Neutral Citation Number: [2013] EWHC 3622 (Fam)

Case No: COP 12225464

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2013

Before :

MRS JUSTICE PARKER

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Between :

YLA	**Applicant**
- and -	
PM	**1st Respondent**
- and –	
MZ	**2nd Respondent**

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Mr Martin Downs (instructed by **YLA Legal Services**) for the **Applicant** at each hearing **Ms Alev Giz** (instructed by **Harney & Wells**) on 20 and 21 March 2013, **Ms Lorraine Cavanagh** on 10 April 2013 and **Mr Anthony Hayden QC** and **Ms Lorraine Cavanagh** on 3 May 2013 for the **First Respondent** by their litigation friend, the **Official Solicitor** **Ms Janet Bazley QC** on 20 and 21 March 2013 (instructed by **Quality Solicitors, Howlett Clarke**) for the **Second Respondent** with **Mr Andrew Bagchi** as junior counsel. **Mr Andrew Bagchi** alone on 10 April and 3 May 2013.

Hearing dates: 20 & 21 March, 10 April and 3 May2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE PARKER

This judgment is being handed down in private on 20 November 2013 It consists of 45 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Parker :

1. The court is faced with a difficult dilemma both within Court of Protection proceedings concerning PM, and care proceedings concerning B born to her in August 2012. YLA is the Applicant in both proceedings.

2. PM is married to MZ, B's father. PM is certainly a vulnerable adult. She has a significant global learning disability, "moderate" to "severe": her condition is innate, but her function may improve somewhat. Her IQ is assessed at 49. Her capacity to marry, to consent to sexual relationships, and to decide on her own place of residence are in issue. She does not have the capacity to litigate. The Official Solicitor acts as her litigation friend.

3. I heard this case on 20 and 21 March 2013. I gave my decision on 10 April 2013: it included interim views of the evidence and some conclusions on it: and also my view that I should grant the declarations as sought, and that I could not sanction PM living with MZ. This will be painful for PM, possibly extremely painful, it is not clear; and will deprive B of his mother's company save for contact. I said that I have found these extraordinarily difficult decisions. I intended to deliver judgment within a week, but was unable to do so. I had to consider lengthy and detailed submissions and 23 authorities. But most of all, I have reflected long and hard about whether there was any room to revisit my conclusions, which I said on 10 April I reached with a very heavy heart. I cannot do so, given my findings.

The background facts

4. PM was born in this country in 1976 and is now 37. She is a British citizen, of Sikh origin. Although she is said to have converted to Islam, there are inconsistencies as to whether this was when she was a child, or in 2001, or 2005: and all previous documentation, including at the time of her second marriage in 2005, describes her as Sikh. This may be relevant as to whether the marriage is regarded as valid in Islam. It seems to me doubtful that she has any understanding of any religious affiliation.

5. Before this marriage PM was living with and being cared for by her mother Mrs M, who lives with her stepfather Mr S, who is Muslim. She has lost contact with her own father and two siblings. Very conflicting statements have been made by Mrs M about PM's capacity and understanding, and about PM's history. Take up of support services has been sporadic and inconsistent: compliance with social services has been superficial but with an underlying obstructivness, and interspersed with complaints against the LA.

6. P has been twice married before. The reasons for those marriages and their dissolution are not clear: it is said that the first was to Mr S's nephew but ended in divorce or was annulled due to non-consummation after he was not able to get a visa to join her. The second was to her maternal cousin: he is said to have been a heavy drug and alcohol user: he alleged that he was not told about her learning disability and after he came to England to join her he was beaten and abused by her mother and stepfather. There was a divorce in India.

7. Social Services have been involved with PM for at least 10 years. In 2007 Mrs M said that it was very important for PM to be married, and said that she had a longstanding

relationship with her then husband (just as she has said about PM and MZ). She later assured social services that there would be no further marriage.

8. MZ was born in 1980 in Lahore, Pakistan, and is now 33. He came here on a student visa in 2009. MZ faces as yet unresolved immigration proceedings. This is MZ's first marriage, so far as is known. An account has been given as to how PM and MZ met. I shall address this, so far as I can, below.

9. A Muslim marriage, not recognised in this jurisdiction, was performed between them on 26 November 2011. PM became pregnant by MZ with B almost immediately. A register office ceremony took place on 29 February 2012.

10. On 26 August 2011 MZ applied for further leave to remain since his two year student visa was to expire in September 2011. The application was refused (with a right of appeal) on 11 October 2011: the Secretary of State determined that his proposed course of study at the College of Venereal Disease Prevention did not represent academic progress. MZ lodged an appeal which had the affect of allowing him to stay pending its resolution. On 30 April 2012 he applied for further leave to remain on the grounds of his marriage. He was asked to elect whether he wished to pursue a fresh application as a student or the application based on his marriage. Before he could do so the Venereal Disease College had its licence withdrawn. He would have had to re-apply for leave to renew on the basis of a new college place. He therefore issued a fresh application based on "the outstanding family court proceedings and rights of access to his son". He has been refused further leave to remain on the basis of the 'student' application since he had not put forward new college details. He has appealed.

11. Mr Gill QC, who has provided a specialist opinion, advises that MZ is entitled to rely on his Article 8 rights in respect of the interests of all the affected members of the family unit, in particular B's best interests. MZ's role in caring for B or contact with him will be crucial. He is likely to be granted limited leave to remain and eventually indefinite leave to remain. If he is found to have participated in a forced marriage that will be taken into account, but the court still has to consider the best interests of B.

12. In February 2012 the immigration authorities notified YLA that PM was to be or had been married. YLA registered a caveat against the marriage. They had been told that PM had attended the Register Office with Mr S but could not remember any details about MZ nor that she had been married and divorced twice. An anonymous informant had telephoned to state that Mr S had received £20,000 in consideration of the marriage. The family is said to have altered divorce documentation in respect of PM's second husband once a defect was pointed out to them at the Register office.

13. Dr Doswell, a psychiatrist, completed a capacity assessment on 30 January 2012 on YLA's instructions. She concluded that PM had not demonstrated that she understood the information relevant to getting married and having sexual intercourse and lacked capacity.

14. On 2 February 2012 MZ agreed in a meeting with the CLDT (Community Learning Disability Team) that he would not share a bed with PM nor have sexual intercourse with her nor go ahead with the civil ceremony until the capacity issues were resolved.

15. On 7 February 2012 MZ was seen by a social worker to discuss Dr Doswell's report. He did not accept that PM had a learning difficulty. He later denied that he had been told about her disability: or if he had he did not remember it.

16. On 21 February 2012 a caseworker with the Registrar General's office reported that he was satisfied that PM had capacity and that the marriage may go ahead which it did on 29 February. Evidence had been provided by the CLDT and by the family and the Registrar General had given advice. The Superintendent Registrar was not able to share this information with the LA. There was no right of appeal by an objector. Also, the police thought that no crime had been committed because the sexual activity seemed to be consensual.

17. At the Register Office, the Registrar who performed the marriage on 29 February 2012 was worried about PM's presentation and demeanor and the fact that Mrs M slapped her on the face to get her to smile for a photograph. She emailed social services to express her concern. Mrs M has admitted this. In the view of the social worker who has seen the photograph the smile was more of a grimace.

18. It later emerged that the material that Mrs M had produced to the registrar was a report from a local paediatrician (Dr A) who may have had some connection with the family, purporting to find that PM understood what marriage was. This report was of course in conflict with that of Dr Doswell. The doctor is now under investigation by his professional body because of the provision and terms of his report.

19. The family avoided meetings to discuss what had happened until 20 March. At that meeting they said that the stress of the investigations was having a negative effect on PM, because of her pregnancy. At a meeting which later took place on 2 May PM could not recall being slapped by her mother on her wedding day or feeling sad and said that she was happy, was not forced to have sex, and enjoyed the experience. On 17 May she said that she loved her husband and had not been forced into the relationship.

20. YLA was concerned about PM's capacity to undergo pregnancy and childbirth and to care for a child. Assessments were carried out. At that point Mrs M put herself forward as carer: although her accounts swung drastically from saying that PM was competent, and that she could do nothing for herself. MZ disputed that PM could not care for a child. He described her as "clever" and a "fast learner". He has since said that this is because the concept of learning disability is not recognised in Pakistan.

21. In July 2012 PM and MZ presented themselves at children's services. PM stated that she had been physically and emotionally abused by her mother and stepfather (I note that MZ alleges abuse by Mrs M but does not make any complaint against Mr S). He talked about these problems to another social worker but did not mention physical abuse. On 2 August shortly before B's birth was due, they left PM's family home, and were rehoused on a temporary basis. MZ alleges that Mrs M and Mr S have since made death threats against his family in Pakistan. Mrs M and Mr S deny all allegations against them. PM is now estranged from them.

22. At a home visit on 3 August it was made clear to MZ that he must abstain from a sexual relationship with PM. He signed a written agreement to that effect. He said that he had not been made aware of this requirement before and could not recall it

having been discussed at the February meeting. He did say (and I note has always maintained) that he had abstained from sex with her during the pregnancy in any event, because of her health.

23. A social care assessment completed in late August 2012 indicated that there was no evidence that PM was not having her needs met by MZ. PM resisted the suggestion that she should live separately from MZ so that her skills could be monitored.

24. Social work and cognitive assessments indicated that PM was not capable of caring for B and there were also asserted to be risks of domestic violence from her family. B was received into care after his birth in mid-August and made the subject of care proceedings and was placed in foster care. Parental attendance at contact was excellent.

25. Dr Taylor undertook a capacity assessment of both PM and MZ. He concluded that PM functions in the "extremely low range" in terms of her comprehension and reasoning, her ability to sustain attention, concentrate and exert mental control, to process material and retain information. She is functionally illiterate with a reading age of 7.7 years and has a global learning disability. MZ falls within the entirely average spectrum. He formed the view that PM could not safely and consistently parent a child. She might be able to parent in a secondary role, with support. She could not be left in sole care of a child.

26. Subsequent social services experience and assessment shows that PM can carry out basic tasks but is easily distracted and can cause B to be unsafe. She cannot understand why something is unsafe. She cannot bath him safely, or make up bottles properly, even with repeated instruction, for instance.

27. After various interim hearings the care proceedings were issued on 20 August 2012 and the COP proceedings were issued on 7 October 2012. The case came before me on 21 November 2012. I note that Roderic Wood J at a previous hearing declined to approve a parent and child foster placement because it would have entailed sharing a bedroom amongst other reasons. I listed a hearing of the capacity issues (without also listing the care proceedings). Within the care proceedings I approved a plan for PM, MZ and B all to go together to a parent and baby foster placement: they were not to share a bedroom and this has been monitored. I directed that a further capacity assessment be carried out by jointly instructed Dr Joyce. It was agreed at that hearing that no planning could take place for B until capacity issues were decided: at the forefront of the court's concerns was the question of whether PM could live with MZ.

28. I directed that MZ must not engage in sexual intercourse or any sexual contact with PM: although for avoidance of doubt he is permitted to put his arm around her and hold her hand. I recall MZ indicating his unhappiness at my direction: after some resistance he agreed to give an undertaking. I stress that there was no indication that he did not intend to abide by the agreement, but he seemed resentful of the court's intervention.

29. MZ, PM and B went to the foster placement, which is culturally and linguistically appropriate, and they are still there. MZ's parenting of B is skilled, sensitive, warm and wholly appropriate. B is comfortable and relaxed with him. It is common ground that PM's disability is such that she cannot be left alone with B for even the shortest

period of time. She has received much training and instruction, and she tries hard, but her poor concentration, memory and a lack of empathy, provide insuperable difficulties, and B is not relaxed in her care.

30. The foster parents have raised a number of concerns, disputed by MZ, about his behaviour and attitude to PM.

31. MH and PM occupy separate bedrooms and so far as can be ascertained, there has been no breach of the undertaking.

32. The Official Solicitor filed a statement on PM's behalf. His legal submissions were developed by Ms Giz. I shall deal with them separately. He referred to information within the papers as to the history and as to PM's wishes and feelings.

    i) He stressed that PM had been, to her representatives, unequivocal, persistent and consistent in her stated belief that her marriage to MZ is a "love marriage", that she likes to be married to him, that she loves her baby and wants to continue to live with them both.

    ii) On 6 March 2013 she told her solicitor "it's my right and I want to fight for it, if you don't mind". She wanted to live with her husband and the baby and to tell the judge this herself. She has made similar forceful statements to others.

    iii) There has never been any doubt or hesitation, or any sign of apprehension or anxiety when talking about MZ, including her sexual relationship.

    iv) The Official Solicitor asked me to see PM because it was important both to her perception of the proceedings and the decision making process but also because 'it will assist the court in determining whether this is a case where the power to make capacity declarations for the protection of [PM] should be exercised at all, or certainly at this stage. Further, reading [PM's] stated wishes and feelings is perhaps a poor substitute for the court's ability to acquire more direct, first hand experience of [PM] and her situation. He referred to s 4 MCA 2005: "the person must so far as is practicable be permitted and encouraged to participate or improve his ability to participate, as fully as possible, in any act done for him and any decision affecting him".

33. Ms Giz told me in her submissions that PM has a deep and profound wish to live with her husband and baby.

34. Prior to the hearing commencing before me, I was asked by Ms Giz (via email) to see P to ascertain her wishes and feelings: I declined. I was particularly concerned from what Ms Giz wrote that I was being asked to form my own assessment of the strength of her wishes and feelings: and indeed capacity. In children's cases the court sees the child for the purpose of allowing wishes and feelings to be expressed and to allow the child to feel part of the proceedings: the meeting is not to be used for gathering evidence. I have met adults without capacity in other proceedings for that purpose. I thought that there was risk that I might form a view which I was (i) not entitled to take and (ii) might be adverse to PM in the sense that I formed the view that her views were repetitively expressed, the subject of influence, or did not convey understanding. YLA disagreed with my seeing PM being particularly concerned as I was that there

was a confusion in the communications on behalf of the Official Solicitor between permitting PM to feel that she is part of the proceedings, and forming an evidential view as to her wishes and feelings. I had at that stage in fact forgotten that PM had been in court in November and was to be in Court at the hearing. I note that in *CC and KK v STCC* [2012] EWHC 2136 (COP) Baker J heard evidence from KK in order to assist in the decision as to capacity. This was evidence given in the parties' presence and submissions were made as to it. Seeing PM privately would not have permitted the other parties to be part of the process.

35. Miss Giz wrote a second email asking me to change my ruling. She stated that I was not being asked to make evidential findings. I did not change my mind: I reserved further consideration of this question until the trial. The application was not renewed at the hearing.

36. In written submissions filed shortly before the hearing I was met with applications on behalf of MZ (Miss Bazley QC) and the Official Solicitor acting for PM effectively to abandon the hearing. Miss Bazley asked me to encourage the LA to withdraw the COP proceedings, alternatively that they should be adjourned. This was expanded on during the hearing. It was submitted that it was obvious that it was not in P's interests for any declaration to be granted, because she wants to live with M and be with B. It was submitted that I had a discretion as to whether to make any declaration at all, because it might not be in PM's best interests for any such declaration be granted: because she wants to be with her husband and child. Miss Bazley submitted to me that it was disproportionate to continue with the hearing and the overriding objective required me not to.

37. It was submitted to me that YLA was at fault because it had failed to state what its plan was, and that I could (or certainly should) not grant a declaration until it had formulated a plan. YLA responded that it needed clarity before it could determine the way forward.

38. I declined to adjourn

    i) No previous application had been made to adjourn: and it was wrong to lose two days of court time.

    ii) I did not accept that I should not embark on the enquiry.

    iii) I thought that I might on hearing the expert evidence conclude that PM had capacity.

    iv) Conversely I was not convinced that the very narrow view of welfare advanced by Miss Giz was correct: nor that I was permitted to duck the issues.

    v) I accepted that on the face of it YLA could not provide a plan unless capacity was resolved: even if only on an interim basis.

    vi) I accepted that the whole point of the listing was to resolve capacity: after which it was intended that the parties should take stock.

39. I am told that the LA was asked whether it sought findings of fact, and at that stage said that it did not.

Evidence

40. I asked YLA to consider what plan they might put in place. Although the plan had been for a period of reflection after the hearing to consider the way forward, I now did not think that this could be long delayed. I was particularly concerned about the foster career's observations of MZ and PM. I asked that the social workers be called to give evidence. On day two they produced some outline plans for PM to be accommodated and looked after, if I were declare her incapacitous in respect of marriage and sexual relations, and not to permit her to live with MZ in the community. The guardian was informed about my concerns, and attended court by counsel on the second day.

41. I heard

- Dr Joyce
- Ms RB ,social worker adult care
- PT, social worker for the child
- GM, social worker adult care
- MZ

42. I considered that my first task was to assess capacity. If PM has capacity then much else would fall into place. I had stressed at the earlier hearing and repeated that the question of capacity although guided by expert evidence is a matter for me. At that point I thought that I might conclude having heard Dr Joyce that PM does have capacity: also that there might be some solution which would permit PM to live with MZ and B. His case is that he is prepared to continue his undertaking that he will not engage in sexual relations indefinitely if necessary and that she will be safe with him: although he wants to continue to be married to her. He says that he feels a moral duty to her. He wants to be rehoused with her and B in a two bedroomed flat with significant support from social services.

Capacity: the law

43. The fundamental principles are that:-

i) A person must be assumed to have capacity unless it is established that she lacks it: s1(2) MCA 2005.

ii) The test for capacity involves

a) the "diagnostic test" (does the person have an impairment or disturbance in the functioning of the mind or the brain) and

b) is the person unable to

i) understand the information relevant to the decision.

ii) to retain the information.

iii) to use or weigh that information as part of the decision making process or

iv) to communicate the decision

c) Capacity is issue and time specific.

d) It is not necessary for the person to comprehend every detail of the issue including peripheral detail but the question is whether the person under review can "comprehend and weigh the salient details relevant to a decision to be made" see Macur J (as she then was) in *LBL v RYJ* 2010 EWHC2664 [Fam] at para 24: and it is recognised that different individuals may give different weight to different factors.

e) Unwise decisions are different from decisions based on a lack of understanding of risks or inability to weigh up the information about a decision.

f) The court must consider all relevant evidence in coming to a decision and not just the expert evidence. Baker J in *CC & KK & STCC* [2012] EWHC 2136 (COP)

Capacity in respect of sexual relations

44. In *Re E (An alleged patient); Sheffield City Council v E* [2005] 1 FLR 965 X City Council v MB, NM and MAB [2006] 2 FLR 968 (Re E) Munby J said that

> [74] "Crucially, the question is whether she (or he) lacks the capacity to understand the sexual nature of the act. Her knowledge and understanding need not be complete or sophisticated. It is enough that she has sufficient rudimentary knowledge of what the act comprises and of its sexual character to enable her to decide whether to give or withhold consent……"
>
> [84] And the test of capacity to consent to sexual relations must for this purpose be the same in its essentials as that required by the criminal law.
>
> [86] "Such information might include basic knowledge about the risks of pregnancy, sexually transmitted diseases; some understanding of what is involved in sexual activity; and an understanding of the nature of the relationship they have with the other party".

45. The parties in this case agree that the test is per *D Borough Council v AB* 2011 EWHC 101 (COP) [2011] 2 FLR 72 Mostyn J:

i) an understanding of the mechanics of the act,

ii) that there are health risks involved,

iii) that heterosexual sex might result in the woman becoming pregnant.

46. I accept that all that is required is a basic low level of knowledge, and also that the question is not whether it is wise to have sex.

Issue specific or partner specific?

47. The test is complicated by the decision of the Supreme Court in the criminal case of *R v Cooper* 2009 UKHL 42 and two subsequent first instance Court of Protection decisions: *D County Council v LS* 2010 EWHC 1544 (Fam) Roderic Wood J and *D Borough Council v AB* (above). Before *R v Cooper* Munby J had held firmly that the test in relation to both sexual relations and marriage was issue specific rather than partner specific. In *Cooper* the complainant knew perfectly well what sex was and had general capacity to consent but was unable to consent on this occasion due to her irrational fear of the Defendant. The House of Lords held that the test under the Sexual Offences Act 2003 was partner rather than issue specific and made a number of general observations relevant to civil cases, including doubting Munby J's approach. Roderic Wood J tried to steer a middle course.

48. Mostyn J stands firmly by Munby J. He drew a distinction between capacity to consent to sex and the exercise of that capacity: which to me makes sense in the context of the 2003 Act. He asked the question "Is the local authority supposed to vet every proposed sexual partner of Alan to gauge if Alan has the capacity to consent to sex with him or her?"

49. Hedley J on 20 July 2012 in *CYC v PC & NC* [2012] MHLO 103 (Cop) said:

> [19] "Capacity to take a specific decision, or a decision of a specific nature, with which the Act is concerned. Sometimes that will most certainly be generic.....but it will not always be so".

50. In *A Local Authority v H* 2012 EWHC 49 COP Hedley J said that:

> "[21] possession of capacity is quite distinct from the exercise of it by giving or withholding consent.
>
> In the criminal cases [capacity] arises most commonly in respect of a single incident and a particular person where the need to distinguish between capacity and consent may have no significance on the facts. … there is no absolute distinction between capacity in civil and capacity in criminal law, it is merely that they fall to be considered in different contexts, and, often perhaps, for different purposes.
>
> [23] In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom. I do not think more can be required.

> [25] In my judgment one can do no more than this: does the person whose capacity is in question understand that they do have a choice and that they can refuse? That seems to me an important aspect of capacity and is as far as it is really possible to go over and above an understanding of the physical component.
>
> [26] … I would be disposed to view that in terms of whether any specific consent was (or in these circumstances) could be given. … The focus of the criminal law must inevitably be both act and person and situation sensitive … this Court, however, has to be effective to work on a wider canvas. It is in those circumstances that I find myself closer to the views expressed by Munby J. (as he then was) and Mostyn J.
>
> [31] .. H lacks capacity to consent on two specific bases: first that she does not understand the health consequences of sexual relations…; and secondly that she cannot deploy the information effectively into the decision making process."

Capacity in respect of marriage

51. Sexual relations are a component of the test of capacity to consent to marriage.

52. Singleton LJ in the Estate of Park, deceased, *Park v Park* [1954] P 112 at 127 said:

> "To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without any degree of mentality it cannot be said that he understands the nature of the contract"

53. In *Re E* [2005] 1 FLR 965, Munby J said that it was not enough for someone to understand that he or she was going through a marriage ceremony, or understood its words: there must be understanding of the nature of the marriage contract, and the duties and responsibilities attached to marriage; they are that marriage is a contract, formally entered into, which confers on the parties the status of husband and wife, an agreement to live together, to love one another as husband and wife, to the exclusion of all others, creating a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and domestic life and the right to enjoy each other's society, comfort and assistance.

Evidence as to capacity

54. The evidence established from a number of sources that the extent to which P truly understands the meaning and importance of what she says, and how much it is a learned or perhaps even coached response, is unclear. She is suggestible, keen to please, acquiescent, compliant and timid.

55. RB states that PM can make some decisions about her life, can communicate verbally, and is able to follow directions and commands. She can manage most tasks of daily

living, and some household tasks. But she needs support to manage any more complicated or sophisticated tasks, and managing her life in the outside world.

56. In 2006 Dr Conboy–Hill assessed PM and concluded that her scores put her at the lowest level the test could generate: and that she had a severe learning disability. She masked this by using a repertoire of pat responses and socially sophisticated interjections: acquiescence, passivity and social aptitude combines to make her extremely vulnerable.

Dr Doswell's assessment

57. PM was assessed by Dr Doswell on 30 January 2012. Dr Doswell concluded that PM had only the most basic understanding of marriage, and did not understand that it was a legal process.

58. PM was clear that she wanted to get married and was not expressing any unhappiness about sexual relationships. It was unclear whether she had any genuine understanding of marriage or whether she had picked up phrases without comprehending the concepts behind them. It as unclear how much education she had previously received. She did not seem unhappy to find herself pregnant.

59. PM said that

    i) You get married because you love someone and they love you: living together sleeping in one room, going out shopping and to Indian restaurants and having babies.

    ii) She said that no-one could have children if they are not married (Dr Doswell wondered whether this might be cultural but PM said that this applied to Dr Doswell as well as her).

    iii) When asked about the difference between being married and not being married she said that she wants to get married and would be upset if she could not.

    iv) She said that they needed to get married so that they could live with her parents, she could wear nice clothes and dresses, and that a marriage would make her and her husband happier.

    v) When asked what would happen if she could not marry she said that everyone had the right to get married.

    vi) She said that when married you have a new life, share your life: you are a different person and you change a lot, but could not say how you would change.

60. In respect of sexual intercourse PM said that

    i) When you have sex you take your clothes off and join your whole bodies from knee to chest.

    ii) Your husband puts his penis in your vagina, (she said that she enjoyed this).

iii) She could not provide any additional details, she just repeated the same phrase and said that she feels happy and that they have a bath or shower afterwards.

iv) When you make love you get pregnant and your stomach gets bigger.

v) She could not explain how or why this happened: her husband made the baby with her stomach and his front part.

vi) She had no understanding of contraception or how to avoid pregnancy or that it could be avoided.

61. Dr Doswell formed the view that she repeated a number of phrases relating to marriage that made it appear that she had an understanding of marriage but on additional exploration there was no depth of understanding. She did not understand at even the most basic level that marriage is a legal process and that it is possible to do all the things which she described without being married. Not only did she not understand anything about the process of contraception, but had no comprehension of the concept of or nature of sexually transmitted disease. It was not clear that she had the capacity to retain relevant information.

62. PM has since undergone some education with a community nurse. The conclusion was that she had some basic understanding but is unable to weigh up the information as part of the decision making process. Although the assessor stressed that she might have the capacity to learn further, she expresses concern that she will learn by rote, and therefore further education may coach her for a further assessment.

63. Dr Joyce is a psychologist (based at the Maudsley Hospital) with specialist experience in best interests and capacity assessment and experience as an expert witness. She saw PM at the foster placement on 24 January 2013. She used a capacity assessment checklist which forms part of her assessment.

i) PM told her that she was happy to see her, liked living with her husband and the baby and doing things with and for him. She said that the baby was five years old, and was now talking.

ii) She told Dr Joyce that the court was to decide where she and MZ and the baby were to live. Dr Joyce tried to explain in simple language and in a broken down way that the court wanted to know whether she could decide and choose what to do about sex and marriage and what were the good things and bad things about them. She did not understand, and she repeated back words such as ‘choose’, ‘decide’ and ‘good things’. After some repetition PM was able to say “It’s the court making a decision’, but had great difficulty in understanding and remembering what had been said. She did not understand what a court was.

64. There are examples in the evidence of PM making statements which she has learnt out of context: it is said that she knows that she is not allowed to have sex with MZ. But the context is that she says “I am not allowed to have sex with [M]” as a stock phrase: sometimes at the very beginning of a meeting with social workers, for instance: wholly out of context and unprompted. In the assessment by the nurse who undertook the educative work after B’s birth PM would say without prompting and usually when

discussing a quite different subject "[M] has my permission and my consent" but could not explain why she had said this or what it meant.

65. Dr Joyce showed her pictures as part of the standard test regime. She had previously seen them in the work done by the community nurse. She was interested in the pictures and not embarrassed. She was able to describe the act of sexual intercourse, and that "it makes eggs and baby", and that "egg and baby grows inside". There was no indication that she understood that the egg came from her. She did not know how long a pregnancy was, but was able to repeat 'nine months', but said that there were 7 days in a month. She was able to describe how a baby comes out. She was able to name body parts, and say what was happening in most of the pictures showing sexual activity, and able to say whet were appropriate places for it to take place: e.g. in the bedroom, not outside. I note however that there was one picture which confused her, and she again came out with the phrase 'giving my consent, M' (i.e. her husband). This seems to me to be an example of a pat or learned response. Then she went through a list of various sexual activities in a repetitive manner giving each a number, as she had clearly been taught.

66. She showed little knowledge of sexually transmitted infections, although she was interested in being told. She was able to repeat that a person who you had sex with could pass on an illness but did not understand this. (These issues had been addressed by the community nurse in the education programme.) She did not know what contraception was although she remembered being told about it. She did not understand what condom use was for. When asked what happened if a man did not use a condom she referred to 'white stuff, gets on your hands, feels sticky' but she did not in any way relate this to conception, or infection, nor tie this in to the question posed immediately before about how a baby was made. Dr Joyce said in evidence that she did not relate seminal fluid to conception, and had no concept that it could pass on disease.

67. When asked the good things about sex that she enjoyed, she said that it was 'relaxing' (a word that seemed to be a set or learned response) and was 'making love'. Dr Joyce told me in evidence that she was not able to be any more specific than that; about what happened or what she felt. When asked what might be the bad things and about risk she did not understand and could not think of any bad things.

68. When asked what her she could say no she said "of course you can". "He doesn't force me to have sex, and we don't have it any more." When asked if she minded she said that she did not (she has said this more than once).

69. When asked what happens when you get married she said that you live in a house together and have a baby. When asked who decides she said "He came to our house. We felt happy". She said that she had told her parents that she wanted to marry MZ and she enjoyed playing with him, helping out and making love. She said that they look after each other, and he helps her. She did not understand that there are laws about getting married, the formal content, the legal framework, or that marriage is a contract. She said that when she got married she did not know the words or understand them, and that she had practiced reading them out. She said that it was "solemn" but could not say what this meant. She said that they had wanted to get married and that they had promised to help and look after each other. She should wash her husband's clothes, make dinner, and go out. She said first of all you stay

married for three years; but then said that they would be married forever. Dr Joyce told me that she said "he takes me out, cook, household tasks".

70. She said that she wanted to live in London and that she would have help there and that a nurse or social worker would get them a house.

71. She said that she liked being married to MZ and having a baby. She accepted that she would need some help in looking after him.

72. PM said that she would be sad and unhappy and if she couldn't live with MZ. She did not want to live with her mother again: things had not been very good: her mother had shouted at her and hit her.

73. In evidence Dr Joyce said that PM said

    a) she understood that there was some kind of reciprocity.

    b) she understood that he was special, and that there was some kind of process involved.

    c) she finds the concept of the future very difficult: although she had some understanding.

    d) she is distractible.

    e) her memory processing is poor.

    f) she understands that it is some kind of formal relationship.

    g) she has no understanding of divorce as a concept, although she understands that she has been married before and is no longer married she does not seem to understand why that is; or that it is possible to for her bring a marriage to an end.

    h) she has no depth of knowledge.

    i) she is not able to explain what she meant.

    j) at times there were subtle changes in her language: she used words she clearly did not understand.

74. Dr Joyce accepted that the issue of what the rights and duties of marriage are is very difficult: she maintained the view that PM had no true understanding of the formal significance of marriage or that it is a contract.

75. Dr Joyce concluded that PM would not acquire capacity to marry until she has the capacity to consent to a sexual relationship. She is aware of (i) the mechanics of the act, and (ii) that sex can result in pregnancy, but (iii) she does not have awareness or understanding of potential risks of STI's: she has been given information but cannot absorb it. But she is motivated to learn, and simple repetition and explanation might help her learn. It is difficult to put a time scale on it. It will take some time to learn: and it would be important to ascertain whether she truly did understand, or was just

repeating information. She said that she was "nearly there" in relation to her understanding. But pushed as she was pushed by both counsel and me, she would not budge from her view that at the moment PM does not have capacity.

76. PM said that she wanted to live with her husband and baby but was unable to consider any other option or any pros and cons of any alternative. Dr Joyce suggested to her various alternatives of supported living, but she was not able to consider these. Dr Joyce concluded that she lacked capacity as to where to live.

77. Dr Joyce said that there could be a considerable psychological impact on her if she could not live with MZ and the baby: she would be anxious and unhappy, and would not be able to understand the decision. She did not understand that the court might decide that she cannot live with her husband and baby. Any change would have to be explained very clearly and simply and with certainty as to what was happening next.

The foster carers

78. I appreciate that I have not heard the foster carers. MZ said that they do not understand the cultural differences, and that he is concerned as to how he should behave to PM because of the undertakings. The undertakings do not of course prevent him from touching PM, or showing her affection.

79. A number of observations of P and M together prior to the placement describe his care of and patience and tenderness to her. But the foster care reports paint a worrying picture.

i) MZ and PM never touch, even accidentally. Twice PM touched his arm, and he did not respond.

ii) They can go for an hour without speaking, and only PM initiates conversation. MZ only talks to PM when he wants her to do something.

iii) PM eats on her own, and although he makes dinner every day, usually eats away from her, with B in his arms.

iv) MZ never asks PM whether she would like to do anything for B, apart from changing his nappy. She asks occasionally to hold B. he no longer asks her whether she would like to give him his milk, and has never asked her if she would like to feed him a solid meal.

v) MZ walks ahead of her with her struggling to keep up. Recently he was seen walking ahead with B in his arms with PM pushing the pushchair 6 feet behind.

vi) They always sit on separate settees.

vii) They never show any affection.

viii) When B is awake all MZ's attention is on him, and when he is asleep, MZ is on is on his phone or watching TV or doing chores. He does not take proper care of her hygiene requirements: for instance he does not remind her to

shower or make sure that she has sufficient clothes. or buy her toiletries: the foster carer has to do that.

ix) He is distant with her.

x) He says that he was "duped" by her parents.

xi) He will always hand B to the foster carer rather than to PM, even if PM is sitting down and there is no risk that she will drop him.

xii) The foster career thinks it is most unusual even within this restrained and modest culture for there to be no signs of affection between husband and wife at all: such as talking with their heads together, a touch, a smile.

80. The social worker observes that MZ is overly protective and possessive of the baby: he won't let PM hold B nor not permit her to play any part in his care.

The case on behalf of MZ

81. It is submitted that MZ married PM out of love and respect for her.

82. He does not consider that it is to M's benefit for the court to decide that she did not have the capacity to marry him.

83. He does not consider that it is in her best interests for any party to prosecute a nullity petition even if the court i**s** persuaded to conclude that PM lacked the capacity to marry him on 29 February 2012.

84. MZ says that his immigration status was not the reason for the marriage, and that it was not arranged by PM's mother and stepfather, with whom PM was living. He denies anonymous information given to the LA that £12,000, £15,000 or £20,000 changed hands. He says that it was a love match. He says that he did not realise that PM was suffering from a mental incapacity. He thought that she was just a shy girl. He says that he did not spend much time with her after the marriage.

MZ's evidence

85. MZ's case is now that he will stay with PM out of duty and a sense of responsibility.

86. I was worried about MZ's insistence both through his counsel and in evidence about the amount of support that he would need:

i) A two bed roomed flat.

ii) A social worker to come in the morning for two hours, and again in the evening at bedtime, because he cannot care for PM as well as the baby. He was not unaware of what a play pen was and not prepared to use one once it was explained to him. This was because he was not prepared to put the baby in his cot. The social workers were criticised on his behalf for being unable to commit to such a package.

iii) He told me that he has to go the mosque and also to pray at home and needs home care cover at these times. I was left in considerable doubt as to what else he needs to do for two hours or so in the morning so that B must be cared for by someone coming into the home. As was pointed out to him (although he did not seem prepared to accept this) parents just have to fit in their household tasks around the care of a child.

iv) I was left with a very strong doubt as to what his true commitment and ability was to providing full time seven day week care to the baby.

87. I felt that there was a lot I did not understand about him. He was defensive and at times contradictory in his evidence, and I thought self serving, and I do not know what his true motivation for or intention in respect of this marriage is. He struck me as a controlled person: but that does not mean that I can be confident that he has not or will not seek another sexual outlet.

88. One of the social workers told me in evidence that it would be disastrous for all if PM became pregnant again. I asked Ms Bazley to convey that to her client. I am not confident that he had previously thought this. But I cannot make any finding about this. But I also cannot ignore that he has allowed to conceive a child for whom she cannot care.

Findings of fact

89. In final submissions, as a result of MZ's evidence, Mr Downs asked me to make findings of fact that MZ's motive for the marriage was immigration status; that he knew and had always known that PM lacked capacity; and that there was a concerted attempt to circumvent the LA's objection to the civil marriage and that it is likely that he knew Mrs M and Mr S, and allowed to continue or encouraged them, that B had been conceived in an attempt to bolster his immigration claim that B had been created for that purpose, and that the likelihood is that MZ will abandon PM. Miss Bazley responded that this was quite unfair: he had had no notice, and he wanted to call evidence in response. After the hearing had concluded Mr Downs served a detailed schedule of findings of fact: many of which related to Mrs M and Mr S.

90. I accept that the LA has notified its intention to seek these findings very late even though the outline of the findings sought is heralded clearly in the documents before the court.

91. Miss Bazley says that she wants to have the opportunity to have Mrs M and Mr S called to give evidence, and the foster carer, and to have evidence from the registrar of marriages. She also said that she would seek extensive documentary disclosure: of what, I was not clear.

92. She also stressed to me that the importance of any findings that I make is very grave, at least potentially, because of the impact on the immigration proceedings on MZ and the baby. I note however that MZ has said in assessment that he wants to live in Pakistan with PM and B.

93. I accept that the impact of findings could be grave: but that is not a reason either for not making findings: or for not disclosing them to the immigration authorities. I

accept entirely however that I must be very careful before drawing any conclusions adverse to MZ in respect of what led to the marriage. I will not make findings of fact as to his motivation for the marriage, or whether B was born to assist his immigration case, or what he was in fact told: but I cannot ignore the history.

94. I can make an interim declaration if there is reason to believe that P lacks capacity in respect of the matter in issue (s 48 MCA) and it is in P's best interests to make the order or give directions without delay.

95. In so doing I am entitled to make my decision on the basis of facts that are not proved but where there are solid grounds to think that they may be true.

96. I thought that MZ was very intelligent; very acute; aware of the impression he made; reasonable in manner. He had the assistance of an interpreter but gave evidence almost entirely in English, of which he has a good command.

97. There were a number of questions which he found it difficult to answer, or which he tried to sidestep: (and in my view this was not due to lack of comprehension or lack of reasoning ability): and issues raised in the papers which he did not satisfactorily address

i) his reasons for the marriage.

ii) his understanding of PM's disability.

iii) his contact with her and ability to observe her at close hand in the three months between the Islamic and register office ceremonies: during which time they lived together and shared a bed.

iv) whether B was conceived in circumstances where he must have known that she did not really understand what was happening, and when he must have known that she could not care for a child without the help of others.

v) what he was told in February 2012 (I reject his account that he was not told, or did not remember the meeting with the social worker when he was told that PM had a significant learning disability).

vi) why he disregarded the agreement that he would not marry her until Dr Doswell's report had been considered.

vii) why he went ahead with the register office wedding having been told of her incapacity.

viii) his knowledge of Dr A's report.

ix) his shifting accounts as to her disability and competence.

x) whether he was duped into the marriage.

xi) why, if his case is that he was duped into marriage having been misled as to her capacity, he wants the marriage to continue.

xii) why having read the reports he states that he would like to resume sexual relations with her (as Miss Bazley put in her opening position statement: although he said something different in evidence).

xiii) why he does not consider that it is to her benefit for a declaration of incapacity to marry to be made.

xiv) why he resists a declaration that she does not have capacity to have sexual intercourse.

xv) whether his statement of growing realisation as to her capacity is compatible with his desire that the marriage should continue.

xvi) what his true intentions are for his relationship with her in the future.

xvii) why he has given different accounts as to how PM's mother and stepfather treated her and why he did not repeat any such accounts but was vague and unspecific in the witness box about what he alleged she had said to him.

98. In particular I found his evidence about the extent to which he had not appreciated PM's disability unconvincing. He says in his statement that he was told before the Islamic marriage that she had a "mild" learning disability: thus he was on notice.

99. His reported refusal to accept in February 2012 that she had problems was in very marked contrast to his graphic account of how incapable she is of performing any household or child care task. His excuse that he had been out a lot when they were first married and had not noticed her problems struck me as very lame.

100. MZ says that he was not concerned by PM's demeanor at the wedding. He says that it is culturally appropriate for women to cry at their weddings: when asked in evidence he could not explain why that was so since the Islamic marriage had taken place three months earlier and the register office marriage was a mere formality. He says that he did not see her being slapped.

101. I can I think properly approach the case this way:

i) I have no evidence other than hearsay and at least double hearsay at that about money changing hands. In my experience these kinds of allegations and of sums between £12,000 and £20,000 are often made. I am not prepared to make any finding as to this on the basis of this evidence and I put the suspicion that money did or was to have changed hands out of my mind for the moment: and indeed this issue may never be revisited.

ii) I cannot however ignore the sequence of events and the underlying incontrovertible facts: and my observations (I stress not findings) based on the evidence which I have heard and in particular MZ's own evidence.

a) MZ came in on a student visa ostensibly to study accountancy: this may be true. He then applied for a new course: and his own evidence establishes that he applied for the only course available at that time, to study venereal disease, just to get himself on a course, with the intention of then changing. At least one of the colleges at which he

was registered has been closed down by the Home office. He has produced no documentation. The fact that he may not have been in law an overstayer once his visa expired because he had made an application/launched an appeal does not draw the sting from the stark sequence of events.

b) It may be true as MZ said that he met PM in a shoe shop where he worked. I do not know. If he did it does not help me decide who made the running with regard to the marriage. I do not accept however on the basis of his evidence that this was a courtship in the sense that he met her independently and pursued the relationship. Mrs M had told a social worker that PM used to travel in to town by bus to meet MZ. He told the court that he always met her with her mother and her mother always chaperoned them.

c) Mrs M and Mr S were very vague when visited as to where MZ was, or what he did, when he was not at their home.

d) I have profound doubts as to his evidence that he failed to recognise that she was very vulnerable and lacked understanding and that he could truly have thought that her demeanour and behaviour was consistent with that of a shy village girl. He had been in England since 2009. She is older than him. She had been married before. She can barely read or write. She needs support in all areas of her daily life. I find it very difficult to accept in the light of all I know about PM, her passivity and compliance, that she first spontaneously raised the question of marriage and proposed to MZ or that she independently pursued the relationship. I also note that MZ was told (according to Mr Teverson) that PM lacked capacity in January 2012 but denied that there was a problem and that he said that she was capable of caring for a child. In his statement he said that with love and care she is able to live a normal life. He painted a very different picture in his evidence: he said that she was not safe to be with the baby at all. Ms Bazley told me (she did not in fact lead this from him in evidence but I take this as part of his case) that the reason why he needs a substantial amount of help is because PM interferes with his care of the baby and he cannot stop her.

e) I am unable to make any finding about the allegations made against Mrs M and Mr S. But I am also not able to find as Ms Bazley asks me to do that the allegations are true and that MZ has thus shown himself to be protective and caring of PM. It is equally possible that those allegations were made, and that PM was induced to make them, and they were not true: and that MZ has his own reasons for wanting to move out and obtain their own accommodation: and that MZ thought that this would further his immigration position. But I make no finding about that at the moment: but bear in mind it is one of the spectrum of possibilities.

f) In his statement MZ said that he loves his wife dearly. "We are deeply in love and I care for deeply and wish to protect her". To the court he

> said "she loved me and I liked her as well". He told the foster carer that he had been "duped" into the marriage, and told one of the social workers that he had been deceived and PM had been used. How these feelings fit in with his present intentions and his asserted sense of moral duty is not clear. When asked whether it was difficult to have a relationship of equals with PM he was either unable to or would not address the question.

102. I stress that I am not making any findings about what led to the marriage at the moment: in deference to Ms Bazley's submissions. But I think that there is a very significant possibility that this marriage was entered into, and indeed this child created, for reasons solely to do with immigration status. He is certainly relying on the marriage and the existence of the child now.

103. Of course, many marriages take place for venal or practical reasons, and they can be successful nonetheless; and this does not mean that whatever his motive that he does not feel a sense of duty and commitment. But the signs are not good. And MZ was wholly unable to describe what this marriage does in fact mean to him.

104. I can draw and do draw some conclusions about his present attitude; and I do so largely on the basis of MZ's own evidence. I cannot ignore the detailed foster carer's notes: and indeed having heard him, what they say seems to chime very much with what MZ says about his current experience of PM and his feelings about her; and his perception of the future. Ms Giz could not suggest any reason why I should doubt their observations. MZ did not in reality dispute their observations but merely said that his motives had been misunderstood. I found his explanation unconvincing.

105. At the moment I am doubtful, whatever his true motivation, that this personable intelligent young man will truly be able to maintain a marriage long term where he is the carer, and where there is no sexual relationship, and where PM is in reality another child. Indeed his requests (and it may be that they are more properly regarded as demands) for assistance, indicate to me that even now he is not able and perhaps not prepared to shoulder the demands of caring for B as well as for PM. He cannot expect YLA to and nor will they fund daily support in order to cover the times when he wants or needs to do other things. His care of B in the community cannot be monitored.

106. It is obvious to me that although he is highly competent and loving as a parent that MZ has simply never contemplated and is not prepared for a full time caring role. I agree with the social worker, that even taking MZ's case at face value, the frustrations of his role are likely only to increase, particularly as B becomes an active toddler. It may be that he truly cannot imagine what the future holds. And if it is true that he truly was misled and has only just come to realise the truth, then his feelings of resentment and anger are likely only to increase. The foster carer's observations and his own evidence indicate strongly that he finds PM a burden, whatever words he may utter about his duty.

107. In the light of my doubts about MZ's evidence and its inconsistencies both inherent and actual, I cannot at the moment trust him to abstain from sexual intercourse. I find his statement that he does not want to have sexual intercourse with PM now she understands her limitations hard to reconcile with what I know about the past. Also,

if MZ is to be taken at face value PM wants to have sex with her husband: and the evidence that she parrots rather than understands the prohibition on so doing is shown by the fact that she comes out with the statement (I am not allowed to have sex with MZ inappropriately, sometimes on first meeting, and wholly out of context).

The case for MZ and PM

108. I have considered counsels' submissions and the legal propositions. I am not going to refer to all of the 23 authorities on which reliance is placed.

109. There is considerable overlap in the respective presentations of MZ and PM. Both submit that the Court should not, at least not now, make declarations as to PM's capacity in respect of sexual relations, marriage or residence. The Official Solicitor of course advances this case as PM's advocate. MZ purports to do so also in her best interests. But I have to treat this case with a considerable amount of caution. I cannot ignore the advantages to him of declining to disturb this marriage or his domestic life, and it is particularly important to disentangle what is objectively in her best interests, and what he asserts is in her best interests but in reality is in his.

110. Both also rely on Article 8 respect for private and family life, and her wishes and feelings, to which I have to give specific weight under MCA 2005.

111. Both submit that it is not in PM's best interests that a declaration should be made: and that I have a discretion as to whether or not to make a declaration. The Official Solicitor relies heavily on PM's wishes and feelings as expressed through him, which I bear very strongly in mind.

Discretion to make declarations

112. It is stressed to me that the power conferred on the court by section 15 MCA 2005 to make declarations is discretionary:

> "(1) The court may make declarations as to –
> (a) whether a person has or lacks capacity to make a decision specified in the declaration;
> (b) whether a person lacks capacity to make decisions on such matters as are prescribed in the declaration;
> (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person."

113. The Official Solicitor submits that the discretionary nature of the power as stated in the MCA 2005 is an extension of the general power of the High Court to make declarations. Rule 40.20 of the Civil Procedure Rules 1998 provides that:

> "The court **may** make binding declarations whether or not any other remedy is claimed."

114. By virtue of section 47(1) MCA 2005, the Court of Protection has "in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court."

115. The guidance to Rule 40.20 at 40.20.2 (White Book 2012 at p.1232) provides:

> "The power to make declarations is a discretionary power….When considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration."

116. To exercise a discretion of course does not mean that a court makes a decision without regard to the context, or that the discretion is not subject to overriding principles as opposed to being unfettered. The context in this case is the MCA 2005, which has been enacted in order to provide a framework for, and to protect and promote the interests of those who cannot make decisions for themselves. I do not think that when it comes to capacity as opposed to best interests, I have any true "discretion" or choice as to whether to make a declaration. Capacity comes first, best interests afterwards. Section 2 MCA 2005 deals with people who lack capacity: a statement of what is. Wishes and feelings are relevant under section 4: best interests decisions: a statement of what ought to be.

117. Respect for private and family life comes into the best interests test: it its not an invasion of private or family life to declare that a person lacks capacity in any particular respect.

118. Miss Bazley submits that the overriding principle is Article 8 HRA. She says that that the true test is proportionality: it is not proportionate in this case to prevent husband and wife living together because it overrides PM's right to family life and her wishes and feelings. It is submitted that it is only on one limb of the test for understanding sexual relations that PM falls short. PM must be nearer to the capacity / incapacity borderline so as to justify greater weight being attached to her wishes and feelings. Proportionality and necessity are related concepts, as is "useful purpose".

119. But I consider that the purpose of a declaration is to engage the powers of the Court of Protection. If a person lacks capacity then it is necessary and proportionate and has a use to grant a declaration that that is the factual position. The court's discretion in respect of best interests declarations depends on the assessment of best interests. That is not an unfettered discretion. The court has to apply the statute. I do not accept that the question of whether it is in the best interests of P is a relevant consideration in deciding whether to make a declaration that PM lacks capacity. I do not think that in *ITW v Z, M & Various Charities* [2009] EWHC 2525 (Fam) (*ITW v Z*) (see below) Munby J was suggesting that it was. *ITW* concerned not a declaration as to what *was*, but what P *wanted to happen*. I think that there is an important distinction.

120. Ryder J in *Oldham MBC v GW and PW* [2007] EWHC136 (Fam) [2007] 2 FLR 597 said:

> "A judge in the Court of Protection – may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective. On the other hand, the court must be equally careful not to be influenced by sympathy for a person's wholly understandable wish to return home."

121. I agree entirely. I have to decide on capacity in order to decide whether PM needs protection. I do not take into account in making a finding as to capacity that she may need protection. If she needs protection I have to look at her welfare needs: over all, and taking into account her wishes and feelings, but without being bound by them.

Respect for private and family life

122. In *Re MM (an adult)* [2007] EWHC 2003 (Fam) [2009] Munby J said that

> " [102] So far as concerns private life I can conveniently start with what the European Court of Human Rights said in *Pretty v United Kingdom* (2003) 35 EHRR 1 at para [61] (citations omitted):
>
> "As the court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."
>
> The Court stressed at para [65] that:
>
> "The very essence of the Convention is respect for human dignity and human freedom."
>
> [103] In *Niemietz v Germany* (1993) 16 EHRR 97 at para [29] the Court indicated that "private life" includes at least two elements. The first is the notion of "an "inner circle" in which the individual may live his own personal life as he chooses"; the second is "the right to establish and develop relationships with other human beings".
>
> [104]The Strasbourg jurisprudence thus recognises that the ability to lead one's own personal life as one chooses, the ability to develop one's personality, indeed one's very psychological and moral integrity, are dependent upon being able to interact and develop relationships with other human beings and with the world at large."

Wishes and feelings

123. In *ITW v Z* Munby J considered the weight to be attached to the wishes and feelings of P in a testamentary capacity case. He said:

> " i) First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see Re MM; Local

> Authority X v MM (by the Official Solicitor) and KM [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at paras [121]-[124].
>
> ii) Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular a priori weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P's wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the test of incapacity under the 2005 Act is, as under the common law, 'issue specific', so in a similar way the weight to be attached to P's wishes and feelings will likewise be issue specific.

124. One of the difficulties of addressing the submissions of MZ and on behalf of PM is that the concepts of (i) capacity (ii) best interests (iii) practical consequences of the decision (iv) legal consequences of the decision are confused and elided.

125. In *ITW v Z* Munby J set out a number of features which may be important in assessing wishes and feelings , with reference back to *MM:*

> "(a) *the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings:*
>
> I do not consider that because PM 'only' fails to understand one of the criteria this places her close to the borderline. She fails to understand, and may never understand, an essential component of sexual relations. Even without pregnancy, disease or illness is very important.
>
> *(b) the strength and consistency of the views being expressed by P:*
>
> I recognise that PM has been forceful and consistent, but I am entitled to take into account (as perhaps not in the assessment of capacity to consent to marriage or to sexual relations) that she does not fully appreciate important issues in these proceedings.
>
> i) the fact that immigration is an issue,
>
> ii) the reality of MZ's attitude to PM arising from the observations of the foster carer and social worker,

iii) that so far as MZ is concerned he does not love her and never has done so (his oral evidence), that (perhaps) he regards himself as having been duped, and that he is only staying with her, according to him, out of a sense of duty. Although Miss Bazley submitted that he respects her, I detected no respect either.

iv) *all the relevant circumstances.*

In this context the relevant circumstances will include, though I emphasise that they are by no means limited to, such matters as:

(c) *the possible impact on P of knowledge that her wishes and feelings are not being given effect to.*

I accept that this may cause her bewilderment and distress. She will be unable to understand why that is: but that arises from her incapacity. The precise extent to which P truly understands the meaning and importance of what she says, and how much it is a learned or perhaps even coached response, is unclear. But there is a solid body of evidence that she has no or very little understanding of much of what she says at all.

d) *the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances."*

It is submitted that PM's wishes and feelings are, in the circumstances of this case, rational and sensible, particularly considering that she has undergone a ceremony of marriage with MZ (despite the local authority having entered a caveat) and has had a baby with him. The life she seeks to continue is her reality and if the success of the current placement is also added to the mix of considerations, her wishes and feelings seem even more realistic and capable of "sensible implementation." But in the context of my findings. I do not regard them as sensible, rational and capable of sensible implementation.

e) *crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.*

I do not regard living with MZ as being in her best interests. The current placement is certainly a 'success' so far as MZ is concerned: there is no solid evidence that it is an unqualified success from PM's.

126. It is submitted that there are real benefits to PM from her relationship with MZ that the court should not discount.

127. I do not discount that:

i) (disregarding the circumstances in which she became pregnant) there is an advantage to her at the moment in being able to be with her baby.

ii) She derives self –esteem from regarding herself as married.

iii) There have been times when MZ has been observed to be affectionate and caring towards her.

iv) I accept that at the moment she has no-one else: I cannot find that that is due to circumstances outside MZ's control.

128. I am unable to say (as is submitted) that

i) MZ has protected her against her family.

ii) He is now reported to be a protective and caring companion.

iii) The relationship PM has with MZ is mutually beneficial and rewarding and is loving and caring.

iv) He has enabled her to leave an abusive relationship with her family and become independent, and that PM has independently referred to death threats from PM's family and of her own volition does not want her mother to know where she is living. I accept that there may have been abuse of PM in her family: the wedding incident may support that. There is much other evidence however that Mrs M has provided some good care for PM. I am unable to say that MZ has protected PM against PM: he stood by when Mrs M slapped PM, I do not accept his assertion that he was not aware of this. I cannot ignore that a photograph of a smiling bride might be important evidence were the genuineness of a marriage disputed.

129. It is submitted that in every respect, PM's life has improved since being able to leave her family home with MZ and she has found a degree of contentment and fulfillment that she had not experienced before and which would be replaced with distress and anxiety were she made to separate from MZ.

130. I accept that she will experience stress and anxiety if she cannot live with him and the baby. I do not accept that she has truly found contentment and fulfillment or that she will do so in the future. I do not accept that her life has improved since leaving her family home. In my view she will be placed at risk if she lives with him in the community. Her "feeling of being supported, protected, loved" as it is put, is not based on reality.

Consequences of incapacity declarations: nullity on the grounds of lack of consent

131. It is submitted that there is no purpose in a declaration of incapacity because it is very unlikely that the Official Solicitor will wish to seek the court's authority under section 18(1)(k) MCA 2005 to present a nullity petition, on the basis of PM's best interests. I do not accept that proposition. If this marriage falls apart, or if I were to make the findings as to motivation sought by the authority, or if there was harm asserted to PM,

he might wish to do just that. If a final declaration is made as to incapacity and that it is not in PM's interests to live with MZ, then he might also think in her interests not to be tied to a limping marriage: or to consider that annulment might be better for PM than to be divorced by MZ's petition: which I perceive that he may very well want to do at some time in the future.

132. It is rightly pointed out that there is a three year time limit: but I observe that this is not absolute and one of the grounds in which the bar may not operate is mental incapacity of the Petitioner. It is submitted that MZ is unlikely to wish to present such a petition: but I do not know what he might want to do: and at what stage.

133. In *XCC v AA* and others [2012] EWHC 2183 (COP) the Official Solicitor was reluctant, in a case of very gross incapacity to marry, to present a nullity petition on DD's behalf, but eventually agreed to do so after a further hearing when I had made a declaration of non-recognition.

134. I reject the submission that if there is no prospect of the declaration being put into legal effect by the annulment of the marriage, I should not declare PM to lack capacity. That puts the issues the wrong way round.

135. Nor do I accept that Article 8 family life considerations impede the presentation of a nullity petition on PM's behalf, if she lacks capacity.

136. It is submitted that the court is unlikely to want to sanction PM living with MZ in circumstances where a declaration of lack of capacity to have sexual relations has been made. That is correct. It is not a reason to refrain from making a capacity declaration. I regard that submission as putting the test the wrong way round. too

137. Finally the Official Solicitor submits that "if negative declarations are made in respect of sexual relations and marriage, the best interests stage, which may fall for consideration at a later date, will be one where the court will be forced to make decisions which are in reality contrary to what would otherwise be thought to be in PM's best interests. The fact of the declarations having been made will, by necessity, limit the options before the court and the options for PM." I regard that again as conflating the capacity and the best interests tests and putting the issues the wrong way round.

138. In *Re MM (an adult)* [2007] EWHC 2003 (Fam) [2009] Munby J highlighted the need for the court to only exercise its protective powers (then being exercised under the Inherent Jurisdiction) where there was a need to protect a vulnerable adult from abuse. He also highlighted the need for particularly serious reasons to exist before public authorities can legitimately intervene in P's rights under Article 8. The passages upon which reliance is placed in my view relate to best interests rather than capacity declarations.

139. In *Re MM* Munby J also said that

- The court is entitled to intervene to protect a vulnerable adult from the risk of future abuse or exploitation so long as there is the real possibility of harm.

- The emphasis must be on sensible risk appraisal, seeking a sensible balance and being willing to tolerate manageable or acceptable risks, and being careful that rescue from one type of risk did not expose P to a risk of treatment at the hands of the state which could be abusive of dignity, happiness or human rights. One of the most important matters was wishes and feelings.

140. MM in fact was held to be capacitous as to sexual relations. She was not capacitous as to marriage but Munby J made a declaration that she did not have the capacity to marry. He made an order that MM was to be placed in supported care, rather than living with her partner, although she was allowed to see him (and have sexual relations with him). So MM is not authority for the proposition that the court should not make a capacity declaration because it will then have to make a best interest declaration. The whole point of a best interests declaration is that it weighs up the alternatives. Nor is it authority for the proposition that wishes and feelings as asserted should be followed or that the incapacitous person should be left in risky situation as opposed to public care. I have identified the risk. It is not fanciful.

141. If a person is not able to consent to sexual intercourse then it cannot be in that person's best interest to have sexual relations: Ms Giz made it clear that she was not submitting that because PM was "so near the line" in understanding, that sexual relations must be treated as of no consequence, and no adverse consequence.

142. If I have a discretion as to whether or not to make a capacity declaration (which I do not consider that I do,) I decline the invitation not to make declaration on the basis of wishes and feelings/ welfare.

143. I reject the submission on behalf of the Official Solicitor that the declarations are not necessary, that PM's wishes and feelings are relevant to the declarations (other than best interest declarations), and that PM can with impunity be exposed to sexual relations to which she cannot consent. In any event her wishes and feelings have to be assessed in the context of my present assessment of the realities and risks of her present position and the consequences of different courses of action.

144. In any event to expose PM to the risk of sexual relations is to expose her to the risk of a criminal offence under Sexual Offences Act 2003. MZ may not have known that she lacked capacity when B was conceived, but he could not rely on that defence now.

145. I do not consider that the making of a declaration of incapacity in respect of PM will cause her any distress at all. She would not understand it. It is the consequences, if I make a declaration that she is not to live with him or have sexual relations with him, (and probably the former) which will cause distress, quite possibly grave distress. She is placed in this position though no fault or agency of her own. She is the victim.

Capacity findings

146. The evidence before me entitles me to find that it has been proved that P does not have capacity. The psychiatric evidence is unanimous and clear. In addition I have reviewed the factual material and evidence.

147. Practical steps have been taken at the moment to help PM make the decision. Further education may assist: on the other hand it may be that her presentation will be further

distorted by learnt pat responses. This does not prevent me making an interim decision.

148. PM lacks capacity to consent to sexual relations; I do not regard PM as being able to understand all relevant information, to retain or to use or weigh the information as part of the process of making the decision; and information relevant to the decision includes the reasonably foreseeable consequences of deciding one way or another or failing to make the decisions (section 3 MCA 2005). Although the fact that information can only be retained for a short time does not prevent P from making the decision, the information must be retained at the time when the decision is made: thus the decision to undergo an imminent medical procedure is quite different from an ongoing state of affairs with the requirement for repeat decisions, such as are required in respect of sexual relations. She cannot deploy the information in order to understand the necessary components of the act, and she cannot protect herself.

149. PM understands the mechanics of sex, at a simple level based on experience, but lacks fundamental understanding of whether MZ may or may not present a health risk to her. I reject Miss Bazley's submission that she cannot be regarded as lacking capacity in this regard because MZ as a good Muslim will be faithful: like Dr Joyce I wish life were that simple. She does not understand this aspect, with whichever partner. In any event I do not accept that in this respect I should regard capacity as person rather than issue specific. I have considerable doubts about her capacity to say 'no', whatever she may say or have been taught. Certainly she would be incapable of saying no because there was a risk of becoming pregnant: because she does not understand how conception takes place. Likewise in relation to sexually transmitted disease.

150. I accept that PM has some understanding of the concept of marriage. PM certainly understands the concepts of love, sex, living together, companionship and mutual parentage. She does not understand the concepts of status, rights, responsibilities, obligations, exclusivity, or agreement. Furthermore she has no concept that this relationship can be brought to an end. She has (and this may be relevant dependent on my ultimate findings) no understanding that this marriage may be relied upon to support an immigration application.

151. She does not have the capacity to consent to marriage (i) because she cannot consent to sexual relations and (ii) she does not understand the obligations and responsibilities of marriage, and she is unable to weigh up the options.

152. All the evidence makes it clear that she did not have capacity as at the date of the marriage.

153. And finally, I observe that on the evidence of Dr Joyce as to PM's understanding of the process of conception, I do not think that PM has the capacity to decide whether or not to conceive a child, notwithstanding that she knows at some level that sexual intercourse may result in a child.

154. When I heard Dr Joyce's evidence I thought that there was a case for saying that PM was truly on the cusp of understanding. The more I have reflected on the papers and the law and the evidence in the process of writing this judgment, the less I accept that looking at PM's functioning overall that in legal terms she is "almost there" in terms

of capacity. The tragedy of this case is that through no fault of her own her emotions are engaged and another human being has been created who is also an innocent party

155. Of course I accept that persons with disabilities have a right to family life and that person with disabilities may be able to care for children. There is no doubt however that PM cannot care for B. She does not have that foresight, the skills or the ability to empathise with him. She cannot safely be left alone with him, and she needs a care to keep her safe.

156. I accept also that as Mostyn J said in *D Borough Council v AB* that restriction of sexual relationships concerns very profound aspects of civil liberties and personal autonomy.

157. But people with disabilities also have the right to have their bodily integrity and their autonomy protected. And, as I have said elsewhere, to inflict pregnancy and childbearing on a person who cannot consent to that state is about as gross a physical interference as can be imagined. And to put an incapacitated person in a position whereby she bears a child which she cannot look after is grossly cruel.

158. I accept that PM was not able to choose a partner nor to consent to marriage. It is only after much education since her marriage to MZ that she has even reached the limited and superficial understanding that she has.

What to do next?

159. I have to decide whether (a) I can trust MZ to adhere to his undertaking, particularly since it may be true that PM is herself active in making sexual overtures or advances to him: and in circumstances where the couple will be living together in great intimacy: and it may not be possible to provide two bed roomed accommodation. (b) I also need to decide whether it is in PM's interests to live with MZ at all bearing in mind the tensions between them described by the foster carer and alluded to by and on behalf of MZ.

160. Can B safely live in the community with MZ and PM? This local authority cannot provide a long term assisted placement.

161. Although I did not factor this into my decision in respect of capacity, I note that the guardian, who was present in court for the second day, was very alarmed by MZ's evidence.

162. My doubts about the relationship are such that I do not think that it is in PM's interest to live in the community with MZ at the moment. I think that there is a substantial risk that her needs will be neglected. The fact that he seems unable to attend to her simple care needs even within the highly supported environment of the foster home is extremely telling.

163. And, even taking his case at its highest, the reality is that he is now relying on his marriage and fatherhood of B in support of his claim to remain, relying on Article 8. So, the reality is that whatever his original motivation, PM is being used.

164. The dilemma in this case is that PM loves B, at least at some level understands that he is her baby: although it is unclear how much she understands that she carried him and gave birth to him: she never describes him as having been in her tummy, for instance. She is able to repeat learned phrases: with little clarity as to what she truly understands, or understood at the time, or remembers, about his origins.

165. I accept that to separate PM, the innocent victim in all this, from him will cause her great distress: in spite of her memory problems it seems to me that she is likely to remember this. But it will also cause her great distress if the marriage fails or if MZ abandons her: and I think that there is a high risk of both.

166. MZ's position is bound to be self serving: at the very least he wants to preserve what he has. I am unable to find at the moment on the evidence that I have heard that MZ's motivation is purely altruistic.

167. I regard the Official Solicitor's approach as being too narrowly focused. Throughout the emphasis has been on PM's expressed wishes and feelings, without regard for the fact that those wishes and feelings are not based on a capacitous understanding.

Plans for the future

168. YLA accepts that it has not given detailed thought to the future. That is what the next hearing is to resolve.

169. The social workers suggested that she would be housed in supported circumstances, either with a family or in a small group home, and have contact with B. I need to resolve whether this needs to be professionally supervised outside the home, assuming that MZ is living elsewhere with B.

170. The whole question of whether B ought to live with MZ needs to be considered.

171. I have taken into account PM's wishes and feelings.

172. YLA is prepared to keep the family together in the supported placement for the time being: but with a very heavy heart I cannot authorise PM living with MZ independently. Much though this will distress and grieve her and although she wants to be with him and B, it is not in her interests to be exposed to such conflict and strain, over the care of B, and about the status of their relationship, and she will not be able to understand the restrictions. She may be, albeit inadvertently, placed at risk, or not have her care needs met. I say that bearing in mind that there are many observations before he had to cope with B as well of MZ treating her with tenderness and concern.

173. I say that conscious of how very difficult this will be for PM: and conscious that I have to weigh to very disadvantageous alternatives: and mindful of what Munby J said in MM about the state making things worse.

Decisions

174. In the light of Dr Joyce's evidence as to possible education, I make only interim decisions.

175. Adjournment: discretion not to make declaration on the basis of wishes and feelings/welfare/pressure; encouragement to YLA to withdraw these proceedings: I decline to adjourn. These proceedings are properly bought by a responsible and conscientious local authority which cannot plan without the court making some decisions.

176. I make interim declarations that PM lacks capacity to consent to sexual relations and to decide where she should live (the evidence for which is overwhelming).

177. I will hear submissions as to precise proposals for housing and contact, and on

    i) further educative work for PM

    ii) the way forward for PM

    iii) the way forward for B (iv) any other matter.

Addendum to judgment

178. This judgment was circulated in draft on 10 April 2013. I have made editorial corrections. A hearing took place on 10 April 2013 and a further hearing was set for 3 May 2013 to decide what was to happen to PM and B.

Subsequent authority

179. In *PC & Anor v City of York Council* [2013] EWCA (the appeal from *CYC v PC & NC* - COP No.12015615 *)* the Court of Appeal upheld Hedley J (see para 49 above):

    i) The test for capacity to marry is "status-specific and not spouse-specific" per *D Borough Council v B* (Mostyn J) : it is a "general and non-specific approach to capacity to marry": *Local Authority v M* (Munby J)

    ii) *R v Cooper* is limited to s 30 Sexual Offences Act 2003: and under the MCA 2005 capacity to consent to sexual relations is act-specific and not partner-specific.

    iii) The test as to whether to take up cohabitation is not precisely the same as the test to consent to marry and consent to sexual relations.

    iv) Some decisions such as marriage or divorce are status or act specific. Others, such as cohabitation, are person specific. But all decisions require to be considered within the framework of the MCA 2005.

    v) The statutory test for capacity is decision specific rather than act or person specific.

    vi) The question is the capacity of a person to 'make a decision' in relation to 'a matter' at 'the material time'. In all cases (per Munby J in *Sheffield*) the necessary elements to have sufficient understanding of a problem in order to have capacity to decide what to do about it are the ability to:

        a) Recognise the problem

b) Obtain, take in and comprehend and retain information about it

c) Believe that information, and

d) Evaluate that information so as to arise at a solution

180. I had concluded that PM lacked sufficient understanding in all those respects to consent to

i) Marriage

ii) Sexual relations

iii) Whether to live with MZ

Seeing PM

181. Mr Hayden QC, appearing on behalf of PM at this hearing, told me that this application was not renewed: the time for this had passed.

Findings of fact

182. No party seeks a further finding of fact hearing.

Appeal

183. No party wished to appeal.

MZ's position

184. All pretence that this is or could be a functioning marriage has now evaporated.

185. MH now states through his counsel's position statement, served just before the 3 May hearing, that

i) He recognises that the marriage will not be recognised in English law, he will not engage in sexual relations with her, and 'that for all intents and purposes his relationship with her is at an end.'

ii) He wants to remain with B in England

iii) He should not co-parent with PM and wants to be accommodated with B in the community

iv) He intends to continue with his immigration application

v) He does not accept that there is or may be objective concern about his ability or motivation to care for B

vi) He is thinking hard with the benefit of legal advice about whether he will himself take steps to annul the marriage.

186. My decision that PM should not live with him seems to be amply justified.

YLA's plans

187. YLA propose that MH and B be rehoused in the community, whilst recognising my anxieties about the true commitment and capacity of MH to care for B. These proposals were made prior to MZ articulating his new plans.

188. RB proposed that PM live apart from MH and B whilst she receives further educative work aimed at increasing her understanding; with regular and high levels of contact to B. She puts forward a shared lives project; essentially placement with a foster family. Possible placements had been identified, and plans made for PM to visit them. MZ was also to take part in visits and be involved in planning.

Further information

189. A further local authority assessment records that

i) PM sustained a fractured jaw in September 2012. The explanation advanced is that she caused this by yawning. That sounds most unlikely to me. The local authority has suggested that she might have fallen although no history has been given of a fall. The cause of this injury remains unexplained.

ii) The foster care assessment is said to record that MZ shows signs of frustration with PM, and that he speaks to her in sharp tones and with irritation, and that she responds apologetically.

iii) Although she is plainly fond of B, she does not understand his need for close contact. She speaks to B from a distance and there is minimal contact and interaction between them.

iv) PM has not reacted with distress to the information that the court may have to decide that she cannot live with MZ and B, at least whilst further education was undertaken. She appears to accept it in a matter of fact way. Her understanding is limited, and she is compliant and acquiescent as before, reflective of her lack of understanding. Thus her reaction, certainly at the moment, is less extreme than I had feared.

v) Before the 3 May hearing PM had not been told (because her legal team did not know) that MZ regards the marriage at an end. At the hearing Mr Hayden QC tried to explain this to her. He was not able to make much progress at that time. Further attempts must be made to inform her of this gradually, sensitively and with care.

vi) PM has made allegations of sexual abuse against Mr. S. Whether they are true or not I am not in a position even to begin to evaluate. She is said to have said (I do not know to whom) that she was told not to tell anyone. This allegation, if true, heightens the conclusion that she is extremely sexually vulnerable and would not report abuse or sexual contact.

Further education

190. The practice nurse saw PM in April. She says that PM did not show 'cognitive engagement' with the concepts that she was discussing. PM gives an illusion of

competence, filling in gaps with learned stock phrases. The practice nurse considers that education is unlikely to increase her capacity. She cannot transfer information from one setting to another, apply it in a different context, or weigh information to make a decision.

191. I note that in her meetings with the practice nurse since the main hearing PM used the word "semen". I infer that someone has taught her that word. In the circumstances this may have been MZ. This has not been examined in evidence.

192. In the context of MZ's decision about the marriage I consider that

i) there is no purpose in further sexual education at the moment (although there may be in protective 'keep safe' work)

ii) further sexual education could make PM more vulnerable by exposing her further to sexual terminology and ideas, particularly if she is not living with her husband.

193. I ruled that it was lawful for the local authority to provide further education in their discretion.

PM and B

194. These proceedings are about PM: but B's case is inextricably entwined with hers. I found myself, whatever my misgivings, unable to gainsay YLA's proposals in their care plan. Whatever MZ's motivation in entering into this marriage, B is his child. He says that he has capacity, the will and the motivation to love and care for him properly. If so I should not deprive B of that chance. If MZ cannot care for B then it is possible that family in Pakistan could do so. But this will need rigorous evaluation.

195. PM will be found a home and will have contact with B.

196. It is most important that MZ should realise that

i) He has a high degree of responsibility for B since he is the only parent who can exercise parental responsibility effectively,

ii) He needs to show B a high degree of commitment and sensitivity

iii) B will soon have questions about his mother. He must be helped to understand that none of this is her fault and that she is a vulnerable person. He needs to understand that she is a valuable person in her own right. I have no doubt that MZ will remarry and have more children. It is his duty to ensure that his new wife and B's half-siblings and any other family members do not ostracise B or tease B about his mother.

197. I told MZ these things. I do not know whether or not he took any notice.

Question as to forced marriage

198. In *XCC v AA; BB; CC & DD* [2012] EWHC 2183 (COP) at paragraph 30 I said that:

> "In my view a marriage with an incapacitated person who is unable to consent is a forced marriage within the meaning of the Forced Marriage Act 2007."

In my earlier judgment I said:

> "[185] In this case the family does not perceive DD to have been "forced" because there was no threat or physical or emotional coercion. In this context it must be made clear that "Forced Marriage" is defined by the Forced Marriage (Civil Protection) Act 2007 as occurring
>
> "if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent"; and by section 1 (6) "force" includes "coercion by threats or other psychological means"."
>
> "[186] "Force" in the context of a person who lacks capacity must include inducing or arranging for a person who lacks capacity to undergo a ceremony of marriage, even if no compulsion or coercion is required as it would be with a person with capacity."

199. Forced marriage is not currently a criminal offence. However, on 9 May 2013 the government introduced the Anti-Social Behaviour, Crime and Policing Bill into the House of Commons. This will, if enacted, make forced marriage a criminal offence along with a breach of a forced marriage protection order.

200. Mr Downs informed me that the police took the view that my analysis in *XCC v AA; BB; CC & DD* [2012] EWHC 2183 (COP), that a marriage which takes place without consent is a forced marriage, was wrong.

201. I accept that I had not heard full legal argument. In that case, I asked for further submissions. The parties have conducted further research. An agreed submission has been submitted. I base the following analysis on those submissions, with gratitude to counsel.

202. I am not concerned with criminal proceedings, nor with the question of whether such an offence would be one of strict liability or if not, what would be the requisite mental element in the alleged perpetrator.

203. Section 63A Family Law Act 1996 provides:

> (1) The court may make an order for the purposes of protecting—
>
> A. a person from being forced into a marriage or from any attempt to be forced into a marriage; or
>
> B. a person who has been forced into a marriage.
>
> ...

(4) For the purposes of this Part a person ("A") is forced into a marriage if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent.

(5) For the purposes of subsection (4) it does not matter whether the conduct of B which forces A to enter into a marriage is directed against A, B or another person.

(6) In this Part—

"force" includes coerce by threats or other psychological means (and related expressions are to be read accordingly); ..."

204. These provisions have been in force since 25 November 2008.

205. Marriage for these purposes includes a marriage ceremony which does not create a marriage for the purposes of English law: such as the Nikah ceremony here.

206. The relevant provisions were inserted into the Family Law Act 1996 by the Forced Marriage (Civil Protection) Act 2007. This was a private member's Bill introduced by Lord Lester with government support. Although some of the debate touched upon problems that have arisen in this case [Simon Hughes MP raised the question of Registrars seeing prospective spouses separately in advance of any ceremony], the problem was not addressed specifically. The closest is an intervention by Lord Lester in debate on 10 May 2007 about the definition in section 63A (6) which he said was quite different from, "voluntary arranged marriage." For these purposes the stress might be put on voluntary or its opposite, involuntary.

207. Statutory Guidance was issued pursuant to section 63Q Family Law Act 1996 as amended in January 2010: "The right to choose: multi-agency statutory guidance for dealing with forced marriage." Chapter 1, Paragraph 1 states,

> "In forced marriages, one or both spouses do not (or, in the case of some adults with support needs, cannot) consent to the marriage and duress is involved. Duress can include physical, psychological, financial, sexual and emotional pressure."

208. In 2010 the Forced Marriage Unit published, "Forced Marriage and Learning Disabilities: Multi-Agency Practice Guidelines." That is the guidance to which I referred in *XCC*. The Guidance states:

- at paragraph 2.3, "if a person does not consent or lacks capacity to consent to a marriage, that marriage must be viewed as a forced marriage whatever the reason for the marriage taking place. Capacity to consent can be assessed and tested but is time and decision-specific."

- at paragraph 2.11 [when considering duress], "Remember where an individual lacks capacity, then the need to consider the presence of duress does not arise because they are not able to consent to the marriage."

209. Mr Downs had suggested that this advice was wrong and not based on sufficient legal analysis.

210. He based this on the propositions that to obtain a Forced Marriage Order it is necessary to prove, on the balance of probabilities, two elements:

i) that P has been "forced into a marriage"; and

ii) it is without P's free and full consent.

211. Mr Downs submitted that that would still leave open the question as to whether the person had been "forced." Additionally, the statutory guidance for dealing with forced marriage appeared to imply that duress was required in addition to lack of capacity.

212. In the context of this case, it was submitted (although I did not agree) that it was not clear that "force" had been used as opposed to the proper exercise of parental influence[1] (said to be motivated by concern that PM should be provided for in the future and social convention).

213. However, there is now a consensus between the parties that an incapacitous marriage is a forced marriage and that if a person does not have capacity to consent he or she cannot give free and full consent . The parties accept and adopt the analysis in XCC, and agree that such an interpretation is not inconsistent with the Statutory Guidance if account is taken of the fact that the concept of duress is effectively meaningless in the case of a person without capacity. Mr Downs refers to *Hirani v Hirani* [1983] 4 FLR 232[2] where the Court of Appeal adopted the formulation of Lord Scarman in *Pao On v Lau Yiu Long* [1980] AC 614 PC, "duress, whatever form it takes, is a coercion of the will so as to vitiate consent." Ormrod LJ in *Hirani* went on to say, "The crucial question in these cases, particularly where a marriage is involved, is whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual."

214. I agree with the parties that in cases of an incapacitous individual, the reality of consent is already absent, and that if P lacks capacity this renders the marriage involuntary, in contrast to Lord Lester's word "voluntary".

Is there any utility in requesting that the Registrar General consider this and similar cases and review the guidance that is made available to Registrars?

215. As well as extracts from the Guidance Handbook the Registrar's Office has provided a statement from the Superintendent Registrar about what happened at the Register Office in this case, and some correspondence.

216. Discussion took place at the hearing as to whether there was anything that could be done to avoid problems of this nature arising in another case.

[1] the phrase used in *Mahmud v Mahmud* [1994] SLT 599

[2] cited by Baron J in *Re P (Forced Marriage*) [2011] 1 FLR 2060 who used this test when determining whether there was a forced (overseas) marriage in that case. The ratio of the case is at paragraph 24 and demonstrates that she was concerned with whether P had her free will overborne and was given no effective choice

217. In this case of course PM was already pregnant before YLA was aware that she might marry MZ.

218. The statement and correspondence record that PM and MZ attended the Register Office on 22 December to give formal notice under s 27 Marriage Act 1949. PM was accompanied by Mr S. An anonymous phone call alleging the monetary arrangements had been made earlier that day. Mr S is said to have been very persistent and pressurising about the marriage and even aggressive, and about accompanying PM to the Registrar.

219. MZ and PM were however interviewed together without Mr S and then separately. They were seen by the Deputy Superintendent. She reports that PM was obviously learning disabled, and spoke in a 'simplistic way'. She did not recall being married and divorced previously. Her mind tended to wander and she was confused about her husband's name.

220. PM brought in her divorce documents. The first related to a divorce in Pakistan from AM. When first produced the divorce deed bore only the signature of the husband. It was taken away and 30 minutes later another copy was produced which bore signatures also of PM and two witnesses. They also produced documents relating to annulment in a court in Punjab of her second marriage to KSN on the ground of non-consummation.

221. The Deputy Superintendent Registrar was worried that PM was being manipulated into the marriage and informed the UKBA of that , and on the basis of the allegation about money changing hands, and because of MZ's immigration status.

222. The marriage notices were displayed.

223. On 24 January 2012 YLA raised a formal objection on the ground of PM's asserted lack of capacity. PM was notified in writing. Both YLA and PM were invited to submit evidence.

224. Mr S and Mrs M attended and denied that PM lacked capacity. YLA's letter was not received until after the statutory notice period had expired. It was no longer possible to register a caution as the certificates for marriage had been issued. It was the duty of the registrar to investigate whether there was any lawful impediment to the marriage.

225. A Safeguarding Strategy Meeting was held between CLDT and the registrar. Further evidence was submitted including the report from Dr A. The case was sent to the GRO (office of the Registrar General for advice). The Superintendent Registrar felt that PM did understand the concept of marriage. It is not clear from the documentation whether she in fact saw PM herself. She was concerned about being seen not to have taken into account the cultural background and PM's right to marry and found a family.

226. On 22 February the Superintendent Registrar recommended, based on the evidence presented by PM and the CDLT, the marriage could take place. Advice had been received from the General Register Office. 'There was conflicting medical evidence

provided to me, and also other factors to consider in this case i.e. [PM's] family background and her rights under Article 12 of the Human Rights Act (sic).'

227. In *A Local Authority v AK* UKHC COP B29 (29 November 2012) (unreported - Case No. COP 11950943), Bodey J made some comments about the Registrar's Handbook. The Office of the Registrar General has kindly disclosed the relevant extracts to the parties in these proceedings. Bodey J said that :

> "This case has thrown up the role of Registrars and of the registration service when a borderline-incapacitated individual presents wanting to marry. It is not a Registrar's job to assess mental capacity and plainly he or she would be wholly unqualified to do so. If there is doubt in the Registrar's mind when an individual responds to the standard questions put at the notice-attestation meeting, then the procedure is for the doubt to be referred upwards, first to the local Superintendent Registrar and thereafter, if necessary, to the Office of the Registrar General. In a really tricky case, this could end up with a decision to call for a psychiatric report into capacity. That said, the standard handbook provided to Registrars presently says nothing about the need for mental capacity to contract a marriage and does not mention the Mental Capacity Act 2005. It may be that those responsible for the handbook would wish to consider the advisability of incorporating a paragraph on this, perhaps referring to the basic S3 requirements and summarising the information necessary to be understood and weighed up, with a note on what to do where an individual's mental capacity to marry may be in real doubt. The experience of this case also suggests that greater emphasis should be laid on the need for the aspiring spouses to be seen separately, not together as happened here"

228. If a registrar discovers the existence of a legal impediment to the marriage it must not proceed. The Guidance to Registrars provides that:

- M5 "attesting a notice" stresses that initial questioning of the person(s) wishing to give notice of the marriage is of utmost importance, and the parties should be interviewed separately (paras 3 and 5). I assume that this was done in this case but PM's presentation was such that she gave the illusion of basic competence.

- M5 Paragraph 3 mentions capacity though it is unclear from the context as to whether this includes mental capacity.

- M5 Paragraph 6 deals with duress. The guidance provides that if the Superintendent Registrar considers that either party is not entering into the marriage of his or her own free will the ceremony must be deferred or stopped until satisfied that the party does wish to proceed. There is reference to warning signs: reluctance, injuries, dominant behaviour of one party, no common language. There is no reference to incapacity or the MCA 2005. I agree with Bodey J that this is an important omission, which requires reconsideration.

- Section M15 deals with objections to marriage. Paragraph 16 provides that once the certificate has been issued, no caveat can be issued. This may explain why, on receipt of the report of Dr A, it was not sent to YLA, "asking for substantiation to the objection."

- M 15 Paragraph 23 provides that although a caveat cannot be entered after the Superintendent Registrar's certificate has been issued, an allegation of lawful impediment should be investigated by the Superintendent Registrar of the district where the marriage is to take place.

- Section M17 deals with solemnization. Paragraph 24 provides that if the Superintendent Registrar is of the opinion that either of the parties to the ceremony does not understand the nature of the ceremony, e.g. through drink or drugs, the ceremony should be stopped.

229. At the moment it is difficult for me to be clear why, since there were two medical opinions, one of which, provided by the local authority, was carefully and rigorously analysed and argued, and stated that PM lacked capacity, the conclusion was reached that there was no lawful impediment to the marriage and the marriage was permitted to go ahead on the basis of Dr A's opinion, obtained by the family. The documents provided by the Registrar's office are peppered with concerning comments about Mr S's aggression and persistence, and PM's demeanour and vulnerability. The overwhelming concern was that MZ was marrying PM for a visa, thus communication with the UKBA, yet the Registrar accepted without challenge almost helplessly it seems, the bare assertion that this was not the motive for the marriage.

230. Protection might have been effected by a Forced Marriage Protection Order (FMPA). Such an order is, as was pointed out by Wall P in *A Chief Constable v (i) A and (ii) B and others* 2010 EWHC 2438, made in the exercise of a protective, essentially injunctive jurisdiction, based on risk analysis. It is an *in personam* order, which binds Respondents personally, and breach is punishable by fine or imprisonment.

231. For those who lack capacity altogether such an order may need to be without limit of time. It may give a breathing space for vulnerable and coerced persons, or those who are of borderline or fluctuating capacity, and facilitate what Macur J (as she then was) described *LBL -v- RYJ and VJ* [2010] EWHC 2665 "the process of unencumbered decision making by those who they have determined have capacity, free of external pressure or physical restraint in making those decisions".

232. S63 C FLA 1996 provides that an application may be made by a person who is to be protected by the order, or by a relevant third party . As Holman J points out in *The Bedfordshire Police Constabulary v RU and FHS* [2013] EWHC 2350 (Fam), 'Section 63C(7) defines "relevant third party" as "a person specified, or falling within the description of persons specified, by order of the Lord Chancellor". The Lord Chancellor has so far made one such order, namely The Family Law Act 1996 (Forced Marriage) (Relevant Third Party) Order 2009 SI 2009, No. 2023. The effect is to specify a local authority as a relevant third party for the purposes of section 63C(2). He has not specified the police or a police force as a relevant third party.'

233. An application may be made by any other person with the leave of the court: in which case the court must have regard to all the circumstances, including (i) the applicant's

connection with the person to be protected (ii) the applicant's knowledge of the person to be protected, and (iii) the wishes and feelings of the person to be protected so far as they are reasonably ascertainable, so far as the court thinks it appropriate, in the light of the person's age and understanding, to have regard to them. The Court may make an order without an application being made to it in family proceedings including under the inherent jurisdiction for the protection of adults. Holman J comments that he understands that the Police may on occasion apply for leave to make such applications. In my experience they commonly do so in certain areas outside London.

234. An FMPA may be made for the purpose of protecting a person being forced into marriage or from any attempt to force into marriage, or protecting a person who has already been forced into marriage. The court must have regard to all the circumstances including the need to secure the health, safety and wellbeing of the person to be protected.

235. S 63B FLA 1996 provides that an order may contain such prohibitions, restrictions and requirements, and such other terms as the court thinks appropriate. The terms of such order may relate to conduct inside and outside England and Wales, and respondents who are, or may become involved in other respects, of which examples are aiding, abetting, counselling, procuring, encouraging or assisting another person to force or attempt or force a person to enter into marriage. No specific intent is required.

236. It seems to me that in this protective jurisdiction, a Registrar who performs such a marriage would be assisting the main perpetrators, albeit innocently and in ignorance of coercion or lack of consent.

237. If an MCA 2005 declaration of lack of capacity to consent to marriage, including an interim declaration pursuant to s 48, with or without an FMPA order, were served on the Office of the Registrar General and/or a Register Office I am sure that such an order would be respected and a ceremony would not take place.

238. In the future a court may need to decide whether a FMPA could be made, if necessary, against the Registrar General.

239. The Forced Marriage Protection regime is no longer new. It is of proven effectiveness, providing that it is utilised.