

Court of Protection Caselaw Update September 2026



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Nancy Williams Post AGNI decisions

OXFORDSHIRE COUNTY COUNCIL V P [2026] EWCOP 33 (T2)

RELEVANT FACTS

- The first reported decision to consider and apply the AGNI test.
- P = a young woman born in 2001 who had been subject to social care involvement for most of her life.
- P had various diagnoses which included a learning disability, limited verbal communication and functioned well below her chronological age.
- P had been residing with her grandmother.
- During the proceedings, the court had made interim orders authorising a move to a supported living placement and authorising P's deprivation of liberty there.

OXFORDSHIRE COUNTY COUNCIL V P [2026] EWCOP 33 (T2) – 2

ISSUES

- Capacity not in dispute
- Key issues were residence and care:
 - i) whether it is in P's best interests to remain at her supported living placement or have a trial of residing with her grandmother;
 - ii) if P is to remain at her placement, what contact arrangements with her grandmother are in her best interests;
 - iii) whether in respect of the two available residence options before the court, the care arrangements at either one amount to a deprivation of liberty applying AGNI; and
 - iv) whether the proceedings should conclude.

OXFORDSHIRE COUNTY COUNCIL V P [2026] EWCOP 33 (T2) – 3

PARTIES' POSITIONS

- DEPRIVATION OF LIBERTY
 - All parties agreed that P would be deprived of her liberty if she remained at her placement.
 - Living with grandmother:
 - OS's position – it would be less clear whether there is a deprivation of liberty.
 - Grandmother's position – the care arrangements are unlikely to amount to a deprivation of liberty. No final determination could be made without undertaking a review of P's presentation and feelings about her care arrangements.

OXFORDSHIRE COUNTY COUNCIL V P [2026] EWCOP 33 (T2) – 4

DECISION

- CARE ARRANGEMENTS AT PLACEMENT = DEPRIVATION OF LIBERTY
 - Objective element has been met
 - Placement was relatively normal because P was not secluded.
 - The physical environment was far removed from the paradigm of a prison cell.
 - Concrete situation: P was subject to ongoing supervision and unable to leave the placement without support in place.
 - Subjective element not satisfied – no valid consent had been provided
 - Considerable doubt that P was providing valid consent to her care arrangements:
 - » P's wishes were inconsistent in relation to where she wished to live and with whom.
 - » Considerable doubt regarding the extent of P's understanding of 'home'.

OXFORDSHIRE COUNTY COUNCIL V P [2026] EWCOP 33 (T2) – 5

DECISION

- GRANDMOTHER'S HOME – NO CONCLUSIVE DECISION
 - Objective element likely to be met
 - Little difference in the care arrangements – unclear whether the care arrangements would be significantly less restrictive than the supported living placement.
 - Subjective element not satisfied – no valid consent had been provided
 - Unclear what P's reaction to her care arrangements at her grandmother's home would be.

OXFORDSHIRE COUNTY COUNCIL V P [2026] EWCOP 33 (T2) – 6

LEARNING POINTS?

- AGNI applied, but to what extent?
- A multifactorial approach was applied, but the decisive factors mirrored the acid test:
 - P was subject to ongoing supervision
 - P was not free to leave her placement

SALFORD CITY COUNCIL V AR (BY HIS LITIGATION FRIEND, LF) V PR & QR (AR'S PARENTS) [2026] EWCOP 45 (T2)

RELEVANT FACTS AND ISSUES

- AR, a 25-year-old man with diagnoses of moderate and severe learning disability and autism spectrum disorder.
- AR had lived most of his life with his parents.
- Since May 2025, he has been living at a supported living placement.
- PR and QR did not seek to challenge AR's care arrangements at the hearing.
- Capacity was not disputed by any of the parties.
- The contested issue concerned the contact arrangements between AR and his parents. Not an important feature of the court's decision.
- **IMPORTANT ISSUE:** whether AR's care arrangements amounted to a deprivation of liberty?
- **NOT GUIDANCE** – AGNI is fact and case specific.

SALFORD CITY COUNCIL V AR (BY HIS LITIGATION FRIEND, LF) V PR & QR (AR'S PARENTS) [2026] EWCOP 45 (T2) - 2

DECISION – OBJECTIVE ELEMENT

- IMPORTANT PRINCIPLES AT PARA 49 :
- (1) *Non-secure environments matter. Living in a family home, foster placement, supported living or ordinary home is highly relevant and may point away from deprivation of liberty.*
- (2) *Purpose matters. Protective and therapeutic restrictions are relevant and distinguishable from punitive confinement.*
- (3) *Relative normality matters. The more the placement and care plan resembles ordinary life for a person in P's circumstances, the less likely it is to constitute a deprivation of liberty.*
- (4) *Protective motivation matters. Although not decisive, restrictions imposed for care and safety rather than punishment weigh against a finding of deprivation of liberty.*
- (5) *Objection and consent matter profoundly. A person may lack decision-specific MCA capacity yet still possess sufficient factual understanding to express valid consent for Article 5 purposes. Genuine contentment, acceptance or tacit consent may negate the subjective element of deprivation of liberty. Mere acquiescence, however, may not suffice.*

SALFORD CITY COUNCIL V AR (BY HIS LITIGATION FRIEND, LF) V PR & QR (AR'S PARENTS) [2026] EWCOP 45 (T2) - 3

DECISION – OBJECTIVE ELEMENT

- AR is NOT deprived of his liberty
- Decisive features of the case:
 - *'protective purpose of the restrictions, the relative normality of the placement, the extent of community participation and the absence of institutional or custodial characteristics'* [68].
- NB: Contact restrictions are a relevant factor - can change the character of the placement

SALFORD CITY COUNCIL V AR (BY HIS LITIGATION FRIEND, LF) V PR & QR (AR'S PARENTS) [2026] EWCOP 45 (T2) - 4

DECISION – SUBJECTIVE ELEMENT

- Unnecessary but considered due to the 'novelty of the issue and the care with which it was argued by counsel'.

- AR was unable to provide valid consent:

'Whilst AR is capable of expressing preferences and emotional responses, there is little evidence that he understands the nature of the choice between living at the placement and living elsewhere, the restrictions which operate within the placement, or that he has sufficient appreciation of those arrangements to make an autonomous decision either accepting or rejecting them. His ability to communicate contentment or dissatisfaction is real, but that is not necessarily the same as understanding the nature of the arrangements to which that contentment relates.' [76]

SALFORD CITY COUNCIL V AR (BY HIS LITIGATION FRIEND, LF) V PR & QR (AR'S PARENTS) [2026] EWCOP 45 (T2) - 5

LEARNING POINTS?

- A further interpretative guide has been imported into the MCA 2005 which appears to focus on compliance and non-capacitous agreement with (otherwise known as acquiescence to) restrictions placed upon them.
- Consequence of AGNI – highly restrictive care regimes may not amount to a deprivation of liberty contrary to the protective and broad scope of Article 5 [19 - 21].
- Approach to valid consent raises forensic difficulties [72]: Is evidence required as to agreement and disagreement, and can it be challenged? What about the situation where P's position changes from time to time? Who decides? Presumably it's the Court? Approach with caution.
- What mechanism can be put in place to review care arrangement if there is no deprivation of liberty?
 - If the care plan engages P's Article 8 rights, the matter can return to court in 12 months' time to review the care plan.
 - A 12-month adjournment is not an attractive proposal.

LONDON BOROUGH OF BRENT V MUSTAFA [2026] EWHC 2159 (FAM)

- One of the first reported cases in the Family Court to apply AGNI.
- Application by a local authority to withdraw its application for an extension of a deprivation of liberty order.
- Court found that Mustafa's care arrangements did not amount to a deprivation of liberty applying AGNI.
 - Objective test not met.
 - Subjective test: 'a child who is not Gillick competent may nonetheless have sufficient understanding for their views to be relevant as to whether they consent to aspects of deprivation of their liberty' [39].
- Even if Mustafa were to withdraw his consent to the use of physical restraint – authorised under Section 93 of the Education and Inspections Act 2006.



SOPHY MILES

Welfare Deputies

Transparency and Disclosure



WELFARE DEPUTIES- AGAIN: RE HB 2026 EWCA CIV 960

- **1st instance judgment by HHJ Beckley-Re HDEB [2026] EWCOP12**
- Application by SB and JB –”loving and caring parents”- for reconsideration of refusal of appointment as welfare deputies for HDEB
- Some similarities with Ruby Parr but: fewer health complications; aged 22; lived in residential care
- Supported by health and social care professionals
- HHJ Beckley did NOT appoint them
- Should still have autonomy protected despite disabilities
- Accepted love and commitment and that family could communicate better than professionals- they have to learn or HDEB’s autonomy at risk
- Not practical for parents to make day to day decisions as HDEB in residential care
- Collaborative decisions worked for HDEB and appointment would not overcome difficulties from pressure on statutory bodies
- Gave permission to appeal

THE APPEAL-1 (SIR STEPHEN COBB, P)

- 1st appellate decision on PWD appointment
- OS acted as Advocate to the Court, OPG joined
- OS noted tension between approaches:
- -Lawson, Hopton, Mottram [2019] EWCOP 22- PWD exceptional measure, used sparingly
- Parr v Cheshire East Council and Merseyside ICB [2026] EWCOP1 –more pragmatic, partly response to system deficiencies
- Court accepted PWD not intended to overcome professional hesitation/risk aversion; cannot create options or over-ride resource based decisions; and should not be extending PR to adulthood
- But HHJ Beckley had erred:
 - Collaborative decision making had not worked
 - Could have made order with limited authority if impractical to exercise powers eg of dress and diet
 - AND

THE APPEAL-2

- All decisions to be made in P's best interests- on a spectrum
- Some mundane –sections 5,6 MCA
- Some can only be made by Court
- “Middle ground” where PWD may be appropriate-may include factors:
 - - Applicant in special relationship to P
 - -PWD can enhance decision-making for P as individual having regard to P's wishes/values
 - - Stream or series of decisions foreseeable
 - - Where P is transitioning to adult services [suggested timelimited appointment to 25]
 - - Can be shown public bodies have failed or may fail to apply MCA (esp: consultation)
- Future decision-making must be prompt and agile
- “Autonomy” has variable meanings- dignity and quality of life more helpful

IMPLICATIONS

- Significant re-calibration of approach
- Potential for expansion - in context where many family members have been discharged as r1.2 representatives post AGNI
- Note that this is not a checklist – don't have to prove each factor (PWD may be appropriate even if there have not been failings)
- More PWDs but more likely to be time limited- with specific review at 25?
- Important to advise families in community care cases

RE GARDNER (DECEASED) COURT OF PROTECTION – DISCLOSURE OF POSITION STATEMENTS [2026] EWCA CIV 640

- Successful appeal against judgment of Poole J in *Re AB (Disclosure of Position Statements)* 2025 EWCOP25
- Poole J concluded position statements could be disclosed to non-parties (eg observers) without order of the court. ‘Bracing’ approach- P’s Article 8 rights are protected by the Transparency Order
- Sir Stephen Cobb P said this was wrong:
 - COP proceedings are private in nature- direction for public hearing doesn’t turn them into civil or tribunal proceedings
 - COPR r5.9(2) applies to position statements – COP may, on application, permit a non-party to inspect a document in the court records or have a copy.
 - COPR r5(9)(4)-before making order under 5.9(2) court will consider whether it should be provided on edited basis- court did not engage with this

RE GARDNER (2)

- Disclosure of position statements which contain personal information is a serious interference with Article 8
- Substantive case – efficacy of ADRT- properly engaged public interest BUT the extent to which documentation should be opened up had to be carefully managed- administration of justice **must never** be compromised in name of openness.
- “The Court of Protection exists for P’s benefit. Transparency must support justice, not overwhelm it.” [12]
- Transparency Order provides anonymity but in this case was going to expire anyway
- COP Rules Committee should consider procedure about disclosure of position statements.

RE GARDNER- 3

- In the meantime:
 - Open justice will be well-supported by disclosure of the documents listed at PD4B para 4(2): (a) case summary; (b) chronology of relevant events (c) issues for determination at the hearing. Should be short, uncontentious. Case summary should set out essential background, not quote from source material and ideally agreed [78]
 - If non-party wants to see other material should comply with rule 5.9 so respondents understand issues [80]
 - Decision is for judge not parties. Person seeking access must explain why they want it and why it advances open justice. Court will consider competing factors, practicality and proportionality and must consider P's Article 8 rights [77].
 - Judge may guillotine or decide not to deal with application at all if it would impede administration of justice [80]

RE GARDNER-4

- Useful references for the court:
- Cape Intermediate Holdings v Dring [2019] UKSC 38 at [27] Supreme Court noted that considerations which might lead the court not to allow inspection of a witness statement included “the interests of justice, the public interest, the nature of expert evidence, the nature of confidential information and the need to protect a child or protected person”- referred at [77]
- Non-exhaustive checklist from reg 4, Remote Observation and Recording (Courts and Tribunals) Regulations 2022, quoted at [60], factors include need for administration of justice to be “as far as possible, open and transparent”; timing of any request; practical issues; impact which decision may have on content or quality of evidence/public understanding/safety and right to privacy of those involved

RE GARDNER -5

Implications

- Reminder of inherent private nature of Court of Protection proceedings –open justice is about ensuring accountability and scrutiny; will not require wholesale release of documentation
- Comment of Peter Jackson LJ- restrictions in Transparency Order are “the price that has to be paid to make it lawful for the proceedings to be heard in public”
- PD4B documents need to be prepared as standard- if these are provided this should be sufficient
- Standing item at RTMs?
- Application from non-party should be on a COP9; but court can always dispense with it and is very likely to be sympathetic if no PD4B documents provided

HINDUJA V HINDUJA [2026] EWCOP 34

Useful case about collateral disclosure – use of documents in other proceedings

- COPR r5.10 provides .—(1) Where a document has been filed or disclosed, a party to whom it was provided may use the document **only for the purpose of the proceedings in which it was filed or disclosed, except where—**
 - the document has been read to or by the court or referred to at a public hearing; or
 - the court otherwise permits.

(2) Paragraph (1)(a) is subject to any order of the court made under rule 4.3(2) [power to impose restrictions when directing public hearing]

HINDUJA-2

- Context – longstanding feud within wealthy family. COP proceedings had taken place in relation to Srichand, who died on 17 May 2023. Nephew Sanjay wanted released of documents into other proceedings on blanket basis with receiving court to assess relevance
- COP had **waived legal professional privilege** on behalf of Srichand –undertakings in place
- Standard TO was varied by Court of Appeal (*Hinduja v Hinduja* [2022] EWCA Civ 1492): the following could not be used without order of the court even if read or referred to at public hearing:
 - - Category A- documents filed within the Court of Protection proceedings
 - - Category B- documents that contained information derived from a category A document

HINDUJA-2

Principles

“it is vital that those who are the subject of proceedings in the Court of Protection have confidence in the confidentiality of the proceedings, and in particular the confidentiality of assessments undertaken for the purposes of determining whether or not they have capacity.” [48] (and echoing similar comments in Gardner at [64])

If a party seeks to release or vary confidentiality restrictions, including after death of P: [53]

- i) The court will need to consider on a case-by-case basis the justification for disclosure of the relevant documents, and it will be for the person seeking disclosure to justify their request.
- ..cont'd

HINDUJA-3

Cont'd

- ii) The question to be asked is whether the specific interest in disclosure outweighs the ongoing interest in the protection of the confidentiality of personal and sensitive information contained within documents filed or disclosed in the Court of Protection proceedings, given the sensitive context in which those documents were provided, and the legitimate expectations of confidentiality on the part of all those involved in the proceedings.
- iii) If disclosure is granted, it should be limited to what is essential to achieve the particular objectives justifying disclosure.

HINDUJA 4

What about application to use documents in other proceedings?

-Court will apply principles from CPR [57]:

- Must be a cogent reason
- Burden on applicant for disclosure
- Must be no unwarranted prejudice to disclosing party (beyond use of documents)
- “Use” includes reviewing documents to see if they are useful
- Therefore 2 stage approach is needed: seek permission to review documents, then make informed application to deploy them

HINDUJA -5

Legal professional privilege- a reminder [61]

“There is no dispute that in so far as the documents qualify for legal professional privilege, that privilege is absolute and cannot be overridden by any other interest: *Three Rivers (No. 6)* [\[2005\] 1 AC 610](#), §25. Where there has been a limited waiver of privilege for a particular purpose, it does not follow that privilege is waived generally. The person who receives the privileged material may therefore not use it for purposes other than those for which it was provided: *Berezovsky v Hine* [\[2011\] EWCA Civ 1089](#), § § 28–29 and 34.”

Consent would be needed from Srichand’s PRs before an application could be made

HINDUJA -6

- Category A and B permission granted for parties and their lawyers to review documents with a view to application being made.

Noted that in Re AB [2019] EWCOP 66, Keehan J refused application by police for disclosure of a report when police investigating whether P had committed a serious offence- Keehan had considered importance of P being able to be frank in assessments-

Useful statement of principles in relatively common scenarios.

RACHEL BAKER

1. *PATRICIA V CYGNET HEALTHCARE LTD* [2026] EWCOP 29 (T3) – July 2026
2. *A LOCAL AUTHORITY V AC* [2026] EWCOP 31 (T3) – July 2026
3. *NHS NORTH EAST LONDON ICB V FHR, FN & FZR* [2026] EWCOP 43 (T3) – August 2026
4. *TDB, R (ON THE APPLICATION OF) V LONDON BOROUGH OF HARINGEY* [2026] EWCA CIV 1184 - September 2026

PATRICIA V CYGNET HEALTHCARE [2026] EWCOP 29 (T3)

PEEL J – JUDGMENT ON 23 JULY 2026

- Patricia, aged 26, had longstanding anorexia nervosa, autism and pathological demand avoidance
- Previous COP proceedings (2023 and 2025) had resulted in orders that she should be fed, against her consent, through an NG tube
- Subsequent to 2025 proceedings, Patricia discharged to a SEDU under s3 MHA 1983
- Her Responsible Clinician had directed that Patricia's treatment should include NG tube feeding
- Patricia sought COP orders, including that not in her best interests to have NG tube feeding

RE PATRICIA – 2

Question:

In circumstances where Patricia was detained pursuant to s3 MHA 1983, and her Responsible Clinician had directed what medical treatment to give her for her mental disorder, did the Court of Protection have jurisdiction to make best interest decisions / orders effecting what treatment Patricia would receive.

Answer:

No, the Court of Protection did not have jurisdiction in these circumstances. The MHA 1983 trumped the MCA 2005 and Patricia's application could not proceed within the Court of Protection. She would have to challenge her medical treatment through other routes

RE PATRICIA – 3

Key Points:

1. s63 MHA 1983 (within Part 4 MHA 1983) and s145(4) MHA 1983 had the effect that the NG tube feeding was medical treatment given to Patricia for the mental disorder (anorexia nervosa) from which she was suffering
2. Under s63, if Patricia's Responsible Clinician had directed that the NG tube feeding should be given then her consent to treatment was not required under the MHA 1983
3. The effect of s28 MCA 2005 is that the MCA cannot be used to authorise anyone (a) to give a patient medical treatment for mental disorder or (b) consent to a patient being given such treatment if *"at the time when it is proposed to treat the patient, his treatment is regulated by Part 4 of the Mental Health Act"*
4. A best interest decision that Patricia should not receive NG tube feeding amounted in reality to a decision about treatment which would thwart the intention of s28 and was not for the COP to make

RE PATRICIA – 4

Peel J – paragraph 39(i)

“...the effect of Patricia’s application is to seek to require Cygnet, as a result of a best interests decision, to put together, and implement, a fresh [treatment] plan...she is seeking a declaration that forcible feeding is not in her best interests. Thus, she says, the relief sought relates to non-treatment rather than treatment. In my judgment, this argument does not succeed. Treatment and non-treatment are two sides of the same coin. They are all part of the process of the giving and receiving of medical treatment. Whether framed in the positive or the negative, the court is still being asked to authorise treatment and that is an excluded decision”

Paragraph 39(iii)

“The clear purpose of s28 is to separate power between two legislative regimes. It would be surprising if the 2005 Act intended to reserve to the Court of Protection wide-ranging powers, in the case of incapacitous patients, to make best interests decisions which override the decision making under the MHA 1983...Had the legislation intended to reserve to the Court of Protection something as significant as a supervisory best interests oversight, it would surely have said so in terms”

A LOCAL AUTHORITY V AC, CA, BC, DD [2026] EWCOP 31 (T3)

HAYDEN J – JUDGMENT ON 24 JULY 2026

- AC, young woman with moderate learning disability and other developmental/physical difficulties
- Of Pakistani heritage and in October 2024 travelled to Pakistan for family celebration
- Whilst there, met a male who she then married in a Nikah on 2 November 2024. Family later claimed this had not been pre-arranged before the trip took place
- AC and biological family returned to UK on 7 November 2024
- Concern raised re: forced marriage. Family members arrested and charged under relevant criminal legislation. AC taken by local authority to separate accommodation
- Local authority applied to Court of Protection for orders regarding AC's capacity
- COP informed that defendants to the criminal proceedings intended to assess AC's capacity to marry to bolster their defence (that she had consented to, and had capacity to consent to, the marriage)

RE AC – 2

Two key issues for the Court of Protection

1. How to approach the assessment of AC's capacity to marry which was sought within the criminal proceedings
2. How to approach an assessment of AC's capacity to marry

RE AC – 3

Issue One: The Assessment Sought Within the Criminal Proceedings

1. A finding that AC lacked capacity to decide to marry was a necessary constituent in the criminal charges against her family members
2. Hayden J had to consider whether any decision for AC to undergo a capacity assessment for the purposes of the criminal proceedings was itself a best interests decision under s4 MCA 2005 and if so, whether the decision was one for the COP
3. He concluded that on the specific facts of the case, the decision was indeed a welfare decision for the COP to make and one which would have to – in the usual balancing exercise - take into account the “*significant consequences for AC in both outcomes, i.e. whether the assessment takes place or not*”
4. Various pieces of relevant information would need to be put to AC as part of the “pre-assessment” capacity assessment
5. What ultimately happened within the criminal proceedings to the capacity assessment obtained by the defendants was a matter for the Crown Court judge

RE AC – 4

Issue Two: Capacity to Marry

1. The test for capacity to marry should not require an understanding of all the legal or financial consequences of marriage. These are issues which capacitous adults may not need to consider or might even struggle to address or be entirely ignorant about.
2. The focus should be on the fact that marriage involves an agreement “**by two people that they are making a commitment for their lives to be joined together, and that they wish that status to be recognised by others. It is necessary to understand that a formal process is required to enter into marriage and to leave it**”
3. It is not the function of the COP to intervene to protect a party from a marriage which might seem “**regressive, patriarchal or counter feminist**” and the fairness of the terms or wisdom of the consent are not matters for the COP to intervene in. Neither is it necessary or appropriate to evaluate a party’s understanding of the differences in different types of marriage (with specific reference to arranged marriages)
4. Departing from Mostyn J’s decision in NB v MI, Hayden J found that capacity to engage in sexual relations was a pre-requisite for establishing capacity to marry. Whilst not all marriages involve sexual activity between the parties, it is “**integral to the construct of marriage and not divisible. The vulnerability of a person who understands, in broad terms, the nature of marriage but lacks an understanding of the essential elements and consequences of a sexual relationship is manifest...**” otherwise, “**It would corrode the Act to interpret it in a way which exposed vulnerable and incapacitous adults to abusive situations in which they have no agency to protect themselves**”

NHS NORTH EAST LONDON ICB V FHR, FN & FZR [2026] EWCOP 43 (T3)

MCKENDRICK J – JUDGMENT ON 26 AUGUST 2026

- FHR, 28 year old British Muslim who sustained catastrophic hypoxic brain injury in Jan 2020
- Diagnosed as PDOC in 2020. Thereafter, discharged home where ICB commissioned his care
- Numerous disputes and 3 sets of COP proceedings
- 3rd application issued by ICB in 2024
- Further PDOC assessments undertaken. FHR assessed to be in PVS. Family disputed
- DJ Mullins transferred to Tier 3 in October 2025: this was an SMT case. Should CANH be withdrawn?
- Numerous expert and clinical reports and investigations ensued. Protracted litigation
- Oral evidence heard in August 2026 including from FN (mum) and FZR (dad) and sister (FRR)
- Court's decision: continued CANH not in FHR's best interests and should be withdrawn

RE FHR – 2

Notable aspects of the Case:

1. Parties to be alert to SMT issues and to take appropriate action
2. Clear restatement of *Aintree* (UKSC, 2013): court's focus is on P and the factors he would be likely to consider as relevant to the best interests decision if he was able to do so
3. Religious faith is relevant but not determinative, even where a fatwa is relied upon as incontrovertible evidence of what P's faith dictates
4. The clinical definition of FHR's medical condition (PVS/MCS) was not determinative. In fact, if the family's position was correct (that FHR was not PVS) that supported a conclusion that treatment should be withdrawn (it being more likely that FHR could feel the pain and discomfort of treatment)
5. Rather than carrying out experimental tests on FHR, the "humanity encapsulated in the section 4 MCA test" should remain the court's focus

TDB, R (ON THE APPLICATION OF) V LONDON BOROUGH OF HARINGEY [2026] EWCA CIV 1184

COURT OF APPEAL – JUDGMENT ON 15 SEPTEMBER 2026

- Appeal against dismissal of application for JR of Haringey's assessment of TDB's social care needs under the Care Act 2014
- Key question for the court: was Haringey required to carry out an assessment of TDB's capacity prior to completing the Care Act assessment?
- TDB aged 25 with a range of complex mental and developmental difficulties. Longstanding background of involvement from children's services and then adult services. Concerns raised by adoptive parents about lack of support. Solicitors instructed to challenge local authority about this
- In October 2024 a solicitor acting on his behalf urged the local authority to undertake a joint assessment incorporating a CA 2014 assessment, review of his EHCP and review of his Pathway Plan. Asked for confirmation that the assessment would include specialist input (e.g. from autism specialist, psychologist and learning disability specialist)

RE TDB - 2

- An assessment was completed by TDB's social worker in December 2024. The specialist input envisaged by the solicitor was not obtained and no assessment of TDB's capacity was carried out
- Pre-Action JR correspondence was sent advancing grounds including that the assessment was *“conducted without the requisite skills, knowledge and competence”*
- Proceedings were also issued in the Court of Protection for decisions about his residence and care, in the course of which expert evidence about TDB's diagnoses and capacity has been obtained from Dr Lisa Rippon. Those proceedings are ongoing

RE TDB - 3

- JR application was dismissed, decision appealed and Ct Appeal allowed the appeal
- Baker LJ gave the judgment which was handed down on 15 September 2026
- Appeal allowed on 2 grounds:
 - The local authority should have undertaken a capacity assessment before the CA 2014 assessment of needs was completed; AND
 - The Regulations impose a mandatory obligation to ensure that the assessment is carried out by someone with the skills, knowledge and competence to do so and that where it considers the individual's needs so require, the local authority must consult a person who has the necessary expertise in relation to the individual's condition or other circumstances. In the particular circumstances of TDB's case, the social worker was not the appropriate person to undertake the Care Act assessment
- Key outcome of the decision – see paragraph 91:
 - ***“...whenever there is a reason to doubt the capacity of a person whose needs for care and support are being assessed under the Care Act, a capacity assessment under the MCA must be carried out by an appropriately qualified professional before the Care Act assessment of needs is completed”***

RE TDB - 4

- Baker LJ's reasoning (paras 92 – 96):
- A local authority has a general duty under s1 CA 2014 to promote a relevant individual's well-being
- Under s1(2) and s1(3) CA 2014 various factors must be considered in promoting well-being, and a local authority's assessment of those factors are affected by whether or not the individual has capacity
- The CA 2014 makes specific references to capacity in relation to needs assessments and care and support plans (for instance, s9(5)). In order to comply with the provisions of the CA 2014 dealing with needs assessments and preparation of care and support plans, a local authority must have a clear understanding of the individual's capacity
- The relevant secondary legislation (Care Act Regulations) also impose requirements that are contingent upon the capacity of the individual, for instance the requirement to carry out the assessment in a manner which ensures the individual can participate in the process as effectively as possible
- The Care and Support Statutory Guidance further reinforces the need to have regard to an individual's capacity when needs assessments are carried out. In particular, paragraphs 6.32 and 10.63 which send the clear message that where there is concern about an individual's capacity to make a specific decision, an assessment of capacity should be carried out

Baker LJ noted the risk that the Court's decision would *"impose an additional layer of work on local authorities, and some extra costs. But the purpose of assessing capacity is to improve the chances of arriving at a more accurate assessment of the individual's needs. That can only be to the benefit of the individual and in due course should lead to a more efficient and effective use of the local authority's resources"* (paragraph 99)

And at paragraph 105 – neither the presumption of capacity (s1(2) MCA 2005) nor the principle that a person is not to be treated as unable to make a decision unless all practicable steps to help him have been taken without success (s1(3)) are important but should not be used to avoid assessing P's capacity. When there is good reason / legitimate doubt about P's capacity an assessment should follow

And at paragraph 106 – whether or not P has a formal diagnosis of a particular disability or impairment should not determine whether a capacity assessment is undertaken. The question local authority's need to ask is whether there is an *"impairment of, or a disturbance in the functioning of, the mind or brain"* (MCA 2005)

CC V BRISTOL CITY COUNCIL & ORS [2026] EWCOP 19

- Application by the local authority for final declarations of capacity, and best interests decisions, in the domains of residence, care and contact.
- P was a 23 year old man.
- P had a diagnosis of learning disability and psychosis.
- There was a longstanding history of violence and aggression.
- He lived with his grandmother with a package of care provided 2:1 care for 6 hours a day, 5 days a week.



BETH CHALCRAFT

Expert instructions

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- The court heard evidence from Dr Radcliffe, a clinical psychologist.
- Issues arose during the hearing:
 - The length of the letter of instruction.
 - The way that the documents were sent to the expert.
- Theis J provided guidance on the instruction of experts in the Court of Protection.

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- Approval by the court.
- Identify decisions under consideration, the relevant information, diagnostic and functional elements of capacity, and the causal relationship between any impairment and the inability to decide.
- Avoid lengthy recitals of fact and case law.
- The letter of instruction should contain:
 - A neutral statement of the facts.
 - A list of materials the expert is being provided with.
 - The legal framework.
 - If assessing capacity, identification of the relevant decisions to be assessed.
 - Details of any transparency order and whether proceedings are public.
 - Details of any people the expert should or may meet with and a reminder of the importance of there not being any unrecorded/informal discussions.
 - Timescales for the report, dates of hearings, confirmation of who the report will be disclosed to, a reminder about the ability to pose questions of clarification and information about the expert's fee.
- Post-filing questions of clarification should only be done in accordance with rule 15.7(2) COPR 2017 or by court order.
- Keep under review what further evidence or documents should be sent to the expert.
- If an expert is to give oral evidence, they should be provided, in advance, with an updated court bundle, a list of updating documents and any further relevant documents filed immediately prior to the hearing.

Thank you!

