KINGS CHAMBERS

THE COURT OF APPEAL HANDS DOWN A SIGNIFICANT JUDGMENT ON: INTERNET AND SOCIAL MEDIA USE, SEXUAL RELATIONS AND RESIDENCE DECISIONS IN THE COURT OF PROTECTION

Sam Karim QC & Francesca P. Gardner appeared on behalf of the Official Solicitor in a significant decision from the Court of Appeal concerning the tests to be applied in the Court of Protection when assessing a person's capacity to make decisions as to the use of Internet and social media, where they should reside and consent to sexual relations.

The Court of Appeal recently handed down judgment. The Court heard appeals by the Official Solicitor on behalf of Miss B, a young woman with a diagnosed learning disability and from the local authority owing duties to Miss B under the Care Act 2014.

The appeals were against the decision of Cobb J in *Re: B (Capacity: Social Media: Care and Contact)* [2019] EWCOP 3 where the court had determined that *inter alia,* Miss B had capacity to make decisions as to where she should reside but that she lacked capacity to make decisions about using the Internet and social media and to consent to sexual relations. It was argued on behalf of Miss B by the Official Solicitor that Cobb J had adopted an approach which was too restrictive of Miss B's freedoms, particularly around her access to the Internet and social media. The local authority argued that Cobb J's decisions in relation to Miss B's capacity were correct, save for his conclusion that Miss B has capacity to make decisions as to residence as it meant that the local authority was prevented from supporting and/or protecting Miss B.

In relation to the Internet and social media use the Court limited itself to observing that the relevant information to be applied to decisions relating to Internet and social media usage should be adapted to the facts of a particular case: '…*Whether the list of guidance is shorted or longer, it is to be treated and applied as no more than guidance to be adapted to the facts of the particular case.'* [44]. The significance of this cannot be underestimated. At first instance, the Court concluded that the following amounted to relevant information, namely:

i) Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it;

ii) It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites;

iii) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended;

iv) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;

v) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm; and

vi) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime. [37 i)- vi) of the judgment]

In this case, as conceded by the local authority, items (iii) and (vi) were not relevant for Miss B [44]. Accordingly, the relevant information is to be applied selectively dependent on the particular factual circumstances.

The court also consider the complex issue of what amounted to relevant information for the purposes of Miss B's capacity to consent to sexual relations. In doing so it has extended the test especially in respect of (b) below:

(a) To a degree, it remains uncertain as to whether consent is a part of relevant information. The Court said at [51]:

> *"… Mr Karim referred us to the observation of Parker J in The London Borough of Southwark v KA [2016] EWCOP 20 at [52] that "consent is not part of the 'information' test as to the nature of the act or its foreseeable consequences. It goes to the root of capacity itself". Her point, which is plainly correct, was that awareness of the ability to consent to or refuse sexual relations is more than just an item of relevant information. As she elaborated at [53]:*
>
> > *"The ability to understand the concept of and the necessity of one's own consent is fundamental to having capacity: in other words that "P knows that she/he has a choice and can refuse"."*
> >
> > *The same point had previously been made by Mostyn J in the London Borough of Tower Hamlets v TB [2014] EWCOP 53 at [39]-[41]."*

(b) Under section 3(4) of the Mental Capacity Act 2005, the Court concluded at [57]-[58] that (underline added):

> *"In IM at [80] the Court of Appeal, approving the approach of Bodey J in Re A (Capacity: Refusal of Contraception) [2010] EWHC 1549 (Fam), [2011] Fam 61 at [63] and [64], said that there must be a practical limit on what needs to be envisaged as "reasonably foreseeable consequences" in the MCA s.3(4) and that, in the context of consent to sexual relations, "the notional decision-making process attributed to the protected person ... should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity". <u>The risk of catching a sexually transmitted infection through unprotected sexual intercourse, and the protection against infection provided by the use of a condom, satisfy that requirement.</u> Those are facts well known among all sexually active generations. Accordingly, we consider that, in accordance with the MCA s.3(1)-(4), the ability to understand and retain those facts at least for a period of time and to use or weigh them as part of the decision whether to engage in sexual intercourse are essential to capacity to make a decision whether to have sexual intercourse."*

> *"We respectfully disagree with Parker J in London Borough of Southwark v KA at [72] that it is not necessary to understand condom use. The only practical purpose of understanding that sexually transmitted infections can be caused through sexual intercourse is to know how to reduce the risk of infection since the purpose cannot be to encourage abstinence from intercourse completely. The point was not directly considered in any of the other High Court cases. So far as concerns IM, the one Court of Appeal authority relied upon by Mr Karim on this issue, the point did not arise. In that case the first instance judge, whose judgment was upheld by the Court of Appeal, decided that LM had "a basic understanding of the risks of sexually transmitted diseases", which is precisely what B did not have in the present case."*

Finally, the local authority had criticised Cobb J's use of the list of the relevant information set out in the decision of Theis J in *LBX K, L, M* [2013] EWHC 3230 (Fam) and, in relation to the list, the court observed: *'So far as concerns the appropriateness of the list, as in the case of the list specified by Cobb J in relation to a decision to use social media, we see no principled problem with the list provided that is treated and applied as no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case.'* [62]

The court agreed with the local authority that the decision of Cobb J was fundamentally flawed in: *'(1) failing to take into account relevant information relating to the consequences of each of those decisions, and (2) producing a situation in which there was an irreconcilable conflict with his conclusion on B's incapacity to make other decisions, and so (3) making the Local Authority's care for and treatment of B practically impossible…. the Judge's flawed conclusion followed from his approach in analyzing B's capacity in respect of different decisions as self-contained "silos" without regard to the overlap between them.'*

The decision from the Court of Appeal is significant for a number of reasons and requires careful consideration from any practitioner in this area. In summary, the following are significant consequences of the judgment:

- The Court of Appeal has now confirmed that consent **is arguably** part of the relevant information for the purposes of assessing whether a person has capacity to consent to sexual relations, albeit this is unclear. The previous first instance and Court of Appeal decisions have been arguably inconsistent on this point;

- A person must **now** have a proper understanding, at a rudimentary level, about sexually transmitted diseases and how condom use can protect a person against sexually transmitted diseases;

- The checklist provided in previous Court of Protection decisions as to the relevant information to be considered in relation to different areas of decision making are to be used as guidelines only and the information that is relevant to a decision will be dependant upon the facts of a particular case. This applies to the use of the internet and social media; and

- When assessing a person's capacity, all of the relevant factors must be taken into account and ought to result in consistent and workable decisions. The often adopted "silo" approach should be avoided, as there can be an overlap as to the information that is relevant to two separate decisions, for example decisions relating to residence and a person's contact with others.

The full Judgment can be found here: https://www.kingschambers.com/resources-and-training/news/2019/07/03/sam-karim-qc-and-francesca-p.-gardner-appear-on-behalf-of-the-official-solicitor-in-significant-court-of-appeal-decision/

- **Sam Karim QC**
- **Francesca P. Gardner**