



Press Summary

THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

24 November 2021

A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor) (Appellant)

[2021] UKSC 52

On appeal from [2020] EWCA Civ 735

Justices: Lord Briggs, Lady Arden, Lord Burrows, Lord Stephens, Lady Rose

Background to the Appeal

A Local Authority commenced proceedings in the Court of Protection seeking declarations under the Mental Capacity Act 2005 (“the Act”) as to JB’s capacity in various matters, including a declaration that JB lacked capacity to consent to sexual relations. A question arose as to whether, in assessing JB’s capacity to consent to sexual relations, the judge should have regard to whether JB had capacity to understand that the other person involved must give consent, and did in fact give and maintain consent throughout the act. The judge found that this was not relevant information for the purposes of determining if an individual had capacity to consent to sexual relations under the Act.

The Local Authority appealed to the Court of Appeal. The Court of Appeal recast the relevant matter as whether JB had the capacity “to engage in” rather than “consent to”, sexual relations. The Court of Appeal found that in deciding whether a person had the capacity to engage in sexual relations, a judge should have regard to whether that person can understand that the other person involved must be able to consent and gives and maintains consent. The Local Authority’s appeal was therefore allowed. JB, by his Litigation Friend, the Official Solicitor, appealed to the Supreme Court.

Respond (a charity providing services to children, young people and adults with learning disabilities), and Centre for Women's Justice (a charity seeking to combat male violence against women and girls) provided written submissions as interveners in the appeal.

Judgment

The Supreme Court dismisses the Appeal. Lord Stephens gives the judgment, with which all members of the Court agree.

Reasons for the Judgment

Lord Stephens considers each of the grounds of appeal in turn.

Ground 1 [86 – 91]

The Appellant argued that it was wrong to recast the relevant matter as whether JB had capacity to “engage in” sexual relations because section 27(1)(b) of the Act, which sets out those decisions which cannot be made on behalf of a person, refers to “consenting to have sexual relations”. The Appellant argued that this section should be read as controlling the scope of section 2(1) of the Act, which relates to whether a person lacks capacity.

The Court rejected this interpretation of the statutory scheme and found that the wording of section 2(1) of the Act is broad and flexible. The Court also rejected the alternative submissions on behalf of the Appellant that JB's desire to initiate sexual relations was not a “decision” within the meaning of the Act.

Ground 2 [92 – 96]

The Appellant argued that even if the relevant matter was recast as whether a person had capacity to “engage in” sexual relations, in answering that question, it was not relevant to look at whether that person understood that the other person must be able to consent, and did in fact give and maintain consent throughout the act. The Appellant argued that this interpretation of the Act inappropriately extended its purpose to protecting the general public, and moreover created an impermissibly “person-specific” test for capacity.

The Court rejected these submissions. First, the Court found that it was correct that the Court of Protection should have regard to reasonably foreseeable adverse consequences with the aim of protecting members of the public, as well as the person who may lack capacity. Second, the Court found that the test in section 2(1) was decision-specific, not person-specific.

Ground 3 [97 – 116]

The Appellant argued that to have regard to whether a person had capacity to understand that the other person must be able to consent and must in fact consent before and throughout the sexual relations creates an impermissible difference between the civil and criminal law.

The Court found that no impermissible difference arose, and that there were strong policy justifications, including the Court of Protection's responsibility to protect persons who may lack capacity as well as to protect others, for any higher standard in the civil law test for consent. The Court also found that any differences between the civil law test and the criminal law test should be assessed as they arose in individual cases.

Ground 4 [117 – 119]

The Appellant sought to argue that the Act must be construed compatibly with Article 8 of the European Convention on Human Rights which provides for a right to respect for private and family life. This ground was not raised prior to the appeal to the Supreme Court, and permission to raise it was refused. The Court nevertheless found the operation of the Act is compatible with Article 8.

Ground 5 [120]

The Appellant argued that the Court of Appeal's test for capacity to engage in sexual relations was inconsistent with article 12(2) of the United Nations Convention on the Rights of Persons with Disabilities, which provides for recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

The Court rejected this argument as there is no separate standard for persons with disabilities. Furthermore, the Court noted that in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26, the Supreme Court had recently confirmed that it would not examine whether the UK has violated provisions of an international treaty which are unincorporated in domestic law.

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)