HEALTH, WELFARE AND DEPRIVATION OF LIBERTY
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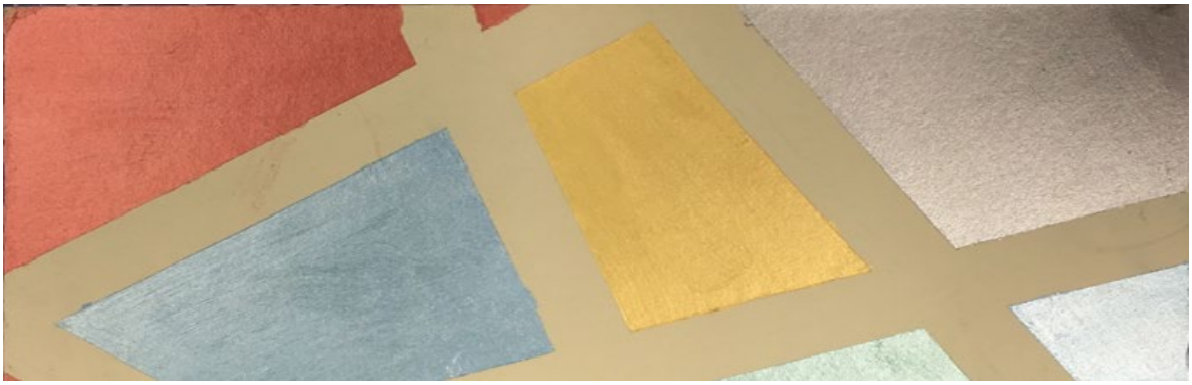

Welcome to the September 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: an update on post-*AGNI* developments, two capacity conundrums in one case and 'over-litigation' in a PDOC case;

(2) In the Property and Affairs Report: an update from the Property and Affairs Court User Group meeting and the OPG is recruiting lawyers;

(3) In the Practice and Procedure Report: the Court of Appeal resets the approach to personal welfare deputies, and cross-border cases involving Scotland;

(4) In the Mental Health Matters Report: recent cases concerning the relationship between the MHA and the MCA and a excoriating judgment on "detainability;"

(5) In the Children's Capacity Report: *AGNI* and children and the Joint Committee on Human Rights reports on the human rights of children in care;

(6) In the Wider Context Report: litigation capacity complexities, and recent medical guidance documents concerning consent, voluntarily stopping eating and drinking, and eating disorders and critical care.

(7) In the Scotland Report: a Practice Note that has caused some consternation.

A reminder that that whilst Chambers have launched a new and zippy version of our website which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

Contents

AGNI update

The DHSC has yet to publish the further guidance that it has promised following what seems now universally to be known as *AGNI*.

Alex continues to update his resources page on the case. Of most immediate relevance to our readers are likely to be the following:

- The initial flurry of webinars has started to slow; we draw your attention, in particular, to the National Mental Capacity Forum webinar.
- On 15 July 2026, ADASS published an updated Deprivation of Liberty Safeguards (DoLS) Priority Tool to prioritise the allocation of new requests to authorise a deprivation of liberty, reflecting the AGNI judgment.
- West Midlands ADASS has published updated DoLS forms to reflect the judgment – there are no statutory forms for the DoLs process, but these forms are used by many local authorities, and the updated forms represent an operationalisation of the judgment (note, the relevant updated forms say April 2026, but they were prepared in June 2026).
- The Joint Committee on Human Rights wrote on 8 July to the Secretary of State for Health and Social Care to ask a number of questions about the Government's proposed response to the judgment.

The minutes of the Property and Affairs Court User Group meeting held on 1 July also record the Senior Judge's update on the court's approach:

- ***Existing authorisations:*** *Existing authorisations remain valid and there is no need to apply to discharge them.*
- ***Pending applications:*** *Pending applications should proceed as normal. On referral, the judge will apply the new test and may direct a COP24 statement if further information is required.*
- ***COPDOL11 applications:*** *Fewer COPDOL11 applications are expected, although the streamlined route remains available for review applications.*
- ***Deputies:*** *Where there is no DoLS authorisation, a deputy seeking to sell P's property can now file a COP24 addressing the relevant Article 5 factors, including P's wishes, living arrangements and the care provider's views. This avoids requiring the*

deputy to confirm an authorisation that is unlikely to exist.

HHJ Hilder indicated that this is likely to be the approach directed by the court.

Tenancies are different: the question there is one of best interests, rather than an AGNI question.

- ***COP9/COP24 applications to end a DoL:*** *The court was asked whether these applications need to be made by a solicitor. HHJ Hilder treated this as a Mazur issue (CILEX v Mazur [2026] EWCA Civ 369), rather than an AGNI issue. The ordinary post-Mazur rules on delegation therefore apply, with no separate COP-specific exception.*

The first reported case to consider *AGNI* was *Oxfordshire County Council v P* [2026] EWCOP 33 (T2). It makes very interesting reading, but it is very important to emphasise that it does not represent a judicial interpretation of *AGNI* which represents a precedent to follow, as opposed to application to the facts of a particular case. We emphasise this because it is, with respect, an application which is not entirely easy to square with the decision of the Supreme Court in *AGNI*. Paragraphs 16-18 (where *AGNI* is considered and applied) show how strong the gravitational pull of *Cheshire West* remains; given that the facts of *P*'s case demonstrate (on their face) rather fewer of the 'multi-factorial' components of deprivation of liberty were satisfied than did MEG's case, it would have been very helpful had the judgment explained why, in light of the Supreme Court's clear statement that MEG was not deprived of her liberty, P in the Oxford case was nonetheless "very likely" to be so.

AGNI features in the Practice and Procedure, Mental Health Matters and Children's Capacity sections of the Report below as well (a special prize for those playing *AGNI* bingo who can spot all of the appearances).

Finally for these purposes, and whilst not referencing *AGNI*, we noted with interest the case of *CP v Spain* [2026] ECHR 114, handed down on 11 June 2026. The case concerned the compulsory admission of a woman to hospital to give birth pursuant to a judicial order despite her wish to give birth at home. Much of the decision focused on Article 8 ECHR, the court ultimately finding that there had been no breach of the woman's Article 8 rights. The reasons for this related largely to the specific Spanish legal provisions relating to the rights of the foetus, which differ to those in England & Wales. However, CP also asserted that she had been unlawfully deprived of her liberty. In light of the commentary on *AGNI* and the extent to which the Supreme Court correctly analysed the Strasbourg case-law, it is perhaps of some interest to set out the 'multi-factorial' approach adopted by the ECtHR:

The court's case-law

126. To determine whether someone has been "deprived of his liberty" within the meaning of Article 5 of the Convention, the starting point must be his or her specific situation and account must be taken of a range of factors such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see Aftanache v. Romania, no. 999/19, §§ 78, 26 May 2020, with further references; and Nada v. Switzerland [GC], no. 10593/08, § 225, ECHR 2012). The Court attaches importance to factors such as whether it is possible to leave the restricted area, the degree of supervision and control

over the movements of the person concerned, the extent of that person's isolation and whether they can have contact with the outside world (see Guzzardi v. Italy, 6 November 1980, § 95, Series A no. 39, cited above, and H.M. v. Switzerland, no. 39187/98, § 45, ECHR 2002-II). Article 5 § 1 may also apply to deprivations of liberty of a very short duration (see, among many authorities, Creangă v. Romania [GC], no. 29226/03, § 93, 23 February 2012; M.A. v. Cyprus, no. 41872/10, § 190, ECHR 2013 (extracts)); Gillan and Quinton v. the United Kingdom, no. 4158/05, § 57, ECHR 2010 (extracts); and Siedlecka v. Poland, no. 13375/18, §58, 31 July 2025). Where mentally disordered persons are placed in an institution, the Court has held that the notion of deprivation of liberty covers more than merely a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see Stanev v. Bulgaria [GC], no. 36760/06, § 117, ECHR 2012, with a further reference). The absence of handcuffing or other measures of physical restraint is not decisive in establishing whether there has been a deprivation of liberty (see M.A., cited above, § 193 in fine), and nor does the characterisation or lack of characterisation given by a State to the facts (see Creangă, cited above, § 92) or the purpose of the measures taken by the authorities which deprived the applicants of their liberty (ibid., § 93). In Ulisei Grosu v. Romania (no. 60113/12, §§ 27-32, 22 March 2016) the Court found that taking of a person by the police to a psychiatric hospital against his or her will could amount to "deprivation of liberty". In Aftanache (cited above, §§ 81-83) it reached a similar conclusion in respect of an applicant who had been held against his will by ambulance personnel and the police for about six hours.

Application to the present case

127. The Court notes at the outset that in this case the hospital made a formal application supported by reasons for an order for the applicant to be compulsorily admitted to hospital (see by contrast Aftanache, cited above, § 97). The necessity of the measure was considered by a competent court which had issued a reasoned decision of 24 April 2019 granting it (see, for the Court's assessment of its lawfulness and proportionality under Article 8 of the Convention, paragraphs 98-117 above). Although the applicant disagreed that there had been any medical emergency, it followed from the medical professionals' conclusion that her admission to hospital was required, given the risk to the foetus (see, for the hospital's submissions and the courts' findings, paragraphs 16, 17, 19, 40 , 45and 59 above; see further, mutatis mutandis, O.G. v. Latvia (dec.), no. 6752/13, § 29, 30 June 2015).

128. The Court observes that the duty court in the present case did not order that the applicant be detained, arrested or otherwise deprived of liberty, within any pending criminal or administrative proceedings or otherwise (see paragraph 19 above and contrast, for instance, Zelčs v. Latvia, no. 65367/16, § 37, 20 February 2020; and M.A. v. Cyprus, cited above,§ 194). The role of the police was narrowly defined by the same order as "accompanying" the applicant

to the hospital and making sure that she went there in a medically equipped vehicle (see paragraph 20 above), which cannot be equated to detention.

129. As regards the first of the periods referred to by the applicant, the Court notes from the police report and the parties' submissions that the disputed period lasted from 3.30 p.m., when the police arrived, to 5.30 p.m., when the applicant was admitted to the hospital (see paragraphs 22 and 28 above), that is, for a short period of time. At no point was the applicant arrested or detained during that period (see, by contrast, Stelian Roşca v. Romania, no. 5543/06, § 60, 4 June 2013). Neither the police officers nor the ambulance personnel entered the applicant's home. Importantly, there is nothing to suggest that, should the applicant have refused to comply with the order, the order would have enabled the officers to enter her home, let alone to arrest her. As submitted by the Government and not disputed by the applicant, they could only have done that if they had obtained a separate order for arrest for disobedience of the first court order.

130. In any event, it is not for the Court to speculate how the events would have unfolded if the applicant had disobeyed the order of 24 April 2019. The facts of the case are that the police spent more than an hour persuading the couple to go to the hospital without entering her home (see paragraphs 22 and 25 above). The officers engaged in an extensive conversation with the midwife and the applicant's partner who told the applicant what was being said (and the midwife contacted her lawyer). Then, at 4.50 p.m. the applicant accepted that she had to go to the hospital. While the parties are in dispute about whether she went to the hospital of her own free will or as a result of pressure by the officers, the Court does not detect elements of coercion which affected the applicant's liberty within the meaning of Article 5 of the Convention (see, by way of contrast, Venskutė v. Lithuania, no. 10645/08, § 73, 11 December 2012; and compare to Guenat v. Switzerland (dec.), no. 24722/94, Commission decision of 10 April 1995). It is noteworthy that the applicant's submission that the police officers had put pressure on her was made for the first time in her observations to the Court and not in the domestic proceedings (compare paragraphs 26 and 27 above).

131. Once she agreed to go to hospital, the applicant was given time to prepare for the journey, and then she was taken to the hospital by ambulance (see paragraphs 23 and 27 above). The police officers were not present in the ambulance. The applicant's partner asked the officers to give him a lift as he was unable to drive (see paragraph 23 above). The Court finds that the way in which the applicant was taken to hospital does not in itself raise an issue under Article 5 § 1 of the Convention, nor did it go further than normal practical arrangements for taking someone for hospital treatment.

132. Having regard to the specific circumstances discussed above and the short duration of the disputed period (see, mutatis mutandis, Vadym Melnyk v. Ukraine, nos. 62209/17 and 50933/18, § 84, 16 September 2022), and bearing in mind the domestic legal framework, the reasons given by the court for its order and the way the

order was carried out, the Court finds that the applicant's situation between 3.30 p.m. and 5.30 p.m. on 24 April 2019 did not amount to a deprivation of liberty.

133. As regards the second period referred to by the applicant in her observations (from her admission to the emergency department to the time the child was delivered), the police officers had left immediately on the applicant's admission to the emergency department (see paragraph 24 above, and contrast Udaltsov v. Russia, no. 76695/11, §§ 130 and 136, 6 October 2020). As labour was not induced, the medical personnel provided assistance to the applicant as she continued in labour (see paragraphs 31 and 34 above). As regards the applicant's allegations that she had been under enhanced supervision by the supervising nurse, she referred to nurse's notes made in the clinical history which stated that the applicant should "no longer" be considered "in custody". However, the Court, applying its established case-law, does not find sufficient indications of coercion or any intention on the authorities' side to detain the applicant within the meaning of Article 5. Contrary to the applicant's submissions, the supervisory nurse's notes of her exchange with a duty doctor on 24 April 2019 and in the early hours of 25 April 2019 (see paragraph 29 above) clearly suggest that the applicant did not need supervision, and was perceived by the medical personnel in the same way as "any other patient" and treated as such.

134. Lastly, in respect of both periods, the applicant was not isolated or unable to contact the outside world. It is uncontested that she was accompanied by her partner at all times, apart from the very short period of the journey to the hospital, and she was free to communicate with the midwife during the disputed period.

135. Based on the above considerations the Court concludes that the applicant was not deprived of liberty within the meaning of Article 5 § 1 of the Convention between 4.30 p.m. of 24 April 2019 and 1.40 a.m. of 26 April 2019.

The guidance provided in 2014 by Keehan J in *Re FG* as to the steps required where deprivation of liberty may arise in the obstetric context will require updating in light of *AGNI*. *CP* will need to be taken into account in doing so. In that process, we suggest there are two important points to remember:

1. In identifying whether there is a deprivation of liberty, a key element in determining the presence of the coercion which Strasbourg repeatedly identified as necessary is whether there are coercive measures envisaged in any court order which may be in play. If there is a Court of Protection order providing for entry to property and removal to hospital, together with measures designed to prevent P leaving hospital (even if P has gone to hospital without force), we suggest that questions of deprivation of liberty are very likely still to arise;

2. However, arguably, this is a second order issue. It is notable that in *CP*, the first question was whether the intervention designed to bring about the birth in hospital was justified by reference to Article 8. If it is not, then steps taken to restrain – let alone confine – the person are likely to be unjustified.

By way of early indication of such an approach, we note that in the obstetric treatment case of *University Hospitals of Derby and Burton NHS Foundation Trust & Anor v HH* [2026] EWCOP 35 (T3), Theis J identified that:

> *In the proposed order the Trusts also provide that to the extent which the care and treatment provided to HH in accordance with the care plan amounts to a deprivation of liberty such deprivation of liberty is authorised in the exercise of the court's inherent jurisdiction. Miss Richards accepts the multi-factorial approach the court should now take in the light of the decision Re AGNI [2026] UKSC 16. She recognises that the purpose of any restraint would be to support the proposed care plan, that it is likely to be for a relatively short period of time and that her transportation to the hospital could, arguably, be permitted under s 17(3) MHA. However, where the care plan authorises up to 6:1 and provides for both physical and chemical restraint and where it is likely HH would be objecting to those arrangements, in the circumstances of this case, the restrictions amount to a deprivation of liberty.*

The Official Solicitor agreed with this analysis; although Theis J did not expressly endorse it, it appears from the tenor of her judgment (focused very much on HH's best interests) that she, also, agreed with the proposition.

Two capacity conundrums in one case

A Local Authority v AC & Ors (Consent to Marriage) [2026] EWCOP 31 (T3) (Hayden J)

Mental capacity – assessing capacity

Summary[1]

In this case, Hayden J considered an application relating to AC, who was 20 years old and had a moderate learning disability and developmental delay. In 2024, AC visited Pakistan with her family and married in an Islamic ceremony. The position of AC's family was that the ceremony had "*not been planned in advance of the trip and that AC and the proposed husband formed an attraction to each other when they met and quickly wanted to be married*," and they "*believed that AC had the capacity to make the decision*" (paragraph 2).

AC returned to the UK with her family (rather than remaining with her husband). Shortly thereafter, a report was made to the police about the validity of the marriage. A police officer met with AC and took the view that AC "*lacked capacity to make 'her own choice to marry'*" (paragraph 3). Her family were charged with offences relating to causing a person lacking capacity to marry. Forced Marriage Protection Orders orders were made in respect of AC and her siblings.

A finding that AC lacked capacity was "*an explicit and necessary constituent of the counts on the* [criminal] *indictment*" (paragraph 10). The present judgment arose due to requests for capacity assessments in the criminal proceedings:

> *In April 2025, the defence solicitors in the criminal proceedings indicated that they too had arranged for a capacity assessment for AC which was to take place on 8th May 2025. In the correspondence between AC's representatives in these proceedings and the defence solicitors, it was agreed that the assessment in the criminal proceedings would be delayed to enable*

[1] Tor having been involved in the case, she has not contributed to this note.

> *this Court to consider whether any assessment of AC's capacity, for the purposes of the criminal proceedings, required the authorisation of this Court.* (paragraph 5)

Hayden J decided that he needed to consider "[w]*hether any decision for P to undergo a capacity assessment, for the purposes of criminal proceedings, is in itself a best interests decision pursuant to section 4 of the Mental Capacity Act 2005. If so, whether the best interests decision is one which must be taken by the Court of Protection.*"

The CPS was joined to the proceedings, and submitted that "[o]*rdinarily, no pre-assessment of P's capacity to consent to participate in an assessment of their capacity is required. Here, the assessment of capacity is being carried out not in order that a best interests decision can be made about P's care or treatment, or to inform the exercise of statutory duties towards P for example duties to provide care and support. It is being carried out at the request of defendants in criminal proceedings to support their case in those proceedings.*"

Hayden J found that the decision of whether to undergo an assessment of capacity (at least in this context) was a welfare decision, such that "[w]*here P lacks capacity, the Court must decide whether undergoing an assessment is in P's best interests (Section 4 MCA 2005) and is, accordingly, a decision to be taken by the Court of Protection.*" While the decision to admit a capacity assessment into proceedings will be one for the Crown Court judge, Hayden J held that the decision of whether to consent to participate in a capacity assessment was one taken under the MCA, although he also observed that "[t]*his is not "a capacity assessment per se* […] *but an assessment specifically focused on the impact on AC of participating in an assessment. There are clearly significant consequences for AC in both outcomes, i.e. whether the assessment takes place or not*" (paragraph 9).

Hayden J considered that the following factors were relevant to AC's decision to participate in a capacity assessment for the purposes of the criminal proceedings:

> *(i) AC must be able to understand, retain, use or weigh the fact that there are **criminal proceedings** against CA, DD and BC;*
>
> *(ii) AC must be able to understand that there has been a **marriage** between herself and the proposed husband;*
>
> *(iii) AC must be able to understand, retain, use and weigh the fact that she has been assessed as lacking capacity to **marry / engage in sexual relations**;*
>
> *(iv) AC must be able to understand, retain, use and weigh the fact that CA and BC have been **arrested and charged** with **forcing her** to be married;*
>
> *(v) AC must be able to understand, retain, use and weigh the fact that CA and BC's **defence in criminal proceedings** is that AC does have capacity to make **her own decisions** to marry and to enter into sexual relationships [my emphasis];*
>
> *(vi) AC must be able to understand, retain, use and weigh the fact that the reasonably foreseeable consequence of her not having a further assessment would be that the conclusions of the current assessment would remain in place;*
>
> *(vii) AC must be able to understand what further reasonably foreseeable consequences might arise if such an assessment did not take place* (paragraph 12).

Further:

> *(i) **The nature of the assessment**... it would be a retrospective assessment of her capacity to enter into marriage, i.e. in 2024; and*
> *(ii) AC must appreciate that the expert has an overriding duty to the Court, irrespective of who has instructed them.* (paragraph 13)

And

> *AC must understand that the report may be obtained but not disclosed by the defendants* (paragraph 14)

Hayden J noted statistics from the CPS that there have typically been between 1-6 prosecutions for forced marriage annually (which may or may not have been based on a person's incapacity to marry) and thus considered that the decision was unlikely to have a significant impact on the work of either the Crown Court or the Court of Protection.

Hayden J then went on to consider the test for capacity to marry:

> *17 …* [M]*any, I suspect most, practitioners consider the case law generates a test which can be overly burdensome and lacking the flexibility required in understanding the different approaches to marriage and / or its obligations in a multicultural society. Moreover, the "obligations of marriage" and what constitutes "the contract of marriage" are not ubiquitous, they are subtle, nuanced and mutable. There is a real danger that an unnecessarily sophisticated test might operate to the disadvantage of those struggling with capacity, requiring them to evaluate issues which many others might find no need to address at all, or even struggle to address, as capacitous adults. Some couples enter marriage with carefully negotiated prenuptial agreements, contemplating the meticulous division of financial assets in the event of divorce. Others give the matter absolutely no thought at all and are entirely ignorant of the applicable law. It requires to be acknowledged that the authorities are contradictory on some key points. I also note that there has been some discussion in the criminal proceedings as to whether a definitive test for capacity to marry exists in law at all.*

Hayden J considered that while marriage may vary depending on culture, "*the assessment of capacity to marry should not impose overly complex concepts*" (paragraph 18); "[t]h*e terms of a contract of marriage will vary in differing cultures, religions, and now, following developments* […], *in same sex marriages*" (paragraph 23). However, he considered that "*the capacity for 'marriage' is, in some respects, conceptually more complex than that of 'consensual sexual relations'. It engages various mutual obligations, altered legal and, in some circumstances, social status; it is long term and status specific*" (paragraph 18).

Hayden J noted that it had now been 22 years since *Sheffield City Council v E & Anor* [2004] EWHC 2808 (Fam), and

> *This has been a period of significant social change. In the intervening years, we have seen: Marriage (Same Sex Couples) Act 2013, granting same-sex couples the same status as opposite-sex couples in marriage and divorce; Civil Partnership (Opposite-sex Couples) Regulations 2019, granting opposite-sex couples the opportunity to choose civil partnership rather than marriage should they prefer to do so; Divorce, Dissolution and Separation Act 2020, permitting couples the opportunity to divorce without attributing blame, applying equally to civil partnerships; Equality Act 2010, consolidating anti-discriminatory*

> *legislation, and protecting individuals from discrimination on a wide variety of grounds, e.g. sexual orientation, race, religion or belief, age, sex and many others; Children and Families Act 2014, endeavouring to secure the active involvement of both parents in a child's life following separation of the adults. All this legislation both has an impact on family life and is reflective of changing attitudes to marriage, children and families.* (paragraph 20).

Hayden J considered that "*it is the fact of the "contract" which is the salient and unifying feature of marriage, not its terms. As Treitel (The Law of Contract) stated, 'a contract is an agreement giving rise to obligations…'. Agreement is a far more accessible word than contract, but it has very similar meaning"* (paragraph 25). Where religious and civil marriages differ in their context and expectations, "*it is the fact of the 'agreement' itself which requires to be understood, not the fairness of the terms or the wisdom of the consent. This is a secular Court; we are not involved in cultural relativism*" (paragraph 27). Further:

> *It is no function of a judge to intervene, paternalistically, to protect a party from a marriage which might seem to some to be regressive, patriarchal or counter feminist. I would note, with some diffidence, that arranged marriages frequently generate happy, successful and enduring relationships. Nor is it necessary or indeed appropriate to evaluate P's understanding of these differences. That would impose an additional test upon her which would not be imposed on an individual whose capacity was not in question. It would sublimate rather than promote her autonomy, an outcome which would be wholly contrary to the philosophy of the MCA. At risk of repetition, I emphasise, what is required is an understanding that an agreement has been made which changes status and is intended to endure. This, I think, captures the essence of the issue in terms which are simple and accessible.* (paragraph 28)

In considering other case law, Hayden J elaborated that he did not "*consider a couple's expectations of what marriage might involve is a pre-requisite to establishing capacity. It is the understanding of an agreed change of status from that of an individual to that of a couple which is the universal essence of any marriage"* (paragraph 38).

Hayden J considered the proposition that capacity to marry will 'generally' include capacity to make decisions around sexual relations, noting that not all marriages are sexual. However, and he considered that it was "vanishingly unlikely" that person would have capacity to marry, but lack capacity to engage in sexual relations; even if this was theoretically possible, and contrary to the decision of Mostyn J in *NB v MI* [2021] EWHC 224 (Fam), Hayden J held that the test for capacity to marry must include capacity to engage in sexual relations:

> [t]*he link between sexual relations and marriage is a theologically consistent tenet of most established religious traditions. Marriage has been, and in many cultures still is, the only gateway to sexual relations. The two have been interlinked for thousands of years. Sex is regarded not merely as something which happens within marriage; rather, it is seen as one of the ways in which the marital relationship may be both expressed and nourished. This may underpin religious perspectives, but it is equally valid in a secular context. Sexual relations are not, for all the reasons Mostyn J discusses, a necessary component of marriage, but in entering into a marriage, an understanding of the nature and mutuality of sexual relations must be. To this degree, it is integral to*

> *the construct of marriage and not divisible. The vulnerability of a person who understands, in broad terms, the nature of marriage but lacks an understanding of the essential elements and consequences of a sexual relationship is manifest, particularly where that involves an inability to comprehend the indivisibility of consent to sexual relations. To reason otherwise requires distortion of the objectives and philosophy of the Mental Capacity Act, which is intended to promote the autonomy of the vulnerable, enabling them to take decisions, be they wise or foolish. It would corrode the Act to interpret it in a way which exposed vulnerable and incapacitous adults to abusive situations in which they have no agency to protect themselves* (paragraphs 43-44).

Hayden J concluded at paragraph 45 that:

> *marriage is a formal agreement between two adults in which the fact of the agreement requires to be understood, not the fairness of the terms nor the wisdom of the decision. It requires a simple recognition by two people that they are making a commitment for their lives to be joined together, and that they wish that status to be recognised by others. It is necessary to understand that a formal process is required to enter into marriage and to leave it. Further, and for all the reasons set out above, both parties to a marriage must have capacity to engage in sexual relations, whether they choose to do so or not.*

Comment

Capacity to have one's capacity assessed

We agree with the view expressed by the CPS that ordinarily, a 'pre-assessment' of a person's capacity to decide whether to engage in a capacity assessment (which would appear to be a necessary pre-requisite to make a best interests decision on behalf of the person) is neither necessary nor desirable.

We suggest strongly that the observations made by Hayden J should be limited in the first instance to the very specific context of the case, in which AC's family wished for her to participate in a report they hoped would be exculpatory – but there appeared to be a clear concern about whether doing so was in her best interests.

There may also be some analogies between the situation under consideration by Hayden J with the situation where the person is 'voluntarily' seeking to have confirmation of their capacity, most obviously to grant an LPA or make a will.

However, as a general proposition, we suggest that, both legally and practically, the approach is very different:

- As a matter of legal analysis, the decision of whether to conduct a capacity assessment is not typically taken "on behalf of" the person. Others take the view that one is required so that they know the basis upon which they are discharging a power or function. The decision that they make that they have sufficient grounds to consider the person's capacity in a specific area or areas that they need to assess it is one for them, not for the person. It is therefore not a decision covered by the MCA at all.

- At a practical level, it is not feasible to 'decide' on behalf of an incapacitous person that they will undertake a capacity assessment: the person either will or they will not engage, and an external decision that would be in their best interests to do so will not change this. Many assessments of capacity proceed with less than complete engagement of the person, and simply have

to make findings of what information is available. Whether a capacitous decision or incapacitous preference, engagement in the assessment depends on what the person is willing to do, not what others considers best for them to do.

We are also duty bound to note a 'pre-assessment' of capacity to engage in a capacity assessment appears to run the risk of staring down an infinity well – would a capacity and best interests decision need to be taken in respect of the pre-assessment?

Alex has written further about this issue here.

Sex and marriage

It is unfortunate that we now have Tier 3 judgments pointing in diametrically opposite directions as regards the question of whether it is possible to have the capacity to marry without having the capacity to decide to engage in sexual relations. We suggest that this is an issue which requires appellate consideration; such appellate consideration also should encompass (we suggest) whether it is still correct in light of *JB* to say that the capacity to marry is a 'status' rather than a 'person' based test.

Capacity and the questionably consenting partner

Nottinghamshire County Council v LM & Anor [2026] EWCOP 38 (T2) (HHJ Rogers)

Mental capacity – sexual relations

Summary

In this case HHJ Rogers has added to the growing jurisprudence on capacity to engage sex in the post *JB* era – specifically, where capacity is contingent on P's ability to assess the consent of a prospective partner.

The application in this case was brought by the local authority – with support from the relevant healthcare trust – to determine LM's capacity to engage in sexual relationship and to consent to the sharing of information in respect of sexual offences. The parties otherwise agreed that he lacked capacity in relation to litigation, care, residence, contact with others and internet and social media use.

LM was described as a middle-aged man who had been living in a residential placement for the past decade or so. He had an IQ of between 52 and 60 and experienced a troubled childhood. He had a brief occupational history punctuated by the misuse of alcohol and cannabis.

LM also had a 2009 conviction for the rape of a vulnerable man and a history of "intense" relationships with men and women, and an active online presence through which he has forms such relationships.

The Official Solicitor on LM's part supported the conclusions reached by the consultant forensic psychiatrist instructed in the case, Dr Rebecca O'Donovan, namely that he retained capacity with regard to both engagement in sex and the sharing of his offending history. She emphasised the *"profound, sensitive and far-reaching nature of the question in issue"* and the significant potential invasion of personal autonomy in a *"paternalistic or overly protective approach"* (paragraph 13).

In his analysis of the relevant legal framework, HHJ Rogers reviewed the relevant principles from *JB* [2021] UKSC 52 and the (unsuccessful) argument put forward on behalf of the Appellant in *JB* by John McKendrick KC (as he then was) that "*sexual activity, and decisions about engaging in sexual relations for a person of full capacity, are largely visceral rather than cerebral, owing more to instinct and emotion than to analysis. On this basis he argued that to include as part of the information relevant to the decision the fact that*

the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity imposes a discriminatory cerebral analysis on the potentially incapacitous. I reject that submission. As the Court of Appeal observed, at para 96, "amongst the matters which every person engaging in sexual relations must think about is whether the other person is consenting" (emphasis added). If that is properly viewed as cerebral or as involving a degree of analysis, a decision to engage in sexual relations is necessarily cerebral or analytical to that extent." (*JB* at paragraph 19).

HHJ Rogers also noted (albeit that he ultimately dismissed the potential relevance of the decision of Poole J in *PN (Capacity: Sexual Relations and Disclosure)* [2023] EWCOP 44, in which the latter found that P retained capacity to engage in sex because, notwithstanding a pattern of impulsivity ad inappropriate, non-consensual sexual touching, this arose as a result of PN's "disregard" of the need for consent rather than an inability, due to an impairment of or disturbance in the functioning of the mind or brain, to understand the need for consent in a sexual partner (paragraph 22, citing *PN* at [16]) .

Ultimately, HHJ Rogers rejected the Official Solicitor's acceptance of Dr O'Donovan's conclusions, noting that:

1. LM did not understand the concept of age and, even after education, while he was aware that sex was legal at "one and a six" could not the understand if sex with a 14 year old or 18 year old was legal (paragraph 28);

2. LM reportedly struggled with understanding his own or others' ages in chronological terms (paragraph 41);

3. The argument pursued on behalf of the Official Solicitor that "*LM understands consent, but and in any event any perceived difficulties, in the moment, are attributable to his innate urges not to intellectual deficit, so that, applying the legal test, the essential causal nexus is not there. In terms of authority. Miss Gardner submits that this case is akin to PN and should be dealt with similarly* (paragraph 50).

HHJ Rogers concluded:

> *56. Variously, as set out above,* [Dr O'Donovan] *describes LM as having difficulty processing information, cognitive rigidity and reduced impulse control, all consistent with his diagnosis. She notes his limited insight into his offending and his difficulty in interpreting the actions of others. In her analysis section in G30, Dr O'Donovan notes LM's inability to interpret information about prospective partners. She recognises the difficulty in interpreting and processing information and says in terms "he may find it difficult to determine if an individual was unable to consent to sexual relations in the absence of overt visual and verbal cues." In conclusion, Dr O'Donovan's view is that "as LM's decision to engage in sexual relations largely relies on the interpretation of his own internal world, he is able to process the necessary information to make this decision.*
>
> *57. I confess to being unclear precisely what Dr O'Donovan means when referring to LM's internal world but to the extent she is regarding consent as irrelevant to LM's thinking in the moment as he is overwhelmed by his desires, that may be true in the moment for him, but it is no answer, in my judgment, to the question of whether he is able to understand, retain, use and weigh the points relevant to consent.*
>
> *58. Therefore, for reasons which are not entirely obvious, I am satisfied that Dr*

O'Donovan's conclusion on this aspect is flawed. I find much of her analysis to be sound. It seems to me to tend towards the opposite answer to that she alighted upon. In my judgment, she focussed too much upon LM's reaction to the offence of rape. She is correct, of course, in a strict criminal law sense that his plea of guilty to rape must mean that the Crown Court was satisfied as to his fitness to plead and the mens rea. Without more information and aware that the strict criminal law position does not always demonstrate the precise practical nuances, I am loathe to draw such a firm conclusion as to LM's understanding of consent. The disposal by way of a hospital order does not undermine the correctness or implications of the conviction but shows the complexity of the situation.

59. I agree with Mr Brownhill's submission that Dr O'Donovan appears to have taken a sequential approach, in discounting questions of consent given her view that the driving forces would overwhelm LM to act as he chose to do so. In my judgment, as Mr Brownhill submits that is a misunderstanding of the law as set out in JB. Just because a particular outcome in a real-life situation may in the end be determined by an overwhelming need for sexual gratification, driven not by intellectual deficit but by personality or early life experiences, that does not mean that the test relating to the issue of consent in the overall assessment of engaging in sexual activity does not arise. That first stage may not be dispensed with. I agree with Mr Brownhill that to do so would run directly counter to the approach dictated by JB.

60. The same points arise in respect of Dr O'Donovan's addendum report. Strikingly she acknowledges that LM might not recognise that a sexual partner freezing is consistent with withdrawal of consent and yet, as before, discounts that in terms of relevance because of LM's need for sexual gratification which she believes will override other thoughts. That, in my judgment, is a misunderstanding of the legal text to be applied and a further example of sequential thinking.

61. I agree with Dr O'Donovan that LM's sexual drive is not attributable to his intellectual deficit. Where I respectfully disagree is where she concludes that the essential casual nexus is not established. The relevant nexus is not with the sexual drive and therefore the overriding feelings in the moment but in relation to LM's inability to negotiate the elements of consent which the evidence demonstrates, and I find, is plainly and directly because of his intellectual deficit.

HHJ Rogers ultimately rejected the comparison with Poole's *PN* judgment (see paragraph 65).

On the question of sharing information regarding his offending history, HHJ Rogers noted that the question had been raised, unhelpfully, in a vacuum, with no actual best interests decision in issue (paragraph 68). He declined to give guidance on the issue but at paragraph 71 pointed instead to the *PN* judgment in which (at paragraph 25), Poole J had observed that:

However, for present purposes I assume that the relevant information will include the risks to others that arise from the previous offending, how the disclosure of information might be given so as to allow others to avoid or mitigate such risks and prevent P from committing offences which could have adverse consequences, and the reasonably foreseeable consequences of sharing or not sharing the information. In PN's case there are a large number of possible ways in which he might share information, from providing strangers

with a long list of previous behaviour, to saying to someone with whom he has formed a relationship, "I have been accused of touching women inappropriately before, but I will not do so with you."

Comment

The Court of Appeal has recently held that recourse to autonomy is (we paraphrase) apt to lead people astray when it comes to best interests: see the *HB* case discussed in the practice and procedure section of this Report. It might be thought that this case shows how recourse to autonomy can be equally apt to lead people astray when it comes to the assessment of capacity. Dr O'Donovan's desire, matched by that of the Official Solicitor, to uphold the 'autonomy' of LM arguably led to an approach to capacity which downplayed the effect of LM's cognitive impairments. HHJ Rogers, by contrast, took what might be thought to be a more detached view – and a view which (on its face) more obviously accords with the law as set down in *JB*.

A side point is that it seems that the Official Solicitor's position was in part influenced by LM's decision to plead guilty to rape historically (see paragraph 58). However, as the Supreme Court emphasised in *JB,* the criminal law and the civil law in respect of sexual activity are separate and distinct areas. Further, in the criminal context, the essentially procedural concept of 'fitness to plead' and the substantive concept of 'mens rea' are both concepts which appear to be linked to mental capacity, but derive from different places and should not be confused. See further in this regard, generally, our webinar on "When P is an offender,' and, specifically with reference to the law relating to sex, Alex's article What place has 'capacity' in the criminal law relating to sex post JB?

PDOC, expertise and over-litigation

NHS North East London ICB v FHR [2026] EWCOP 43 (T3) (McKendrick J)

Best interests – medical treatment

Summary

FHR, aged 28, sustained a catastrophic hypoxic brain injury in January 2020 when he tried to hang himself. He had been in a prolonged disorder of consciousness ever since: cortically blind, mostly paralysed, PEG-fed, with a cuffed tracheostomy requiring deep suctioning every half hour, daily digital rectal evacuation and worsening contractures. He was cared for at his adapted home by an ICB-commissioned package from August 2020 until April 2025, when – in the third set of Court of Protection proceedings about his residence and care since December 2020 – he was moved on an interim basis to a care home so that a PDOC assessment could be undertaken. Since then he had five emergency hospital admissions for infections. The serious medical treatment issue was only transferred to Tier 3 in October 2025, prompting King LJ, refusing permission to appeal, to describe the case as having been "*subject to egregious delay*" (paragraph 22). McKendrick J was blunter still: the proceedings had been "*highly charged and over-litigated*" and "*at times* [FHR] *has been lost in the litigation*" (paragraph 4).[2]

By the final hearing FHR had undergone 12 CRS-R, 23 WHIM and 2 SMART assessments. Much of the three days of evidence was consumed by a dispute as to whether he was in a vegetative state, MCS- or MCS+, which the judge found

[2] McKendrick J took the unusual step of setting out in an appendix the procedural history of the case.

"*doctrinaire*" with "*more than a hint of professionals following their own beliefs*" (paragraph 9). The single joint expert on awareness, Ms Gill-Thwaites, had found a vegetative state on SMART assessment in January 2026 but flagged an unverified response to "*stick out your tongue*"; after a court-directed programme of optimisation and further testing, command-following could not be verified, but two episodes of tears and a smile in the presence of family led her to revise the diagnosis to MCS-. Dr Allanson, engaged to carry out one of Ms Gill-Thwaites' recommendations, but sent a letter of instruction by the mother's solicitors which went well beyond it, concluded that FHR was minimally conscious with "*some chance*" of change, and recommended a medication review, a trial of neuro-stimulants and removal of the tracheostomy. Dr Nair, the single joint expert on best interests, considered FHR to be in a permanent vegetative state with no trajectory towards emergence, that pain must be assumed, and that "*it is the giving of daily digital rectal evacuation, half hourly-to-hourly deep tracheal suctioning, frequent hospital admissions and ongoing CANH that must be justified and not the withdrawal*" (paragraph 117). Professor Wade, the ICB's clinical adviser, was admitted as a witness with expertise rather than a Court of Protection Rules expert (paragraph 46) and supported Dr Nair. A best interests meeting in March 2026, chaired by an independent palliative care consultant, had concluded that CANH should continue to allow optimisation and a return home; its chair told the court that the conclusion was provisional and the decision was for the court.

FHR was a Muslim from a close family. His mother exhibited a fatwa from the Islamic Council ruling that withdrawal of CANH would not be permissible (paragraph 76). His father said he could not say his son would want to continue living in his current condition, and that a young man who had taken pride in his appearance and independence "*would have found a life in which he was dependent on others for every aspect of care* […] *very hard to accept*," before counterbalancing that with the importance of his faith (paragraph 87). His sister made an impassioned plea for more time.

McKendrick J concluded that CANH was no longer in FHR's best interests (paragraphs 1, 126). Preferring Dr Nair's evidence, he found it more likely than not that FHR was in a permanent vegetative state; but if he was in MCS- it made no difference and *"may even make for a stronger best interests case*" because it would increase his awareness of pain, discomfort and the futility of his existence (paragraph 134). He experienced pain; he was subjected to an arduous care regime; and there was no reliable evidence of awareness leading to joy, comfort or pleasure:

> *… Love has the power to impair our objectivity. There is no reliable evidence before the court of awareness leading to joy, comfort or pleasure. No witness has explained how it is that FHR cannot stick his tongue out when asked, but he has the awareness and cognition to be able to produce the emotions necessary to cry when his father speaks to him of Allah or to smile when his football team is mentioned. I am satisfied these are not meaningful responses but are reflexive.* (paragraph 143)

The judge accepted that FHR would want his life and death to take place within the teaching of Islam and that family mattered greatly to him, but, adopting Lieven J's approach in *NHS West and North London ICB v MP* [2026] EWCOP 36, would not speculate as to whether he would have wished to continue living in his massively diminished state (paragraphs 145-147). The family's largely unchallenged evidence of responses was their perception, shaped by love. To continue CANH even for six to twelve months

of further testing was "*wrong in principle and wholly unfair on FHR*" (paragraph 126). A s.16 order was made for palliation at a specialist unit able to manage the tracheostomy, with permission to apply for it to be varied so that FHR could die at home, which the judge hoped could be achieved (paragraphs 153-155). The transparency order was directed to be discharged 21 days after his death.

Comment

Three key things stand out. First, the judgment is a forthright application of the post-*Aintree* orthodoxy, echoed in the RCP 2020 Guidelines and in *NHS North Central London ICB v PC* [2024] EWCOP 31, that the VS/MCS label is not the question; the trajectory and whether P could ever recover a quality of life they would value is. But it goes a step further. The 'double edged sword' reasoning at paragraph 134 – that greater awareness, in the presence of pain and no prospect of improvement, strengthens rather than weakens the case for withdrawal – inverts the intuition, common among families, that any sign of consciousness is a reason to carry on. Practitioners should expect that argument to be deployed in future PDOC cases.

Second, in relation to evidence, an ICB may rely on its own clinical adviser without appointing him as an expert under the Rules (ss1, 3(2) of the Civil Evidence Act 1972). A clinician engaged to carry out one of the single joint expert's recommendations reports to the single joint expert, not to the party who sends a letter of instruction, and one who writes to the judge directly after listening to the opposing expert risks the finding, however gently expressed, that she may have inadvertently "*transitioned from clinician to advocate for the family*" (paragraph 128).[3] And a best interests meeting under the RCP Guidelines which concludes in favour of continuing CANH so that further testing can take place does not bind the court, particularly where the chair accepts its conclusion was provisional.

The third key point relates to the delay. FHR was diagnosed as being in a vegetative state in 2020. Three sets of proceedings about residence and care followed before anyone squarely raised the treatment question, and only in October 2025 was the case recognised for what it had always been. Where CANH for a PDOC patient is, or is likely to be, contested, that issue must be identified and listed at the outset rather than allowed to sit behind disputes about where P lives and who cares for him. The fatwa is also worth noting: the court accepted FHR's faith and its relevance under s.4(6)(b) MCA, but a religious ruling that withdrawal is impermissible was not treated as evidence of what FHR himself, confronted with his actual circumstances, would have wanted.

Epsom and clinical practice

Readers interested in thinking more about the impact of the decision of the Court of Appeal in the *Epsom* case may wish to read the report of an expert workshop held at Green Templeton College on 19 March 2026 which has now been published.

[3] McKendrick J's allusion to the debates having become "*doctrinaire*" is perhaps rather harsh, but we are aware that there can be some very strong feelings at play amongst clinicians working in this area. They echo (in our experience) some of the debates that can arise in relation to eating disorders, where disagreements about apparently narrow technical points can mask much more fundamental – often ethical – disagreements. It is not obvious to us that these disagreements are well suited for resolution in the court room.

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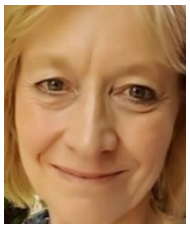

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in October. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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