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Case Numbers and initials of P:
1272635T (JM)
12727467 (AMY)
12738724 (JG)
12240569 (MM)
12755071 (VE)

Date: 10 March 2016

IN THE COURT OF PROTECTION
(Sitting in Open Court)

Before MR JUSTICE CHARLES

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

RE: JM, AMY, JG, MM and VE

Conrad Hallin (instructed by Gateshead Council Corporate Services and Governance (re JM); London Borough of Tower Hamlets Legal Services (re AMY); Hill Dickinson LLP (re JG); Manchester City Council Legal Services Division (re MM); and Blackburn with Darwen Borough Council (re VE)
Jason Coppel QC and Rachel Kamm (instructed by the Government Legal Department) for the Secretary of State for Health and the Secretary of State for Justice
Bridget Dolan (instructed by the Official Solicitor) for the Official Solicitor
Stephen Broach (instructed by the Law Society's Legal Services Department) for the Law Society of England and Wales (written submissions only)

Hearing dates: 3 and 4 December 2015 and 13 January 2016

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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MR JUSTICE CHARLES

Charles J:

Introduction

1. These five cases are examples of cases in which the procedure to be adopted by the Court of Protection (COP) was left open in my judgment in *Re NRA & Others* [2015] EWCOP 59. That judgment contains the references to the decision of the Supreme Court in *Cheshire West* and of the President and the Court of Appeal in *Re X* which are the essential background to *NRA*.

2. In short, the five cases were chosen as cases in which it was thought that there was no family member or friend who could be appointed as a Rule 3A representative. That is no longer the position in VE and my reference to the test cases in this judgment are to the remaining four.

3. The general approach taken by the Secretary of State, through officials at the Ministry of Justice (the MoJ) and the Department of Health (the DoH), in these test cases means that it is important to remember that they relate to a class of cases in which a welfare order is sought to authorise P's deprivation of liberty ("a DOL welfare order application") and **not** to such applications in general. That class is where the applicant (usually a public authority) is of the view that the application is not controversial and there is no family member or friend who the COP can appoint as a Rule 3A(2)(c) representative.

4. It follows that a general approach that is based on the wide powers of the COP that includes other classes of DOL welfare order applications (e.g. when the case is controversial or when there is a family member or friend who can be appointed as a Rule 3A representative) has to be de-coded:

    i) to relate it to the relevant class of case, and so to ones that are presented as being uncontroversial, and which would have been included in the *Re X* streamlined procedure outlined by the President if it had been approved by the Court of Appeal, and

    ii) to assess which of the theoretically wide range of choices **is actually available on the ground to the COP either as the primary or alternative procedural route for that class of cases**.

5. This means that it is necessary for me to trace the development of the respective positions and evidence of the parties on the procedural route that the COP should take. This has added to the length of this judgment. In doing so and more generally my reference to the Secretary of State (an indivisible office) is to both the Secretary of State for Justice and the Secretary of State for Health and so to central government.

6. It is also important to remember that in *Cheshire West* the Supreme Court has determined that the class of case with which I am concerned involves an objective deprivation of liberty that can only be authorised and thereby made lawful, by a welfare order made by the COP. This conclusion does not provide a label or description for a class of welfare order. Rather, it is a binding conclusion that the position on the ground is that P is being deprived of his liberty which engages:

i) Article 5 and importantly, as the Court of Appeal's reasoning in *Re X* confirms, important principles of the common law directed to ensuring that no-one is unlawfully deprived of their liberty and can challenge it, and so

ii) issues of procedural fairness relating to the imposition of, and the ability to test the lawfulness of, a situation on the ground that amounts to a deprivation of liberty.

7. A consequence of this conclusion of the Supreme Court is that it has, in a time of austerity, imposed major and perhaps unforeseen difficulties and burdens on those responsible for providing, authorising and monitoring the placement and care of a wide range of vulnerable people and if extra resources (alone or coupled with changes to the underlying statutory framework) are required to meet the procedural safeguards required by the *Cheshire West* conclusion in DOL welfare applications within the class represented by the test cases either:

i) those resources have to be provided by central or local government, or

ii) the COP cannot operate a procedure that meets those procedural requirements of Article 5 and the common law and so a procedure that is lawful.

8. The provision of any such resources is highly likely if not inevitably to be at the cost of something else that can also be said to be important, and in the case of local authorities it is highly likely, if not inevitable, that it would be at the expense of the resources available to them to fund the placement and care of vulnerable people. This is an unhappy prospect but, whilst the *Cheshire West* conclusion remains authoritative, it is one that has to be faced by central and local government. The COP cannot itself change that conclusion or create extra resources to enable the COP to adopt a procedure that takes it into account.

9. It is not easy to predict the number of applications and reviews that are within the class to which these test cases are directed. An informal survey was conducted in 2014 by the Association of Directors of Adult Social Services (ADASS) which estimated that there would need to be about 30,000 applications in 2014/15 and 2015/6. The evidence in these test cases and in *NRA* supports that view if all the necessary applications and reviews are brought. This estimate relates to all DOL welfare order applications and the present test cases represent part of that workload. The evidence in these test cases indicates that a high proportion of such cases are likely to be presented as non-contentious and that in over half of such cases it is likely that there will not be a family member or friend who could be appointed as P's Rule 3A representative.

10. So far history does not match such estimates. At present about 90 cases in the class represented by these test cases have been issued and are stayed but for the reasons set out in *NRA*, and confirmed by the evidence in these cases, this does not provide a reliable guide to the number of cases in that class in which, as a result of the decision in *Cheshire West*, public authorities need to apply to the COP for a welfare order to authorise a deprivation of liberty.

11. The existing small numbers of applications and a focus simply on these four cases could found a short term solution (and so a solution for these four cases). Such a

solution de-railed the similar cases in *NRA* as test cases and one of the purposes of these test cases (and my refusal to join P in them and ask the Official Solicitor to act as his litigation friend) has been to enable me to address in the short, medium and longer term the class of cases, expected to be at least in the thousands each year, in which there is no suitable family member or friend who can act as a Rule 3A representative. Naturally, I accept that having done so my task is to make appealable orders in the test cases.

12. Finally, by way of introduction, I mention that:

    i) the cases and this judgment refer to the minimum procedural safeguards that are required. However it seems to me that an approach that leads to a conclusion that the procedural safeguards that are provided and used clearly meets that minimum is to be preferred to one based on just meeting the minimum,

    ii) there are references in the evidence to the Law Commission's investigation and proposed report as a reason why it is difficult to take steps now. However, it seems to me that the length of the timetable for that report and its implementation means that a "wait and see" approach is inappropriate and, in any event, the Law Commission's provisional proposals are heavily dependent on the provision of additional resources and so work on that would inform their work and provide necessary resources for the COP, Ps and their families, and

    iii) the impact of the *Cheshire West* conclusion on resources and procedures extends more widely than DOL welfare order applications and, for example, extends to the DOLS and the appointment of IMCAs and RPRs in that process.

Overview

13. As I pointed out in *NRA*, if professional Rule 3A representatives could be appointed this would satisfy the minimum procedural requirements of a DOL welfare order application and go a long way to meeting the underlying reasoning of the Court of Appeal in *Re X*.

14. An obvious potential source for such Rule 3A representatives is the pool or pools of persons from whom IMCAs, RPRs and Care Act advocates (see in particular ss. 37 to 39 (including ss. 39A, C and D) of the MCA 2005 and s. 67 of the Care Act 2014) are or will be appointed. Indeed, the Court of Appeal in *Re X* made particular reference to RPRs and it was their role that I concluded in *NRA* could effectively be replicated (and in respect of continual or regular review on the ground bettered) by family members or friends as Rule 3A representatives.

15. As is well known, the main source of these advocacy services to Ps and others is based on contracts that local authorities have entered into with advocacy providers. My conclusion in *NRA* was that on the evidence then available those contracts and other sources from which such appointments are and can be made by local authorities did not **in practice** provide an available source from which professional and independent Rule 3A representatives could now be appointed in DOL welfare order applications.

16. To enable the COP to meet the minimum procedural safeguards, the primary position of the Secretary of State in *NRA* was that it would be able to appoint professional Rule 3A representatives when there was no family member or friend who could take on this role. So these test cases were his opportunity to provide evidence to show, as he still submits, that there are available sources from which they could **in practice** be appointed by the COP.

17. I am sorry to have to record that in my view the stance of the Secretary of State (through officials at the MoJ and the DoH) in these proceedings has been one in which they have failed to face up to and constructively address the **availability in practice** of such Rule 3A representatives and so this aspect of the issues and problems created for the COP (and others) by the conclusion in *Cheshire West*. Rather they have sought to avoid them by trying to pass them on to local government on an approach based on the existence of an accepted possibility rather than its implementation in practice.

18. In contrast, the applicants before me have taken a constructive and frank approach to the difficulties they face in which they have identified the existing resources and arrangements and so the possibilities that could in theory be adopted or explored if they were responsible for providing extra resources. I am grateful to them.

19. Sadly, the Secretary of State has sought to take advantage of this constructive approach by asserting that this evidence shows that these and other local authorities could and should exercise their powers to provide the extra resources without:

    i) taking a similar constructive approach on a similar hypothesis (namely by addressing what central government could or should do) or

    ii) addressing what (if anything) the Secretary of State would do, or was considering doing, to help local authorities do what he was submitting they could and should do (and so, for example, to reduce harm to the vulnerable that would result from a diversion of local authority resources to meet the minimum procedural requirements).

    This has the hallmarks of an avoidant approach that prioritises budgetary considerations over responsibilities to vulnerable people who the Supreme Court has held are being deprived of their liberty.

20. Naturally, I recognise the existence of significant budgetary pressures and responsibilities on government departments but in my view the approach taken by the MoJ and the DoH is unfortunate.

21. I also recognise that local authorities are under equivalent budgetary pressures and that they form part of the background to their stance:

    i) that the minimum procedural requirements do not necessitate the appointment of professional Rule 3A representatives, and

    ii) that they will not take steps to provide them for appointment by the COP unless they are under a statutory duty to do so.

22. This has led to a "resources led Catch 22" for the COP, and for Ps and their families, because neither central nor local government are offering to create or to try to create a **practically available resource** to enable the COP to meet the minimum procedural requirements by appointing professional Rule 3A representatives.

Overall conclusion

23. I agree with the primary submission of the Secretary of State in *NRA* and in these cases, that the *Re X* streamlined procedure does not meet the minimum procedural requirements but a procedure in which P was not joined as a party and there was no hearing would do so if a Rule 3A representative is appointed for P.

24. I do not agree with the Secretary of State that it is appropriate for the COP to direct the applicants to take steps to provide or identify a person or persons who the COP could so appoint in these test cases or cases in the class represented by these test cases. The main reasons for this are:

    i) the applicant authorities have no statutory duty to do this,

    ii) there is at present no available pool of people who are ready, willing and able to accept such an appointment by the COP,

    iii) absent constructive discussion with and help from central government there is no reasonable prospect that any such pool of people will or should be created by applicant authorities within a reasonable time-scale or at all,

    iv) the applicants in the test cases have expressly confirmed that as they have no statutory duty to do this they will not do it, and

    v) it is unlikely that other applicant authorities would take a different view.

    Rather, in my view, the primary responsibility to provide a resource that enables the COP either to make such appointments or to otherwise meet the minimum procedural requirements in these test cases and cases in the class they represent falls on the Secretary of State, or on the Secretary of State together with the applicant authorities.

25. So, in the four cases in which there is no appropriate family member or friend who could be appointed as a Rule 3A representative I have decided to make an order:

    i) joining both the MoJ and the DoH as parties (but if I receive an assurance that neither will seek to argue that the Crown is divisible and it is the other who should act; I will join only the MoJ),

    ii) inviting the parties to take steps to either:

        a) identify a suitable person who is ready, willing and able to accept immediate appointment as P's Rule 3A representative, or

        b) identify an alternative procedure that is actually available to the COP to take to meet the minimum procedural requirements in the case, and so for example a short term solution for the case (and possibly others in the class represented by the four test cases),

iii) staying the applications pending the identification of a practically available procedure that enables the COP to adopt a procedure that meets the minimum procedural requirements in that case, and

iv) giving all the parties liberty to apply to lift the stay and generally.

26. In my view, this is an order that can and should be made by the COP in other cases in the class represented by these test cases.

27. If and when the relevant authorities make such applications in significant numbers, I acknowledge that, absent the provision of relevant resources, the likelihood, if not the inevitability, is that this approach will create a backlog comprising a very large number of stayed cases. Plainly this is unfortunate but it will identify the extent of the problem and why the COP and the applicant authorities have not been able to progress the applications for welfare orders to authorise P's deprivation of liberty.

28. In my view, this approach places the problem with those responsible for the provision of resources to resolve it namely central government or central and local government acting together. There are a number of routes that the Secretary of State could take, alone or with local authorities, to provide the necessary solution. They include:

i) The Secretary of State could do effectively what the MoJ and the DoH assert local authorities can and would do without significant expenditure or difficulty if so directed by the COP, namely entering into contracts with providers of advocacy services to supply a pool of persons who can be appointed as Rule 3A representatives. If entered into with the Secretary of State these would be new rather than varied contracts. But effectively the Secretary of State would be doing what he asserts local authorities can and should do by agreement with providers of advocacy services.

ii) The Secretary of State could assist local authorities to achieve this result by providing additional resources.

iii) The Secretary of State could set up a pool of accredited legal representatives which is a possibility envisaged by Rule 3A made with the concurrence and so support of the Lord Chancellor.

iv) The Secretary of State could provide further resources to the Official Solicitor.

v) The Secretary of State could make changes to legal aid.

vi) The Secretary of State could provide further resources to enable s. 49 reports to be obtained or to create a wider pool of visitors to enable the COP to instruct them to investigate P's proposed placement.

29. Importantly, and further or alternatively, the Secretary of State could take a case back to the Supreme Court and invite it to revisit its decision in *Cheshire West.*

30. If applicant authorities decide not to spend time and money on making applications that they know are likely to be stayed that backlog will not be as large and the extent of the problem will be less easy to quantify and less obviously placed at the door of

the lack of an available court procedure that meets the minimum procedural requirements.

31. Naturally, in cases in which an applicant can identify a professional Rule 3A representative who is willing to be appointed as a Rule 3A representative, or an alternative way of meeting the minimum procedural requirements, they could avoid that case joining the backlog.

32. In the VE case I will appoint the friend who has been identified as VE's Rule 3A representative and make directions aimed at reducing the difficulties that the applicants (and in particular Gateshead Council) have identified that such appointees have in understanding what they should do. I shall do this in a separate judgment.

Taking stock

33. In *NRA*:

i) I rejected the argument that P **must** be made a party in **every** DOL welfare order application, and

ii) I concluded that, in cases in which it was appropriate to appoint a family member or friend as P's Rule 3A representative to carry out functions directed by the Court, DOL welfare order applications could be determined by making such an appointment and a consideration on the papers (and so without an oral hearing). Naturally, this was subject to the proviso that the paper consideration satisfied the COP that the applications were non-contentious and further directions were not required.

34. Accordingly, I agreed with the primary argument of the Secretary of State that in a DOL welfare order application that was presented as non-controversial the COP can and generally should not make P a party but should appoint a Rule 3A representative. I reached the following conclusions on the procedural requirements of common law fairness and Article 5 (I have added the emphases in bold):

> 194 In my view, in deciding what the minimum is in the circumstances of a given case the determinative issue is whether **in practice** the procedure adopted enables P's position in respect of the essence of P's Article 5 right to be properly protected and promoted ----------
>
> *The practical availability and impact of the procedure advanced by the Official Solicitor, the Law Society and the Secretary of State*
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> 118 They all advance arguments that create a result judged by reference to common law fairness or Article 5 or Article 14 **that is or soon will be one that is not fit for purpose, unless additional public funding is made available to provide one or more of (a) independent litigation friends, (b) legal or other representation or (c) Rule 3A representatives who can effectively provide the necessary safeguards.**
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> 119 No likely source of such funding has been identified by those who would be responsible for the decisions to provide it.
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> 120 In his letter to the court (and so before he put in place the procedure that has enabled him to accept appointment in the majority of the ten test cases before me) the **Official Solicitor points out that the Convention guarantees rights of access to the court that are**

practical and effective not theoretical and illusory. **I agree. He then asserts that unless it is read down Rule 3A(4), which provides that P does not become a party until a litigation friend is appointed, makes the rights of P, if he must be a party, theoretical and illusory. I do not follow this.** Firstly, it is not an assertion based on a lack of P's right to be a party under the relevant procedural rules. Rather, it is based on a delay after an order joining P has been made and **so it is the practical non-availability of the litigation friend** and the problems relating to the effectiveness of interim orders that have this result.

242 Rather, in my view if the Court of Protection was to conclude that the information gathered under the present streamlined process (with or without the suggested improvements set out earlier) does not meet the minimum procedural safeguards there are options that are likely to be more effective in providing those safeguards than joining P as a party and appointing a litigation friend, who if he consented to act would be likely to be the Official Solicitor.

243 For the reasons I have given that route to the implementation of procedural safeguards is not fit for purpose and **it is unlikely that changes relating to the resources of the Official Solicitor and the funding of legal representatives instructed by him can be achieved to render it fit for purpose in the short term.**

244 As appears below, without joining P as a party:

i) a better solution, would be the making of orders for s. 49 reports and the issuing of witness summonses, and

ii) a much better solution, would be that suggested by the Secretary of State (namely the appointment of Rule 3A representatives identified by the local authority) **if and when the Secretary of State takes steps to make it one that is available in practice.**

203 This returns me to the argument advanced by the Secretary of State that a Rule 3A representative identified by the local authority be appointed.

204 The way in which he advanced this argument shows that he must recognise that **if this was a practically available option it would replicate the input that I have decided can be provided by an appropriate family member or friend and so satisfy the procedural safeguards required by Article 5 and common law fairness in non-controversial cases, without joining P as a party.**

205 **To my mind, that replication is an obvious solution that will provide the necessary safeguards more efficiently** and at less expense than either:

i) the making of orders for s. 49 reports and the issuing of witness summonses perhaps coupled with more frequent reviews, or

ii) joining P as a party.

206 **So I urge the Secretary of State and local authorities to consider urgently, and in any event before a test case or cases of this type are before the court, how this solution can be provided on the ground.**

207 If it is not, the likelihood that in such cases the Court of Protection will not provide a procedure that satisfies Article 5 and is fit for purpose, and so will not promote the best interests of the relevant Ps, **cannot be ignored and, in my view, alternatives to address this risk (e.g. changes to legal aid or the resources provided to the Official Solicitor or the provision and funding of accredited legal representatives) should be addressed immediately.**

Part 4

Overall conclusion

> 269 A brief summary of my conclusions is that:
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> (3) I do not have a test case before me in which (a) P has not been joined as a party and the Official Solicitor has not agreed to act as P's litigation friend, and (b) the appointment of a family member or friend as P's Rule 3A representative without joining P as a party is not an available option. Such a test case or cases should be listed for hearing.
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> (4) In contrast to the Court of Appeal in *Re X* and subject to further argument in such a test case or cases, I consider that the way in which the Court of Protection can at present best obtain further information and P's participation in such cases is for it to exercise its investigatory jurisdiction to obtain information through obtaining s. 49 reports or through the issue of a witness summonses. This keeps the matter under the control of the court rather than invoking the necessity of appointing a litigation friend with the problems and delays that history tells us this entails and will entail and **I have concluded is, or shortly will be, not fit for purpose.**
>
> (6) In such cases the argument advanced by the Secretary of State before me that **a Rule 3A representative identified by the local authority be appointed shows that if this was a practically available option it would replicate the input that I have decided can be provided by an appropriate family member or friend and so satisfy the procedural safeguards required by Article 5 and common law fairness in non-controversial cases without joining P as a party.**
>
> (7) That replication is an obvious solution that will provide the necessary safeguards more efficiently and at less expense than either
>
> i) the making of orders for s. 49 reports and the issuing of witness summonses perhaps coupled with more frequent reviews, or
>
> ii) joining P as a party.
>
> (8) **So I urge the Secretary of State and local authorities to consider urgently, and in any event before a test case or cases of this type are before the court, how this solution can be provided on the ground.**

35. In *NRA* I also discussed (a) the resources available to enable the Official Solicitor to act as a litigation friend, which are funded by his budget from the MoJ as the funding department, and (b) the costs of solicitors instructed by the Official Solicitor as P's litigation friend, which are funded by P or by legal aid (and so in that context also the MoJ as the funding department).

36. I concluded that the resource problems of the minimum procedural requirement advanced by the Official Solicitor (i.e. making P a party and appointing a litigation friend) were not limited to the resources of the Official Solicitor but extended to the availability of legal aid (see paragraphs 87 to 108) and I concluded at paragraphs 105 to 108 as follows:

> 105 In any such case, the only reason for having a hearing would be to try and satisfy the legal aid criteria. If the court was to list hearings on that basis issues would, or would be likely to, arise as to whether that satisfied the legal aid criteria or whether the course taken was a contrivance.
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> *Legal aid conclusion*
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> 106 The position is therefore that **there are significant problems relating to the funding of legal representation in applications that are presented as being non-**

> **controversial and which are readily identifiable on the information provided or by limited further investigation as being non-controversial.**
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> 107 Firstly, this is because **they are or are likely to be cases that will not require a hearing and so they do not satisfy the criteria for full or investigative legal aid and legal help will not be available or will not fill that gap**. Secondly, it is **because after any funded investigation they are likely not to satisfy the criteria for full representation because there will be no need for a hearing.** Thirdly, absent changes in approach or regime, my prognosis on obtaining legal aid is that set out in paragraph 94 above.
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> 108 These legal aid problems were not squarely addressed by those advocating the implementation of the obiter conclusion of the Court of Appeal and on my analysis (without assistance of detailed argument on how the representation of P would be funded) **legal aid will not be an available source of funding unless the case turns out to be contentious and so requires a hearing.**

37. This conclusion clearly raised a need to consider whether detailed argument on the legal aid position was necessary because, whatever may previously have been happening in practice, existing practice needed review in the light of that conclusion, in particular by anyone who was arguing for the joinder of P as a party in all cases (or in all cases where there was no family member who should be appointed as a Rule 3A representative).

38. Those extracts from my judgment in *NRA* make it clear to the Official Solicitor and the Secretary of State that, absent further evidence establishing that their respective positions on what is required to satisfy the minimum procedural requirements **is available on the ground and so in practice**, I had concluded that their respective proposals:

    i) were not fit for purpose, and so

    ii) if the COP was to adopt them, it would be adopting a procedure that would not satisfy Article 5 or common law fairness and so would be unlawful.

39. Accordingly, I made it clear that in this next round of test cases both the Secretary of State, the Official Solicitor and the local authority applicants should face up to and address the issue whether the procedural route they were respectively arguing that the COP should take to satisfy the minimum procedural requirements either (a) was practically available, or (b) could and would be made practically available in an appropriate timeframe to provide a process that was fit for purpose rather than one that would or might be fit for purpose if and when it became practically available at some unspecified time in the future.

40. I gave directions inviting them to do this. The Law Society was a party to *Re X* and *NRA* but initially I did not join it as a party to these cases because I thought that the relevant information on the likely availability in practice (rather than in theory) of legal aid to fund solicitors instructed by a litigation friend or a Rule 3A representative would and could be provided by the Official Solicitor and the Secretary of State. But, even after an adjournment for further evidence the practical availability of funding through legal help (for a considerable number of cases) and so the practical application of the explanations of the effect of the relevant regulations provided by the MoJ (and the LAA) was not clear. Accordingly, at the adjourned hearing on 13 January 2016, on its application and without opposition I joined the Law Society as a

party on the basis that it could put in evidence and make submissions in writing and the other parties could reply to them in writing (if so advised). This process ended in mid-February.

The positions of the parties

41. *The position of the applicants.* This has been consistent and has been that the COP can adopt a procedure that complies with the minimum procedural requirements without making P a party and without appointing a Rule 3A representative. They submit that what they propose is the only suggested and available procedure that can be said to be "speedy, practical and effective" and so the only suggested and available process that satisfies that aspect of the minimum procedural requirements.

42. They submit that what they propose also satisfies the remaining minimum procedural requirements. Core points in that argument are that: (a) the COP provides the necessary independent review or check, (b) applicant authorities have a duty of full and frank disclosure, (c) the COP can make a number of directions to obtain more information and can make P a party if it has any doubt about the suitability of a case for a streamlined procedure, and (d) from April 2016 there is the potential for cross-fertilisation of evidence from Care Act assessments and a streamlined procedure. As appears below, I do not accept this part of their submissions. In my view, they run counter to the obiter view of the Court of Appeal in *Re X* and my analysis in *NRA.*

43. *The position of the Official Solicitor.* This developed during the hearing and I think that his final position was that he was no longer suggesting a solution that met the minimum procedural requirements because he now accepts that the solution he was advancing in *Re X* and *NRA* is not available in practice and he did not identify an alternative.

44. At the first hearing in December 2015, in respect of Ps who did not have a family member or friend who could and should be appointed as a Rule 3A representative, the Official Solicitor's position mirrored the one he took in *NRA,* namely that P should be made a party and so a litigation friend (if necessary of last resort and so the Official Solicitor) should be appointed. Initially, he did not address the source of legal aid funding that he maintained would be available post *NRA* to the solicitors he instructed as the litigation friend of last resort. His Counsel was unable to provide a sensible explanation for this omission at the first hearing.

45. On the second day of the first hearing, the Official Solicitor put in a second statement dated 4 December 2015 setting out responses received overnight from six solicitors he instructed regularly to questions on how they would obtain legal aid if there was not going to be a hearing and if the answer was legal help what limitations there were on their ability to service a significant number of cases. The answers contained differing views but did not support a conclusion that in practice legal help was a practical source of funding for a significant number of cases and thus for the procedure being advanced by the Official Solicitor.

46. During the second hearing in January 2016, I was told by the Official Solicitor's Counsel that solicitors the Official Solicitor was instructing regularly were obtaining legal aid funding through legal help and to achieve this were not going on the record. This was a surprising revelation because it did not fully fit with the comments of the

six firms set out in the December statement and the Official Solicitor's note for that hearing, dated 11 January 2016, raised a number of points and doubts on the evidence of the MoJ relating to that source of funding without mentioning that solicitors the Official Solicitor was instructing as P's litigation friend were relying on it on the basis that they did not go on the record.

47. Following the second hearing, the Official Solicitor has filed a further statement dated 5 February 2016 setting out the comments of 5 solicitors he regularly instructs on legal aid funding through legal help.

48. Further, at the outset of the first hearing, and although I had pointed out in paragraph 83 of *NRA* that the Official Solicitor's stance simply postponed the problem, he still did not expressly submit or acknowledge that, as and when what he described as his "saturation point" was reached, the orders that he was inviting the COP to make (i.e. joining P as a party) would not provide a speedy, practical and effective process and so would not be fit for purpose.

49. Rather, he was still effectively advancing a procedural route that he said had not yet reached "saturation point" but which he said would do shortly by reference **only** to his resources. (And it may be that this focus, and a view that their funding is a matter for the solicitors he instructs and an interpretation of the relevant regulations, explains why he did not analyse that funding or, at an earlier stage, seek information from those solicitors about it.)

50. The resources of the Official Solicitor are funded by the MoJ and neither the Official Solicitor nor the MoJ indicated that it was likely that, or that it was being considered whether, the Official Solicitor would be provided with more resources.

51. This silence is a clear indication that neither is the case and so, on his own evidence, if only a small percentage of the necessary and expected applications in cases within the class represented by the test cases now before me are made in the near future, it is inevitable that the Official Solicitor will very shortly reach what he calls his "saturation point" (if he has not done so already if the 90 odd stayed cases are taken into account) and so will not accept further invitations to act as the litigation friend of last resort. As by definition in that class of case there is no family member or friend who could be appointed P's litigation friend (and as yet there are no accredited legal representatives) this means that if (as the Official Solicitor argued should be done) P is joined as a party he would in most if not all of those cases need a litigation friend of last resort – and as the Official Solicitor would not accept appointment there would not be one.

52. So, the procedure advanced by the Official Solicitor at best provided a short term solution and a possibility that from time to time in the future his resources may enable him to accept appointment as the litigation friend of last resort.

53. In oral argument, at the first hearing, Counsel for the Official Solicitor for the first time:

    i) sought to assert that the Official Solicitor was not seeking to advance a procedural solution, and

ii) accepted that if the COP adopted the procedural approach that the Official Solicitor had been arguing for, and which the Court of Appeal had concluded obiter the COP should adopt, to meet the minimum procedural requirements it would be taking a path that would inevitably, and in a very short time, result in a breach of Article 5 because the Official Solicitor had not identified resources that would be made available to support it, and that

iii) if the minimum standard he was advancing was adopted by the COP it would effectively hinder or prevent many Ps from having their care plans considered by the COP for considerable periods of time and so could be damaging to many Ps, and that

iv) as that minimum standard could not be met in practice the COP should take the least bad practically available option. But Counsel did not say what that was by adopting one of the rival arguments of the Secretary of State and the applicants or otherwise.

54. I suspect that the points made in the last two paragraphs would come as some surprise to the members of the Court of Appeal in *Re X*.

55. In the heat of exchanges before me Counsel for the Official Solicitor raised the prospect of me making a declaration of incompatibility. Clearly, if this was a course the Official Solicitor wanted me to pursue it should have been raised much earlier.

56. *The position of the Secretary of State.* In *NRA* the Secretary of State for Justice had taken the lead. In these test cases the Secretary of State for Health took the lead. The further evidence put in by the DoH was approved by the MoJ and vice versa.

57. It is these two government departments that are primarily concerned with the issues relating to the deprivation of liberty of persons who lack capacity. For example, and in particular:

i) The MoJ is responsible for providing the resources to draft and prepare the statutory instruments that put into effect recommendations of the ad hoc Rules Committee in respect of the Court of Protection Rules, and those statutory instruments are made by the President of the COP with the approval of the Lord Chancellor.

ii) The MoJ is the funding department for the Legal Aid Agency (the LAA) and the Official Solicitor.

iii) The DoH has responsibilities in respect of giving guidance under the Mental Health Act 1983 and the Care Act 2014.

58. The position of the Secretary of State also developed over the three phases of the hearing but throughout his general position is reflected by the following paragraphs of a note provided by Counsel at the start of the second hearing on 13 January 2016 in response to questions I had posed by an email sent on 12 January 2016:

> 13. As set out below, the Secretaries of State's position is that the minimum procedural requirements imposed by Article 5 ECHR in general

> require a P without capacity in this situation to have a litigation friend or alternatively a rule 3A(2)(c) representative.
>
> 19. The Secretaries of State's position is that the minimum procedural requirements could be met in a particular case by:
>
> a. P being joined as a party with a suitable family member or friend as a litigation friend;
>
> b. P being joined as a party with the Official Solicitor as his litigation friend;
>
> c. a suitable family member or friend being appointed as a rule 3A representative; or
>
> d. a professional advocate being appointed as a rule 3A representative.
>
> 20. The appropriate option will depend on all the circumstances, including whether or not a professional rule 3A representative is a practically available option in a reasonable timescale on the facts of that particular case.
>
> 21. The Secretaries of State consider that the minimum procedural requirements could be met by the appointment of a professional rule 3A representative who was already involved in P's case, provided that their involvement had been limited to another independent role i.e. they could be the IMCA or Care Act independent advocate in P's case, but they could not be the allocated social worker or a professional provider of care to P. The Department considers that this distinction is consistent with the reasoning in NRA , in particular at paragraphs 248-255, and that it provides the necessary independence to satisfy Article 5.

59. As I have already indicated this needs to be de-coded to relate it to the application of a streamlined (or other) procedure to these test cases and thus to cases that are presented by the applicant authority as being non-controversial and in which there is no available family member or friend on the ground who could be appointed as P's Rule 3A representative (or his litigation friend if P was made a party).

60. On the approach of the Secretary of State in *NRA* and at the two hearings of these cases (namely that P need not be made a party in the test cases) this effectively rules out options (a) and (b) because they involve joining P as a party. So, on that approach of the Secretary of State, these options relate to cases that are (or it is thought may be) controversial, unless they are a fall back in cases when options (c) and (d) are not available.

61. That leaves options (c) and (d) if there is to be a streamlined or other process that does not involve joining P as a party or a hearing for cases in the class represented by these test cases. Option (c) reflects my conclusion in *NRA.*

62. That leaves option (d) in which the "professional advocate" is not an accredited legal representative but is someone with qualifications and/or experience that enables them to take on the role of a Rule 3A representative.

63. No other option, including those mentioned by me in *NRA*, was suggested by the Secretary of State at and before the two oral hearings.

64. So de-coded the Secretary of State's position, or primary position, is that in the class of cases represented by these test cases, and so when the case is presented a being non-controversial and there is no available family member or friend who can be appointed as P's Rule 3A representative, the minimum procedural requirements require that:

    i) a professional advocate be appointed as P's Rule 3A representative, and that

    ii) such an advocate would have sufficient independence provided that their previous involvement with P was in an independent capacity.

65. I accept that point on independence and, as appears from *NRA*, I agree that, **if it was practically available**, option (d) would satisfy the minimum procedural requirements.

66. The Secretary of State submitted that option (d), and so the appointment of professional Rule 3A representative in all DOL welfare order applications presented as being non-controversial where there is no family member or friend who could be so appointed, is a practically available option and so one that is "speedy, practical and effective". He based this on assertions that the relevant resource of professional Rule 3A representatives would be provided by applicant authorities through contracts with suppliers of people who can provide advocacy services to P and others.

67. After the hearing on 13 January 2016, I posed some questions by an email sent on 20 January 2016. They included a question asking who the Secretary of State says is responsible on behalf of the state to provide a resource that the COP can utilise to enable it, as a public authority, to comply with the minimum procedural requirements by properly exercising its discretion under Rule 3A and its management powers. In answer, by a note from Counsel dated 5 February 2016 the Secretary of State repeated the four options mentioned above and added:

    i) the COP should consider whether a professional Rule 3A representative is in general likely to be a practically available option in a reasonable time-scale on the assumptions that (as submitted by the Secretary of State) such an appointment would satisfy the minimum procedural requirements of Article 5 and that (an undefined) reasonable time had elapsed during which local authorities could organise their affairs so that a pool of professional Rule 3A representatives is available for appointment by them, and

    ii) if there is no suitable family member or friend or professional independent advocate available then the COP could comply with the minimum procedural requirements of Article 5 by joining P as a party and appointing the Official Solicitor as their litigation friend and if the Official Solicitor instructed a solicitor they could obtain funding through legal help.

68. Point (i) modifies his earlier stance on practical availability and point (ii) is a back-up argument on which the Secretary of State provided no information on what resources the MoJ would provide to the Official Solicitor to avoid him reaching his "saturation point" and so enable him to accept appointment.

69. *The position of the Law Society.* I joined it to obtain its comments on the availability of legal aid in practice and to update me on the progress towards the creation of

accredited legal representatives. As to the latter, discussion continues but the possibility of appointing one is not something that can at present be sensibly considered as providing a solution.

70. In submission at the first hearing Counsel for the Secretary of State told me that my conclusions on the availability of legal help were not wholly accepted but the extent and impact of this non-acceptance was not made clear. Following that hearing further evidence on the availability of legal aid, through legal help, was put in on behalf of the MoJ.

71. To my mind unsurprisingly, the Law Society put in evidence to the effect that there were a number of practical problems relating to this source of funding and the application on the ground of some of the theoretical possibilities identified by the MoJ. I shall return to this.

72. In commenting on legal aid the Law Society went on to advance submissions that the route to a solution that would satisfy the minimum procedural requirements by providing a practically available option that was "fit for purpose" (see for example *NRA* at paragraph 267) would be the amendment of the legal aid regulations to provide non-means tested legal aid that would clearly be available in contentious and non-contentious DOL welfare order applications. This is unsurprising because it tallies with points the Law Society has made before and it provides the route to participation in such proceedings by solicitors whether instructed by litigation friends or Rule 3A representatives or others.

73. I do not dispute that such suggestions (and the creation of accredited legal representatives) could provide, or be a part of, a practical solution but their consideration is outside the scope of these proceedings and so I did not fix another hearing for argument on them. The MoJ would be the government department that would seek to take forward any such amendments.

Discussion

The practical availability of professional Rule 3A representatives and so of the Secretary of State's primary proposed procedural solution.

74. As I have already mentioned an obvious potential source of professional Rule 3A representatives is persons who are presently available to act as IMCAs, RPRs and Care Act advocates. The initial evidence of the DoH deponent referred to these advocates and some of the legislation and guidance relating to them. But it was effectively only unattributed and unreasoned assertion that did not add to the evidence in *NRA* that local authority applicants could in theory identify and provide (and so fund) persons who could be appointed by the COP as Rule 3A representatives when there was no available family member or friend.

75. At the first hearing Counsel did not take up my offer of hearing oral evidence from the DoH or the MoJ deponents, or of providing their reasoning for these assertions on instructions. Rather, he:

    i) made the general and obviously correct point that agreements between local authorities and providers of advocacy services can be changed,

ii) made some general points about budgetary constraints on central and local government and that local authorities can allocate resources to provide Rule 3A representatives, and

iii) by reference to the evidence of the local authorities (which was clearly to the effect that my view in *NRA* was correct and that **in practice** they would have considerable difficulty in identifying and providing Rule 3A representatives within a reasonable time, or at all, but that if they were able to do so this would be likely to be at the cost of other services to the vulnerable) submitted that local authorities could relatively easily and cheaply and should provide and so fund the provision of professional Rule 3A representatives.

76. This approach by the Secretary of State was worrying. It indicated that either the stance had not been thought through since *NRA*, or that the Secretary of State was seeking to avoid the obvious problems relating to the appointment of professional Rule 3A representatives by simply seeking to pass them on to others without a proper analysis of:

i) how in practice they would be able to provide the relevant resource of suitable people ready, willing and able take on such appointments by the COP, or

ii) if they did not provide it whether they could be compelled to do so.

77. However, this approach by the Secretary of State indicates, as I had concluded in *NRA* and as indicated by the initial evidence from the applicant authorities in these test cases, that the **existing** contractual arrangements between local authorities and the providers of advocacy services (and their other arrangements for supplying and appointing IMCAs, RPRs and Care Act advocates) do not at present provide **an available practical** resource for providing persons who are ready, willing and able to accept appointment as professional Rule 3A representatives.

78. Although they had already addressed these issues, the local authorities understandably wanted an opportunity to comment on this approach of the Secretary of State to making the appointment of professional Rule 3A representatives an available option in practice. Also an adjournment would allow the Secretary of State (a) to provide his evidence based reasoning to support his assertions on the availability in practice of the procedural route he was advancing, and (b) to clarify the extent of his disagreement with my views in *NRA* on funding through legal help.

79. In the second round of evidence, the Secretary of State did not take up the opportunity to set out such evidence based reasoning on the availability in practice of a source of professional Rule 3A representatives save to the extent that the deponent commented on evidence put in by the applicant authorities to show that they could in reliance on the flexibility of existing contracts in some cases, or through re-negotiation of existing contracts, or by entering into new contracts with the providers of advocacy services create such a resource. This possibility has never been disputed by the applicant authorities in *NRA* or in these test cases. It is clearly a theoretical possibility. Rather, what the applicant authorities have been pointing out is that there are a number of significant practical difficulties in turning that theoretical possibility into an available resource in practice.

80. The second statement for the initial DoH deponent asserting the practical availability of a procedure under which professional Rule 3A representatives were appointed also contained the following (with my emphasis):

> 4. For the avoidance of doubt, the Department offers this statement purely in order to help the Court in reaching its conclusion as to the options available to local authorities (and other bodies where appropriate) in terms of the representation of P. Specifically, the Department does not maintain that local authority should do, or should be required by the Court to do, anything that it is not already part of their existing statutory duties. Local authorities (and other bodies where appropriate) should make their own decisions as to how best to deliver on their existing duties.
>
> 6. I would like to take this opportunity to emphasise that I did not intend to give the impression that the Department considered that such a person [an IMCA or Care Act independent advocate] would exist in every case or that local authorities should be required to put forward Rule 3A representatives in every case. As set out in the skeleton argument, the Secretaries of State's position is that the Court is required to consider making one or more of the directions in rule 3A(2) of the Court of Protection Rules ("COPR"), that the appropriate order will depend on all of the circumstances of the case, and that where the appointment of a family member or friend to act as a rule 3A representative is not an available option it may be appropriate for another person to be the litigation friend or to be appointed as P's rule 3A representative.
>
> 7. I have now had sight of the witness statements filed by the applicants following the hearing. These confirm my view that local authorities and CCGs can and do enter into contracts with independent advocates to provide particular services. Some of these contracts may already be sufficiently flexible to enable local authorities and CCGs to ask advocates to act as rule 3A representatives in addition to or instead of their other advocacy functions. If they are not, the local authority or CCG may be able to vary or replace the existing contract so as to include acting as a rule 3A representative within its terms or, alternatively, enter into an additional contract for the services which would sit alongside the main advocacy contract. I acknowledge that this will depend on the availability of willing independent advocates and, for the avoidance of doubt, the Department does not have any specific evidence about that availability. The evidence filed by the Applicants demonstrates that in some local authority or CCG areas the existing contract is sufficiently flexible. Further, it appears that in some areas there is some capacity either for independent advocates take on this role or for additional independent advocates to be recruited. In particular: [the deponent then comments on the evidence of the applicants]

81. The correction in paragraph 6 is directed to what I had made clear was my understanding of the earlier statement. I do not remember an earlier reference to the local authorities having statutory duties to provide Rule 3A representatives for appointment by the COP.

82. As with the submission made in the note from Counsel for the Secretary of State provided at the hearing of 13 January 2016 that I have quoted earlier, this evidence needs de-coding to relate it to the class of cases represented by these test cases. Unsurprisingly, because that note must have been based in part on this evidence that de-coding reaches the same result. But, to my mind, it steps back from the assertions on the availability of professional Rule 3A representatives made in the first statement and seeks to introduce some "wriggle room".

83. The DoH deponent in his two statements, relating to what local authorities could achieve and provide does not even try to address the practical problems identified by the applicant authorities and so why it is said by the Secretary of State that these problems do not, or should not, prevent or significantly hinder local authorities from providing a resource of professional Rule 3A representatives who will be ready, willing and able to accept appointment in all of, or in the majority of, the thousands of expected cases. Indeed, it is expressly acknowledged that the DoH has no specific evidence about that. So, for that reason alone, this evidence / assertion does not show that in practice in most of those thousands of cases the COP could meet the minimum procedural requirements by appointing such Rule 3A representatives.

84. Further, that evidence does not address the resource problems of the local authorities and so, for example, how in the absence of further funding and assistance they could avoid diverting resources from front line services to the vulnerable if they were to provide such a resource of Rule 3A representatives.

85. Rather, what this evidence / assertion of the DoH deponent shows is an attempt by the Secretary of State to "pass the parcel" to applicant authorities on the basis of:

i) unparticularised statutory duties,

ii) possibilities, and

iii) extracts from the evidence of the applicants without addressing the problems they have identified.

86. Prior to the hearing on 13 January 2016 I had asked the following question by email:

> What are the existing statutory duties of local authorities [the deponent] is referring to? And more generally (a) why it is said that the duty / obligation to provide the resources to meet the minimum procedural requirements of Article 5 in proceedings in the COP that the decision Cheshire West has made necessary falls on local authorities and not central government, and (b) is it asserted that if P has to be made a party the duty to provide litigation friends also falls on local authorities

87. The answer in the note provided by Counsel for the Secretary of State at the beginning of that hearing was as follows (with my emphasis):

> 22. [The deponent] referred to the local authorities existing statutory duties in paragraph 4 of his second witness statement. This was a reference to local authorities' statutory duties in respect of DoLs generally under the Mental Capacity Act 2005. <u>For the avoidance of doubt, it is not suggested that there is any specific statutory obligation that requires a local authority to arrange or fund the appointment of rule 3A representatives</u>.
>
> 23. The Department's position is that rule 3A representation is one of the potential methods for the Court to consider, so as to ensure that the process meets the Article 5 minimum requirements in a particular case, <u>but the Department does not seek to impose any new obligation on local authorities or any other bodies.</u>
>
> 24. The Department does not say that the obligation to provide the resources to meet the minimal procedural requirements <u>necessarily falls on local authorities.</u> But that local authorities are public authorities who have

> responsibility for compliance with Article 5, in the same way as other public authorities have such responsibility. Which public authority is required to take steps to comply with Article 5 will depend on the facts of each case for. For example, a local authority would not be obliged to provide resources if the Article 5 minimum procedural requirements were met by the appointment of a family member or friend as a rule 3A representative.
>
> 25. For the avoidance of doubt, it is not asserted that the local authorities responsible for funding the appointment of any litigation friend.

88. To my mind the passages I have emphasised are remarkable omissions from the witness statements.

89. During and after the hearing in January 2016, the argument that the applicant authorities were under a duty or obligation to identify (and so effectively to provide and fund) suitable persons who are willing to act as Rule 3A representatives was developed by reference to a duty or obligation, of a necessary party to the proceedings, to comply with directions of the COP to that effect.

90. In exchanges during the January hearing Counsel for the Secretary of State had, by reference to the evidence of the applicants, submitted that if I made an order or issued an invitation to the applicants in the four test cases to identify a Rule 3A representative they would do so in a short and acceptable period of time. My response was that was not how I read their evidence and was met with the submission that the applicants had not said that they would not so comply with such an order or invitation. So, I asked Counsel for the applicants to take instructions.

91. To my mind completely in line with the evidence of the applicants, the response was that if I concluded that they had a statutory duty to identify and provide persons willing to be appointed by the COP as Rule 3A representatives they would do their best to comply with any direction or invitation I made that they were to do so. But if, as they contended, they were under no such duty, having regard to their overall management of their resources, duties and powers they would not do so.

92. As the citation from the note provided on 13 January 2016 shows the Secretary of State does not assert that the applicants are under any statutory duty to provide persons ready and willing to be appointed as Rule 3A representatives.

93. It emerged during the January 2016 hearing that, if the applicants were under such a duty, there was a possibility that the Secretary of State would have to fund their performance of that obligation under the New Burdens Doctrine and that there is a prospect that judicial review proceedings will be issued by other local authorities based on the application of this doctrine to burdens arising from the decision in *Cheshire West.* I do not know the detail of this potential challenge and so, for example, whether it applies to issues arising under the obligations imposed by Schedules A1 and 1A to the MCA. But if the issues it would raise were of direct relevance in these test cases the Secretary of State and his Counsel would be under a duty to tell me and the applicant authorities more about those issues. They did not and so I proceed on the basis that they have no direct impact on these test cases and the objection by Counsel for the Secretary of State to the introduction of issues relating to the New Burdens Doctrine was well founded. [I was helpfully told by Counsel for the Secretary of State when she provided a list of typing and other obvious errors in my circulated draft judgment that: "A group of local authorities sent a pre-action protocol letter dated 9 November

> 2015 to the Secretary of State for Health about the funding for DOL generally. The pre-action letter focused on the increased number of DOL situations requiring authorisation in light of *Cheshire West* and it argued that the Secretary of State was obliged to fund the local authorities' additional costs (relying on the new burdens doctrine and/or other public law obligations). The letter does not refer to the COP procedures for non-controversial cases and, in particular, it does not referred to rule 3A(2) representatives. No claim has been issued to date."]

94. The line of argument that an obligation, or effective obligation, could be imposed by the COP on applicants to provide Rule 3A representatives (but not litigation friends) was developed and pursued in the written exchanges after the hearing on 13 January. It is now that the management powers of the COP (in particular those in Rules 5 (active case management), 25 (wide powers to manage the case and further the overriding objective), 27(1) and 85(3) (wide powers exercisable on the court's own initiative) enable the COP to direct (rather than invite) the local authority (or other public authority) applicant to identify (in each case) an available or suitable person for appointment as a Rule 3A representative or to take reasonable steps to provide the COP with information about such persons. The Secretary of State asserts that whether or not such a direction would be a lawful exercise of the COP's powers would depend on the facts of each case (including whether the local authority would be able to comply with such a direction in practice). The submission was repeated that local authorities can, and given a suitable direction / request from the COP, would secure additional or alternative provision of advocacy services so that professional Rule 3A representatives will in practice be available in an (undefined) range of cases adding:

> The Secretaries of State have highlighted that some local authority contracts are sufficiently flexible ready to cover appointment of advocates as rule 3A representatives and that other local authorities could renegotiate their contracts, or tender for new contracts, so that they had the ability to identify and provide rule 3A representatives. Therefore, appointing an existing independent advocate as a Rule 3A representative is an option that could be explored by the Court with each local authority on a case-by-case basis. It is not suggested that a Rule 3A representative should or could be mandatory in every case.

95. I do not dispute that this is what the Secretary of State has done and it was so pointed out that such flexibility exists in some of the contracts. I also comment that this option has been explored without success in these test cases.

96. In my view the possibility of renegotiating some contracts or entering into new ones (when the existing contract has no such flexibility) is no more than a possibility that is accepted by the applicants in the test cases but the overall tenor of their evidence is that it is not a possibility they would want to pursue or one which would be likely within a reasonable time to provide persons who were ready, willing and able to be so appointed by the COP as professional Rule 3A representatives. For example:

i) The evidence served before the December 2015 hearing contained the following:

> Gateshead Council is able to utilise advocacy for Annex C consultations. However, in light of the suggestions in the *Re NRA* case that a possible way forward in cases with no family members or friends available might be to utilise an independent Rule 3A representative, this was explored with Gateshead Council's local advocacy agency. I understand that their position is that they are unable to take on the role of a paid Rule 3A representative at the present time. The reason is because they are already overstretched due to

the increased Relevant Persons Representative's role (in the context of Deprivation of Liberty Safeguards) and Care Act advocacy which involve ever-increasing workloads. In order to take on paid Rule 3A representative work the agency would need to recruit and train staff. However, there are reservations about doing so in light of the legal uncertainty in this field ----------.

Notwithstanding the difficulties of purchasing advocacy on the ground, Gateshead Council are not in the financial position to fund advocacy throughout the course of an application even were it the case that advocacy were to be available for this role in the local area. ----------

LBTH takes the view that the lack of available local resources preclude option (C) being viable [the appointment of a Rule 3 A representative]. LBTH have commissioned 2 advocacy organisations to represent people under the Care Act however they have indicated that they do not have the capacity, skills or knowledge to undertake the representation of people coming before the Court of Protection. Advocates have reported that they do not fully understand the court process which is technical and at times bewildering

Even after a period of education for those advocates the issue of capacity and resource would remain. ----------

With regard to 9(b), if the resources were available to fund an identified group of Rule 3A representatives then this would appear to be a way of managing these cases. However, the CCG is aware that there is already strain on the local advocacy services, many of which are declining to accept invitations to act in these cases. I have attached to this statement at exhibit MHW3 a copy of the CCG's approach to its local authority service in relation to its application presently before the Court and the response received which helpfully summarise the difficulties that service was facing. Without these resource issues being resolved, it appears likely that this too could cause delays to the process.

In our view, it is likely that, in a significant proportion of cases the family member identified would not be an appropriate person to be appointed as Rule 3A representative or would not be willing to do so for a variety of reasons. ----------

There would be a significant cost to the Local Authority to identify and source a Rule 3A representative or litigation friend from local authority advocacy services in every case where there is no family member or friend to take on this role. In Manchester we have experience of IMCAs refusing to take on the role of litigation friend without the benefit of legal advice / representation by a private firm of solicitors. This advice / representation cannot be funded if the individual is ineligible for Legal Aid. If necessary, Manchester could consider allocating additional resources to the IMCA service to enable IMCAs to take on the role of Rule 3A representative or litigation friend. ----------

[Blackburn with Darwen Borough Council] has previously been in contact with the local independent Mental Capacity Advocate service, Advocacy Focus, in relation to the COPDOL10 procedure, making enquiries as to whether the IMCA service could complete the Annex C form where no relative or friend of P is available and/or act as a litigation friend for P in relation to those applications. Advocacy Focus confirmed to the Local Authority that they are unable to accommodate or prioritise referrals that are made solely in relation to COPDOL10 applications and that they would be unable to commit to taking these in the long term, owing to capacity and

> workload issues and already having an excessive waiting list. Effectively, therefore, in this Local Authority area, the IMCA service is not available to complete Annex C of the applications or to act as a litigation friend for P. The IMCA service also stated that, if such a role were to be contemplated, they would need additional resources and funds from the Local Authority. Even if the local IMCA service (or other professionals) were able to take on the role of Rule 3A representative, the requirement to appoint an independent Rule 3A representative in every case where P had no family member available or suitable to fulfil that role, would represent an additional significant cost to the Local Authority for which there are no resources available. The cost would be a recurring one, as each case would require a review application at intervals of 12 months or less. In addition, the requirement to keep the care arrangements under review in the interim, would necessitate ongoing involvement with the independent Rule 3A representative, which would further add to the burden on resources of the IMCA service if they were to undertake that role, and substantially add to the cost for the Local Authority.

ii) At the December hearing Gateshead Council prepared a statement that was later confirmed in evidence which contained the following comments:

> The advocacy agency has been approached with a view to asking them to take on the role of an independent Rule 3A representative ---------- the agency have indicated that they are unable to take on the role of providing independent Rule 3A representatives at present. The agency are already stretched by the RPR work and Care Act independent advocacy which are relatively new demands to contend with in light of the *Re AJ* case and the implementation of the Care Act 2014 respectively. The agency are concerned that, given the proposals afoot for reform in this area by the Law Commission and the fact that the area of law is changing regularly such as via the Court of Appeals decision on *Re X* and *Re NRA*, it may be that additional capacity recruited becomes redundant in the near future meaning expansion of staff may be unwise at this juncture. ---------- The agency are also not keen to be involved in what they perceive to be legal work. In section 21A MCA 2005 cases, although advocates can be a litigation friend they have felt they do not have capacity to undertake this role to the degree necessary to carry it out appropriately. Additionally, the local authorities are not in a position to fund this role. There is no guidance from the Courts service on the role of independent Rule 3A representative so it is unclear how similar that role is to that of a litigation friend. Certainly, in Gateshead Council's experience, Rule 3A representatives in Court of Protection proceedings have been expected to attend Court and draft statements which are both time-consuming legal tasks. Unlike with an RPR, legal assistance is considered to be unlikely to be available from a firm under legal aid. The agency cannot be served with a "default notice" for failure to carry out this advocacy as independent rule 3A representative work is not listed in the contract specification as required work.
>
> Were it to be a legal requirement to use advocacy then the Council would have no option but to comply with this to meet its legal obligations. However, without external funding being made available each year resources would have to be diverted from the provision of social care services to fund additional advocacy, meaning the Council may not be in a position to continue to provide some of the services it currently offers. There may be an impact upon the sustainability of offering services for which the Council has no legal obligation to provide - such as where the Council is exercising a power. This might be where only one of the eligibility criteria is met. Alternatively, it may be that the Council might have to consider operating a waiting-list in a similar way to how some councils have decided to do so with respect to Deprivation of Liberty Safeguards.

iii) The evidence at the hearing in January 2016 contained the following:

[In the evidence confirming the statement put in by Gateshead Council]

The agency was also initially concerned as to what the Rule 3A representatives role would involve and so were reluctant to agree to take on this work due to the level of uncertainty as to what it might entail and what the Court would expect from such representatives I managed to speak further to [the representative of the agency - Your Voice Counts] who indicated to me that since we had last spoken he felt he now better understood the role of a Rule 3A representative. He considered Your Voice Counts to be an appropriate organisation in principle to do this type of work however he was also clear that his organisation could not deliver the Rule 3A independent representative role utilising the agency's existing staff. This is because the service is currently operating at capacity and to deliver more services the agency would require additional staff, office space, computers and telephones as well as resources to allow for increased management, supervision and training of the required new staff. [He] indicated that the agency remains "swamped" with work and that any quotation that was offered for Rule 3A representative work would be unlikely to be financially competitive as they did not have spare capacity that they were keen to fill. On reflection, [he] would be less concerned now about recruiting additional staff as if they were not used for Rule 3A representative work then they could be used on existing contracts. ---------- [He] considers that if Your Voice Counts decided to take on Rule 3A representative work then the agency would want to limit the work to dedicated workers and could therefore only accommodate a finite number of cases at any one time. This would be necessary to ensure that Rule 3A representative work role would not impact upon the agency's ability to deliver other services under existing contracts.

[In other evidence].

Workforce capacity is the most challenging issue i.e. having a sufficient number of trained advocates to take on this additional work. Initially, the role of Rule 3A representative would be most appropriately handled by experienced independent Mental Capacity Advocates (IMCAs). However, the provider currently has only six, qualified IMCAs, who already have full caseloads, with an overall team of 12 advocates. It will take time to train advocates to act as Rule 3A representatives and this will result in pressures on the provider. There will be waiting lists and criteria will need to be developed for prioritising individual cases above others. These issues cannot be resolved simply by allocating additional resources to recruit more IMCAs as there are a limited number of trained IMCAs in the Manchester area. -----

There is a reluctance on the part of the provider to take on the role of Rule 3A representative or litigation friend without legal advice/representation, particularly as there continues to be uncertainty as to what will be involved in each case.---------- this presents a real obstacle as there is no prospect of legal representation being obtained by the provider if legal aid is not available. If the role of Rule 3A representative does not involve attendance at court, the provider has expressed willingness for its advocates to act as such. -----

The CCG is in agreement with the position outlined by LCC. The responses it has received to its own enquiries with local authority services and the reports it receives from provider organisations, confirm that those services are already at full capacity. ---------- [The representative of a local advocacy agency "Empowerment"] makes reference to the increased workloads of IMCAs in relation to deprivation of liberty cases and there are

now waiting lists for those services. In view of this, it appears clear to the CCG that further funding to those services would need to be made available. In order to contribute additional funding, the CCG would need to make savings from elsewhere within the organisation. The CCG does not currently consider itself to have any additional resources it can divert from elsewhere without causing detriment to its front line services.

Despite a willingness to assist where possible, Advocacy Focus has expressed that an issue with delivering independent Rule 3A representatives in the short term, would be the timeframe required to train additional personnel for the role. The service is currently stretched to capacity by DOL Standard Authorisations and an increased involvement in Court of Protection cases, in addition to general requirements for advocacy arising under the Mental Capacity Act 2005, the Mental Health Act 1983 and the new regime of the Care Act 2014. There is currently a waiting list in operation and a need to manage priorities. Advocacy Focus has previously confirmed to the Local Authority that they are unable to prioritise or accommodate referrals that are made solely in relation to applications under the *Re X* procedure.

There are alternative providers of advocacy services which the Local Authority could explore. The current contract with Advocacy Focus has a break clause requiring three months notice to terminate, however Blackburn with Darwen Borough Council would first endeavour to renegotiate a mutually agreeable position. If a separate contract had to be sought elsewhere for the provision of Rule 3A representatives for the time being, the procurement process would take time and represent an additional cost to the Local Authority, difficulties would arise as budgets have already been set for the current financial year an alternative providers may be facing similar issues in terms of capacity and training to undertake the role. In any event, Blackburn with Darwen Borough Council is currently in the process of going out to tender in respect of its arrangements for advocacy services, as the current contract with Advocacy Focus is due to end on 31 March 2016. The requirement for independent Rule 3A representatives could potentially be incorporated within the terms of any new contractual arrangements sought. The more complex the tender, the greater the anticipated cost to the Local Authority. As demand is greater than the supply of advocacy services at present and Blackburn with Darwen Borough Council would be competing with other local authorities for a finite necessary resource, this is likely to further inflate the cost of procuring such services and leave local authorities with little or no leverage

I spoke with each of the three advocacy agencies on 10 December 2015 with regards to the possible extension of their remit to cover Rule 3A representatives. In summary all three stated they would not currently have the expertise or capacity to take on this role. They consider the Rule 3A representatives role to be a specialist role and somewhat different from the statutory and other advocacy roles they provide at the moment. ---------- --- the carers centre explained that their experience was that carers struggled with the idea of challenging anything. As a consequence carers would need their own representation in order to clarify their role. ---------- PoHWER, in principle will be supportive of developing a service to cover this area of work. This reflects the commercial nature of PoHWER they would require additional resources, more training and staff. PoHWER take the view that being able to offer this type of service would require a great deal of planning and they would not be able to "turn it round quickly". They are currently operating at capacity and cannot consider providing the service without additional funds. REAL would require a better understanding of precisely what is being asked of them before committing to any increase in service. They took the view that their advocates would definitely require additional

> training before taking on any new role. They currently have no capacity and a small waiting-list so any number which is greater than a handful would not be able to be successfully met REAL.

97. As appears from those citations a number of reasons are given by the applicants as to why providers are not keen or willing to provide a source of Rule 3A representatives. Some of those could be addressed by the COP and others by way of clarification but even with such clarification convincing common themes of the evidence are that:

    i) Providers are overloaded and a significant reason for this is the provision of advocates under the DOLS as a result of the decision in *Cheshire West* and more generally.

    ii) The pool from which people could be added to act as rule 3A representatives is limited and they would need training.

    iii) Rule 3A representatives may need legal help and this could only be funded by legal aid or P.

    iv) Any negotiations leading to any such provision would not be straightforward, would take time and would involve the provision of extra funding that would be at the cost of frontline services (if no other funding was provided).

98. What seems to be being suggested by the Secretary of State is that in each and every case the COP should investigate to see whether, as a result of renegotiation or possible renegotiation of the contracts (and so not under their existing terms) between the applicant in that case and its supplier(s) of advocacy services, some existing independent advocates may be made available for and be ready, willing and able to accept appointment in that case (and no doubt others brought by that authority). Any such renegotiation would take time and the Secretary of State has not identified how long the COP should allow for it and how, if at all, the COP should monitor it or, would absent further resources being provided to it, be in a position to do this without jeopardising the performance of its other work.

99. On any view this is a piecemeal and inefficient approach unless and until the approach of applicant authorities is co-ordinated.

100. Importantly, this possibility has been investigated in these test cases with the result that the applicants, including those who have identified flexibility in their existing contracts, have expressly confirmed that unless they have a duty to do so they will not embark on any such re-negotiation. The Secretary of State has not expressly challenged that this is their position or the validity or lawfulness of their reasoning. Nor has the Secretary of State asserted that, and there is no evidence that indicates that other applicant authorities would be likely to adopt a different position.

101. In addition to the absence of any convincing evidence to support the Secretary of State's assertion that professional Rule 3A representatives can be, or will in a reasonable time be, made available in practice for appointment by the COP in a significant number of the expected cases, a major flaw in the Secretary of State's position is that:

i) it is expressly accepted that there is no statutory duty on applicant authorities to provide the relevant resource for the COP, and so

ii) his position is based on the (possible) exercise by local authorities of a number of powers governed by administrative law and so a process governed by a legal regime outside the jurisdiction of the COP and under which the local authorities (like government departments) can take into account a range of factors.

102. It is well established (see *ACCG and Another v MN and Another* [2013] EWHC 3895 (CoP) and in the Court of Appeal [2015] EWCA Civ 411 in particular at paragraph 46 of the judgment of Munby LJ) that when making a substantive order the COP can only choose between available options and cannot properly order a public authority to provide a further option applying a "best interests" test. Any such order would have to be based on administrative law grounds.

103. The same must apply to procedural orders where the test is set by the overriding objective having regard to the principles in the MCA and so not simply the best interests test. An example by analogy of the inability of a court to use a case management power to compel a public authority to do something that involved it making decisions governed by administrative law that it does not want to make is the decision of the Court of Appeal, in *Secretary of State for Work and Pensions v R (on the application of MM and DM)* [2013] EWCA Civ 1565 at paragraphs 78 to 84 on the directions given by the Upper Tribunal to the Secretary of State.

104. More generally any exercise by the COP of its wide ranging case management powers must be based on the exercise of a judicial discretion and so the COP has to take into account whether it can identify a basis for its direction that, if necessary, can be relied on to enforce it and so in these test cases make the applicants do something that they have told me, and I accept, they will not do unless they are under a statutory duty to do it. I have not identified any such duty and indeed no such duty or other basis for making an enforceable direction is asserted by the Secretary State.

105. I acknowledge that the applicants would have the power to comply with such a direction or invitation and in some circumstances the COP could base an order or request on the existence of such a power. But, in these cases, we have not moved forward from *NRA* where I made it clear that I was not prepared to make a direction or request unless I was satisfied that there was a realistic prospect it would be successfully complied with. Indeed, the position is now even clearer because the applicants have expressly stated their position and there is no sensible reason to think that other applicants would take a different view.

106. So, in my view, the COP could not properly and so should not give a direction to the applicant authorities to identify or to provide information about the availability of a Rule 3A representative in the four test cases or in future cases in the same class.

107. *The points made in the note from Counsel dated 5 February and so after the hearings referred to in paragraph 67 hereof.* The first seems to recognise that, as the evidence shows to be the case, there is no existing pool of persons from whom the COP could select and appoint a professional Rule 3A representative, and that on the approach taken by the Secretary of State there are significant problems in the way of making

one available in a timescale that would enable the COP to meet the minimum procedural requirements by making such appointments.

108. The second point re-introduces the procedural course originally advanced by the Official Solicitor but which he has accepted he does not have the resources to put into effect by accepting appointment as the litigation friend of last resort. In making this suggestion it was acknowledged that the MoJ was responsible for funding the Official Solicitor and earlier it had been acknowledged that the Secretary of State was not asserting that the applicant authorities should identify litigation friends.

109. However, in advancing this alternative for cases in the class of those represented by these test cases the Secretary of State did not address whether and if so what resources would be provided to the Official Solicitor (or were in contemplation) to enable him to accept appointment. If I had realised at the hearings that he was making this back up proposal I would have raised this point. It is now too late to do so and thereby start another round of written communications.

110. Sadly, the history of this case does not found what might be thought to be a natural inference that when a government department acknowledges that it is the provider of relevant resources for a course of action it is suggesting, a court can infer and assume that those resources would be provided. Rather, the inference from the continuing silence in respect of the provision of resources to the Official Solicitor carries the inference that there are no plans to provide them. I am sure that the Official Solicitor would have informed the court if he was aware of any such plans or prospect.

111. If I am wrong about this the provision of this resource is one that the Secretary of State can provide under the order I propose.

112. The second stage of this back up proposal is based on the funding of a solicitor appointed by a litigation friend or Rule 3A representative through the provision of legal help (or self-funding if P does not satisfy the means test). It therefore requires the appointment of such a litigation friend or Rule 3A representative and so in cases where there is no appropriate family member or friend this procedure would in practice not be an available because there would be no person who the COP could so appoint who was willing to accept the appointment (which is a precondition of appointment) and so who could instruct a solicitor on behalf of P.

113. However, I will deal with the updating on legal aid issues in case the Official Solicitor is provided with resources to act as the litigation friend of last resort in the relevant class of cases and because they have some relevance when a family member or friend is appointed as a Rule 3A representative or litigation friend and wants to instruct a solicitor.

114. *Updating evidence on legal aid.* This has confirmed that full and investigative legal aid is not properly available for a streamlined process or any process that does not properly need a hearing.

115. My view remains that the court cannot set up a process that includes a hearing simply to enable Ps to qualify for full or investigative legal aid. If a hearing is not needed it is not needed. Also, any hearing would add significantly to the costs of the local authorities.

116. So the only route to full or investigative legal aid is a conclusion that the minimum procedural requirements are that P must be a party (so there must be a litigation friend) and there must be a hearing. The Court of Appeal in *Re X* do not conclude, and no one has submitted, that the minimum procedural requirements require there to be a hearing in every case.

117. To my mind, the remarkable position has been reached in respect of funding through legal help that:

    i) if as I would expect (and the Law Society has without any survey of the practice of its members stated would be normal) a solicitor instructed by a litigation friend went on the record he could not apply for funding under the legal help scheme, but

    ii) the solicitor can do so if he holds off going on the record for the sole purpose of qualifying for that funding.

    That smacks of a device but the MoJ and the LAA have indicated that they accept that this can be done.

118. That approach also carries with it the risks identified by the Law Society relating to "unbundling of legal services" which relates to the professional negligence risk of advising without proper instructions and so a disincentive to solicitors to take this approach.

119. The position advanced by the MoJ, with the concurrence of the LAA, is that if a solicitor accepts instructions and does not go on the record legal help funding can cover all of the work that has in the past normally been done by solicitors instructed by the Official Solicitor under the *Re X* streamlined procedure and so to fund (a) a visit to see P, (b) the preparation of statements (including a position statement) to be used in the proceedings, and (c) the giving of advice to the Official Solicitor as to the stance to be taken in the proceedings (e.g. to seek changes in the care plan and to make a submission to the court that the care plan is in P's best interests and the least restrictive option – which is what the litigation friend has to do because the court must be satisfied as to this).

120. In my view, this position does not sit at all easily with the wording of the regulations and the underlying purpose of legal help. It seems to me that it must be founded on a view on the meanings of "conducting proceedings" and "preparing to provide advocacy in proceedings" and "advocacy in proceedings" that is informed by the need for there to be a hearing if full or investigative legal aid is to be available and so that when there is not a hearing steps, such as those described in the last paragraph, that would normally fall within those descriptions fall outside them and so enable a solicitor who holds off going on the record to fund them through legal help if the means and merits tests are satisfied.

121. The note from Counsel for the Secretary of State handed in on 13 January 2016 includes an important caveat. It is that P may not satisfy the merits test if an experienced IMCA is appointed as the Rule 3A representative because legal help may add little value to the expertise of the IMCA (in other words, there may not be sufficient benefit to P, having regard to all the circumstances of the case, including the

circumstances of P, to justify the cost of provision of legal help) and it is difficult to see why this caveat would not also apply to the Official Solicitor. As I have mentioned, the availability of legal aid is a point that has been raised by a provider of advocacy services and this caveat is directly applicable to that concern.

122. Subject to that caveat, and notwithstanding my doubts concerning the validity of the LAA's interpretation and proposed application of the regulations, I accept that the LAA will apply the regulations relating to legal help in the way that has been asserted by them and the MoJ and so will not take the point that any such solicitor would be conducting court proceedings or preparing to provide advocacy in proceedings etc. This accords with the present experience of solicitors instructed by the Official Solicitor set out in the most recent statement made by the Official Solicitor.

123. However, and although the information from those solicitors indicates that they have been able to fund their work through legal help, it seems to me that taken as a whole their comments show that the level of payment under legal help is such that its use in the back up procedure now suggested by the Secretary of State (rather than the Official Solicitor) is not a viable option particularly if a large number of cases are brought and there are a large number of reviews. To my mind, the following quotes from the information provided by those solicitors describe the likely position on the ground and support that conclusion:

> Solicitor 1
>
> The difficulties that arise could be as follows: (1) there are a lot of clients who are not eligible for legal help due to the means criteria --- the capital limit being £8000, and (2) the providers have limits in terms of numbers of legal help new matter starts they can use. So again legal help may not always be available if solicitors do not have sufficient allocation of new matter starts. If we were to receive a sudden influx of these cases we would not have enough new matter starts because our allocation is used primarily for the mental health tribunal work.
>
> Solicitor 2
>
> To make this method financially sustainable for solicitors, they need to be able to ensure the legal help reaches the exceptional claim threshold (three times £252.90), otherwise the LAA will only pay £252.90. This is possible if meeting P, considering records, considering papers drafting documents etc
>
> Solicitor 3
>
> The use of Legal Help on more than a small handful of cases is not economically viable. Legal Help is remunerated by Fixed Fees (out of London £266) unless the costs calculated at Legal Help rates, out of London £48.24 per hour for all preparation, £27 travel and £3.78 per item for letters and telephone calls) amount three times the fixed fee i.e. £798.
>
> The majority of uncontested Re X type cases calculated these rates are likely to fall between £266 and £798 with the result that the actual hourly rate is much less. I think most legal aid lawyers would say that a breakeven hourly rate was in the region of £60 per hour.
>
> Solicitor 4

The most pressing issue for a provider of services under legal help is the commercial sustainability of the prolonged use of Legal Help as a form of funding. The analysis below is based on the following principles:

(a) COP work can be done on Legal Help taken from a firm's community care matter starts under its community care contract or mental health matter starts taken from the mental health contract.

(b) The maximum available fund within the fixed fee range for COP work done on legal help is £266 (community care - mental health pays £253).

(c) The escape fee threshold is £798.

(d) The hourly rate at which work can be charged when calculating whether the escape fee threshold has been reached or not is in the region of £48 per hour - there are variations depending on the contract and where you are in the country.

(e) Solicitors firms calculate costs and margins on the cost to the firm of a given employee generating one hours work.

Even with the most generous cost estimates, one hour of a fee earners time in the regions (not to speak of London) costs in excess of £50 per hour and with the most efficient working model, will probably be circa £55 per hour - the costs of salary, utilities, contribution to support services such as IT within the firm etc.

Therefore the hourly cost rate of £55 per hour in order to break-even and earn no margin, a fee earner would need to undertake all the work he or she is going to do in one of these cases within 4.8 hours. This includes all non-billable work such as the file set up etc.

If the fee earner goes over that time, they are working at a loss for every hour thereafter and indeed, the whole file represents a financial loss to the firm. The level of that loss will be more or less depending on how much work over the limit a fee earner works.

To make the escape threshold and receive the maximum £48 per hour for each hour worked, a fee earner would have to record at least 16.7 hours of recoverable time (£798/£48 per hour). Even making that threshold would represent a £7 per hour loss to the firm for every hour worked.

Therefore in order to be commercially sustainable each case would need to be able to be completed within an average of circa four hours work. Can this be done? We consider that it is unlikely given the potential need for travel and the unpredictability of the cases. The implications are therefore clear in our view:

(a) Firms will have the work done by the most junior and inexpensive fee earners and will seek to complete it within the four hours which may have an impact on the quality of the work done;

(b) Firms will not take this work.

Solicitor 5

Legal help pays a different fixed fee depending upon the contract being used (i.e. mental health, community care etc). However broadly we would be able to do about four hours or so work on legal help hourly rates before time starts getting written off at the point of costing over and above the fixed fee.

> In any event, the hourly rates don't usually cover our costs. The amount of work involved in these cases in my experience so far is much more extensive than legal help allows, particularly if you factor in the costs of travelling to see P who may be in a remote part of the country. There is of course the possibility of doing so much work that you end up getting the "escape fee" (if do work at 3 x the fixed fee) but those are still run at a loss, and there is a risk of the LAA reducing your costs upon claiming so it goes below the fixed fee threshold and you end up having to write hundreds of pounds of costs for work legitimately done.
>
> In short, in order to give P a service which they would expect as a privately paying client, firms will invariably make a loss doing it on legal help, potentially leading to corners being cut in terms of time and expertise, and therefore a poorer service.
>
> Quite aside from anything else, the work involved in these cases, even if it doesn't go to a hearing, is the same in nature as welfare proceedings that are before the court for which we are able to obtain a higher hourly rate under a legal aid certificate and an enhancement in complex cases. So why should these be treated differently?

124. The Law Society also points out, and I accept, that the experience of its members of the process by which the LAA may authorise an emergency increase in matter starts is not as straightforward in practice as the statement put in on behalf of the MoJ might suggest. The Law Society gives an example of a national firm that undertakes COP work whose application for an exceptional increase was refused on the basis that other providers in their region had not exhausted all their relevant matter starts. This criterion ignores the fact that some providers with community care matter starts will not undertake mental capacity work. Similarly, some providers with mental health contracts would also not use matter starts for the mental capacity work. And, the Law Society also points out that the vast majority of the 46,824 matter starts allocated to providers that is referred to in the MoJ statement are likely to be for mental health tribunal cases. Additionally, providers have been allocated matter starts under their current legal aid contract in accordance with the assessment of need they made for contracts awarded in 2014 but there is no mechanism by which the number of allocated matter starts may be increased, other than exceptionally, during the current contract period which the Law Society understands may run until 2018.

125. It seems that these points on the economic viability of acting for a litigation friend would also apply to solicitors instructed by a professional Rule 3A representative on behalf of P.

126. So, in my view, and ignoring my caveat relating to the application of the merits test, in practice the approach taken by the LAA (and the MoJ) to the interpretation and application of the regulations relating to legal help is only likely to benefit family and friends who are appointed as a Rule 3A representative to get advice on what this role involves and what they should take into account and do.

Apart from adopting the procedure suggested by the applicants, are there any other steps that the COP could take in cases within the class represented by the test cases to meet the minimum procedural requirements?

127. I made some suggestions in *NRA*, namely seeking s. 49 reports and issuing witness summonses. I add the appointment of visitors.

128. These form a part of the procedure suggested by the applicants but none of the parties suggested them on their own, or with expansion, as effective solutions. I mentioned them to trigger a constructive consideration of alternatives that has not taken place.

129. I accept that absent further resources being provided to significantly expand their utility these possibilities cannot provide a practically available alternative to the appointment of a Rule 3A representative to meet the minimum procedural requirements and I have not thought of any others that could do so.

130. A short term solution in a limited number of cases may be to make P a party and appoint the Official solicitor as his litigation friend. I return to this in discussing the order I should make in these test cases.

My conclusion on the practical availability and impact of the options open to the COP suggested by the parties other than the applicants.

131. My conclusion in *NRA* still applies (see paragraph 118) that, absent the provision of further resources, in practice all of these options judged by reference to common law fairness or Article 5 or Article 14 are not fit for purpose because they do not provide a resource which is available and would in practice enable the COP to meet the minimum procedural safeguards for cases in the class represented by the test cases before me.

132. At best they provide a short term solution up to the Official Solicitor's "saturation point".

The course suggested by the applicant authorities

133. As appears from *NRA*, I accept that fairness is a two way street and that welfare orders that authorise a deprivation of liberty provide protection to the relevant applicant authority (see paragraph 7). But it must at least be open to question whether an order made on the basis of a procedure that does not satisfy the minimum procedural safeguards, and so is unlawful, provides such protection even if the care package on which it is based is shown on any challenge to be the least restrictive available option to best promote the welfare of P. If that was the case, it might well reduce the likelihood of any challenge and the amount of any damages but, in my view, this pragmatic help to applicant authorities does not found the adoption of a procedure by the COP that is unlawful on the basis that it does not provide P with the minimum procedural safeguards; and it was not argued that it should.

134. Also as appears from *NRA* (at paragraphs 31 to 52 - where I discuss what I called the Procedural Balance) I am of the view:

    i) that the procedure suggested by the applicant authorities is one that is procedurally and substantively fair for other non–contentious applications to the COP in which the determinative test is the "best interests" test, and

    ii) that if greater safeguards were introduced to safeguard P in such applications this would be unduly onerous both emotionally and financially for Ps and their families.

135. Further I repeat my recognition of the points that:

i) in the vast majority of the cases in the class represented by the test cases (and applications under s. 21A) whether or not P's care package creates an objectively assessed deprivation liberty is not the determinative question and effectively is only relevant to the issue whether an authorisation is needed, or s. 21A applies, and

ii) the determinative question is, applying the best interests test, whether the care package is the least restrictive available option to best promote P's best interests.

136. So the question becomes whether, on a fact and circumstance sensitive approach to determining what is a fair procedure and so one that provides appropriate procedural safeguards, cases within the class represented by the test cases need to be dealt with differently to other non-contentious cases that are determined by the same, or effectively the same, substantive test.

137. On the basis that I am right and the procedure of the COP in other non-controversial cases is fair and so provides appropriate safeguards, the key issue on this question is whether the nature and effect of the situation on the ground that needs to be authorised requires a different approach to meet the essence of the minimum procedural safeguards.

138. I have concluded that it is not possible to escape:

i) from the nature and effect of the classification of that situation by *Cheshire West* as an objectively assessed deprivation of liberty, and so from

ii) the significant consequences that this has at common law and by engaging Article 5 (see paragraph 6 above).

139. In reaching that conclusion I have taken into account the points that the relevant situation on the ground is asserted to be non-contentious and to be justified in the best interests of P, and so it can be said that it is different to other deprivations of liberty (see *NRA* paragraph 193). But:

i) the Supreme Court has held that these cases are ones that involve the deprivation of liberty of persons who lack capacity and are vulnerable and so cases in which, at common law and under Article 5, the situation has a distinct and particularly serious result for persons who do not have the capacity to agree to it,

ii) in my view, the reasoning of the majority in *Cheshire West* means that it is not possible to treat cases in the class represented by the test cases as anything but cases involving a deprivation of liberty when determining whether sufficient procedural protection has been provided by a court at common law or under Article 5 against arbitrary decision making and so arbitrary detention, and to enable the person deprived of liberty to challenge that result,

iii) the lack of capacity and vulnerability of the person deprived of his liberty is plainly a factor that points towards him having someone "in his corner" to carry out an independent review of whether the view of the applicant authority is justified and represents the least restrictive available option even if there is no prospect that that person's best interests cannot be served without, on the *Cheshire West* conclusion, depriving him of his liberty.

140. Whilst I acknowledge that the COP has an investigatory jurisdiction and the applicants have a duty of full and frank disclosure I have concluded that the points set out in the last two paragraphs mean that without some assistance from someone on the ground who considers the care package through P's eyes and so provides the independent evidence to the COP that a family member or friend can provide (see *NRA* paragraphs 230 to 240) the procedure will not provide an independent check that meets the minimum procedural safeguards required by Article 5 and the common law.

141. Although I have parted company with the obiter conclusion of the Court of Appeal in *Re X* that the only way to meet the minimum procedural requirements is to make P a party, in my view the conclusion in the last paragraph accords with, or with much of, the underlying reasoning of the Court of Appeal in *Re X* on what is required to meet the essence and so the purpose of the minimum procedural safeguards. It also accords with (a) the stance of the Secretary of State on what is required and so that the *Re X* streamlined procedure and that suggested by the applicants under which P has no independent representation or check on the ground is not enough, and (b) my reasoning in *NRA* when a family member or friend can be appointed as a Rule 3A representative.

142. History and experience shows that considerable advantages can flow from someone independent from the applicant authority looking at the position on the ground through P's eyes and so "fighting his corner". However careful and however experienced the judge a paper only check based on the evidence provided by and the views of the applicant cannot provide as good a safeguard as one where information from P's perspective is provided by someone on the ground who is independent.

143. As the Court of Appeal in *Re X* points out the DOLS provide that protection through RPRs. And an equivalent approach is taken under the Care Act.

144. I do not suggest that even with such independent help the COP will not miss points, or get things wrong, but in my view the risk of such errors being made will increase significantly if the system or procedure does not include such independent help. Further, if and when such errors occur without it, it is likely if not inevitable that they would properly be attributed (at least in part) to the failure of the system or procedure to provide the minimum procedural safeguards for a person who is being deprived of their liberty.

145. The point that in cases of doubt the COP can, and in a number of cases would, seek further information or take other steps under Rule 3A, or order a s. 49 report, instruct a visitor or issue a witness summons, means that in some cases it would avoid the system or procedural defect arising from the lack of an independent check. But it does not remove it.

146. Nor does the point that from April 2016 there is the added potential for cross fertilisation between Care Act assessments and a streamlined procedure (see in particular s. 67 of the Care Act). This links with the point that a P may have an IMCA or a RPR (see s. 39 of the MCA). An example of this cross fertilisation occurred in the case of JM in which JM's Care Act advocate has completed Annex C to the application to the COP.

147. But, and it is a crucial but, Annex C and so what a Care Act advocate was prepared to do in JM's case and so which such an advocate or an IMCA / RPR may be prepared to do as such under the present arrangements (or as the role of a Care Act advocate develops), is not aimed at the task of a Rule 3A representative. Rather, as the heading of Annex C shows, it records a consultation with P and so under the *Re X* procedure, it is directed to ascertaining the views of P and not to an independent check of the care package, negotiation (if necessary) with the applicant authority as to what it should contain and the taking of a position for or against it in the COP.

148. On one view the role of a Care Act advocate may cover such a check and negotiation about, and so challenge to, terms of the care package, but it is common ground that their present role does not extend to taking on a responsibility to the COP, or taking a position before the COP, or instituting reviews by the COP. On the same theme some IMCAs and RPRs, particularly under the DOLS, and so in connection with proceedings under s. 21A of the MCA, have taken on the role of litigation friend. But again it is common ground that their present role does not extend to acting as a Rule 3A representative.

149. So, in my view the cross fertilisation point:

i) confirms the accepted possibility that persons who have acted as and/or are or may become available to act as IMCAs, RPRs and Care Act advocates for Ps are a resource from which Rule 3A representatives could be appointed,

ii) indicates that constructive discussion between central and local government and the providers of advocacy services coupled with the provision of some extra funding may provide a route to overcoming the present reluctance of the providers of advocacy services to provide and of the persons they recruit to act as Rule 3A representatives, but

iii) does not provide a procedure or resource that is presently available in practice to the COP to meet the minimum procedural requirements by exercising its power under Rule 3A (or its general management powers) to appoint someone to carry out an independent check and report back to the COP.

150. I accept that such constructive discussions coupled with the provision of extra funding would have a good prospect of expanding the resource of advocacy services provided by providers to cover Rule 3A representatives or to achieve the result that those who act or are qualified to act as Care Act advocates, IMCAs and RPRs are ready, willing and able to directly or indirectly play a part in COP proceedings that will satisfy the minimum procedural requirements as a Rule 3A representative, or possibly as the author of a report and so a witness (and so by analogy a visitor or a CAFCASS reporter). Issues in any such negotiations would be (a) the independence of such advocates (see for example paragraphs 64 and 65 above) and (b) whether they could

carry out the day to day supervisory roles that a member of the family or friend can carry out and which could trigger an application for a review. As I said in *NRA* the latter is outside the role of a litigation friend and it may be that it could be dispensed with and covered by periodic reviews.

151. The possibility of this result being achieved is effectively common ground. The divergence between the applicants and the Secretary of State relates to whether it could be achieved without further resources, who should provide such resources and possibly on timescales if and when those resources are provided. So the divergence comes back to the central points raised in *NRA* on the practical availability now (or in the near future) of a process that meets the minimum procedural requirements and has created what I have referred to earlier as a "resources led Catch 22".

152. This reasoning and conclusion means that I do not have to go on to consider whether the COP has the resources to implement the procedure advanced by the applicants in a way that is speedy, practical and effective. However I comment that any such consideration would engage issues concerning the appointment, training and availability of a sufficient number of judges but I am of the view that there should be a real prospect that such issues could be resolved.

153. *Conclusion.* The procedure proposed by the applicants does not meet the minimum procedural safeguards required by Article 5 and the common law and so would be unlawful.

Taking an available short term or the least bad option

154. It is not uncommon in a welfare case for the COP to take the least bad available option. This flows from the point that it has to choose between available options. But the choice is of the least bad available lawful option and so in my view this approach does not provide a basis for choosing an unlawful option.

155. In the short term, it may be that as in *NRA* there is an available short term option of making P a party and appointing the Official Solicitor to act as his litigation friend in these test cases and others of the same type. That possibility is catered for by my proposed order because in each case the MoJ can ask the Official Solicitor whether he can do this on the level of resource it has provided or will provide to him and he can check whether a solicitor would act for him in that case.

156. Also, the proposed order enables an applicant to avoid the stay by identifying a Rule 3A representative or to apply to lift the stay if and when one is found or some other way of meeting the minimum procedural requirements is found.

157. In one sense the stay accords with the general case by case approach suggested by the Secretary of State because in these cases the COP has investigated the possible alternatives and not found one (other than the short term back-up possibility of appointing the Official Solicitor as P's litigation friend until he reaches his "saturation point") and in other cases the joinder of the MoJ and the stay acts as a trigger to the investigation suggested by the Secretary of State save that it also engages central government.

158. If it was to have any real prospect of success this is the investigation that the COP would have to trigger by directions, adjournments for answers and possibly witness summonses on a case by case basis. Not only would such a course jeopardise the proper performance by the COP of other aspects of its work, it would be a waste of time and effort if the public authorities faced directly and indirectly with the problems arising in respect of DOL welfare order applications did not address those problems constructively and timeously.

159. I confess that I have reached my conclusion with reluctance and sadness because it seems to me that:

i) In many cases the *Re X* procedure and thus the approach urged by the applicants would provide the right answer in a proportionate way having regard to what are effectively best interests and not liberty of the subject issues.

ii) If lawful, such a procedure is one that the COP should have a realistic prospect of being able to perform in a speedy practical and effective way and, in many cases, it would correctly identify and authorise a care package that is the best and least restrictive one available to promote P's best interests and thereby relieve many Ps and their families of uncertainty and concern, and many public authorities of the problems flowing from the unlawful provision of such a care package because, applying *Cheshire West*, it deprives P of his liberty.

iii) The purpose and instinct of the COP is to try and provide the results referred to in sub-paragraph (ii) and it seems to me that this underlay the President's decision in *Re X* and I know it underlay the introduction of Rule 3A.

160. The underlying approach of the Secretary of State has been to accept and advance that purpose of Rule 3A without engaging constructively in the provision of resources that would enable the COP to do so by appointing professional Rule 3A representatives. This approach together with the answer to one of my final questions that I could not resist, namely:

> Does the Secretary of State for Justice accept that the MoJ would be the appropriate defendant (as the department responsible for the administration of the court and the making of its rules) to any case alleging a failure by the court as a public authority to comply with the minimum procedural requirements of Article 5?
>
> The Secretaries of State consider that in every case at least one of the four options (identified at paragraph 9 above [the four options I have referred to in this judgment]) will be available, practical and effective. The Secretaries of State consider that the Court will be able to make directions in every case that meet the minimum procedural requirements and therefore the situation posited by the question would not arise.
>
> [A paragraph accepting responsibilities for the COP and its Rules]
>
> The appropriate defendant(s) to any challenge would depend on the precise grounds pleaded by a claimant. But if a challenge were brought which complains solely about the actions of the Court vis-à-vis Article 5, it would require to be considered whether other public authorities, including the local authority which is detaining P, should be joined as defendant in the

> proceedings. The Secretary of State for Justice acknowledges his obligations in respect of the Court of Protection (as set out in the preceding paragraph) but is not able to comment further on the appropriate defendant to a hypothetical claim.

shows that unless the MoJ and the DoH (or one of them) are joined parties they will continue to seek to avoid any responsibility for the provision of resources on the ground that enable the COP to meet the minimum procedural requirements and this will cause further delays and difficulties.

161. They may continue to do this but in doing so they will be refusing the invitation of the COP, for which the MoJ accepts it has responsibilities, to assist it in finding a way in which it can meet the minimum procedural requirements and so act lawfully in the class of cases represented by the test cases.

162. Naturally, I acknowledge that the Secretary of State has no direct knowledge of each case and would probably not be a necessary party if constructive work was being done to provide available resources. But they are not and the Secretary of State can address the general points absent any detailed knowledge of each case and if he needs such knowledge he can ask for it.

163. I have issued only an invitation to the Secretary of State because, for the same reasons that I have concluded that I cannot direct or order the applicants to provide a Rule 3A representative or other resources to meet the minimum procedural requirements, I accept that I cannot order the Secretary of State to do so.

164. My invitation will enable the Secretary of State to demonstrate to the COP that his submission in these cases is right, or can be made right, by him identifying in each case which of the four options he has advanced is an available, practical and effective procedure in that case. I express the hope that he will be able to do so. When a history showing the availability of such options has been established it may well be that the COP (and the other parties to such cases) will no longer need the assistance of the Secretary of State to identify the options that are available to them. But at present they do.