2 of the 2015 Regulations provides, so far as relevant:

> "(1) An adult's needs meet the eligibility criteria if—
>
> (a) the adult's needs arise from or are related to a physical or mental impairment or illness;
>
> (b) as a result of the adult's needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2); and
>
> (c) as a consequence there is, or is likely to be, a significant impact on the adult's well-being.

(2) The specified outcomes are—

(a) managing and maintaining nutrition;

(b) maintaining personal hygiene;

(c) managing toilet needs;

(d) being appropriately clothed;

(e) being able to make use of the adult's home safely;

(f) maintaining a habitable home environment;

(g) developing and maintaining family or other personal relationships;

(h) accessing and engaging in work, training, education or volunteering;

(i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and

(j) carrying out any caring responsibilities the adult has for a child.

(3) For the purposes of this regulation an adult is to be regarded as being unable to achieve an outcome if the adult—

(a) is unable to achieve it without assistance;

(b) is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety;

(c) is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or

(d) is able to achieve it without assistance but takes significantly longer than would normally be expected."

42. S.18(1) of the Care Act provides that a local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if conditions set out in s.18 are satisfied. Under s.24(1)(a), where a local authority is required to meet needs under s.18, it must prepare a care and support plan for the adult. S.25(3) provides that, in preparing a care and support plan,

"the local authority must involve —

(a) the adult for whom it is being prepared,

(b) any carer that the adult has, and

> (c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare."

43. S.67 is headed "Involvement in assessments, plans etc." Subsection 67(1) and (2) provide:

> "(1) This section applies where a local authority is required by a relevant provision to involve an individual in its exercise of a function.
>
> (2) The authority must, if the condition in subsection (4) is met, arrange for a person who is independent of the authority (an "independent advocate") to be available to represent and support the individual for the purpose of facilitating the individual's involvement; but see subsection (5)."

Under subsection 67(3), "relevant provisions" include ss 9(5)(a) and (b) and 25(3)(a) and (b). Subsections 67(4) to (6) provide:

> "(4) The condition is that the local authority considers that, were an independent advocate not to be available, the individual would experience substantial difficulty in doing one or more of the following—
>
> (a) understanding relevant information;
>
> (b) retaining that information;
>
> (c) using or weighing that information as part of the process of being involved;
>
> (d) communicating the individual's views, wishes or feelings (whether by talking, using sign language or any other means).
>
> (5) The duty under subsection (2) does not apply if the local authority is satisfied that there is a person—
>
> (a) who would be an appropriate person to represent and support the individual for the purpose of facilitating the individual's involvement, and
>
> (b) who is not engaged in providing care or treatment for the individual in a professional capacity or for remuneration.
>
> (6) For the purposes of subsection (5), a person is not to be regarded as an appropriate person unless—

> (a) where the individual has capacity or is competent to consent to being represented and supported by that person, the individual does so consent, or
>
> (b) where the individual lacks capacity or is not competent so to consent, the local authority is satisfied that being represented and supported by that person would be in the individual's best interests."

44. S.80(2) provides that "a reference in this Part to having or lacking capacity, or to a person's best interests, is to be interpreted in accordance with the Mental Capacity Act 2005".

45. The requirements that must be met by a local authority carrying out a needs assessment under the Care Act are set out in the Care and Support (Assessment) Regulations 2014 ("the 2014 Regulations") made under powers granted by s.12 of the Care Act. Regulation 3, headed "Assessments – general requirements", provides:

> "(1) A local authority must carry out an assessment in a manner which—
>
> (a) is appropriate and proportionate to the needs and circumstances of the individual to whom it relates; and
>
> (b) ensures that the individual is able to participate in the process as effectively as possible.
>
> (2) In seeking to ensure that an assessment is carried out in an appropriate and proportionate manner, a local authority must have regard to—
>
> (a) the wishes and preferences of the individual to whom it relates;
>
> (b) the outcome the individual seeks from the assessment; and
>
> (c) the severity and overall extent of the individual's needs.
>
> (3) In a case where the level of the individual's needs fluctuates, the local authority must take into account the individual's circumstances over such period as it considers necessary to establish accurately the individual's level of needs.
>
> (4) A local authority must give information about the assessment process—
>
> (a) to the individual whose needs are being assessed;
>
> ….

> (5) The information must be provided prior to the assessment wherever practicable, and in a format which is accessible to the individual to whom it is given."

46. Regulation 5 of the 2014 Regulations provides:

> "(1) A local authority must ensure that any person (other than in the case of a supported self-assessment, the individual to whom it relates) carrying out an assessment—
>
> (a) has the skills, knowledge and competence to carry out the assessment in question; and
>
> (b) is appropriately trained.
>
> (2) A local authority carrying out an assessment must consult a person who has expertise in relation to the condition or other circumstances of the individual whose needs are being assessed in any case where it considers that the needs of the individual concerned require it to do so.
>
> (3) Such consultation may take place before, or during, the carrying out of the assessment."

(b) *Guidance*

47. The judge and this Court were also referred to statutory guidance, "Care and support statutory guidance" (published by the Department of Health and Social Care, July 2025) ("the Guidance"). Amongst the extensive passages cited from the Guidance, the following are of particular relevance.

48. Chapter 6 is headed "assessment and eligibility". Paragraph 6.11 provides:

> "An individual may be unable to request an assessment or may struggle to express their needs. The local authority must in these situations carry out supported decision making, helping the person to be as involved as possible in the assessment, and must carry out a capacity assessment. The requirements of the Mental Capacity Act and access to an Independent Mental Capacity Advocate apply for all those who may lack capacity."

49. Under the heading "Supporting the person's involvement in the assessment", paragraphs 6.30 to 6.32 provide:

> "6.30 Putting the person at the heart of the assessment process is crucial to understanding the person's needs, outcomes and wellbeing, and delivering better care and support. The local authority must involve the person being assessed in the process as they are best placed to judge their own wellbeing. In the case of an adult with care and support needs, the local authority must also involve any carer the person has (which may be more than one carer), and in all cases, the authority must also involve any

> other person requested. The local authority should have processes in place, and suitably trained staff, to ensure the involvement of these parties, so that their perspective and experience supports [sic] a better understanding of the needs, outcomes and wellbeing.
>
> 6.31 Where local authorities identify that an adult is unable to engage effectively in the assessment process independently, it should seek to involve somebody who can assist the adult in engaging with the process and helping them to articulate their preferred outcomes and needs as early as possible. This will include some people with mental impairments who will nevertheless have capacity to engage in the assessment alongside the local authority. They may require assistance whereby the local authority provides an assessment, tailored to their circumstances, their needs and their ability to engage. They should be supported in understanding the assessment process and assisted to make decisions wherever possible.
>
> 6.32 Where there is concern about a person's capacity to make a specific decision, for example as a result of a mental impairment such as dementia, acquired brain injury or learning disabilities, then an assessment of capacity should be carried out under the Mental Capacity Act (MCA). Those who may lack capacity will need extra support to identify and communicate their needs and make subsequent decisions, and may need an Independent Mental Capacity Advocate. The more serious the needs, the more support people may need to identify their impact and the consequences. Professional qualified staff, such as social workers, can advise and support assessors when they are carrying out an assessment with a person who may lack capacity."

50. At paragraphs 6.85 to 6.88, under the heading "Training", the Guidance provides:

> "6.85 It is essential that the assessment is carried out to the highest quality. The assessment must: identify the person's needs, outcomes and how these impact on their wellbeing; consider the person's strengths and capabilities; and consider what universal services might help the person improve their wellbeing. Local authorities must ensure that their staff have the required skills, knowledge and competence to undertake assessments and that this is maintained….
>
> 6.86 Local authorities must ensure that assessors are appropriately trained and competent whenever they carry out an assessment…. They must also have the skills and knowledge to carry out an assessment of needs that relate to a specific condition or circumstances requiring expert insight, for example when assessing an individual who has autism, learning disabilities, mental health needs or dementia….

> 6.87 When assessing particularly complex or multiple needs, an assessor may require the support of an expert to carry out the assessment, to ensure that the person's needs are fully captured. Local authorities should consider whether additional relevant expertise is required on a case-by-case basis, taking into account the nature of the needs of the individual, and the skills of those carrying out the assessment. The local authority must ensure that the person is able to be involved as far as possible, for example by providing an interpreter where a person has a particular condition affecting communication – such as autism, blindness, or deafness…
>
> 6.88 Where the assessor does not have the necessary knowledge of a particular condition or circumstance, they must consult someone who has relevant expertise. This is to ensure that the assessor can ask the right questions relating to the condition and interpret these appropriately to identify underlying needs. A person with relevant expertise can be considered as somebody who, either through training or experience, has acquired knowledge or skill of the particular condition or circumstance. Such a person may be a doctor or health professional, or an expert from the voluntary sector, but there is no obligation for the local authority to source an expert from an outside body if the expertise is available in house."

51. Chapter 10 is headed "Care and support planning". Under the heading "planning for people who lack capacity", paragraphs 10.56 to 10.66 provide:

> "10.59 Good, person-centred care planning is particularly important for people with the most complex needs. Many people receiving care and support have mental impairments, such as dementia or learning disabilities, mental health needs or brain injuries. The principles of the Care Act apply equally to them, in addition to the principles and requirements of the Mental Capacity Act 2005 (MCA) if the person lacks capacity (see also chapter 7 on independent advocacy).
>
> 10.60 The MCA requires local authorities to assume that people have capacity and can make decisions for themselves, unless otherwise established. Every adult has the right to make his or her own decisions in respect of his or her care plan, and must be assumed to have capacity to do so unless it is proved otherwise. This means that local authorities cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.
>
> 10.61 The local authority must support the person to understand and weigh up information, to offer choices and help people to exercise informed choice. A person must be given all practicable help to make the specific decision before being assessed as lacking capacity to make their own decisions.

10.62 Local authorities must understand that people have the right to make what others might regard as an unwise or unusual decision. Everyone has their own values, beliefs and preferences which may not be the same as those of other people. People cannot be treated as lacking capacity for that reason. Sometimes the care and support plan may have unusual aspects; the question to explore is whether it will meet the assessed needs and lead to the desired outcomes.

10.63 If a local authority thinks a person may lack capacity to make a decision or a plan, even after they have offered them all practicable support, a social worker or other suitably qualified professional should carry out a capacity assessment in relation to the specific decision to be made. For example, the local authority may assess whether the person has the capacity to decide whether family members should be involved in their care planning or whether the person has the capacity to decide on whether a particular support option will meet their needs.

10.64 Where an individual has been assessed as lacking capacity to make a particular decision, then the local authority must commence care planning in the person's best interests under the meaning of the MCA. Furthermore a person making a decision concerning a plan on behalf of a person who lacks capacity must consider whether it is possible to make a decision or a plan in a way that would be less restrictive of the person's rights and freedoms of action. Any restriction must be in the person's best interests and necessary to prevent harm to the person, and a proportionate response o the likelihood of the person suffering harm and the seriousness of that harm.

10.65 The duty to involve the person remains throughout the process. If lack of capacity is established, it is still important that the person is involved as far as possible in making decisions. Planning should always be done with the person and not for them; should always start by the identification of their wishes, feelings, values and aspirations, not just their needs, and should always consider their wellbeing in the wider context of their rights to security, to liberty, and to family life.

10.66 Where a person has substantial difficulty in being fully involved in their care planning or lacks capacity to agree and consent to the care plan, they may be supported by family members or friends. If a person has no family or friend who is able to facilitate the person's involvement available and willing to do so, then an independent advocate must be appointed. A friend or family member is not appropriate to facilitate the person's involvement if the person has capacity to decide who they wish to support them and chooses not to be supported by that individual. If the person lacks such capacity, then the local authority must decide on the suitability of the friend or family

> member to act in the person's best interests. The role of the independent advocate is to:
>
> • support and represent the person to facilitate their involvement in decision-making in the care planning process
>
> • assist the person in communicating their wishes, feelings, value and aspirations where possible
>
> • to challenge the local authority's decisions if necessary to represent the person's wishes or to promote the person's wellbeing and rights to security, liberty and family life."

52. Under guidance provided under s.2 of the Autism Act 2009, "Statutory guidance for local authorities and NHS organisation to support implementation of the adult autism strategy", local authorities (paragraph 1.4):

> "should be providing general autism awareness to all frontline staff in contact with adults with autism."

The autism guidance further provides that local authorities must

> "Ensure that any person carrying out a needs assessment under the Care Act 2014 has the skills, knowledge and competence to carry out the assessment in question and is appropriately trained. Where the assessor does not have experience in the condition, the local authority must ensure that a person with that expertise is consulted."

(c) *The Mental Capacity Act 2005*

53. S.1 of the MCA, headed "The principles", provides:

> "(1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) 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.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done or a decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests.
>
> (6) Before the act is done or the decision is made regard must be had to whether the purpose for which it is needed can be as

> effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

54. S.2 is headed “People who lack capacity”. S.2(1) provides:

> "A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

55. S.3 is headed “Inability to make decisions.” S.3(1) provides:

> “For the purposes of s. 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.”

56. S.4 sets out the steps to be taken by a decision-maker when determining for the purposes of the MCA what is in the best interests of a person lacking capacity.

57. S.5, headed “acts in connection with care or treatment” provides, so far as relevant:

> (1) If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if—
>
> (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
>
> (b) when doing the act, D reasonably believes—
>
> (i) that P lacks capacity in relation to the matter, and
>
> (ii) that it will be in P's best interests for the act to be done.
>
> (2) D does not incur any liability in relation to the act that he would not have incurred if P—
>
> (a) had had capacity to consent in relation to the matter, and
>
> (b) had consented to D's doing the act.”

58. S.42(1) of the MCA provides that the "Lord Chancellor must prepare and issue one or more codes of practice" for a range of defined purposes, including "(a) for the guidance of persons assessing whether a person has capacity in relation to any matter". S.42(4) provides that "it is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so in one or more of" a range of defined ways, including "(e) in a professional capacity", a status which plainly includes a social work professional. Pursuant to the duty under s.42(1), on the implementation of the Act in 2007, the then Lord Chancellor issued the Mental Capacity Act 2005 Code of Practice. Plans to publish a revised Code have currently been postponed. Although the Code of Practice is now recognised as being out of date in a number of respects, (and was described to us by Mr Ruck Keene as "frozen in aspic") it continues to remain "in force".

59. Under the heading "When should capacity be assessed?", paragraphs 4.34 and 4.35 are relevant to this appeal:

> "4.34 Assessing capacity correctly is vitally important to everyone affected by the Act. Someone who is assessed as lacking capacity may be denied their right to make a specific decision – particularly if others think that the decision would not be in their best interests or could cause harm. Also, if a person lacks capacity to make specific decisions, that person might make decisions they do not really understand. Again, this could cause harm or put the person at risk. So it is important to carry out an assessment when a person's capacity is in doubt. It is also important that the person who does an assessment can justify their conclusions. Many organisations will provide specific professional guidance for members of their profession.
>
> 4.35 There are a number of reasons why people may question a person's capacity to make a specific decision:
>
> - the person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision
> - somebody else says they are concerned about the person's capacity, or
> - the person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works (see paragraphs 4.11–4.12 above), and it has already been shown they lack capacity to make other decisions in their life."

60. Under the heading "Who should assess capacity?" paragraph 4.38 provides:

> "The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made. This means that different people will be involved in assessing someone's capacity to make different decisions at different

> times. For most day-to-day decisions, this will be the person caring for them at the time a decision must be made…."

Paragraph 4.42 provides:

> "More complex decisions are likely to need more formal assessments … A professional opinion on the person's capacity might be necessary. This could be, for example, from a psychiatrist, psychologist, a speech and language therapist, occupational therapist or social worker. But the final decision about a person's capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity – not the professional, who is there to advise."

The first instance judgment

61. In his judgment, the judge summarised in some detail the earlier assessments and reviews. He quoted the solicitor's letter of 7 October 2024, stating that "at its highest …it might be taken as an expression of the claimant's 'wishes and preferences'". He did not cite the provisions in the Care Act but quoted regulations 3 and 5 of the 2014 Regulations and summarised the relevant passages from the Guidance. He quoted some case law to which he had been referred and a passage from a judgment of Hallett LJ in this court in *Lambeth London Borough Council v Ireneschild* [2007] EWCA Civ 234 (in a case which pre-dated the Care Act) at paragraph 57

> "one must always bear in mind the context of an assessment of this kind. It is an assessment prepared by a social worker for his or her employers. It is not a final determination of a legal dispute by a lawyer which may be subjected to over zealous textual analysis. Courts must be wary, in my view, of expecting so much of hard pressed social workers that we risk taking them away, unnecessarily, from their front line duties."

62. The first ground of challenge at first instance was that the assessment was conducted unlawfully in that it was prepared contrary to the requirements of both Regulation 5 of the 2014 Regulations and the Autism Statutory Guidance. Three arguments were advanced in support of this ground. (1) The social workers who conducted the assessment did not have the requisite "skills, knowledge and competence" and appropriate training to carry out the assessment. (2) For that reason, the local authority was under a duty to consult an expert in autism, and a psychologist or psychiatrist with a specialism in issues of capacity relating to sexual relations. (3) There ought to have been a capacity assessment.

63. In rejecting this ground, the judge found that the evidence fell "far short" of allowing him to conclude that the assessment was unlawful because the input of others was "required." Social workers are "highly trained" and, in this case, had "a good deal of experience". T was well known to HLDP and the local authority. Taking those factors into account, the judge concluded that the decision to proceed without further input was not irrational. The evidence demonstrated that the social worker who had carried out the assessment had received appropriate training and had experience of carrying out

needs assessments for those with autism. On the question of capacity, the judge concluded:

> "34. As to capacity, the assessors proceeded on the basis that the Claimant lacked capacity in respect of the formation and maintenance of healthy sexual relationships. There was no suggestion at all that the Claimant lacked capacity in any other area (and linked to that, social media use in respect of which I have seen a capacity assessment dated 20 May 2020). None of the medical professionals who have assessed him have expressed any concern about capacity and each appears to have been confident that the Claimant was well supported to make relevant decisions.
>
> 35. Nothing in the assessment I am concerned with appears to have triggered any concern about capacity. The report notes that the Claimant sat between … one of his carers and his mother … and "asked them to advocate on his behalf." It is clear from the assessment that they performed that task with care. No one at the meeting raised any concerns and there are some indications that the Claimant engaged appropriately. He is entitled to the important presumption of capacity. I have seen nothing to suggest that there was any cause for concern about the Claimant's capacity to make a specific decision after appropriate support has been offered. The Defendant was therefore in my judgment entitled to proceed without a capacity assessment."

64. The second ground at first instance was an irrationality challenge described by the judge as being aimed at three findings: (1) the "conclusion" that T has a learning difficulty rather than a learning disability; (2) a reference to a need for "Physical support – personal care support" and (3) a "conclusion" that T could access mainstream services without support. The judge rejected the contention that the reference to "physical support" was a finding at all. He held that it was "plain" that the local authority did not reach its own decision on the extent of T's learning issues but instead relied on professionals who were qualified to express a view, a course which the judge described as "plainly not irrational". As to mainstream services, the judge observed (paragraph 39):

> "There is a broad measure of agreement between the experts that the Claimant was able to function at a level higher than that to be expected of someone with a learning disability. The decision that the Claimant could access mainstream services with help was plainly not irrational."

The fact, as presented to the court, that T had not been able to access services since the assessment was immaterial as the lawfulness of the decision had to be assessed at the time it was made.

65. The third ground at first instance was described by the judge as "a policy challenge comprising 2 limbs". The first was a "broad argument" that the local authority had "an inflexible policy to exclude those with additional needs from HLDP based only the

diagnostic criteria used to identify a learning disability". The judge rejected this on several grounds, including that the local authority was not applying the policy when it conducted the assessment and that it was clear on the evidence that it took a flexible approach to the policy which was not dependent solely on a diagnosis. The second "narrow" argument was that the local authority treated the issue of access to HDLP as already determined and closed whereas it ought to have recommended a reconsideration of eligibility. The judge rejected this on the grounds that "there was no sensible basis on which the Defendant could have been expected to consider a referral back to HLDP for a fresh assessment."

The appeal to this Court

66. Four grounds of appeal were put forward on T's behalf:

(1) Ground 1: Errors in relation to approach to capacity. The judge erred in law by finding that an assessment of the appellant's mental capacity was not required prior to the completion of his needs assessment pursuant to the Care Act. A capacity assessment was required by the Care Act Statutory Guidance and the Mental Capacity Act Code of Practice, in circumstances where there was reason for concern about the Appellant's capacity in material respects.

(2) Ground 2: Unlawful conclusion in relation to duties in response to Appellant's 7 October 2024 letter. The judge erred in law by finding that specialist input requested on T's behalf was not required. The 2014 Regulations and associated statutory guidance required such input in the circumstances of T's case, and the issue for the judge was the application of those Regulations and guidance, not simply whether adequate reasons had been given by the local authority for refusing the request.

(3) Grounds 3 and 4 (taken together in the appeal skeleton argument): Unlawful lack of reasons and/or factual basis to support conclusions about grounds for re-referral to HLDP and T's ability to cope without HLDP support. The judge erred in rejecting the submission on T's behalf that he was unable to access standard/mainstream healthcare services and in finding that he was able to achieve a great deal with appropriate support, there being no adequate evidential basis for that conclusion.

67. At the start of the appeal hearing, Mr Hilton Harrop-Griffiths for the local authority suggested, somewhat faintly, that the appeal was academic because the Care Act assessment under challenge in the judicial review proceedings had been overtaken by the proceedings in the Court of Protection. Ms Victoria Butler-Cole KC, on behalf of T, conceded that the challenges to the first instance judgment, in particular under ground 1, had to be considered in the light of subsequent events, in particular the capacity assessment conducted in the Court of Protection proceedings. She acknowledged that, if the local authority were to agree to conduct a fresh needs assessment incorporating the findings in relation to capacity, ground 1 would be academic on the facts of this case. She stressed, however, that there remained a question of wider importance: in circumstances where there is reason to doubt someone's capacity to make decisions relevant to their care needs, is it lawful for a local authority to complete a Care Act assessment without carrying out an assessment of the person's capacity? On behalf of Mind, Mr Alex Ruck Keene KC (Hon) stressed the importance of a clear answer to that question. In those circumstances, we decided to proceed with the appeal, but the focus of the appeal was confined to grounds 1 and 2.

68. Under ground 1, Ms Butler-Cole submitted that the judge's conclusion that the local authority had been entitled to proceed without a capacity assessment was an error of law. Applying the terminology of paragraph 6.32 of the Guidance, there was plainly concern about T's capacity to make a specific decision. There was the finding in 2019 that he lacked capacity to make decisions about the use of social media and the observation of his current placement provider that he lacked capacity to make decisions about relationships, including sexual relationships. The judge had been plainly wrong to say there was no suggestion at all that T lacked capacity in other areas.

69. Ms Butler-Cole submitted that the appellant's case was strongly supported by paragraphs 4.34 and 4.35 of the Mental Capacity Act 2005 Code of Practice. Taken with paragraph 6.32 of the Care Act Guidance, it was evident that, where there is a concern about a person's capacity, the question of their capacity to make decisions that give rise to a prima facie need for support has to be determined in order for the nature and extent of the need to be identified. This difference in the characterisation of need will then feed through into the decision as to how the eligible needs should be met. Whether someone has the mental capacity to make a decision about that aspect of their needs is inevitably going to affect how that need is characterised and the measures required to meet it. By way of example, Ms Butler-Cole cited the use of the internet and social media. An individual who is assessed as having a need in that area will be given guidance and support, but the nature and extent of that support will be different if the individual is assessed as lacking capacity. In those circumstances, a person providing care and support will be able to make best interests decisions on behalf of the individual.

70. In the present case, the Care Act assessor knew or ought to have known about T's complex history. She also had, or ought to have had, regard to the solicitor's letter dated 7 October 2024. Ms Butler-Cole for obvious reasons alighted on the express statement in the assessment under challenge that T "lacks capacity in understanding relationships/sexual relationships and boundaries of relationships". But she also pointed to other statements in the assessment about T's lack of understanding or constant need for support (for example, to maintain a safe living environment).

71. Ms Butler-Cole submitted that an assessment of capacity is obviously relevant to the identification and characterisation of needs and how they are to be met and, because it is obviously relevant, it has to be done before a Care Act assessment is completed. She submitted that the threshold for carrying out a capacity assessment is relatively low – a reason to doubt – and on the fact of this case that threshold was plainly crossed. On any reasonable analysis, the available information was sufficient to raise a concern about T's capacity.

72. Ms Butler-Cole cited the observations of Swift J in *Royal Bank of Scotland Plc v AB* [2021] EWCA Civ 345 at paragraph 26-27:

> "26. The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining

> capacity. To do that would be to fail to respect personal autonomy in a different way…..
>
> 27. In this case, the Tribunal's reliance on section 1(2) of the 2005 Act was in error. The Tribunal relied on the section 1(2) presumption to create Catch-22: a conclusion that an assessment of AB's capacity to litigate would only be appropriate if there was already expert evidence that she lacked capacity to litigate. That was a misapplication of section 1(2) of the 2005 Act. Section 1(2) does require any lack of capacity to be *"established"*; but it does not require a lack of capacity to be established before a court can require an assessment of capacity. That proposition only has to be stated to be recognised as self-defeating."

Swift J's observations were endorsed by this Court on appeal – see *Royal Bank of Scotland Plc v AB* [2021] EWCA Civ 345

73. The appellant's submissions on ground 2 were presented by junior counsel Ms Gráinne Mellon. Her principal argument was that, against the backdrop of this particular appellant's multiple and complex needs and conditions, specialist input from a psychologist or a psychiatrist was plainly required. Ms Mellon stressed that this was not an academic argument. It goes to the very heart of the difficulty in this case because it is through the involvement of this expertise that the appellant is most likely to get a proper identification of his needs and the ways in which those needs can be met. Only through this specialist input will it be possible to unlock the circular issue of how T is to access the services that everyone accepts he needs.

74. Ms Mellon relied on the mandatory duty imposed on the local authority by regulation 5 of the 2014 Regulations to ensure that that specialist input is obtained if it is required and on the duty imposed by regulation 3(2)(c), when seeking to ensure that the assessment is carried out in an appropriate and proportionate manner, to have regard to the individual's wishes and preferences, the outcome they are seeking, and the severity and overall extent of their needs. The duties were reinforced by paragraphs 6.85 to 6.88 of the Guidance. In addition, prior to the assessment being carried out, there had been a specific request, in the solicitor's letter dated 7 October 2024, for specialist input from a psychologist, from a learning disability specialist and an autism specialist, a request to which the local authority should have had regard under regulation 3(2)(a).

75. Ms Mellon submitted that the outcome of the assessment, a decision that T's GP should be asked to refer him to a psychologist, was plainly inadequate. Eighteen months on, nothing had happened. In all probability a different outcome would have been achieved had the local authority sought specialist input from a psychiatrist or psychologist as part of the assessment.

76. Ms Mellon submitted that the judge failed to grapple with this issue. There was no consideration in the judgment of why it was argued that an input from a psychologist was required. The judge only referred in general terms to the input of "others". He failed to address T's specific conditions and needs and the specific specialist input which the appellant argued was required.

77. Responding to the appeal on behalf of the local authority, Mr Harrop-Griffiths based his submissions squarely on the administrative court's judgment. There was nothing about the needs assessment that warranted or required a capacity assessment. Such an assessment is only required when there is a decision for the person to make. The social worker who carried out the assessment did not consider it necessary for T to have an independent advocate when T himself had asked for his mother and a support worker from the placement to be present. In the circumstances, applying the Care Act Guidance, no capacity assessment was necessary and the judge's analysis of the issue was correct.

78. In oral submissions, Mr Harrop-Griffiths suggested that the involvement of an individual in his Care Act assessment was determined not by reference to an assessment of capacity under the MCA but rather by the provisions of s.67 of the Care Act. The provisions are couched in terms similar to those in the MCA (compare s.3(1) of the MCA with s.67(4) of the Care Act). He submitted that the presence of these provisions in s.67 explained the absence of any express reference to a capacity assessment in the Care Act.

79. Mr Harrop-Griffiths also submitted under ground 2 that the judge's analysis had been correct. The social worker who carried out the assessment was fully trained. The judge had been entitled to take into account the historic evidence of earlier assessments of T's cognitive abilities. There was no basis on which it could be said that any specialist input was "required" and the decision to proceed without it was not irrational.

Mind's intervention

80. The important context of this appeal is explained in the witness statement of Ms Kulthum Dambatta, the senior lawyer at Mind, from which I cite the following passages:

> "Mind emphasises that the issues raised in this appeal are of general importance because they concern systemic features of Care Act assessment practice affecting people with mental health problems, autism and learning disabilities, including the legal and practical consequences of treating mental capacity as a matter arising only where concerns are identified, as opposed to an integral component of lawful assessment….
>
> Evidence from a systematic literature review by Jayes, Palmer, Enderby et al (Disability and Rehabilitation, 2019) titled "How do health and social care professionals in England and Wales assess mental capacity?" [exhibited to the statement] shows that mental capacity is frequently misunderstood in practice and capacity assessment practice varies significantly across England and Wales. …. In such circumstances, local authorities may fail to identify what support is required to enable the individual to make decisions, may be unable to apply the wellbeing principle lawfully, and may affect the effectiveness of safeguarding responses….

There is also evidence that failures to properly consider mental capacity are closely associated with safeguarding risks. A review by the University of Bristol titled "Mental Capacity, Self-Neglect, and Adult Safeguarding Practices: Evidence Synthesis and Agenda for Change" (2022) [exhibited] which draws on a synthesis of Safeguarding Adults Reviews found that individuals experiencing self-neglect were placed at heightened risk where professionals failed to assess capacity. The study identified a recurring pattern in which the presumption of capacity was misapplied, resulting in capacity assessments not being carried out even where there were evident indicators of impaired decision making, including disengagement from services and relevant diagnoses affecting cognition….

Taken together, this evidence indicates that the proper application of the Mental Capacity Act is central to the discharge of safeguarding duties under the Care Act, including the duty to protect vulnerable individuals from abuse and neglect…

Evidence from practitioners and Mind's own research on assessment and crisis care practice indicates that the lack of appropriate expertise may affect the accuracy of assessments and their outcomes. This is directly relevant to the issues raised in Ground 2 of this appeal. In Mind's experience, the absence of appropriate expertise is not neutral: it impacts on both the accuracy of assessments and the outcomes that follow…. This is supported by Mind's own research …. These findings point to a clear link between lack of expertise at the assessment stage and poorer outcomes for individuals….

Taken together, this evidence indicates that where assessments for individuals with complex mental health needs, autism, learning disabilities, or intersecting vulnerabilities are conducted without appropriate expertise, there is a heightened risk that needs will be misidentified or misunderstood, including being framed as behavioural or falling outside the scope of social care, often resulting in delayed intervention and increased risk….These risks are particularly acute for autistic individuals and those with cognitive impairment….

Evidence from Mind's research also demonstrates the consequences of decisions being made about individuals rather than with them, especially where capacity is an issue. Where individuals are not effectively supported to participate, this may mask underlying impairments in decision making, leading to premature or inaccurate assumptions about capacity and undermining the reliability of assessments. Moreover, where individuals are not treated as active participants in their care, they are more likely to disengage from services, delay seeking help, and only re-present at a point of acute crisis …. These findings suggest that failures to involve individuals

> meaningfully are not merely procedural shortcomings but go to the heart of autonomy, rights and the lawful exercise of care functions. This is particularly significant where capacity is in issue, since effective participation depends upon appropriate support to understand information, communicate preferences and make decisions …."

81. Ms Dambatta expressed her conclusion in these terms:

> "34. The evidence set out in this statement identifies recurring themes in assessment practices. Where mental capacity is not actively considered at the assessment stage, there is a significant risk that assessments fail to identify need accurately, fail to support decision making and fail to engage individuals properly in the process.
>
> 35. This is not an isolated or case-specific issue. The evidence from research, lived experience and national data shows that treating capacity as a reactive issue rather than an integral component of lawful assessment may affect the reliability and effectiveness of assessments across the system. A failure to involve appropriate expertise risks compounding these issues. The consequences from this are significant, with consequent impact on vulnerable individuals, and risks are not evenly distributed. Those with complex, fluctuating or intersecting vulnerabilities; including trauma, poverty or care experience, are particularly affected where assessment processes are inflexible, insufficiently responsive or lack appropriate specialist input.
>
> 36. The evidence cited highlights the need for clear guidance from the Court of Appeal as to the proper role of capacity within Care Act assessments, and the involvement of appropriately skilled assessors and relevant expertise. Such guidance is necessary in order to ensure that those with the greatest need are not systematically excluded by deficiencies in assessment practices."

82. In his helpful written submissions on behalf of the intervenor, Mr Ruck Keene told the Court that Mind's concern was the wider implications of the decision on the approach to assessment under the Care Act and that Mind made no specific submissions about the local authority's decisions in relation to T.

83. Central to Mr Ruck Keene's argument was that the obligation to consider capacity comes not just from the Guidance but from the Care Act itself. S.80(2) provides that any reference in Part 1 (which includes all the provisions in the Act with which we are concerned) to a person having or lacking capacity is to be interpreted in accordance with the MCA. Discharging its duties towards an individual under the Care Act may require a local authority to consider a person's decision-making capacity. This may arise substantively, to the extent that a potential lack of capacity to make a decision relates directly to the person's needs for care and support, or procedurally, to the extent that a potential lack of capacity relates to the participation in the assessment of need.

84. The substantive relevance of capacity to a needs assessment depends entirely on the circumstances. In some cases, (for example, cases of serious physical impairment) a person's decision-making capacity is entirely irrelevant to the presence or absence of needs. In other cases the condition which gives rise to care and support needs may also mean that they have impaired decision-making capacity, (for example, where a person has a severe mental illness). There will also be cases in which the impairment of the person's decision-making capacity is the primary issue giving rise to a need for care and support. Mr Ruck Keene submitted that, in those circumstances, it is not surprising that the Care Act does not expressly refer to capacity in the 'substantive' section of s.9. Having capacity to make decisions in the care and support 'zone' does not automatically equate to having no needs and, conversely, lacking capacity does not equate to having needs. Determining the relevance of capacity is an intensely fact-specific exercise for both those entrusted by the local authority with the task of assessing under s.9, and, where that decision is challenged by way of judicial review, for the court upon such a challenge. Mr Ruck Keene submitted, however, that the fact that it is fact-specific means that it is all the more important that assessors have clear and authoritative guidance.

85. The procedural relevance of decision-making capacity to the process of needs assessment is central to Mind's argument. Anyone carrying out an assessment of needs under s.9 must also be alive to the possibility that the person may lack capacity to make decisions about participating in that assessment. It will always be relevant in relation to the question of whether someone else should be involved in the assessment process: see s.9(5)(c) of the Care Act. It may also be relevant if the person purports to refuse an assessment: s.11(2).

86. Mr Ruck Keene was critical of the judge's reasoning in concluding that the local authority was entitled to proceed without a capacity assessment, in particular his observation (at paragraph 35):

> "[T] is entitled to the important presumption of capacity. I have seen nothing to suggest that there was any cause for concern about [his] capacity to make a specific decision after appropriate support has been offered."

87. Mr Ruck Keene identified "two significant – and common – errors" in this passage. The first related to the reference to the presumption of capacity, one of the fundamental principles in s.1 of the MCA. Under s.5, a decision cannot be taken about an individual on a best interests basis unless the decision-maker (1) has taken reasonable steps to establish whether the individual lacks capacity in relation to the matter in question and (2) reasonably believes that he does. Mr Ruck Keene submitted, however, that the presumption cannot be used to avoid taking responsibility for assessing and determining capacity where there is a legitimate doubt as to whether the person has capacity. He relied on the evidence in Ms Dambatta's statement quoted above as demonstrating that failing to take such responsibility has real and significant adverse consequences.

88. Secondly, Mr Ruck Keene submitted that asking whether there is a cause for concern about the person's capacity to make a specific decision *after* appropriate support has been offered is to ask the wrong question. The question is whether there is a cause for concern about the person's decision-making. It is that concern which triggers the

requirement to assess their capacity. S.1(3) MCA prohibits steps being taken to make decisions on their behalf unless practicable (not appropriate) steps have been taken to support them to make the decision without success, but that – by definition – is a matter which requires consideration of the person's decision-making capacity. Mr Ruck Keene suggested that HHJ Bird may have been misled by inaccuracies in the Guidance set out above, in particular the following sentence in paragraph 10.63:

> "If a local authority thinks a person may lack capacity to make a decision or a plan, even after they have offered them all practicable support, a social worker or other suitably qualified professional should carry out a capacity assessment in relation to the specific decision to be made."

Mr Ruck Keene stressed that the obligation to conduct a capacity assessment arose whenever there was a reason to doubt a person's capacity.

89. In conclusion, Mind invited this Court to confirm that

(1) where there is reason to believe that a person lacks capacity in respect of any matter relevant to a care and support needs assessment, that a mental capacity assessment should be carried out prior to needs assessment being completed;

(2) having reason to believe that someone may lack capacity in respect of the assessment should be considered a relatively low threshold triggering an assessment of their capacity;

(3) the obligations as regards the expertise and training of assessors in Regulation 5 of the 2014 Regulations are mandatory and not merely aspirational.

90. In supplementary oral submissions, Mr Ruck Keene summarised Mind's position in simple terms: people who are discharging functions under the Care Act need to be told in no uncertain terms that where there is reason to consider capacity you have to consider it.

Discussion and conclusion

91. On ground 1, I accept the submissions of the appellant, supported by Mind as intervenor. I conclude that, whenever there is a reason to doubt the capacity of a person whose needs for care and support are being assessed under the Care Act, a capacity assessment under the MCA must be carried out by an appropriately qualified professional before the Care Act assessment of needs is completed.

92. This is clear from the provisions of the Act itself as well as the guidance issued thereunder.

93. First, understanding a person's capacity is integral to the evaluation of their well-being. The definition of "well-being" in s1(2) includes a number of factors which are affected by an individual's capacity. For example, when considering, under paragraph (d), the "control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided)", it will clearly be necessary to consider whether the individual has the capacity to make decisions about those matters. The same applies when considering, under paragraph (e), the

individual's "participation in work, education, training or recreation" or, under (g), their personal relationships.

94. Secondly, in order to carry out its functions relating to an individual's well-being under the Care Act, a local authority must, under s.1(3), have regard to, inter alia, the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being; the individual's views, wishes, feelings and beliefs; all the individual's circumstances, not only factors which might lead others to make unjustified assumptions about the individual's well-being; the importance of the individual participating as fully as possible in decisions being provided with the information and support necessary to enable them to participate; and the need to ensure that any restriction on the individual's rights or freedom of action is kept to the minimum. In assessing these issues, a local authority must have a clear understanding of the individual's capacity to make decisions in the various domains in which his well-being is under consideration.

95. Thirdly, there are specific refences to capacity in the provisions in the Care Act about assessments and the preparation of care and support plans. Under s.9(5)(c), the persons who a local authority must involve in an assessment include, where the adult lacks capacity to ask the authority to involve someone, any person who appears to the authority to be interested in the adult's welfare. The same obligation arises under s.25(3) when the local authority is preparing a care and support plan following an assessment. A local authority's obligation under s.11 to respect an adult's refusal of a needs assessment is contingent upon the adult having capacity to decide to refuse it. Where the individual lacks capacity to make such a decision, the local authority must carry out the needs assessment if it concludes that an assessment is in his best interests. In order to comply with these provisions, a local authority must, again, have a clear understanding of the individual's capacity.

96. Fourth, the requirements imposed by the 2014 Regulations on a local authority carrying out an assessment are also contingent upon the capacity of the individual adult, in particular the requirement to carry out the assessment in a manner which ensures that the individual is able to participate in the process as effectively as possible, to have regard to the wishes and preferences of the individual, and to provide information to the individual in a format which is accessible to the individual to whom it is given.

97. Fifth, the provisions in the Act and regulations are reinforced by the Guidance, in particular the express words of paragraphs 6.32 and 10.63. Although there was some criticism at the Bar about some of the language in these paragraphs of the Guidance, the core message is clear – when there is a concern about a person's capacity to make a specific decision, then an assessment of capacity should be carried out under the MCA.

98. The effect of these provisions is to require local authorities and their social workers carrying out Care Act assessments to comply with the MCA and its Code of Practice. The assessment of capacity must be carried out in accordance with the principles in s.1 of the MCA and the provisions of ss 2 and 3. There must also be compliance with the Code of Practice, in particular paragraphs 4.34, 4.35, 4.38 and 4.42.

99. It is puzzling why this this point has not arisen for consideration before in the nineteen years since the MCA was brought into force. None of the very experienced counsel who

appeared before us was able to suggest a convincing reason. To my mind the interpretation of the statutory provisions is clear. But the evidence of Ms Dambatta about the deficiencies in practice is concerning. There is, of course a risk that this judgment may impose an additional layer of work on local authorities, and some extra costs. But the purpose of assessing capacity is to improve the chances of arriving at a more accurate assessment of the individual's needs. That can only be to the benefit of the individual and in due course should lead to a more efficient and effective use of the local authority's resources.

100. In this case, there was clear evidence that T lacked capacity in at least one respect identified by his placement provider (relationships including sexual relationships and the understanding of boundaries). That evidence was expressly cited in the Care Act assessment. Furthermore, looking at the totality of the evidence available to the assessor, there was plainly reason to believe that T may lack capacity in other areas.

101. The consequences of failing to recognise the need for a capacity assessment are starkly demonstrated by how the issue of T's difficulties with relationships was treated. Instead of recognising the requirement to conduct a capacity assessment, the local authority concluded (in a passage headed "My desired outcomes") that his difficulties with relationships and sexual relationships in particular should be dealt with by a referral for positive behaviour support which would "empower T to make informed decisions about [his] care and support [and] improve [his] personal relationships with others" and that T's family and the provider's staff would "continue to advise and support T to maintain healthy relationships in person and online". Ms Butler-Cole submitted that this was not a proper assessment of need nor an adequate analysis of how to meet it. I agree. Without a capacity assessment, the local authority was unable to judge whether this was the appropriate level of support.

102. It should be remembered that, prior to the Care Act assessment being carried out in December 2024, the local authority had been expressly reminded in the solicitor's letter dated 7 October 2024 of T's history of difficulties in sexual relationships dating back to 2019 and that he had been arrested for sexual offences. It is also, to say the least, concerning that, six months after the Care Act assessment in which no assessment of capacity was carried out, T was arrested for serious sexual offences and remanded in custody for eight months.

103. I do not accept Mr Harrop-Griffiths' argument that there was no decision for T to make which required a capacity assessment. As Ms Butler-Cole observed during the hearing, there were a number of decisions about his care – his relationships, his contact with other people, his use of the internet and social media – which were identified as issues in the assessment and were issues on which his capacity was in doubt. As Ms Butler-Cole also pointed out, all three of the reasons identified in paragraph 4.35 of the Mental Capacity Act 2005 Code of Practice were present at the time of the assessment under challenge. T's behaviour and circumstances raised a doubt as to whether he had the capacity to make a decision. The staff at his residential unit were concerned about his capacity. He has diagnoses of autism and ADHD and, at an earlier point, he was found to lack capacity to make decisions about the use of social media. In those circumstances, under the statutory provisions and the Guidance, the local authority ought to have obtained a capacity assessment.

104. I also reject Mr Harrop-Griffiths' submission that the provisions of s.67 of the Care Act in some way obviate the obligation on the local authority under the MCA to carry out a capacity assessment where there is doubt as to the individual's capacity. As Ms Butler-Cole observed in reply, s.67 is a specific provision about the process of securing the individual's involvement in assessments and plans. It has no relevance to the question whether the individual has capacity to make decisions about aspects of his life. It does not override the clear requirement, in statute and in the Guidance, for an assessment of capacity to be conducted where there is a doubt as to the individual's capacity to make decisions relevant to his needs.

105. There are three further points about capacity to be made arising out of the submissions made to us. First, I endorse the observation that the presumption of capacity should not be held out as a reason not to assess capacity when it is in doubt. As Swift J observed in *Royal Bank of Scotland PLC v AB*, supra, "when there is good reason for cause for concern, where there is legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity." The presumption of capacity in s.1(2) of the MCA is an important principle when assessing capacity but it is not a reason for deciding not to assess it when capacity is in doubt. Secondly, the principle in s.1(3) that 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 is equally important. But again this is not a reason for deciding not to assess capacity when it is in doubt. I therefore agree with Mr Ruck Keene's submissions that the judge's approach in paragraph 35 of his judgment was wrong.

106. Thirdly, there is a strong suggestion in this case that the decision not to conduct a capacity assessment may have been influenced by the earlier conclusion that T did not have a learning disability. But the question of an individual's capacity is not determined by whether their level of cognitive ability places them in the category of "learning disability". S.2(1) of the MCA refers to "impairment of, or a disturbance in the functioning of, the mind or brain". It does not refer to disability. Someone who is categorised as having a learning disability may lack capacity to make some decisions but not others. Equally, someone who is not categorised as having a learning disability may lack capacity to make some decisions. I agree with the observation of MacDonald J in *North Bristol NHS Trust v R* [2023] EWCOP 5 at paragraph 48:

> "a formal diagnosis may constitute powerful evidence informing the answer to the second cardinal element of the single test of capacity, namely whether any inability of R to make a decision in relation to the matter in issue is *because of* an impairment of, or a disturbance, in the functioning of the mind or brain. However, I am satisfied that the court is not precluded from reaching a conclusion on that question in the absence of a formal diagnosis or … in the absence of the court being able to formulate precisely the underlying condition or conditions. The question for the court remains whether, on the evidence available to it, the inability to make a decision in relation to the matter is because of an impairment of, or a disturbance in the functioning of, the mind or brain."

107. For those reasons, under ground 1 I conclude that an assessment of capacity was clearly required in this case before completion of the Care Act assessment in December 2024 and the judge was wrong to conclude that it was not.

108. Turning to ground 2, I accept the appellant's argument, supported by Mind, that regulation 5 imposes a mandatory obligation to ensure that the assessment is carried out by someone with the skills, knowledge and competence to carry it out and that, where it considers the individual's needs so require, the local authority must consult a person who has the necessary expertise in relation to the individual's condition or other circumstances. In addition, when ensuring that the assessment is carried out appropriately, the local authority must, under regulation 3(2), have regard to the severity and overall extent of the individual's needs. The provisions in the regulations are, as Ms Mellon demonstrated, supported by provisions in the Guidance at paragraphs 6.85 – 6.88. "It is essential that the assessment is carried out to the highest quality" (paragraph 6.85). The assessors must "have the skills and knowledge to carry out an assessment of needs that relates to a specific condition and circumstances" (paragraph 6.86). "When assessing particularly complex or multiple needs, an assessor may require the support of an expert to carry out the assessment, to ensure that the person's needs are fully captured" (paragraph 6.87). Where the assessor does not have the necessary knowledge of a particular condition or circumstances, they must consult someone who has relevant expertise. This is to ensure that the assessor can ask the right questions relating to the condition and interpret those appropriately to identify underlying needs" (paragraph 6.88).

109. I recognise, of course, the very considerable skill and expertise which a trained social worker, such as the assessor in this case, brings to their work. But in the context of this case, given T's complex diagnosis and needs, I agree that the local authority ought to have sought the advice of a psychiatrist or psychologist.

110. I accept Ms Mellon's submission that the judge failed to address T's specific conditions and needs and the specific specialist input which it was argued was required. The judge asserted that the evidence "falls far short of allowing me to conclude that the assessment was unlawful because the input of others was 'required'". There was no consideration in the judgment of why it was argued that an input from a psychologist was required. The judge only referred in general terms to the input of "others". I accept that this Court must be slow to interfere with a judge's assessment of the evidence. In my view, however, his conclusion is not sustainable having regard to the evidence before him, including the important and detailed statement from T's adoptive mother. I conclude that the failure to seek input from a psychologist in this case was irrational. Accordingly, I would also allow the appeal under ground 2.

111. I would therefore allow the appeal against the dismissal of the judicial review claim, and quash the Care Act assessment of 13 December 2024. Subject to any further submissions, however, I would not make an order, as originally sought in these proceedings, directing the local authority to carry out a fresh Care Act assessment. Decisions about Ts future care are now being determined in the proceedings in the Court of Protection. It is for that court to decide on any further assessments.

LADY JUSTICE MAY

112. I agree.

LORD JUSTICE BEAN (Vice President, Court of Appeal, Civil Division)

113. I also agree.