A critical case commentary on Avon and Wiltshire Mental Health Partnership and North Bristol NHS Trust v WA and DT: Did the judge reach a fair and just decision regarding the capacity and best interest of the person?

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***Abstract—Avon and Wiltshire Mental Health Partnership and North Bristol NHS Trust v WA and DT* [2020] EWCOP, [2020] 7 WLUK 271: This case critically evaluates the findings on *WA*'s capacity assessment and best interest decision made by the courts to determine the treatment plan. From the finding's on *WA*'s capacity, it is apparent that the way capacity testing was dealt with was not in accordance with the MCA guiding principles, but rather based on a subjective view of the assessors. Consequently, *WA* was held to be incapacitated requiring the courts to look at the best interest provisions under section 4 of the MCA in discussing the proposed treatment options. The positive aspect to this case was that Hayden J gave greater weight to *WA*'s wishes and feelings, and affirmed his autonomy.**

***Index Terms*—Autonomy, Equality, Self-determination, Vulnerability.**

I. INTRODUCTION

The right to autonomy is the central focus in *WA*'s case. Coggon states that 'Without a more refined comprehension of the concept of the patient, judges risk both overstating the importance of autonomy for patients who have capacity and underestimating the weight that should be given to personal values of patients who lack capacity'.[1] He further states that '…I have argued that there should be parity in mental capacity law's treatment of patients' values, if these can be established, regardless of whether they currently have or lack capacity'.[2]

First, this case commentary seeks to critically evaluate the findings on *WA's* capacity and best interest under the Mental Capacity Act 2005 ('the MCA'). Second, it examines the way decision makers carry out capacity testing and whether this is applied in a discriminatory way. Third, it discusses the distinction between those who are capacitated and those who are incapacitated. Last, it examines whether the wishes and feelings of the person are respected by the courts when a person becomes incapacitated.

The key concepts of this case commentary are autonomy, equality, self-determination, and vulnerability, which will be applied in analysing *WA's* case.

II. FACTS

Avon and Wiltshire Mental Health Partnership and North Bristol NHS Trust v WA and DT [2020] EWCOP, [2020] 7 WLUK 271: *WA* suffered from post-traumatic stress disorder as a result of trauma and abuse in his past, and came to the United Kingdom, via Italy, to escape abuse in Palestine. *WA* identified with the date of birth given to him by his grandmother, and considered this a fundamental aspect of his identity. When his date of birth was assessed and reassigned by the authorities, he began a hunger strike whereby he refused all food and drink. Consequently, the Trusts applied to the courts for a declaration to determine *WA's* capacity and provide him with a treatment plan. The court found *WA* to have an impairment of, or a disturbance in the functioning of, the mind or brain,[3] which prevented him from weighing information in relation to nutrition and hydration, and thus deemed him incapacitated. They applied the best interest test, per section 4 of the MCA, to determine the proposed treatment plan by the Trusts.

III. CAPACITY TESTING AND ITS LEGAL BASIS

The legal test for capacity is embodied in the framework of the MCA, and its legal basis is to determine whether an individual has the capacity to make decisions. The starting premise is that 'A person must be assumed to have capacity unless it is established that he lacks capacity',[4] and the capacity test must be conducted by the assessors in accordance with the guiding principles.[5]

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[1] John Coggon, 'Mental Capacity Law, Autonomy and Best Interest: An argument for Conceptual and Practical Clarity in the Court of Protection' (2016) 24 Medical Law Review, 396, 399

[2] Ibid 413

[3] Mental Capacity Act 2005 (MCA 2005), s 2 (1)

[4] MCA 2005, s 1 (2)

[5] Ibid, s 1

The capacity test entails two stages. According to the first stage, which is the functional test, a person is unable to make a decision for himself if he is unable to understand the information, retain the information, use or weigh the information, and communicate his decision.[6] In my view, the functional test does not allow for a fair assessment because the assessors interpret it as a checklist, rather than applying the above four elements to the individual's circumstances.

The second stage of capacity testing is the diagnostic test, which requires that 'A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'.[7] The problem with the diagnostic test is that a person may be incorrectly diagnosed if the assessors revert to a status approach and reach their conclusion on discriminatory grounds.[8]

IV. APPLICATION OF CAPACITY TESTING BY DECISION-MAKERS IN *WA*'S CASE

Capacity testing in *WA*'s case followed a status-based approach. The assessors concluded that *WA* had failed the functional test because he was fixated on his date of birth, and this was interpreted as preventing him from weighing up information. In deciding capacity in *WA*'s case, the assessors did not go into detail other than pointing to his rigidity of thinking about his date of birth.

The assessors failed to recognise that this rigidity of thinking arose from *WA*'s date of birth being a fundamental part of his identity, and thus something very important to him. This does not suggest, in any way, a rigidity of thinking that would prevent him from weighing up information. As stated by *WA*'s foster parent, 'We also believe that a DOB is everyone's right of passage'.[9] *WA's* desire to have his original date of birth restored was interpreted by the assessors as his being incapacitated. In my view, this was not the correct interpretation of the MCA, but the personal view of the assessors.

WA no longer wanted to live, but acknowledged to the treating clinicians that if his date of birth were restored, 'he would manage better'.[10] He could thus communicate information.[11] Hayden J even acknowledged *WA* as an intelligent, articulate man.[12] Moreover, some treating clinicians, such as Dr Wild, held the view that *WA* was capacitated, thereby demonstrating that capacity testing can indeed be influenced by personal perspective. A clear example of the variation in capacity assessment between assessors is seen in the differing views of Dr Wild and Dr Cahill on *WA*'s capacity. Dr Wild held that *WA* had the capacity to refuse clinically assisted nutrition and hydration, and that acting contrary to his wishes 'would provoke a deterioration in *WA*'s mental health'.[13] In contrast, other clinicians gave different accounts of *WA*'s capacity:

> Dr C said, in evidence, that she found this case, on this point as well as others, *'extremely difficult'*. She described her opinion relating to capacity as *'on a knife edge'*. Nonetheless, she considered that the rigidity of thinking and preoccupation in relation to his date of birth occluded *WA*'s capacity to weigh and use the overall information relevant to a decision to accept nutrition and hydration.[14]

The findings on *WA*'s capacity test were based solely on the fact that the assessors did not agree with *WA*'s perspective and could not understand why he was obsessed with a mere date of birth. It appears that they did not understand how to apply the relevant provisions of the diagnostic and functional tests to someone in *WA*'s situation (that of a refugee). Perhaps, had the assessors been trained in dealing with vulnerable groups such as refugees, then *WA*'s capacity may have been assessed differently, taking into account his history and background circumstances and understanding his views with compassion.

The conclusion of the Home Office on his age assessment was the major contributing factor to *WA*'s critical state. He simply could not come to terms with the injustice bestowed upon him when his date of birth was changed. *WA*'s hunger strike was the result of the further trauma he endured each time he was asked to provide his date of birth.[15] His condition may have deteriorated when his constant

[6] MCA 2005, s 3 (1)
[7] MCA 2005, s 2 (1)
[8] Ibid
[9] *Avon and Wiltshire Mental Health Partnership and North Bristol NHS Trust v WA and DT* [2020] EWCOP 37, 7 WLUK 271 [8]
[10] Ibid [79]
[11] MCA 2005, s 3 (1) (d)
[12] [2020] EWCOP 37 [12] (Hayden J)
[13] [2020] EWCOP 37 [73]
[14] Ibid [63]
[15] Ibid [12]

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plea, for his date of birth to be restored to the original date which he knew it to be, fell on deaf ears. He only wanted the Home Office, as he put it in his own words, to *'hear my voice'*.[16] The fact that he had experienced trauma and suffered from post-traumatic stress disorder seemed to have been put aside by the treating clinicians when assessing his capacity. If his date of birth was fundamental to him, it was not a matter for anyone to say otherwise; he had been stripped of a fundamental human right. Hayden J even acknowledged that 'It is important that I record that if, hypothetically, the date of birth with which WA identifies was restored to him, all the doctors are clear that it would be a significant boost to his psychological well-being'.[17]

V. ASSESSORS' APPROACH TO CAPACITY TESTING

Donnelly takes the view that 'Professionals carrying out this legal function should be obligated to understand the statutory standard in detail and be able to show a high degree of competence in applying this knowledge to individual cases'.[18] Her view is very much applicable in *WA*'s case, in that the assessors may lack knowledge of the MCA and of the manner in which they are required to apply the test in practice. *WA* was a vulnerable person with a difficult life experience, and an assessor may not be familiar with how to approach a person with his background. Dunn states that 'Strikingly, it now appears that a decision made by a person judged able to make that decision for him/herself need no longer be respected by the court, if he/she is deemed to be "vulnerable".'[19] This was clearly reflected in *WA*'s case because he was socially vulnerable. Although Hayden J believed that *WA*'s experience and trauma were contributory factors in his present circumstances, this did not dissuade him from relying more on the assessors' findings on capacity.

An assessor might not, in *WA*'s circumstances, empathise with or understand his traumatic experience when conducting capacity testing; they might simply interpret the functional test from a holistic point of view without considering the ramifications thereof on someone as vulnerable as *WA*. Thus, conducting capacity testing in a manner contrary to the legal framework can result in finding a person incapacitated when, in reality, this is not the case. This raises concerns because patients are diagnosed via capacity testing by under-qualified assessors who may not be equipped to conduct the test because they are not 'legally trained'.[20] Interestingly, Donnelly stated the following:

> Unsurprisingly, therefore, the MCA framework involves the use of alternative, non-judicial, assessors. Reliance on these assessors can only be justified, however, if the assessor has the skills and knowledge necessary to carry out the task. Otherwise, administrative convenience may be purchased at an unacceptable cost to the overall goals of the legislation.[21]

Furthermore, Donnelly said:

> Ultimately, and inevitably, all capacity assessors come to the task clothed with their professional and personal values, motivations and beliefs. These factors impact on how assessors engage with the people whose capacity they assess and may determine the conclusions they reach. Yet for the most part, the law operates as if these factors did not exist.[22]

As the assessors play a fundamental role in capacity testing, there should rest on them a degree of expectation, not only to fully grasp the legal framework under the MCA and the code of practice,[23] but also to have some insight into an individual's circumstances, such as knowing how to deal with a refugee. This would allow them to adopt a more suitable approach to assessing capacity; as Donnelly recognises, '…there is a strong probability that these assessors also lack information about the test for capacity and how it should be applied'.[24] She further states that 'Because, under the MCA, capacity can be assessed by a wide range of people, including non-professionals, there is a risk that capacity assessment will be regarded as a task which anyone can perform'.[25] This risks an incorrect

[16] Ibid [56]
[17] Ibid [66] (Hayden J)
[18] Mary Donnelly, 'Capacity Assessment under the Mental Capacity Act 2005: Delivering on the Functional Approach?' (2009) 29 Legal studies 464-491, 8
[19] Michael Dunn, 'To empower or to protect? Constructing the 'vulnerable adult' in English law and public policy' (2008) 28 Legal Studies, 234, 236
[20] Donnelly (n 18) 1
[21] Ibid 2
[22] Ibid 17
[23] The Stationery Office, 'The Mental Capacity Act 2005, Code of Practice' https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921428/Mental-capacity-act-code-of-practice.pdf accessed 1 May 2021
[24] Donnelly (n 18) 11
[25] Ibid 22

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outcome for the person being assessed, as is the case with *WA*.

Interestingly, Donnelly goes on to express her concern that, unlike for other mental health assessors, there is no mandatory formal training for capacity assessors.[26] This raises questions as to how capacity assessors derive their conclusions. If there is no legal training for assessors and they are relied upon merely due to their position, then *WA* could have been stigmatised due to his refugee status. In my view, this represents a major flaw in the capacity testing process: a person who may not lack capacity is deemed incapacitated merely due to the assessors' basic knowledge of the law and legislation. As Donnelly puts it, 'the MCA tells assessors what to do but is much more reticent in actually ensuring that they do this'.[27] Thus, in *WA*'s case, the assessors could have erred in determining the status of his capacity. One of the treating clinicians reported that this case was a difficult one,[28] describing it as one of the cases *'up there'.*[29] The consequences of such an error can have a detrimental effect on a person's life and livelihood. As succinctly put by Donnelly, 'Where a person with capacity is inappropriately found to lack capacity, the harm suffered is evident. The person loses his or her power to make the decision to which the finding relates, which, depending on the nature of the decision, may have a very significant impact on his or her life'.[30]

It was apparent from the account provided to the court by *WA* that it was not that he could not weigh up information, but that he was fighting for something which he identified as being important. Thus, it is questionable as to whether he lacked capacity and whether the decision to deem him incapacitated was the correct one. In fact, this can be seen as an interference with his right to privacy and family life, as well as his right to freedom of expression, according to Article 8 (1) and Article 10, respectively, of the European Convention on Human Rights, as amended (ECHR) – and states are obliged to protect human rights.[31]

Moreover, the assessors failed to consider the real issue: *WA*'s condition may not have reached the point at which he could be deemed incapacitated had the legal framework on capacity been applied correctly. Had *WA*'s capacity testing been in line with the legal framework under the MCA, to which all assessors are required to adhere, then there would be greater consistency in the outcomes reached. Concluding that a person lacks capacity because he is obsessed with his date of birth is a prejudicial view, contrary to the designs of the MCA; moreover, it can be seen as discriminatory.

Donnelly recognises that the personal and biased views of assessors in capacity testing can result in incorrect outcomes.[32] What may be important to *WA* may not be important to others; however, that does not need to imply that this is an irrational view. The British Psychological Society also recognises the personal bias involved in capacity testing and suggests that psychiatrists conducting these tests should follow the recommendations: 'Supervision and reflection are important tools to help counter these. Mental Capacity Act assessments require this too as personal biases may impact on how individuals or a decision is approached, or may cause emotional reactions to the case itself'.[33]

WA expressed his wish to be associated with the date of birth that he believed to be his actual date of birth, and it was his right to have his autonomy respected. The court and assessors should have heard and accepted this. The fact that he refused nutrition and hydration in defence of his date of birth was a plea for his injustice to be heard, and not an indication that he was incapacitated. Therefore, it cannot be concluded that the outcome of his capacity testing was based on a fair assessment. As Donnelly suggests, 'the quality of capacity assessment will only improve if professional assessors are made aware of their professional duties and more effectively held to account'.[34]

The decision reached by the court with regard to *WA*'s capacity relied purely upon the assessors' report, and such reliance can be seen as giving undue weight to the assessors' opinions. In the words of Hayden J, 'Whilst the evidence of psychiatrists is likely to strongly influence the conclusion of the Court as to whether there is *"an impairment of the mind"* for the purposes of section 2(1) MCA, the

[26] Ibid 22
[27] Ibid 20
[28] [2020] EWCOP 37 [80]
[29] Ibid [80]
[30] Donnelly (n 18) 20
[31] European Convention on Human Rights, Article 1
[32] Donnelly (n 18) 14
[33] The British Psychological Society, 'what makes a good assessment of capacity' 17 para [4.11] https://www.bps.org.uk/sites/www.bps.org.uk/files/Policy/Policy%20%20Files/What%20makes%20a%20goo%20assessment%20of%20capacity.pdf> accessed 15 May 2021
[34] Donnelly (n 18) 22

ultimate decision as to capacity is a judgment for the court'.[35] In contrast, it was apparent in *WA*'s case that the decision on capacity was based solely on reliance. In my view, capacity assessors should not be so heavily relied upon by the courts when they lack the fundamental understanding of what is required in capacity testing.

It is not enough for the courts to rely only on the role of assessors and what they deem the correct determination on capacity testing. There needs to be some additional mechanism in place to evaluate their conclusion; for example, questions asked of assessors on their understanding and application of the test. This would ensure the accountability of assessors in carrying out capacity testing. In the absence of such measures, both unprofessional and professional assessors could reach differing conclusions based on the same assessment, as was seen in the views of the treating clinicians in *WA*'s case.

VI. ANALYSIS BETWEEN THE MCA AND WA'S CAPACITY FINDINGS

Haden J states: 'It is important to preface my analysis of the law by stating the uncontroversial fact that there is no obligation on a patient with decision-making capacity to accept life-saving treatment, and doctors are neither entitled nor obliged to give it'.[36]

The courts' decision to accept that *WA* was incapacitated on the evidence of the assessors, and thus move on to the best interest reasoning, was not a fair one. In my view, *WA* had decision-making capacity. According to the assessors, he only lacked capacity because of his wish not to have his human rights violated. Furthermore, 'A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success'.[37]

WA's liberty was denied on the basis of the capacity assessment, which was wrongly determined without justifiable reasoning. The assessors could not provide a good reason as to why they deemed *WA* incapacitated, other than pointing to his fixation on his date of birth, which, in my view, was not enough. A clear example can be seen in the case of *ZH* v *Commissioner of Police for the Metropolis* [2013] EWCA Civ 69, [2013] 1 WLR 3021, where the police commissioner argued that they had acted in the best interest of the schoolboy who fell into the water when a police officer tapped his back. The boy was said to be fixated by the water so that he would not move from the vicinity.[38] However, the fact that the commissioner argued, albeit unsuccessfully, that the boy's fixation on the water meant that he lacked capacity, and thus justified the use of reasonable force, demonstrates that there remains a lack of understanding in certain cases where a person is considered to lack capacity.

Moreover, the MCA makes it clear that 'A lack of capacity cannot be established merely by reference to a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity'.[39] Therefore, there needs to be a sufficiently robust approach to capacity testing that a fair and transparent outcome can be reached when a person's capacity is at stake, because a fixation on a date of birth or on water, in my view, exemplifies the kind of unjustified assumption that the statute clearly prohibits.

The significance of *WA*'s date of birth was made clear to the courts not only by *WA* himself, but also by his foster parents, and the date of birth assigned to him was seen as *'some kind of betrayal*'.[40] His foster parents considered *WA* to be intelligent, and that his fight for justice throughout his life, rather than suggesting an inability to weigh up information, demonstrated that '*he is someone that holds and stands by his beliefs and values*'.[41] If his views or decisions are interpreted as unwise by the assessors, then this is a personal opinion rather than a categorical one.

If capacity testing is conducted such that an unwise decision by a person may be deemed a lack of capacity, this is clearly contrary to the guiding principle of the MCA, which states that 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision'.[42] This was not what the legislature envisaged, but is clearly evident in the outcome of *WA*'s assessment. This result was based on his inability to make wise decisions due to his obsession with his date of birth, and the assessors' judgement of his views to be those of a reasonable person was a rather objective standard.

[35] [2020] EWCOP 37 [38] (Hayden J)
[36] Ibid [23] (Hayden J)
[37] MCA 2005, s 1 (3)
[38] [2013] EWCA Civ 69, [1]
[39] MCA 2005, s 2 (3) (b)
[40] [2020] EWCOP 37 [11]
[41] Ibid [8]
[42] MCA 2005, s 1 (4)

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VII. DISCRIMINATORY APPROACH IN CAPACITY TESTING TOWARD THE INCAPACITATED PERSON

Donnelly discussed the discriminatory approaches found in capacity testing, and mentioned that race and gender can play a role in the way capacity assessment is carried out.[43] For example, she cited reports on gender as a factor that could lead to a judgement of incapacitation.[44] Moreover, she acknowledged the following: 'Furthermore, a person found to lack the capacity to make a particular decision may have to live with the broader consequences of this assessment. As well the possible social stigma'.[45] Recognising *WA* as incapacitated could result in prolonged stigmatisation, both socially and personally. It is widely known that 'the stigma of a psychiatric diagnosis affects not only patients but also their siblings and other family members'.[46] Stigmatisation can affect a person's welfare, and it is unfortunate that refugees are likely to be placed in such position. For these reasons, it was vital that *WA*'s capacity testing be fair and truly reflect his capacity to make decisions.

Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD) states that the incapacitated should have the same equal treatment as those who are capacitated.[47] Moreover, it recognises the need for equality before the law. Article 12 (2) states that 'Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[48] Furthermore:

> States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body.[49]

The CRPD would require *WA* to have the same equal rights, whether or not he were incapacitated. However, *WA* was stigmatised from the outset in the capacity testing; thus, he was already deprived of his right to equal treatment. What the courts got right was the recognition of *WA*'s personal autonomy. Hayden J took the view that 'it must be emphasised that loss of capacity does not override respect for personal autonomy. Protecting the autonomy of the incapacitous is every bit as important as protecting the autonomy of the capacitous'.[50] Thus, autonomy prevails even if a person is found to be incapacitated, and force-feeding a person against their will was not something the courts were willing to entertain. As Hayden J succinctly put it: 'This said, I have come to the clear view that when *WA* says no to CANH his refusal should be respected. No must mean no!'[51] This is a clear demonstration of respect for *WA*'s autonomy and bodily integrity.

This is well summed up by Boyle as he rightfully observes: 'The person found to lack capacity is always vulnerable to losing her or his right to bodily integrity. Therefore, respectful substitute decision-making alone does not provide a full answer to criticisms of the role of capacity in the legal system. If capacity is to continue to operate, it is vital that it is coherent, fair, and properly understood'.[52]

VIII. THE COURTS' APPLICATION OF THE BEST INTEREST TEST IN *WA*'S CASE

In determining the best interest of the incapacitated person, the courts look at the criteria set out in section 4 MCA. As Baroness Hale puts it: '… in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological'.[53] Thus, the courts should place greater weight on the person's wishes and feelings when deciding their best interest, allowing the person to be the central focus. John Coggon states that 'The demands to find what is objectively in the patient's best interests should not

[43] Donnelly (n 18) 16
[44] Ibid
[45] Ibid 20
[46] Kimayer LJ, Narasiah L, Munoz M, et al. 'Common mental health problems in immigrants and refugees: general approach in primary care' [2011] CMAJ, 183 (12) 959, 962
[47] Convention on the Rights of Persons with Disabilities, Article 12
[48] Ibid, Article 12 (2)
[49] Ibid Article 12 (4)
[50] [2020] EWCOP 37 [96] (Hayden J)
[51] Ibid [102] (Hayden J)
[52] Sam Boyle, 'How should the law determine capacity to refuse treatment for anorexia' (2019) 64 International Journal of Law and Psychiatry 250,251 para [2.3]
[53] A*intree University Hospitals NHS Foundation Trust* v *James* [2013] UKSC 67 [39] (Baroness Hale*)*

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be equated with a demand to find some monistic, universal value and apply it to the individual just because she lacks capacity'.[54]

WA could clearly express his views when he informed clinicians that he knew he would die if he did not receive nutrition and hydration; thus, he understood the consequences. There is a concern that the courts are more inclined to follow the advice of clinicians to determine the best interest of a person, without placing sufficient weight on the person's expressed wishes. However, Hayden J acknowledges that 'When applying the best interests tests at section 4(6) MCA, the focus must always be on identifying the views and feelings of P, the incapacitated individual. The objective is to reassert P's autonomy and thus restore his right to take his own decisions in the way that he would have done had he not lost capacity'.[55] Hayden J was in favour of more involvement from *WA* when discussing his best interest. We get to see that the main focus is the person, as voiced by Baroness Hale, in *Aintree University Hospitals NHS Foundation Trust* v *James* [2013] UKSC 67, [2014] A.C.591.

In *WA*'s case, the CRPD would recognise his will and preference prevailing; however, under the current position of the MCA, his wishes were determined using the best interest test. The best interest test becomes paradoxical because the statute requires that the expressed wishes of the person be considered, while in reality, little significance is given to the person's wishes and feelings.[56] In contrast, in *WA*'s case, the courts did a good job of giving weight to his expressed wishes.[57] The intervention was indeed in his best interest, but Hayden J wanted to allow *WA* autonomous decision-making, rather than strictly dictating it. As he puts it:

> I am not in a position to reinforce *WA*'s sense of identity in any way; only engagement in the identified psychological therapy will achieve that. I am, however, able to protect *WA*'s autonomy. In effect, to restore it to him. For all involved in this case, the decisions were difficult and painful. From this point on, the decisions will ultimately be taken by *WA* with the advice and encouragement of his family and clinicians, but no more than that.[58]

IX. INTERPRETATION OF WISHES AND FEELINGS OF THE INCAPACITATED PERSON

While the court in *WA*'s case placed greater emphasis on his wishes and feelings, in some instances they are less inclined to do so, as was the case in *Re AA (Mental Capacity: Enforced Caesarean) [2012] EWHC 4378,* [2012] 8 WLUK 283. *AA* was a pregnant woman detained under section 3 of the Mental Health Act 1983 and diagnosed with psychosis and delusions. The court held that *AA* was incapacitated to make decisions. However, in deciding on capacity, there was only a transient mention of her diagnosis, for which not much discussion or detail was provided. Interestingly, the application of the functional test under section 3 (1) MCA 2005 was omitted. The courts did not take the wishes and feelings of the person into consideration; the judge was more inclined to discuss what would be in her best interest, given that the birth was imminent and the elective Caesarean was expected to be commenced within 24 hours of the court order[59]

While the psychiatrist and the obstetrician took the view that it was in *AA*'s best interest to undergo a Caesarean to prevent uterine rupture and any risk of harm to the unborn child,[60] *AA*'s wishes and feelings should have held greater weight, as they did in *WA's* case. Donnelly considered the following:

> It is true that the MCA requires that decisions made in the best interests of the person lacking capacity must take into account the person's own wishes and views (both past and present) and, therefore, an (inappropriate) finding of incapacity should not entirely end a person's involvement in the decision-making process. However, it is unclear how effectively this aspect of the MCA will actually work in practice, especially where the decision that the person wishes to make is not in accordance with his or her best interests as 'objectively' perceived.[61]

[54] Coggon (n 1) 414
[55] [2020] EWCOP 37 [45] (Hayden J)
[56] MCA 2005, s 4 (6)
[57] Ibid
[58] [2020] EWCOP 37 [103] (Hayden J)
[59] *Re AA (Mental Capacity: Enforced Caesarean) [2012] EWHC 4378,* [2012] 8 WLUK 283
[60] Ibid [4]
[61] Donnelly (n 18) 20

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*AA'*s case demonstrates that the application of section 4 (6) MCA is not always given sufficient emphasis. In contrast, in *WA*'s case, the court wanted to respect his autonomy and value system by not subjecting him to a treatment that could affect his well-being in the long term. This was about recognising that the person's wishes were paramount in the proceedings and any proposed treatment should not violate his autonomy.

The way Hayden J dealt with *WA*'s wishes and feelings was in accordance with section 4 (6) MCA. He allowed *WA* a far greater role when applying the best interest test; his wishes and feelings were considered of high importance, even though he had been found to be incapacitated. Conversely, in *AA*'s case, the Court of Protection took the opposite approach.

Munro acknowledges that 'Even where an individual's current wishes and feelings have been clearly and consistently expressed, knowing how to reach a decision which takes these into account alongside the other sources of evidence regarding P's interests outlined in s 4 MCA is not straightforward'.[62] He recognises the difficulty with the ways in which the courts take into consideration the wishes and feelings of a person; as he puts it: 's. 4(6)(a) MCA enjoins us to have regard to P's past and present wishes and feelings when reaching a decision on her behalf, and in some cases they simply are not'.[63]

Szmukler also states the following:

> People with mental illness do not have an impairment of such an ability for most, or indeed all, decisions, and for most or all of the time. If there was a significant impairment of this ability, involuntary treatment would only be justified if it were in the person's 'best interests'. We qualified the term 'best interests' as 'subjective' best interests – that is, one that gives paramount importance to the person's deep beliefs and values, or what might be termed the person's 'will and preferences'.[64]

X. CONCLUSION

The literature and findings on *WA*'s case show that there is still much room for improvement in the way assessors conduct capacity testing. Individuals faced with capacity testing risk being diagnosed on the basis of a status approach rather than the two-stage capacity test. If this approach continues to be the way forward, there will always be an infringement of individuals' autonomy.

Donnelly identified flaws in capacity testing, and the effects of assessors' lack of knowledge on the outcome thereof.[65] Her findings on the issues with capacity testing and problems with the way assessors carry out this function are still found in cases such as *WA*'s case. Even after *WA'*s case, there is still no framework to govern assessors' knowledge other than the MCA, whose interpretation by assessors has been shown by the literature to be problematic. *WA*'s case has demonstrated that stereotyping a person according to their background, gender or race can have a detrimental impact on that person's capacity assessment. Thus, it is recommended that, when conducting capacity testing on individuals from different backgrounds, assessors have an awareness of the person's background, and not rely on their own subjective views when faced with situations with which they are unfamiliar.

Furthermore, it is important that the MCA is amended to include the qualification requirements and suitable training required of all assessors conducting capacity testing. This will ensure a requisite standard for all assessors to follow, which would eliminate the biased approach and lack of understanding currently associated with capacity testing.

As the will and preference test has not been adopted by the English courts, the best interest test under section 4 MCA generally shows little consideration for the expressed wishes of a person deemed incapacitated. However, even though *WA* was found to be incapacitated, the judge did not disregard his wishes and feelings when applying the best interest test. The unfortunate aspect of *WA*'s case was the assessors' conclusion regarding capacity. In my view, *WA* was misunderstood by the assessors.

[62] Nell Munro, 'Taking wishes and feelings seriously: the views of people lacking capacity in court of protection decision-making' [2014] Journal of social Welfare and Family Law, 59, 69

[63] Ibid 69

[64] George Szmukler, 'Capacity Best Interests "Will and Preferences" and the UN Convention on the Rights of Persons with Disabilities' [2019] 18 World Psychiatry 34, 37

[65] Donnelly, n (18) 23

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