

Re B [2019] EWCOP

Case summary

In an important Court of Appeal judgment Simon Garlick acted as junior counsel for the local authority in successfully appealing the decision of Cobb J sitting as a nominated Court of Protection judge in Re B [2019] EWCOP 3, and successfully opposing the cross appeals of B, through the Official Solicitor. In the Court of Appeal, he was led by David Lock QC of Landmark Chambers.

B is a 31 year old woman with a learning disability which causes her to be unable to care for herself, and to require support in her social interactions in the community. B spends a great deal of time on social media sites contacting men with whom she wishes to have an intimate/sexual relationship. Shortly before the issue of Court of Protection proceedings she had made contact with, then physically met and probably had sexual relations with C, a 70 year old man subject to a Sexual Harm Prevention Order and with convictions for indecent assaults on children. B refused to accept C's convictions and proposed to live with him and have a child with him. B is currently living with her family where she is not supported in her physical care and the evidence suggests she is experiencing emotional and financial abuse. The local authority's care plan is that B lives in structured supported accommodation where her care needs, including for routine and positive support, can be met, and her contact with others controlled.

The local authority sought section 15 Mental Capacity Act 2005 ('MCA') declarations that B lacks capacity to make decisions as to her residence, her care arrangements, her contact with others, her use of social media, consenting to sexual relations and her property and affairs.

There being no authority on what 'relevant information' (Section 3 MCA) a person thought to lack capacity in respect of accessing the internet and social media would have to be shown to be unable to understand, retain or weigh up in order for the

presumption of capacity to be rebutted, Cobb J arranged to hear this case and another case raising similar issues (Re A [2019] EWCOP 2) in consecutive weeks, and to deliver guidance on the issue which would take into account the evidence and submissions he heard in both cases.

In relation to B Cobb J made section 15 MCA declarations that she lacks capacity to take decisions about her care arrangements, her contact with others and her property and affairs. He made section 48 (interim) declarations that she lacks capacity to make decisions about using social media to make connections with others, and to consent to sexual relations; in both of those areas he concluded that further educational work needed to be done with B following which she should be reassessed. However, applying a 'strict decision-specific approach' which he considered the MCA required, he decided that B has capacity to decide on residence. Cobb J did not accept the local authority's submissions that the risks of living with C (or others who might exploit her) must be part of the relevant information for a decision about residence, nor did he accept the submission that B had no proper understanding of the care that would be available to her in structured accommodation and so could not understand the reasonably foreseeable consequences of choosing a) to remain at the family home, b) to move to live with a man she met on the internet ,or c) to move to structured accommodation.

Cobb J gave guidance in both Re A and Re B in relation to the relevant information for decisions about accessing the internet and social media which he considered a single area of decision-making. He set out a list of 6 items of information which he considered relevant to decisions in this area.

B, by the Official Solicitor, appealed Cobb J's decision in two respects. Firstly she argued that the guidance given by Cobb J in relation to internet/social media decisions was in part inapplicable to B's circumstances, and that in requiring her to understand, retain and use or weigh the range of information set out in the judgment, Cobb J had set the bar too high, in contravention of Articles 8 and 10 ECHR and the UN Convention on the Rights of Persons with Disabilities. Secondly she argued that in deciding that she lacked capacity to consent to sexual relations Cobb J had required her to have too high a level of understanding of health risks being associated with sex, and had impermissibly expanded the relevant information for decisions to consent to sexual relations to include knowledge of the individual's need to consent, and knowledge that condoms would reduce the health risks.

The Council maintained that Cobb J's decisions in relation to both capacity to take internet/social media decisions and capacity to consent to sexual relations were correct, but appealed his decision that B has capacity to decide on residence.

The Court of Appeal allowed the Council's appeal, agreeing with the Council's submission (at paragraph 63) that the judge's conclusion was fundamentally flawed in 3 respects:

*'(1) failing to take into account relevant information relating to the consequences of each of those decisions [the residence options], and (2) producing a situation in which there was an irreconcilable conflict with his conclusion on B's incapacity*

*to make other decisions, and so (3) making the Council's care for and treatment of B practically impossible. Mr Lock submitted that the Judge's flawed conclusion followed from his approach in analysing SK's capacity in respect of different decisions as self-contained "silos" without regard to the overlap between them.'*

The court agreed that Cobb J's decision that B has capacity to decide on residence is incompatible with his findings and declarations in relation to contact, sexual relations and care, as it means that B has capacity to decide to live with someone with whom she lacks capacity to have contact or sexual relations. Furthermore, the judge's findings and declaration that B lacks capacity to decide on her care arrangements must mean that she is unable to understand in sufficient degree the care she will receive in structured accommodation as opposed to living at home, or with C which (it was agreed) is one element of information relevant to decisions about residence.

The Court upheld Cobb J's decision in relation to both sexual relations and decisions about accessing the internet/social media. Usefully the court clarified that whilst understanding of one's own need to consent to sexual relations is not part of the relevant information, it is fundamental to having capacity. The Court also ruled that the information that condom use may reduce the risks of infection is part of the relevant information for giving consent to sexual relations holding that '*The only practical purpose of understanding that sexually transmitted infections can be caused through sexual intercourse is to know how to reduce the risk of infection since the purpose cannot be to encourage abstinence from intercourse completely.*'

The Court also upheld Cobb J's formulation of relevant information for decisions about access to the internet/social media. It saw no particular advantage in the shorter (3 item) list of relevant information put forward by the Official Solicitor noting that '*Whether the list or guideline of relevant information is shorter or longer, it is to be treated and applied as no more than guidance to be adapted to the facts of the particular case*'. As the court makes clear this principle applies to any other lists of relevant information for other types of decision – particularly those set out by Theis J in LBX v K,L,M [2013] EWHC 3230(Fam), relating to decisions about residence, care and contact – and emphasises that such lists are '*guidance to be expanded or contracted or otherwise adapted to the facts of the particular case...*' and not to be applied as prescriptive or exhaustive lists of information, as such an approach would depart from the structured process for the assessment of capacity set out in Sections 2-3 MCA.

The judgment is welcome in 3 respects:

- i. It upholds the useful guidance given by Cobb J to those whose job it is to assess an individual's capacity to make decisions about access to the internet and social media. Of course, as the Court of Appeal agreed, if lack of capacity is established any best interests decision-making process will have to balance carefully the conflicting imperatives of empowerment and protection before deciding on what if any action to take to limit the individual's access to the internet.

- ii. It clarifies the test to be applied relating to decisions on consent to sexual relations.
- iii. It makes clear that the 'strict decision-specific approach' which Cobb J considered he was required by the MCA to apply must not lead the court (or decision-makers in general) to separate 'relevant information' into different silos rather than to acknowledge that the structure of Section 3(4) must be followed, so that if a failure to understand particular information has significant foreseeable consequences for more than one decision, it is information which is 'relevant' to all those decisions.