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Case No: COP 12521181

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2021

Before :

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

- -

Between :

A LOCAL AUTHORITY	**Applicant**
- and -	
C	**1st Respondent**
(By his litigation friend, AB)	
- and –	
A CLINICAL COMMISSIONING GROUP	**2nd Respondent**
- and -	
SECRETARY OF STATE FOR JUSTICE	**3rd Respondent**

- -
- -

Mr Neil Allen (instructed by **A Local Authority**) for the **Applicant**
Ms Victoria Butler-Cole QC and Mr Ben McCormack (instructed by **O' Donnells Solicitors**) for the **1st Respondent**
Mr Sam Karim QC and Miss Aisling Campbell (instructed by **Hill Dickinson LLP)** for the **2nd Respondent**
Ms Fiona Paterson (instructed by **Government Legal Department)** for the **3rd Respondent**

Hearing dates: 1st and 2nd December 2020

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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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THE HONOURABLE MR JUSTICE HAYDEN, VICE PRESIDENT OF THE COURT OF PROTECTION

This judgment was delivered at a hearing conducted on a video conferencing platform with members of the public attending. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of C and members of his family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Hayden :

1. This application concerns C, who is a 27-year-old man with a wide range of interests. He enjoys participating in sports, he listens to music, particularly rap music and he is interested in history. I have been told that he regularly visits museums with his carers. C has been diagnosed with Klinefelter syndrome (XXY syndrome). This is a genetic disorder that occurs in 1 in 660 men where the male has an additional X chromosome. Though men with XXY syndrome can live healthy lives, there are features of the syndrome which may impact on development. In C's case, developmental delay and other social communication difficulties were noted when he was two years of age. The records show that C, as a child, preferred spending time on his own and avoided physical contact. C was first noted to speak at around 4 years of age.

2. C's parents were plainly assiduous in pursuing assessment for him. In 1998, he was assessed for an autistic spectrum condition at Alder Hey Hospital. The assessment took place over a period of six weeks, C was aged 4 at this point. Dr Peter Gerome, Consultant Paediatrician, diagnosed C with autistic spectrum disorder. It is an understatement to say that in the years that followed, C could be extremely challenging; his behaviour was sometimes aggressive and dangerous. In 2011, it was necessary for C to move out of his family home. I have no doubt at all, having read all the papers, that the move was unavoidable and in the best interests of both C and his family. The consequence, however, has been that C needs significant assistance with independent living and is likely to continue to do so. The package of support C receives requires the deprivation of his liberty and, since 2017, the Court of Protection has authorised the deprivation (see para 178 Schedule A1 Mental Capacity Act 2005, 'MCA').

3. Between 2014 and 2017, C was detained in hospital, pursuant to the Mental Health Act 1983. C's admission had become necessary as a result of a deterioration in his mental health and threats that he was articulating which were of a sexual nature. For accuracy, it is important that I record that the threats were never acted upon. Throughout the period of his admission, C received a range of medication, including antipsychotic treatment. He also participated in psychosexual, psychological, occupational and psychiatric therapies.

4. As a result of his progress it was possible for C to be discharged to his current home. This is not a care home but a house suitable for three occupants and their carers. An agency is commissioned to provide a package of support to meet C's needs. At C's request, I met with him (remotely), and it struck me that C was happy and well-supported. Those who support C all agree.

5. In August 2018, C told AB, his Care Act advocate and litigation friend, that though he wanted to have a girlfriend, he considered his prospects of finding one to be very limited. He said that he wanted to be able to have sex and wished to know whether he could have contact with a sex worker. It was obvious that he had given this issue some thought. AB raised the matter with C's social worker, and, in due course, these proceedings were commenced, by the Local Authority, to address the lawfulness of such contact.

6. Ms Butler-Cole QC and Mr McCormack, who act on C's behalf, via his litigation friend, identify the issues before the Court as:

i. Whether a care plan to facilitate C's contact with a sex worker could be implemented without the commission of an offence under the Sexual Offences Act 2003;

ii. If not, whether the Sexual Offences Act 2003 can be read compatibly with the European Convention of Human Rights, or whether the Court should make a declaration of incompatibility;

iii. If a care plan facilitating such contact is lawful, whether such a plan would be in C's best interests.

All the parties agree that the above accurately identifies the issues before this court.

7. Though the parties' names have been withheld from this judgment, in order to avoid the identification of C, the public has been in attendance on the video conferencing platform. This is both important and encouraging. Issues such as those presented here are rarely ventilated in the court room, let alone more widely in the public domain. Manifestly, there are delicate and sensitive factors to consider. They require to be addressed, by all involved, with maturity, compassion and in a manner which resists the judgemental.

8. In preparation for these proceedings several assessments were undertaken, including by C's social worker and Dr Christopher Ince, a Consultant Psychiatrist. On 24th July 2020, the Court was satisfied that there was reason to believe, pursuant to Section 48 MCA 2005, that C lacked capacity to:

i. conduct these proceedings;

ii. decide where to live;

iii. decide what care and treatment to receive;

iv. decide to use the internet and social media;

v. decide his financial affairs.

9. There is no dispute amongst the parties that declarations should now be made in these terms, having regard to the available evidence. Equally, it has been agreed that the evidence identifies that C has the capacity both to engage in sexual relations and to decide to have contact with a sex worker.

10. C's litigation friend sought and was granted leave to file a statement prepared by Ms Holly Chantler, Director of the Professional Deputies Forum. Ms Chantler is a panel deputy and a solicitor, specialising in Court of Protection cases. The Professional Deputies Forum is a not for profit organisation, representing professional (solicitor) deputies and their support staff. Members of the organisation currently represent approximately 50% of all property and affairs solicitor-appointed deputyships, an estimated 4,500 matters in total. Ms Chantler was asked by Ms Philippa Curran, solicitor, and Ms Butler-Cole QC to obtain the views of its members regarding payment for sex services by property and affairs deputies on behalf of clients. The purpose of this was to obtain an understanding of current practice. Although the matter may be

considered a personal welfare issue, these services require payment and, as such, fall within the authority of a property and affairs deputy.

11. The consultation was conducted delicately, recognising the sensitivity of the issue. The responses were given on the basis they would remain anonymous but would be considered by the court in a document presented by the Professional Deputies Forum, in what was intended to be as accurate a summary of general practice as could reasonably be obtained. I do not read the filed document as purporting to be a comprehensive, statistically based record of current practice. It is, I suspect, little more than a 'finger in the wind' as far as indicating widespread practice. Nonetheless, given the professional experience of those canvassed, it provides some useful insight. The findings are summarised as follows:

i. ***our members have experience of their clients seeking sexual services****;*
ii. *a variety of capacity assessments have been sought or commissioned by financial deputies, including capacity to engage in sexual relationships, capacity to engage the services of an escort and capacity to access and use dating websites;*
iii. *payment for such services has been made in a variety of ways, including from the deputyship bank account. Payment is made to the service provider, usually by the support worker or case management company;*
iv. *the payments are usually recorded as an activity/leisure/entertainment budget and reported as part of the Office of the Public Guardian's annual report on this basis;*
v. *the client would often be accompanied by a parent or support worker;*
vi. such services are commonly requested by male clients in their mid to late twenties who have experienced a brain injury;
vii. *difficulties have been highlighted where clients were also living with an element of physical impairment, particularly regarding their mobility as they require additional support to access services, such as being driven to an appointment;*
viii. it has been noted by deputies that such services have proved beneficial for clients and their support teams, particularly where difficult behaviour has been previously exhibited. This may be more prevalent for young male clients, particularly if they are living with a brain injury;
ix. concerns were raised that if support to access services was unlawful and/or inappropriate, the client may seek to obtain such services for themselves and may use social media to assist with this. One member reported clients who have done this which have "resulted in (unwanted) pregnancies and "falling in love" with unscrupulous characters"*;*
x. *for some clients, they are given a personal allowance and their financial independence is encouraged (particularly where P has capacity to manage small amounts of money). They may use such funds to access sexual services;*

xi. *other arrangements which have been facilitated to support sexual empowerment include purchasing of a private temporary outhouse in the care home for P to use as a place to safely masturbate. Whilst this does not relate to engaging in sexual services with another person, it is an example of the deputy promoting individual sexual empowerment.*

12. I have highlighted above those findings which strike me as most obviously relevant to the circumstances of this case. Each of the findings however reveals, to my mind, a determination to negotiate these intensely sensitive issues in a manner which respects the autonomy, humanity and dignity of all involved.

13. Those who responded were also eager to raise issues which plainly troubled them. They are summarised in the statement and require to be set out in full:

i. *There may be circumstances when P has capacity to engage in sexual relations and/or contact but has a mental disorder. As such, would a care worker still commit an offence pursuant to sections 39, 42 and 53A of the Sexual Offences Act 2003?*

ii. *A care worker who causes or incites sexual activity by an individual (who has a mental disorder) with another person for payment, commits a criminal offence, pursuant to sections 39, 42 and 53A of the Sexual Offences Act 2003. It is not clear if this applies to carers who are providing care to P in their own home, whether employed and funded directly by P (through their deputy) or by a third party, such as a local authority.*

iii. *It is not clear whether there are any similar offences which would apply to professional deputies who are providing the funds for payment of such services or to family members, who may be assisting P to access such services and/or acting as an intermediary between the deputy and the sex worker in the payment of services.*

iv. *It is not clear if any offences would apply only to a deputy acting in a professional capacity.*

v. *P may have capacity to consent to sex but does not have capacity to determine contact, for example, with sex workers. This may cause difficulties in practice – how does the deputy proceed if P has capacity to have sexual relations (and wants them) but does not have capacity to decide contact? In any case, a deputy cannot consent to P having sexual relations if they lack capacity (section 27(1)(b) Mental Capacity Act 2005) but can make a best interests decision about contact.*

vi. *It is not clear if any similar issues arise where the professional deputy is assisting P to access services such as escort or online dating where a future outcome may well include a sexual*

relationship and without which, P would not be likely to meet a potential sexual partner.

vii. *It is not clear if there is any differentiation in potential liability between a personal welfare deputy (or attorney) and a property and affairs deputy (or attorney). Would the position be any different if the property and affairs deputy only paid for the service but the welfare deputy (or a third party) arranged the services and physically assisted P to access.*

14. The concerns expressed above resonate with the issues presented by this case. Unsurprisingly, the statement concluded that many of the members consulted expressed a wish for guidance to be provided to Professional Deputies.

15. I have been considering this case during the course of the third wave of the Covid-19 pandemic public health crisis. Self-evidently, there is an artificiality in addressing questions relating to sexual contact at a time when there are strict, unprecedented privations placed, of necessity, on so much of human interaction. Sensibly, each of the advocates has agreed that, at this hearing, it is unnecessary to consider a care plan for C and/or what, if any, arrangements should be made for him to visit a sex worker. I emphasise that the parameters of this hearing are to be confined to considering the scope and ambit of the applicable law. At a later stage, dependent upon my conclusions, there may/will have to be a careful risk assessment of whether such contact is safe for all concerned and, ultimately, in C's best interests.

The framework of the domestic legislation

16. The Sexual Offences Act 2003 (SOA 2003) provides the applicable framework in the criminal law:

*"**39 Care workers: causing or inciting sexual activity***

(1)A person (A) commits an offence if—

(a) he intentionally causes or incites another person (B) to engage in an activity,

(b) the activity is sexual,

(c) B has a mental disorder,

(d) A knows or could reasonably be expected to know that B has a mental disorder, and

(e) A is involved in B's care in a way that falls within section 42.

(2)Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.

> *(3)A person guilty of an offence under this section, if the activity caused or incited involved—*
>
> > *(a)penetration of B's anus or vagina,*
> >
> > *(b)penetration of B's mouth with a person's penis,*
> >
> > *(c)penetration of a person's anus or vagina with a part of B's body or by B with anything else, or*
> >
> > *(d)penetration of a person's mouth with B's penis, is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.*
>
> *(4)Unless subsection (3) applies, a person guilty of an offence under this section is liable—*
>
> > *(a)on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;*
> >
> > *(b)on conviction on indictment, to imprisonment for a term not exceeding 10 years."*

17. The gravity of the offence is illustrated by the fact that it carries, on conviction on indictment, a maximum sentence of 10 years. Consistent with the philosophy of the Act it should be highlighted that an individual receiving a sentence of imprisonment or a community sentence of at least 12 months would be subject to the provisions of the Notification Requirements of the Sex Offenders Act 1997 for a period of at least 5 years. In lay terms and, as it has become more commonly known, his name would be placed on the 'sex offenders register'.

18. The definition of the phrase "a person involved in B's care" is found in SOA 2003 s42:

> *"**42. Care workers: interpretation***
>
> *(1) For the purposes of sections 38 to 41, a person (A) is involved in the care of another person (B) in a way that falls within this section if any of subsections (2) to (4) applies.*
>
> *(2) This subsection applies if—*
>
> > ***(a) B is accommodated and cared for in a care home, community home, voluntary home, children's home, or premises in Wales at which a secure accommodation service is provided,** and*
> >
> > *(b) A has functions to perform... in the course of employment in the home or the premises which have brought him or are likely to bring him into regular face to face contact with B.*
>
> *(3) This subsection applies if B is a patient for whom services are provided—*
>
> > *(a) by a National Health Service body or an independent medical agency;*
> >
> > *(b) in an independent hospital; or*

(c) in Wales, in an independent clinic, and A has functions to perform for the body or agency or in the hospital or clinic in the course of employment which have brought A or are likely to bring A into regular face to face contact with B.

(4) This subsection applies if A—

(a) is, whether or not in the course of employment, a provider of care, assistance or services to B in connection with B's mental disorder, and

(b) as such, has had or is likely to have regular face to face contact with B.

(5) In this section—

"care home" means—

(a) an establishment in England which is a care home for the purposes of the Care Standards Act 2000 (c. 14); and

(b) a place in Wales at which a care home service, within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 is provided wholly or mainly to persons aged 18 or over;

"children's home"—

(a) has the meaning given by section 1 of the Care Standards Act 2000 in relation to a children's home in England, and

(b) means a place in Wales at which a care home service within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 is provided wholly or mainly to persons under the age of 18;

"community home" has the meaning given by section 53 of the Children Act 1989 (c. 41);

"employment" means any employment, whether paid or unpaid and whether under a contract of service or apprenticeship, under a contract for services, or otherwise than under a contract;

"independent clinic" has the meaning given by section 2 of the Care Standards Act 2000;

"independent hospital"—

(a) in England, means—

(i) a hospital as defined by section 275 of the National Health Service Act 2006 that is not a health service hospital as defined by that section; or

(ii) any other establishment in which any of the services listed in section 22(6) are provided and which is not a health service hospital as so defined; and

(b) in Wales, has the meaning given by section 2 of the Care Standards Act 2000;

> *"independent medical agency" means an undertaking (not being an independent hospital, or in Wales an independent clinic) which consists of or includes the provision of services by medical practitioners;*
>
> *"National Health Service body" means—*
>
> *(a) a Local Health Board,*
>
> *(b) a National Health Service trust,*
>
> *(ba) the Secretary of State in relation to the exercise of functions under section 2A or 2B of, or paragraph 7C, 8 or 12 of Schedule 1 to, the National Health Service Act 2006,*
>
> *(bb) a local authority in relation to the exercise of functions under section 2B or 111 of, or any of paragraphs 1 to 7B, or 13 of Schedule 1 to, the National Health Service Act 2006,*
>
> *(c)...*
>
> *(d) a Special Health Authority; "secure accommodation service" has the meaning given in Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016;*
>
> *"voluntary home" has the meaning given by section 60(3) of the Children Act 1989.*
>
> *(6) In subsection (5), in the definition of "independent medical agency", "undertaking" includes any business or profession and—*
>
> *(a) in relation to a public or local authority, includes the exercise of any functions of that authority; and*
>
> *(b) in relation to any other body of persons, whether corporate or unincorporate, includes any of the activities of that body."*

19. The advocates all agree, correctly in my view, that s.42(4) (my emphasis above) is the pertinent interpretive provision when considering who is encompassed within the scope of s.39. Significantly, s.42(4)(b) illustrates that Parliament was considering the practical and pragmatic aspects of professional assistance and contact in the context of A's official capacity and in connection with B's mental disorder.

20. For completeness and because it has been raised in argument, SOA 2003 s.51 A (as amended) requires to be noted. This concerns the offence of 'soliciting':

> *"**51A Soliciting***
>
> *(1)It is an offence for a person in a street or public place to solicit another (B) for the purpose of obtaining B's sexual services as a prostitute.*
>
> *(2)The reference to a person in a street or public place includes a person in a vehicle in a street or public place.*

> *(3)A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.*
>
> *(4)In this section "street" has the meaning given by section 1(4) of the Street Offences Act 1959."*

21. It is important to emphasise that nobody considers it appropriate for the contemplated sexual activity to be arranged with a street sex worker. Indeed, because of the risks inherent in such a situation, not least and potentially not limited to C, the Local Authority's plan is thought substantially to reduce the risk of this occurring.

22. As Mr Allen, counsel for the applicant, highlights, sex work is not illegal. It is not unlawful for one adult to pay another for sex. The SOA 2003 criminalises matters associated with the practical arrangements such as *'causing and inciting prostitution for gain'*, see s.52; *'controlling prostitution for gain'*, see s.53 and *'keeping a brothel for the purposes of prostitution'*, see s.55. S.53A makes it an offence to pay for the sexual services of a prostitute where, but only where, she or he is subjected to force, threats, coercion or deception. In a striking submission, Mr Allen observes *"King Edward II issued a decree in 1310 requiring that all brothels in London should be closed and, over 700 years later, the focus of the law remains very much the same"*.

23. In a short ex tempore judgment, **Lincolnshire CC v AB [2019] EWCOP 43**, Keehan J expressed views on the scope and ambit of s.39 SOA 2003:

> "*I note that a care worker who causes or incites sexual activity by an individual for payment, with another person, commits a criminal offence, pursuant to ss. 39, 42 and 53A of the Sexual Offences Act 2003.*
>
> *lf care workers who look after and support P were to facilitate such activity, they would be committing a criminal offence and any declaration by me, would not alleviate their liability to be prosecuted.*
>
> *l am entirely satisfied that it is wholly contrary to his best interests for him to have sexual relations with prostitutes. Still less, is it appropriate for this court to sanction the same. On behalf of P, his litigation friend through counsel, Miss Twist, acknowledged those factors, not least the impact of the criminal law and did not seek to pursue an application for the court to grant such declarations. ln my judgment, that was an entirely right and appropriate decision."*

Although Keehan J expresses himself unambiguously, I do not think he would have regarded this ex tempore judgment as comprising an exegesis of the relevant legal framework and applicable case law. Certainly, he did not have the benefit of the extensive argument that has been presented to me.

24. SOA 2003 s.53A, referred to by Keehan J in the Lincolnshire case, provides:

> ***53A Paying for sexual services of a prostitute subjected to force etc.***

> *(1)A person (A) commits an offence if—*
>
> *(a)A makes or promises payment for the sexual services of a prostitute (B),*
>
> *(b)a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and*
>
> *(c)C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).*
>
> *(2)The following are irrelevant—*
>
> *(a)where in the world the sexual services are to be provided and whether those services are provided,*
>
> *(b)whether A is, or ought to be, aware that C has engaged in exploitative conduct.*
>
> *(3)C engages in exploitative conduct if—*
>
> *(a)C uses force, threats (whether or not relating to violence) or any other form of coercion, or*
>
> *(b)C practises any form of deception.*
>
> *(4)A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale*

25. SOA s.53A(2)(b) creates an offence intended to protect exploited sex workers by criminalising their clients; any customer who arranges to pay for sexual activity with a sex worker might technically commit this offence, whatever the state of his knowledge or belief if, but only if, it subsequently transpired that the sex worker was, 'exploited' in the terms prescribed by the section. The offence would potentially capture even the individual who might have taken care to ensure that the sex worker was not exploited.

26. Ms Nina Grahame QC provided one of two advices in respect of the applicable criminal law. In her advice she referred to the CPS charging Guidance, which is in the public domain. Relevantly, it provides that:

> *"This offence was introduced to address the demand for sexual services and reduce all forms of commercial sexual exploitation… it is likely that this offence will be considered in relation to off-street prostitution. lf the police apprehend someone who has paid for sexual services with a person involved in street prostitution, charging the buyer with soliciting may be a more appropriate offence as this does not require proof of exploitative conduct. The offence is most likely to arise in police brothel raids where there is enforcement against suspects controlling or exploiting prostitution for gain and where clients are apprehended in the operation. However, the offence is not limited to particular types of premises. lt could therefore apply to premises which may have a legitimate business, for example a nightclub, as well as on-line internet-based services.*

> *ln considering this offence, the previous history of the buyer may be a relevant consideration when applying the public interest test in the Code."*

27. Section 53A has, to my mind, little, if any, relevance to what is being contemplated for C. Professor Claire De Than provided a statement in these proceedings. Professor De Than is the Chair of an organisation called 'The Outsiders Trust', a senior legal academic and a Jersey Law Commissioner. The Outsiders Trust is a social charity for people with disabilities, it incorporates TLC Trust which focuses on education and support for the provision of 'sexual and intimate services'. The mission of the TLC Trust is described by Professor De Than as trying to ensure *"that disabled people may use sexual and intimate services to help them learn about physical pleasure and may enable them to move forward towards personal sexual relationships"*.

28. All this involves a sphere of life and a facet of interpersonal relationships which I have never had occasion to address before. It is, as I have intimated above, an area of profound sensitivity. The analysis of the rights and interests of those involved requires careful, mature evaluation and a recognition that it is no part of the Court of Protection's role to be judgemental about the way people live their lives, be it with a disability or otherwise. The focus here must be the protection of individual autonomy and an accompanying vigilance to ensure that the vulnerable are not exploited or placed at risk of harm. I recognise that, in this context, it is important to appreciate that 'vulnerability' may not be confined to the protected party in the proceedings.

29. Professor De Than makes the following observation about the wider resources, organisations or websites which provide access to the services of a paid sex worker for a person with a disability:

> *"There are other disability rights charities which will provide advice and some support, and there are plenty of independent sex workers who have experience in working with people with disabilities. However, I am not aware of any other organisations in the UK which are charitable, vet sex workers carefully, and provide anything like such a wide range of support as that available from The Outsiders Trust."*

30. There is a clear policy in place for TLC, concerning the breadth and scope of its services, how these are best provided and in respect of access. There are rules both for the providers of sexual services and for those who access their services. It is convenient to set them out:

i. ***Providers***

> *Providers must apply to advertise on the website through a screening process, in which they must provide evidence of their real identity and that they have previous experience of providing sexual services, either through their own website or on an existing adult services platform. They are also asked about their personal and professional experiences of disability and how that might make them suitable for such work. People who contact registered providers are told that any bad experience should be reported*

back to TLC immediately so that they can take the appropriate action and potentially remove the provider from the site.

ii. ***Service users***

Anyone can see the profiles of vetted sexual service providers on the TLC website, and it is not necessary to become a member in order to make contact with a provider. People with disabilities can also become Members of the TLC Trust and provide each other with support, as well as accessing additional advice. Membership rules are:

'You must have either a disability, disabling illness, learning difficulty, mental illness or be ASD. You can evidence this in a variety of ways including parking permits, receipt of certain benefits and letters from doctors or any other professional. If you are already a member of The Outsiders then this also qualifies you. You might wish to purchase a sexual service, but you don't know what to expect or how to ask for things. Think – plan – then contact to book. Please treat the service providers advertising on this site with the same respect you would any other professional. They experience a lot of people wasting their time and can have a decreased tolerance if they think you are messing them around. Think how you would book a hair appointment and do this the same way. Read their profile thoroughly before making any initial contact. Check that they offer the services that you would like to try and that they are happy to work with the illness/disability/symptoms that you have. Check if they are happy to travel or not. There is no point contacting a provider and asking a load of questions that they have spent time and effort putting into their advert. They will probably consider you a timewaster and not engage. If you do not have a profile, then give the service provider information they need to know such as your living situation, where you would like to meet, your disability/symptoms etc. Do not talk or act in an abusive or threatening manner to service providers or other members. Do not talk sexually to a potential provider until you have met them and paid for a service. They are not there to talk to you for free. There are telephone sex chat or text lines available for that. Tell them which services you would like but do not expect sex talk when making a booking. Do not post, send or share any explicit images. Do not haggle.'

31. It is impossible not to be struck by the clinical, pragmatic and even occasionally banal nature of some of these arrangements. It is, I suspect, a far cry from what the public might expect, in the unlikely event that they had ever given the matter any thought. All the sex workers are said to be *'vetted'* and the services are extended, in principle and where possible, to all disabilities. Those reading the extracts above should bear in mind that the language is pared down to communicate as straightforwardly as possible and particularly to a readership who may require concepts to be broken down. '*Vetting'* really implies nothing more, or indeed less, than ascertaining that the sex worker is both respectful to and understanding of the needs and challenges faced by those with disabilities.

32. Providers are asked to tick a list of what disabilities/conditions they are happy to work with, and this appears on their profile. Generally speaking, anyone who is not accepting of people with disabilities would not apply to be vetted:

> *"However, due to the intimate nature of the job and personal issues/experiences of their own, some providers might not be happy to work with certain issues/conditions/disabilities. For example, some providers are happy to deal with incontinence issues, some are not. Some might only offer services at their location and there may be no wheelchair access etc. But equally some come from a background in healthcare, social work or care, and are very relaxed and capable about supporting any disability. It should be noted that there is a very wide range of sexual, intimacy and bodywork services available, not all involving penetrative sex, and the TLC website has a glossary. Some services are regulated professions with insurance, for example sexological bodywork."*

33. Highly pertinent to the issues that I am being asked to consider are the principles that underpin care planning in this sphere. TLC have the following expectations in respect of what would be shared with them in respect of a 'service users' needs:

> *"The service user's support needs, and whether someone will be accompanying them, for example a friend, parent or care provider to prepare them beforehand, wait outside then come back to wash and dress them if necessary. Any information about how they may need to adapt their services to suit the client and to ensure compliance with all relevant laws, including any communication issues, physical boundaries, and what to do if the client needs help during a visit."*

34. Whilst TLC sex workers would not ordinarily expect to be directly involved in constructing a care plan, Professor De Than says that they would be willing to do so. I note that she observes:

> *"I have also worked with various local authorities, agencies and organisations to develop care plans and risk assessments for individuals being supported in their sexual expression, including where a sexual service provider registered on TLC was being hired."*

35. It is necessary to focus on the practical realities of what is likely to be involved in these arrangements, in order properly to test whether they fall within the reach of the law. In particular, whether the kind of support envisaged is inadvertently, or even advertently, prohibited by Section 39 (a) SOA 2003, i.e. whether it can be construed as "intentionally causing or inciting another person to engage in [sexual] activity".

36. Professor De Than's language, in her report, is refreshingly clear and accessible. Manifestly, it reflects her experience of working with a range of individuals, some of whom will be concrete in their thinking style. I sense that the answers are written with a keen appreciation of the fact that the 'service users' are likely to be reassured by plain

speaking and the establishment of clear boundaries. A number of important questions were asked, and it is important that I record both those questions and the answers given:

> *"**Where would be TLC's preferred place to meet service users? Would there be additional costs if the sex workers were to visit the service user at home?***
>
> *These matters can be negotiated individually with the service providers. Some visit, whereas others like to work only in their own place. The services different workers offer also vary. This information will be clearly available on their profile. If the information needed is not there, then ask.*
>
> *"**Would TLC sex workers expect a carer to sit outside a room or wait outside?***
>
> *This depends on the nature of the disability and the wishes of the client; some service providers explain such issues on their profiles. Others can perform care and support tasks themselves.*
>
> ***What is TLC's policy around ongoing contact from service users – i.e. if they were to call or text?***
>
> *Some service providers offer a contact service, virtual relationships ('girlfriend experience') or similar services. Clients are asked not to expect an ongoing relationship for free, unless they have been offered further contact.*
>
> ***How do TLC sex workers manage the services users' expectation of the experience and the services contracted for?***
>
> *They will discuss it in advance of meeting. There is support available from TLC, The Outsiders Trust and its web resources. There is also a phone helpline. I have assisted many agencies in planning and education about expectations and continue to do so.*
>
> ***What information about risk would a TLC sex worker expect to be shared with them before providing services to a service user?***
>
> *Latex allergies are important, since sexual health is taken very seriously. Anything which requires adaptation/adjustment of services or could affect legal liability, whether or not such liability would be related to the sexual encounter. Anything which puts the service provider at personal risk.*
>
> ***Does TLC have a policy for when a service user is displaying a level of risk?***

> *Yes... There are also whistleblowing services and online registers of 'problem clients' but, essentially, this is discussed on an individual basis as and when necessary.*
>
> ***How do TLC sex workers terminate the contracts for services if they feel that they are at risk?***
>
> *This can be agreed in advance and discussed in individual cases, with a warning normally given, but also see above at 3 for the policy.*
>
> ***Are the sex workers in fact willing to enter into contracts with service users who have known risk factors?***
>
> *Yes, some are, and will either indicate such on their profiles or discuss risk and boundaries individually.*
>
> ***Do TLC sex workers have experience of encounters with people who have a level of risk, and what is the policy for mitigating or managing that level of risk?***
>
> *This can all be discussed on an individual basis and put into writing. Advice and support is available from me, and via TLC and The Outsiders Trust.*
>
> ***How is the money exchanged?***
>
> *This is decided by each service provider and is often negotiable. Amazon gift cards, bank transfers and cash are all options."*

The arguments advanced

37. For clarity, I should make it clear that Ms Butler-Cole and Mr McCormack contend that the kind of support contemplated above i.e. assistance with making practical arrangements to contact, visit and pay a sex worker, falls outwith the scope and ambit of Section 39 SOA 2003 and thus does not criminalise those offering the support. In this they are supported by Mr Allen, on behalf of the Local Authority. Ms Paterson, acting on behalf of the Secretary of State for Justice, who was joined as a party to the proceedings, contends that a construction of Section 39 which rendered lawful a carer's assistance to C in securing the services of a sex worker, would be to go beyond the wording of the legislation and *"would amount to an amendment to the law, as opposed to an interpretation, be it purposive or Convention compliant"*. This, it is submitted, would be to *"encroach upon the role of the legislature or Parliamentary sovereignty"*. The CCG submit that the lawfulness of the care plan must be determined by the Court. Mr Karim QC and Ms Campbell, on behalf of the Clinical Commissioning Group, properly highlight that whilst every step should be taken to promote C's personal autonomy, it is also important to protect him and those providing his care. Further, they emphasise that *"it is imperative any package of care is lawful so as not to place any carers liable to criminal prosecution"*. All this is axiomatic.

38. When considering the 'conditions' set out in Section 39 SOA 2003, there can be no dispute, but that C has a "mental disorder"; that such would be known to the carer and

that what is contemplated is sexual activity. The central question is whether the carer is "intentionally causing" or "inciting" C to engage in that activity. Section 39 is intrinsically linked with Section 42 SOA 2003.

39. It strikes me that whatever the detail of the care plan, the individual assisting C will most likely fall within the reach of Section 42. An arrangement calculated to distance or regularly replace the person undertaking the arrangements could only be a device to circumvent the legislation. It would not be appropriate, in any way, for the court to sanction a subterfuge. The question has to be confronted directly i.e. is the assistance prohibited by the legislation?

40. It is important to consider the philosophy and legislative purpose of the SOA 2003. Central to its objectives is a determination to establish a criminal legal framework which incorporated changes in society, and which reflected the reality that protection was required against crimes which either did not exist generations ago or were not sufficiently understood. The legislation seeks properly to emphasise the paramountcy of consent when sexual acts occur between adults. It emphasises the vulnerability of those in relationships predicated on trust, where the imbalance of power can be so stark as to render any sexual element inappropriate and, dependent on the circumstances, sufficient in and of itself to justify criminal sanction.

41. It is of note that Section 45 of the Police, Crime, Sentencing and Courts Bill 2021 ('the Bill') aspires to insert an additional section into the SOA 2003, which seeks to expand the scope of offences, arising in positions of trust, between an offender and a child (offences at s 16 - 19 SOA 2003) beyond a statutory setting (e.g. a care home or hospital), to include sports coaches and faith leaders. Though I have emphasised, in exchanges with counsel, the fundamental errors and dangers inherent in conflating the circumstances of vulnerable adults with children, it is notable for interpretive purposes only, that s 17 (which applies to children) uses identical wording, namely "intentionally causing" or "inciting" B to engage in sexual activity. Though only the latter provision, concerning children, is amended by the Bill, there is a clear continuity of legislative objective i.e. to protect those in relationships where there is an obvious imbalance of power. Whilst I note the thematic continuity here between the SOA 2003 and the Bill, I do not draw upon it as a tool for statutory construction.

42. It is important to recognise that those with mental health disorders have, in the past, effectively been prevented, by the law, from engaging in sexual relations. Though this was undoubtedly, historically, motivated by a paternalistic desire to protect them, it had the countervailing consequence of dismantling their autonomy and failing to respect their fundamental human rights. In this sphere the legislation marks a significant shift. It is no longer the objective of the law to prevent people with mental disorders from having sexual relationships, rather it is to criminalise the exploitation and abuse of such adults by those with whom they are in a relationship of trust. As I have stated above, there is a similar regime, recognising the different but equal vulnerability of children, which seeks to afford them strengthened protection.

43. This focus on victims whose vulnerability is enhanced by the unequal nature of their trusting relationships is reinforced by the sentencing regime, including harsher sentences for repeat sexual offenders and escalating supervision of convicted sex offenders returned to the community. Additionally, and, to my mind relevant at least by

parity of analysis, there is recognition of the insidious nature of the manipulation of both children and the vulnerable, incorporating paedophile 'grooming' into statute for the first time. The dangers presented by the internet for children and the vulnerable are recognised, with the introduction of both civil and criminal measures. Offences of sex trafficking emerge into legislation, also for the first time, again recognising the multifaceted vulnerabilities of the victims of that particular exploitation.

44. Thus, it becomes clear that the scheme of this legislation is substantially, though not exclusively, directed towards the protection of those who are sexually vulnerable in relationships which may easily become exploitative and in which inequality may corrode meaningful consent. The clear intention of Parliament is revealed when the statute is considered in its entirety and the wording given its literal meaning. All this is, in effect, the application of the literal rule of statutory interpretation: see **Fisher v Bell [1960] 3 All ER 731**.

45. As Ms Butler-Cole has submitted, it is possible, to the extent that it is regarded as necessary, to consider a broader canvas when analysing the likely intention of Parliament in the construction of statutory provisions i.e. 'the mischief rule' see: **R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions and Another [2001] 1 All ER 195; Pepper v Hart [1993] AC 593**. I have been referred to **Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences (Cm 5668) (HMSO, 2002)**. This was the white paper which immediately preceded the introduction of the Sexual Offence Bill in November 2002, outlining a proposed new offence of 'breach of a relationship of care'(see para 49 below).

46. I was also taken to **'Setting the Boundaries: Reforming the Law on Sex Offences (Home Office 2000)'**. This is the initial paper by the Home Office (2000), looking at reform of sexual offences. The following may usefully be highlighted:

> "*…We thought that it should be possible to identify those relationships of care where any sexual element would be so wrong and inappropriate as to justify a criminal sanction. In a relationship of trust or care with a vulnerable person the relative imbalance of power can be so great that it is difficult to deny sexual demands or protest effectively about their actions. Consent would either be absent or obtained inappropriately*." (para 4.8.3)

47. This latter document is, in my judgement, a particularly impressive, wide ranging analysis, which also contains an extensive inter country comparative survey of the law and proposals for reform in other jurisdictions (e.g. Australia, New Zealand, Republic of South Africa, United States, The Netherlands, Germany).

48. The common thread, linking these comparative approaches, is the recognition that vulnerable adults share the universal right to a private life, which includes a sexual life, and which is, in this jurisdiction, protected by ECHR. Equally as important but not always easy to achieve is the need to protect, in law, those who are vulnerable to exploitation. The following passages resonate with my observations above:

> *"4.1.3 We considered that vulnerable adults shared the universal right to a private life which is specifically protected by the ECHR,*

and that private life can include a sexual life. On the other hand, those who are vulnerable to exploitation have to be protected by the law:

'The law must balance between two competing interests – protecting people with impaired mental functioning from sexual exploitation, and giving maximum recognition to their sexual rights. The difficulty for the legal system in striking a balance between these interests is compounded by the considerable diversity of people with mental impairment in terms of extent of impairment, living circumstances, and sexual interest and knowledge.' (Law Reform Commission of Victoria (1988) Report No. 15 Sexual Offences against People with Impaired Mental Functioning)"

49. Later:

"4.8 Breach of a relationship of care

4.8.1The abuse of vulnerable people in institutions and the community is a real problem, and one that should not be under-estimated. Our conference heard that many learning impaired people regarded sexual abuse as a normal and expected part of life: a devastating concept. There are many loving and dedicated people working in care; others, however, find the provision of care provides a unique opportunity to use those in their charge for their sexual gratification with little chance of discovery or effective redress. The law needs to deal effectively with abuse by service providers, but all the evidence is that such abuse is hard to detect and harder to prosecute.

4.8.2Those with a mental disorder may not able to make rational choices about sexual relationships and are likely to be strongly influenced by those treating them. The Mental Health Act 1959 (MHA) provides a comprehensive restriction to prevent those caring for mentally disordered people from abusing their position. This seems a sensible and potentially effective offence, although at present there are very few prosecutions or convictions – only 2 or 3 a year.

4.8.3As there seemed to be evidence indicating that caring work offered access to very vulnerable people and the potential for abuse, we decided to explore a different approach to protecting mentally impaired, disordered or otherwise vulnerable people. We already have law in place that deals with certain caring relationships – those with mental patients. Many other countries have adopted law that criminalises inappropriate sexual relationships between carers and recipients of care. The Sexual Offences (Amendment) Bill 2000 applies this principle to 16 and 17-year-old children and certain adults in positions of trust and responsibility. In Chapter 5 we suggest that some family

> ***relationships should not be sexual. We thought that it should be possible to identify those relationships of care where any sexual element would be so wrong and in appropriate as to justify a criminal sanction. In a relationship of trust or care with a vulnerable person the relative imbalance of power can be so great that it is difficult to deny sexual demands or protest effectively about their actions. Consent would either be absent or obtained inappropriately*** (my emphasis).

50. During the investigations in this case, advice has been sought, jointly by the parties, from leading counsel, to consider the relevant provisions of the SOA 2003 and their interaction with these proceedings. Ms Grahame QC provided an advice dated, 16th March 2020 and Ms Kirsty Brimelow QC provided an advice on 9th July 2020. I have found both to be extremely helpful in highlighting relevant material and case law and much of the analysis is also constructive and erudite. Ultimately, of course, it is my task to interpret the meaning of the relevant provisions. The opinions of the lawyers, as they will fully appreciate, carry no evidential weight (see: **Marquis Camden v Commissioners of Inland Revenue** [1914] 1 KB 641: Phipson on Evidence (19th Edition) at [33-86], "*Nor are the opinions of lawyers admissible to explain technical legal terms, or matters of English law...").* That said I should record that Ms Grahame concluded that whilst she did not discount a prosecution for a potential offence pursuant to s. 39 SOA 2003, she considered it "unlikely that the CPS would choose to prosecute a person involved in [C's] care in the circumstances contemplated here."

51. However, Ms Grahame also made the following observation:

> *"In practical terms, every person who directly or indirectly assists [C] in any effective way will be "causing" for the purposes of s.39. The only way to avoid the operation of s.39 would be to ensure that all direct and indirect assistance, including specific risk assessments, is provided by persons not falling within the s.42(4)(b) definition of past, present or future regular face to face contact. Remembering that [C's] social worker and his litigation friend would fall within the s.42(4)(b) definition and cannot legally participate in the process acts as a useful reminder of where the line is likely to be drawn."*

52. I was referred to the relevant case law. To use Ms Grahame's own phrase, the approach of the criminal courts can properly be described as "robust". Any statutory offence which contemplates "causing" another person to commit an act, prohibited in law, emphasises that it should be done on express or implied authority and/or as a result of the exertion of control or influence over the person acting, see: **Att Gen of Hong Kong v Tse Hung-lit [1986] A.C. 876, PC**. The criminal law is inclined, as Ms Grahame recognises, to regard "causation" as a "question of fact" to be addressed on the basis that the term should be given "its common sense meaning", see: **Price v Cromack [1975] 1 WLR 958; Alphacell Ltd v Woodward [1972] A.C. 824 HL**. It follows that an overly legalistic insistence on a line of causation predicated on a "but for" test, is inconsistent with the far more pragmatic approach of the criminal law. I therefore approach the questions of causation and incitement, within s.39, as essentially a question of fact in which the words are given their common sense construction.

53. Ms Brimelow does not proffer an unambiguous conclusion as to how these statutory provisions should be constructed. I make no criticism of her, or indeed Ms Grahame, for that. On the contrary their approach to the questions asked of them strike me as having been addressed cautiously and in measured terms. Ms Brimelow makes several points which require to be highlighted. She submits:

> *"It is difficult to conceive how a prosecution in a scenario of a regular care worker assisting [C] to access a sex worker in safeguarded circumstances pursuant to a court order would satisfy either of the two stages in the Code or be lawful. The latter will be addressed when considered [C's] rights pursuant to Article 8 and Article 14 ECHR."*

54. The Code that Ms Brimelow is referring to is the Code for Crown Prosecutors, 4th January 2019, issued by the Director of Public Prosecutions, authorised by the Prosecution of Offences Act 1985, s.10. I propose to deal with this below, when I consider the submissions made on behalf of the Secretary of State for Justice. Ms Brimelow also submits:

> *"I have been referred to the ex tempore judgment of Keehan J in Lincolnshire County Council v Mr AB [2019] EWCOP 43. However, it does not consider SOA 2003 in detail and therefore the conclusions in §7 and 8 may be incorrect. In addition Keehan J makes no reference to the importance of the principle of autonomy and the rights of people with mental disorders to live their lives fully. There is no balancing exercise as set out in the recent Court of Appeal decision in A Local Authority v JB (Rev 1) [2020] EWCA Civ 735 Baker LJ"*

55. The balancing exercise Ms Brimelow alludes to is that between the obligation to protect the vulnerable whilst being vigilant to preserve their sexual autonomy. In her concluding paragraphs Ms Brimelow proffers the following analysis with which I strongly agree:

> *"Finally, it is important to reflect that SOA 2003 was a progressive piece of legislation; definitively moving the law forward and away from the Sexual Offences Act 1956 where it was an offence for any man to have extra-marital sexual intercourse with a "defective" and where a "defective" man or woman could not give consent to indecent assault. The 1956 Act denied people with severe mental disorders sexual fulfilment; solely on the basis of diagnosis. It also left vulnerable those who were not considered "defective" but who suffered mental disorder and may have lacked capacity to make a choice about sexual activity. The careful exploration of the SOA 2003 offences by the Court of Protection in [C's] case is important. The SOA 2003 offences need to be considered with a clear appreciation of their purpose; including [C's] dignity and rights as person."*

The position of the Secretary of State for Justice

56. In addition to her primary submission, on behalf of the Secretary of State, set out above at para 37, Ms Paterson assesses the approach to be taken if I concluded that C's Article 8 rights are infringed by the wording of s. 39 SOA. Recognising that in that situation a grant of a declaration of incompatibility could be made, pursuant to Section 4 of the Human Rights Act 1998 (HRA), she emphasises that is a discretionary exercise. Ms Paterson contends, that if I find myself at that point, I should exercise my discretion against making the grant. It is submitted that the SOA aspires, inter alia, to achieve a proportionality between two "legitimate" and objective aims: the protection of vulnerable adults from any form of sexual and/or emotional abuse, arising from their vulnerability; the protection of the Convention rights of third parties which might extend to any risk to a sex worker. It is convenient and for completeness I set out Section 4 HRA 1998 here:

> **"4 Declaration of incompatibility.**
>
> (1)Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2)If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3)Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
>
> (4)If the court is satisfied—
>
> (a)that the provision is incompatible with a Convention right, and
>
> (b)that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
>
> it may make a declaration of that incompatibility."

57. Her analysis leads Ms Paterson to argue thus:

> *"Given the highly sensitive ethical and moral nature of the issues in play before the Court, it is submitted that this is an instance where the margin of appreciation (afforded by the European Court of Human Rights) would be generous and consequently, a declaration would serve no purpose."*

58. In her skeleton argument, Ms Paterson traverses the evolution of the SOA 2003, both in the House of Commons Home Affairs Committee's report and in the House of Lords. She notes that the 'Explanatory Notes to the Act' offer little assistance in respect of the interpretation of s. 39 generally and none in relation to "causing or inciting sexual activity". It is argued that s. 39 when read in conjunction with the notes for section 10

(causing or inciting a child to engage in sexual activity) and section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity), reveal the identified mischief which the legislation is seeking to remedy. This, says Ms Paterson, requires *"the terms of the SOA 2003 to be interpreted through the prism of the protected aims of the legislation towards children and vulnerable adults, borne out of a recognition that the then existing law had failed to provide sufficient safeguards"*. This is really a general statement of policy. It is not, properly analysed, a direct engagement in the exercise of statutory construction. Indeed, Ms Paterson goes on to draw upon the Crown Prosecution Service's guidance: Prostitution and Exploitation of Prostitutes, contending that this too might cast a light on what Parliament must have intended in selecting the wording of s. 39 SOA 2003.

> "The Crown Prosecution Service's guidance states that *"those who sell sex should not be routinely prosecuted as offenders. The emphasis should be to encourage them to engage with support services and to find routes out of prostitution."* Although the guidance is directed towards circumstances in which sex workers have been coerced into providing sexual services, the thrust of the document is clear; prostitution and the activities which surround it are undesirable and are contrary to public policy."

This is an ambitious submission. With respect to Ms Paterson, there is a conflation of two concepts here. Whilst it is no doubt desirable to encourage "routes out of prostitution" as a central tenet of CPS guidance, that is entirely different to asserting that prostitution is contrary to public policy. Parliament has chosen not to criminalise prostitution. In any event, none of this illuminates the proper construction of s. 39 SOA.

59. The explanatory notes to Section 10 contain the words *"the incitement constitutes an offence whether or not the activity incited actually takes place. Whether or not the child consented to the activity caused or incited, or responds to the incitement, is irrelevant."* The explanatory notes contain no commentary on s. 39. Section 39 is concerned with adults with mental disorders, not with children. The two groups are entirely different and should always be recognised as such. To fail to do so would be to corrode our evolved and evolving understanding of the importance of respecting the autonomy of adults with learning disabilities. As Ms Paterson recognises, the above wording (from the explanatory notes to s. 10) if applied to s. 39 would suggest that "any action" by a carer which "in any way" prompts or triggers or might prompt or trigger sexual behaviour in a learning-disabled adult would fall within the contemplated ambit of s. 39. Moreover, s. 39 would apply whether the sexual behaviour in fact took place and irrespective of capacitous consent. The rigorous approach to s. 10 is intended to protect children. To superimpose it on adults who are assessed as having capacity to consent to sexual relations is actively to unpick the central objectives of the legislation. It is a reversion to paternalism.

60. Ms Paterson submits *"it would be incongruous and illogical if another interpretation could be attached to s. 39 SOA, given the similarity of the wording to that in ss 10 and 17 SOA."* Such an approach, to my mind, requires a wholesale departure from the primary principles of statutory construction (discussed above). It also delivers an outcome which is, as I have said, regressive. Additionally, it must be noted that it would deliver an unworkable result and thus could not be what Parliament intended. In

circumstances where an established or married couple, as often happens, are assisted by carers to spend "private time" together, the carer would, on Ms Paterson's construction, be guilty of a criminal offence. These arrangements are routinely and sensitively put in place and, where required, approved by the Court.

61. Moreover, for the reasons that Ms Grahame analysed, if a carer is prosecuted in these circumstances for an offence deemed to be contrary to s. 39, it lets in the possibility that others who assist or participate with the carer (e.g. administrative staff, legal advisers, perhaps even the sex worker) might themselves commit an offence under the **Serious Crimes Act 2007**, which is constructed to capture those intentionally encouraging or assisting crime. Thus, the outcome would be that legislation intending to protect the safety and promote the autonomy of the vulnerable would have become an instrument by which those very objectives would be subverted and in circumstances which could only be regarded as discriminatory.

62. Ms Paterson's oral submissions took a very different focus to those advanced in her written argument. She concentrated instead on the Code for Crown Prosecutors and general public interest considerations. The following guidance needs to be considered:

> ***Offences by care workers against persons with a mental disorder*** *(sections 38-41)*
> *The purpose of these offences relates to the protection of those who have the capacity to consent, but who, for reasons associated with their mental disorder, may agree to sexual activity solely because they are influenced by their familiarity with and/or dependency upon the carer.*
>
> ***Charging practice***
> *Sections 38 and 39 carry a high maximum penalty because it is designed as a 'catch all' offence. The prosecution is not required to prove (sections 38-4J) that the victim has either 'an inability to refuse' or has been given an inducement, threat or deception. Where these elements cannot be proved or are difficult to prove and the defendant is in a position of care, these offences should be charged.*
>
> ***Code for Crown Prosecutors - considerations***
> *A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. Given the seriousness of these offences a prosecution will normally be required.*

63. Statistical research (2011 – 2018) reveals a very small number of s.39 prosecutions with fewer convictions. Logically this has no bearing at all on the exercise with which I am engaged but, given that expert legal opinions were sought in relation to the prospect of any prosecution, it is informative to consider the available wider statistical data. Of course, the number of prosecutions and successful convictions may bear little relationship to actual complaints. The CPS Code for Crown Prosecutors confirms the general approach to charging offences:

> *"2.2 The decision to prosecute or to recommend an out-of-court disposal is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care.*
>
> *2.3 It is the duty of prosecutors to make sure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible. Casework decisions taken fairly, impartially and with integrity help to secure justice for victims, witnesses, suspects, defendants and the public. Prosecutors must ensure that the law is properly applied, that relevant evidence is put before the court and that obligations of disclosure are complied with.*
>
> *2.4 Although each case must be considered on its own facts and on its own merits, there are general principles that apply in every case.*
>
> *2.5 When making decisions, prosecutors must be fair and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity of the suspect, defendant, victim or any witness influence their decisions. Neither must they be motivated by political considerations. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.*
>
> *2.6 The CPS is a public authority for the purposes of current, relevant equality legislation. Prosecutors are bound by the duties set out in this legislation.*
>
> *2.7 Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998, at each stage of a case. They must comply with any guidelines issued by the Attorney General and with the policies and guidance of the CPS issued on behalf of the DPP, unless it is determined that there are exceptional circumstances. CPS guidance contains further evidential and public interest factors for specific offences and offenders and is available for the public to view on the CPS website. Prosecutors must also comply with the Criminal Procedure Rules and Criminal Practice Directions, and have regard to the Sentencing Council Guidelines and the obligations arising from international conventions."*

64. For completeness, I should record that following **R (on the application of Purdy) v DPP [2009] UKHL 44**, it might be possible to seek clarification of the criteria that DPP would take into account when deciding whether to prosecute. A proleptic grant of immunity from prosecution, however, is not within the gift of the DPP **(see: R (Pretty) v DPP [2002] 1 AC 800)**.

65. As I have already commented above, Ms Paterson submits that the focus of policing and prosecution policy is to seek to protect those involved in prostitution and, more generally, actively to discourage it. She recognises, as do I, that for many, probably most, prostitution is not a choice. Whether it is driven by financial necessity, addiction, coercion or whether it arises in the context of people trafficking and/or modern-day slavery it risks corrupting human dignity. The State, it is argued, through its care services should not facilitate, encourage or promote it. I would add to this that it is also important to recognise that, however counterintuitive it may sound, not all prostitution is necessarily coercive.

66. I have given the Secretary of State's argument equally careful consideration. The Code for Crown Prosecutors suggests that the following public interest aims should be "borne in mind":

> *i. Those who sell sex should not be routinely prosecuted as offenders. The emphasis should be to encourage them to engage with support services and to find routes out of prostitution;*
>
> *ii. Diversionary approaches should be prioritised over enforcement of offences under the Policing and Crime Act 2009, which should only be used as part of a staged approach that includes warnings and cautions;*
>
> *iii. It will generally be in the public interest to prosecute those who abuse, harm, exploit, or make a living from the earnings of prostitutes;*
>
> *iv. Generally, the more serious the incident and previous offending history, the more likely it is that a prosecution will be required.*

67. The overall approach to the prosecution of prostitution (to use the term in the guidance) is set out in the prefacing paragraphs:

> *"The CPS focuses on the prosecution of those who force others into prostitution, exploit, abuse and harm them. Our joint approach with the police, with the support of other agencies, is to help those involved in prostitution to develop routes out.*
>
> *The context is frequently one of abuse of power, used by those that incite and control prostitution – the majority of whom are men - to control the sellers of sex - the majority of whom are women. However, CPS recognises that these offences can be targeted at all victims, regardless of gender.*
>
> *The CPS charging practice is to tackle those who recruit others into prostitution for their own gain or someone else's, by charging offences of causing, inciting or controlling prostitution for gain, or*

> *trafficking for sexual exploitation. In addition to attracting significant sentences, these offences also provide opportunities for seizure of assets through Proceeds of Crime Act orders and the application of Trafficking Prevention Orders.*
>
> *For those offences which are summary only (loitering and soliciting, kerb crawling, paying for sexual services and advertising prostitution) the police retain the discretion not to arrest or report to the CPS those suspected of committing an offence, or they can charge the offence without reference to a prosecutor, regardless of whether the suspect intends to plead guilty or not guilty."*

68. The objective of the guidance is to provide practical assistance to prosecutors advising on potential offences in this sphere. There is *"autonomy as to how forces police prostitution within their area"*, specifically for those offences which are summary only e.g. soliciting, kerb crawling, keeping a brothel, advertising prostitution etc. The Code highlights that the police retain the discretion:

i. *Not to arrest or report to the CPS those suspected of committing an offence;*

ii. *To charge the offence without reference to a Prosecutor, regardless of whether the suspect intends to plead guilty or not guilty;*

iii. *To issue a simple caution to a suspect;*

iv. *To decide that no further action should be taken; or*

v. *To issue a conditional caution if they consider that the suspect might be suitable.*

69. It is clear both from the above and from a reading of the guidance in its entirety, that its objective is to distil the central principles of the SOA 2003, along with the other relevant legislation, as well as to codify a recognition of the particular importance of working closely with the police in a pragmatic manner when dealing with all prostitution-related issues. At its heart lies a realistic recognition of what is termed *"the diverse nature of prostitution and the different challenges in responding"*. The following extract requires to be highlighted:

> *"The strategic principles for policing prostitution emphasise that those who sell sex should not be treated as offenders but as people who may be or become victims of crime. Prostitution should be tackled in partnership with other organisations and projects offering support services."*

70. The guidance strikes me as establishing an intelligent and sensitive approach to a sphere of interpersonal relationships which though the circumstances in which they occur may frequently be criminalised, the commercial transaction of sexual relations in reward for payment is not. The permissive and enlightened approach both in the Code and in the ethos of the approach to policing has been pursued for circa 20 years. It is to be noted that a similar approach is deployed e.g. in Spain, Italy, Austria, Germany, Greece, and many other countries. The nature and extent of the regulations may vary in each jurisdiction, but, as in the UK, sex work or prostitution is not, in itself, illegal.

71. Thus, properly analysed the position of the Secretary of State on this point becomes logically unsustainable. Whilst it is entirely understandable that he would not wish to be seen to act in a way which might be perceived as encouraging prostitution, the fact remains that the act is legal. The Secretary of State may not obstruct those who wish to participate in lawful transactions nor, logically those who wish to help them be they carers or otherwise. The progressive approach of either the CPS or the Police to the prosecution of sex workers, whose activities may take them outside the law, has no real bearing on what is, ultimately, a matter of statutory construction. The argument, on behalf of the Secretary of State, though it raises challenging ethical and moral issues, does not engage with what I must decide.

72. Whilst it is entirely right to encourage policing and prosecuting in a way which is driven by a desire to protect the vulnerable and pursue those who exploit others, the Code goes no further. Neither, in my view, should this court. The Secretary of State adopts the philosophy of the Code, by parity of analysis, to extrapolate a moral obligation actively to discourage prostitution in all circumstances. Such an approach fails to recognise the autonomy of those involved in the sexual transaction and the fact that prostitution has not been criminalised. Neither the Secretary of State nor I have been charged with the responsibility of resolving the moral and ethical issues that are raised. Those are issues for the individuals themselves. Parliament has recognised that the State should retreat from this sexual arena. Both the Court and the Secretary of State are bound by the expressed will of Parliament. The only question, as I have set out above, is whether Parliament has expressed itself with sufficient clarity.

Human Rights

73. The first question that arises is whether C's rights are engaged by Article 8 ECHR. Though Ms Paterson has gently tested the point, I have had little difficulty in concluding that Article 8 does extend to a person's sexual life and that in circumstances where, as here, access to a sex worker is lawful (save for the restrictions I have identified above e.g. Section 53A SOA 2003) this too is within the scope of the right. In **Pretty v UK [2002] ECHR 427** at para 61:

> *'the concept of "private life" is a broad term not susceptible to exhaustive definition…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*.'

74. The principle articulated above is now well-established see: **EB v France [2008] 43546/02**

> The Court has, however, previously held that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, p. 33, § 29), the right to "personal development" (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I) or the right to self-determination as

> such (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). It encompasses elements such as names (see *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 (see, for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and *Laskey, Jaggard and Brown v. the United Kingdom,* judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36), and the right to respect for both the decisions to have and not to have a child (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-...).

75. For completeness Article 8 ECHR provides:

> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

76. It must be emphasised that an Article 8 right imposes a positive obligation of the State to ensure that it is not breached see: **Botta v Italy [1998] 26 EHRR 241**:

> *"33. In the instant case the applicant complained in substance not of action but of a lack of action by the State. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see the X and Y v. the Netherlands judgment of 26 March 1985, Series A no. 91, p. 11, § 23, and the Stjerna v. Finland judgment of 25 November 1994, Series A no. 299-B, p. 61, § 38). However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation."*

77. Baker J, as he then was, emphasised and applied the above in our domestic law in **Re: TZ (no. 2) [2014] EWCOP 973** at para 46. The European case law also reveals and

conclusively, that acts committed by third parties which are criminalised by the member state, do not displace an identified Article 8 right i.e. the right remains engaged, see: **Dubská and Krejzová v The Czech Republic [2016] ECHR 1004; Ternovsky v Hungary ((Application no. 67545/09, 14 March 2011)**.

78. At paragraph 61 (above) I discussed how the interpretation of Section 39 SOA 2003, contended for by the Secretary of State, could be discriminatory towards people with disabilities. It is necessary therefore, to consider Article 14 ECHR. Consensual sexual activity constitutes one of the most intimate facets of an individual's private life. It is axiomatic that any interference with this Article 8 right, by a public authority or otherwise, must be justified by cogent and serious reasons. Article 14 provides:

> **"Prohibition of discrimination**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

79. The interrelationship of Article 8 and 14 is now reinforced by the provisions within the **Convention on the Rights of Persons with Disabilities** (CRPD). It is important to note that when the Convention and its Optional Protocol (A/RES/61/106) was adopted on 13th December 2006 at the United Nations Headquarters in New York, there were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention (the Convention was opened for signature on 30th March 2007). This is the highest number of signatories in history to a UN Convention on its opening day. It was the first comprehensive human rights treaty of the 21st century and is the first human rights convention to be open for signature by regional integration organisations. The Convention entered into force on 3rd May 2008. It is a powerful indicator of international recognition of the obligations actively to prevent discrimination against people with disabilities.

80. Article 23 addresses the elimination of discrimination within the sphere of interpersonal relationships. Article 25 considers the provision of services in sexual and reproductive health. Ms Brimelow submits "it is clear that the CRPD envisages that persons with disabilities can and will engage in sexual relationships and should not be discriminated against in their ability to do so." I agree.

81. The essence of discrimination is that a measure taken has a disproportionate impact on a particular group. This may arise collaterally as well as being specifically targeted, see: **DH v Czech Republic (2008) 23 BRAC 526** at para 175. The domestic approach can be seen in e.g.: **R (Stott) v Secretary of State for Justice [2018] UKSC 59** per Lady Black:

> *"8. In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated*

> *differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173. He observed that once the first two elements are satisfied:*
>
> > *"the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."*

82. Analysing the four distinct elements, set out by Lady Black above, which are required to establish the basis of an Article 14 violation, it is clear, to my mind, that the interference with Article 8 rights, effectively imposed by a restrictive interpretation of Section 39 SOA 2003, would apply disproportionately to those with a mental disorder, perhaps only to that group. As Ms Butler-Cole points out, an individual who has physical disabilities and who needs assistance of carers to arrange access to sexual activity is likely to be treated differently. The approach taken by the Courts is set out in **AL (Serbia) [2008] 4 All ER 634**, per Baroness Hale of Richmond:

> *24. It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment". Lord Nicholls put it this way in R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173, at para 3:*
>
> > *". . . the essential, question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the*

> *position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."*

25. *Nevertheless, as the very helpful analysis of the Strasbourg case law on article 14, carried out on behalf of Mr AL, shows, in only a handful of cases has the Court found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman, in Civil Liberties and Human Rights in England and Wales, 2nd ed (2002), p 144, quoted by Lord Walker in the Carson case, at para 65:*

> *"The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe,... 'in most instances of the Strasbourg case law . . . the comparability test is glossed over, and the emphasis is (almost) completely on the justification test'."*

A recent exception, Burden v United Kingdom, app no 13378/05, 29 April 2008, is instructive. Two sisters, who had lived together for many years, complained that when one of them died, the survivor would be required to pay inheritance tax on their home, whereas a surviving spouse or civil partner would not. A Chamber of the Strasbourg Court found, by four votes to three, that the difference in treatment was justified. A Grand Chamber found, by fifteen votes to two, that the siblings were not in an analogous situation to spouses or civil partners, first because consanguinity and affinity are different kinds of relationship, and secondly because of the legal consequences which the latter brings. But Judges Bratza and Björgvinsson, who concurred in the result, would have preferred the approach of the Chamber; and the two dissenting judges thought that the two sorts of couple were in an analogous situation. This suggests that, unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.

83. Applying the above analysis drives me to the conclusion that the interference with Article 8 rights, consequent upon the restrictive interpretation of Section 39 SOA 2003,

contended for by the Secretary of State, is indirectly or collaterally discriminatory towards C and to others with mental health disorders. Its effect would be to criminalise those who care for individuals with a particular type of disability. Ms Butler-Cole submits that this *'restricts the opportunity to enjoy a sex life to some but not others.'* The pertinent question can, to my mind, be tightly framed i.e. can the difference in treatment consequent upon the construction argued by Ms Paterson, really withstand scrutiny? If it had a legitimate aim it may well do so, but I do not consider that it has nor, even if it did, would I consider the impact on those with disabilities to be proportionate. I consider Ms Butler-Cole's submission to be well founded and properly made. She identifies a paradigm of discrimination in respect of which there is no objective, cogent or reasonable justification.

84. I have been addressed by each of the advocates on the obligation to consider Section 3 HRA 1998:

> **3. Interpretation of legislation.**
>
> (1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2)This section—
>
> (a)applies to primary legislation and subordinate legislation whenever enacted;
>
> (b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

85. Section 3 HRA 1998 introduced a new instrument of statutory construction, obliging the court to interpret domestic legislation, wherever possible, in a manner which is Convention compliant. As I have foreshadowed above, I consider that the words of the statute, when given their obvious meaning and considered in the context of the objectives of the statute as a whole, reveal their purpose in a way which does not compromise C's Article 8 rights. Accordingly, I am not required to enlist the aid of Section 3. Were it necessary to do so, I would have little difficulty in interpreting Section 39 SOA 2003 in a Convention compliant way. I consider the grain of the legislation would assist that exercise, for all the reasons I have set out above. In passing, it is instructive to note that where the Convention requires language to be construed in a particular way to achieve an identified purpose, the obligation is not displaced by the fact that the same phrases may have another meaning in a different statute, see: **R (on the application of Hurst) v Northern District of London Coroner [2007] UKHL 13** at [52], per Lord Brown of Eaton-Under-Heywood:

> *"52. I turn, therefore, to the other limb of this argument, the submission that Middleton is now binding authority on the meaning of section 11 in all circumstances, a conclusion, as already explained, plainly contrary to what the House*

in Middleton intended. The answer to it in my judgment is to be found, as the intervener argues, in the analogous field of European Community law where, pursuant to Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135, a similarly strong interpretive obligation is imposed on member states to construe domestic legislation whenever possible so as to produce compatibility with European Community law. The closeness of this analogy has been recognised by the House in Ghaidan v Godin-Mendoza [2004] 2 AC 557—see particularly Lord Steyn's opinion at para 45. Where the Marleasing approach applies, the interpretative effect it produces upon domestic legislation is strictly confined to those cases where, on their particular facts, the application of the domestic legislation in its ordinary meaning would produce a result incompatible with the relevant European Community legislation. In cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way. Thus in R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85, Part II of the Merchant Shipping Act 1988 was to be disapplied in those cases where its operation would infringe directly effective European Community rights; but not otherwise. Similarly in Imperial Chemical Industries plc v Colmer (Inspector of Taxes)(No 2) [1999] 1 WLR 2035 the House, following a reference to the Court of Justice of the European Communities (Imperial Chemical Industries plc v Colmer [1999] 1 WLR 108), held that ICI remained bound by domestic legislation upon its ordinary meaning notwithstanding that in certain circumstances such a construction would be incompatible with European Community rights. This principle was again applied by the Court of Appeal in Gingi v Secretary of State for Work and Pensions [2002] 1 CMLR 587 where Arden LJ expressly approved the following passage from Bennion, Statutory Interpretation, 4th ed (2002), p1117:

> *"It is legitimate for the national court, in relation to a particular enactment of the national law, to give it a meaning in cases covered by the Community law which is inconsistent with the meaning it has in cases not covered by the Community law. While it is at first sight odd that the same words should have a different meaning in different cases, we are dealing with a situation which is odd in juristic terms."*

Buxton LJ, who gave the leading judgment in Gingi, recognised the relevance of the principle to the present case and, as already stated, rejected this limb of the respondent's argument. He was right to do so."

Conclusions

86. This application does not raise any issues about the legality of, or social attitudes towards sex work or, as it is termed in the criminal law, prostitution. Whilst some activities surrounding prostitution are criminalised, the act itself is not. At this hearing and in this judgment, I am not considering any plan for C to visit a sex worker. That decision will be for another day when a comprehensive risk assessment has been undertaken and a care plan devised which will illuminate whether and if so, how such a visit may be arranged. As is recognised, the matrix of risk in C's present situation is likely to be very different from that which obtained in a psychotic episode he experienced as a young person. Here I have constrained myself to the interpretation of Section 39 SOA 2003.

87. Though this case raises an important point, it has not required an urgent or indeed speedy decision. That is something of a rarity in the Court of Protection and particularly in the past twelve months. Since I heard the arguments, the UK has been engaged in a further period of what has become known as 'lockdown'. In this global public health crisis, human contact has been restricted to an unprecedented degree. It is self-evident that the nationally imposed prohibitions must extend to sexual contact, commercially arranged, between strangers. This has given me the luxury of being able to consider the matters raised by this application at greater length than would ordinarily have been available to me. Moreover, it struck a dissonant note, to my mind, to hand down a judgment such as this at the height of a protracted period of national social isolation.

88. Those who read this judgment will notice that I have used the terms 'prostitute' and 'sex worker' interchangeably, for the reasons I have alluded to above. The former has an intentionally pejorative connotation, the latter signifies a degree of volition which will not always reflect the reality. Both terms are therefore unsatisfactory in different ways. I have taken some time in the above passages to set out some of the options and agencies that would be available to C. I have done this to give context to the application and in order that the submissions I have been hearing do not become artificially separated from the reality of the available options. Whilst I consider this contextualising of the application to be important, it has no bearing on the interpretative exercise.

89. The central philosophy of the SOA is to protect those in relationships predicated on trust where the relationship itself elevates vulnerability. This essentially progressive legislation has been careful, in my judgement, to avoid constricting the life opportunities of those with learning disabilities or mental disorders. In contrast to earlier legislation it seeks to achieve protection of the vulnerable without resort to paternalism. The ambition of the Act is to empower, liberate and promote the autonomy of those with mental disorders. It signals a shift away from a regime which was recognised to be overly restrictive and not sufficiently understanding of the rights and liberties of those confronting life with mental disorders. Both the SOA and the Code for Crown Prosecutors (considered above at para 63) plainly take account of the UK's obligations arising from international conventions.

90. The Act brings a range of professionals within the ambit of the criminal law, if they abuse the power bestowed on them by the unequal nature of their relationships with vulnerable adults or children. As such the Act is both promoting free and independent decision taking by adults with mental disabilities, whilst protecting them from harm in

relationships where independent choices are occluded by an imbalance of power. It is tailored to promoting the right to enjoy a private life, it is not structured in a way that is intended to curtail it. In the past legislation endeavoured to prevent those with mental disorders from engaging in sexual relations. The SOA plots a different course. At risk of repetition, I would emphasise the duality of approach in the SOA, in effect striking a balance between protecting those with mental disorders whilst enabling independent choices, in this most important sphere of human interaction. It follows, of course, that such choices are not confined to those which might be characterised as good or virtuous but extend to those which may be regarded, by some, as morally distasteful or dubious. Protection from discrimination facilitates informed decision taking. Those decisions may be bad ones as well as good. This is the essence of autonomy.

91. In C's case there is clear and cogent evidence that he has the capacity to engage in sexual relations and to decide to have contact with a sex worker. He understands the importance of consent both prior to and during sexual contact. He appreciates the link between sexual intercourse and pregnancy. He recognises the possibility of sexually transmitted disease. He lacks capacity to make the practical arrangements involved in identifying a suitable and safe sex worker and is unable to negotiate the financial transaction. What is proposed is that C will be assisted in these arrangements by carers who are sympathetic and content to help him. As I have set out above, this is delicate but not unfamiliar terrain (see para 10 et seq.) I reiterate, this requires to be addressed with both maturity and sensitivity.

92. Section 39 criminalises care workers who are found to be "causing or inciting sexual activity". Here however, the wish to experience sex is articulated clearly and consistently by C himself. He reasons that his overall presentation, the challenges he faces in his general functioning (into which he has some insight) and the circumstances in which he lives, all strongly militate against his being able to find a girlfriend. He lacks the capacity to make informed decisions in his use of the internet. His use of the internet is therefore restricted and monitored. This too closes opportunities for social interaction. C makes the utilitarian calculation that if he is to experience sex, which he strongly wishes to do, he will have to pay for it. C has repeated his wishes to his carers consistently and cogently over the course of the last 3 years. I met with him, via a video conferencing platform. He understands that I am considering what the law permits and that should I come to a conclusion that the law will not stand in the way of carers who are willing and able to help C achieve his wishes, any plans will have to await greater progress in the battle against the pandemic.

93. The mischief of Section 39 SOA 2003, as elsewhere in the legislation, is exploitation of the vulnerable. The provision is perhaps not drafted with pellucid clarity, but its objectives are identifiable. It is intended to signal unambiguous disapprobation of people employed in caring roles (i.e. care workers) who cause or incite sexual activity by a person for whom they are professionally responsible. The legislative objective is to criminalise a serious breach of trust and, as I have commented, attracts a significant custodial sentence. The words of the statute need to be given their natural and obvious meaning. They are intending to criminalise those in a position of authority and trust whose actions are calculated to repress the autonomy of those with a mental disorder, in the sphere of sexual relations. Section 39 is structured to protect vulnerable adults from others, not from themselves. It is concerned to reduce the risk of sexual exploitation, not to repress autonomous sexual expression. The language of the section

is not apt to criminalise carers motivated to facilitate such expression. In my judgement, the expanded interpretation of this provision, contended for on behalf of the Secretary of State, requires the language of the section to be distorted and the philosophy of the Act to be disregarded.

94. Though at risk of repetition, I reiterate that the proposals contemplated here strike me as being far removed from the identified mischief of the relevant provisions. To interpret them as encompassing the proposed actions of the care workers, requires both a distortion of the plain language of the statute and a subversion of the consistently reiterated objectives of the SOA itself. Indeed, given that the Act embraced an evolved understanding of the rights of people with learning disabilities and mental disorder, the more restrictive interpretation, suggested by Ms Paterson, would run entirely counter to its central philosophy. Ms Paterson, sensibly to my mind, recognises the force of the above. Instead, she concentrates her argument on general policy grounds, as I have set out. There is a logical paradox in the reasoning of the Secretary of State. He wishes to discourage prostitution, which many would think to be a laudable objective. Parliament, however, has recognised the futility of seeking to criminalise prostitution and, accordingly, it remains legal. Thus, the Secretary of State, in this instance, finds himself in the invidious position of trying to discourage, by guidelines and policy, that which the law allows. Where that discouragement has equal impact on society generally it may be a reasonable objective. Where it operates to restrict the autonomy of a particular group, as here, it cannot be justified.

95. It follows that, having applied the primary principles of statutory construction to arrive at the above interpretation, it is entirely unnecessary for me to deploy Section 3 HRA 1998 in order to construe a legal meaning which is compatible with Convention rights, see: **Ghaidan v Godin-Mendoza [2004] 2 AC 557**. These domestic provisions are entirely consistent with the fundamental rights and freedoms protected by the ECHR. However, it is important to record I consider that had I been required to have recourse to Section 3, I would have had little hesitation in concluding that the Convention required the construction that I had already arrived at. Any other interpretation would, in my judgment, go entirely 'against the grain' of the SOA.

96. Following the case of **London Borough of Tower Hamlets v NB (consent to sex) [2019] EWCOP 27** there was a good deal of misinformed commentary. That case also involved the rights of people with disorders of the mind to enjoy a sex life, where capacity to consent remained. Judges develop a phlegmatic response to inaccurate reporting but the impact on families can be profound and pervasive. At the heart of this case is a young man who faces many challenges in life and whose emotional security remains fragile. In due course I will have to consider whether it is in his best interests to pursue the course that he has set his mind on. As part of that evaluative exercise, I will have in mind that it will never be in C's interest to put himself or others at risk.