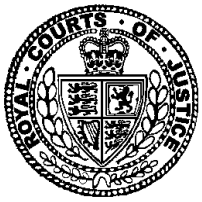

Neutral Citation Number: [2015] EWCA Civ 599

Case No: B4/2014/2849 & 3148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION
12488518

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2015

Before :

LORD JUSTICE MOORE-BICK
Vice President of the Court of Appeal Civil Division
LADY JUSTICE BLACK
and
LADY JUSTICE GLOSTER

- -

RE X (COURT OF PROTECTION PRACTICE)

- -

- -

Ms Nathalie Lieven QC & Ms Katie Scott (instructed by **Irwin Mitchell LLP)** for AC & GS (Appellants)
Mr Stephen Cragg QC & Mr Stephen Broach for the Law Society of England & Wales (Appellant)
Ms Joanne Clement for The Secretary of State for Health and The Secretary of State for Justice
Mr Richard Gordon QC, Mr Alexander Ruck Keene & Mr Benjamin Tankel on behalf of the Official Solicitor

Hearing dates: 17th & 18th February 2015

- -

Approved Judgment

BLACK LJ:

1. This appeal concerns the practice and procedure to be adopted in applications to the Court of Protection in deprivation of liberty cases ("DoL cases") following the decision of the Supreme Court in *Surrey County Council v P and others (Equality and Human Rights Commission and others intervening), Cheshire West and Chester Council v P and another (Same_intervening)* [2014] UKSC 19 [2014] AC 896 *("Cheshire West").*

2. The President of the Court of Protection gave two judgments on the subject ("the first judgment" of 7 August 2014 and "the second judgment" of 16 October 2014). It is in relation to aspects of these that the parties appeal. No order was made reflecting the judgments or pursuant to them.

3. Central to the President's judgments and to this judgment is the Mental Capacity Act 2005, to which I will refer as MCA 2005. References to "ECHR" are to the Convention for the Protection of Human Rights and Fundamental Freedoms and "P" is the person whose liberty is at stake unless the context demonstrates otherwise.

The process leading to the President's judgments

4. In view of the unusual path that matters took in front of the President, I need to look in a little detail at what occurred before him.

a) The President's description of the process

5. A good starting point is the President's own description of the exercise upon which he was engaged. The spur was the expectation that the *Cheshire West* decision would give rise to a large increase in the number of cases in the Court of Protection relating to deprivation of liberty. In the first judgment, the President said:

> "3. In order to address this increase, I arranged for a number of DoL cases to be listed before me for initial directions on 8 May 2014. With the assistance of counsel appearing before me on that occasion, in particular Mr Alexander Ruck Keene who appeared for the Official Solicitor as advocate to the court, I was able to formulate the 25 questions, set out in the Annex to the order I made at the conclusion of that hearing, to be considered at a further hearing I fixed for 5 June 2014….."
>
> "5. The immediate objective, in my judgment is to devise, if this is feasible, a standardised, and so far as possible 'streamlined', process, compatible with all the requirements of Article 5, which will enable the Court of Protection to deal with all DoL cases in a timely but just and fair way. The process needs, if this is feasible, to distinguish between those DoL cases that can properly be dealt with on the papers and without an oral hearing, and those that require an oral hearing."

6. In §7, the President explained how rules are made for the Court of Protection and referred to the work of the ad hoc rules committee ("the Committee") set up to

review the Court of Protection Rules and associated practice directions and forms. In §8, he went on to say that the judgment:

> "concentrates on the issues directly relevant to what I will call the 'streamlined' process. It sets out no more than the broad framework of what, in my judgment, is required to ensure that the 'streamlined' process is Article 5 compliant. Additional, detailed, work needs to be carried out as soon as possible by the Court of Protection in conjunction, where appropriate, with the Committee."

7. In the second judgment, the President supplemented and elaborated upon the first judgment. He again commented upon the need for the Committee to give urgent consideration to certain matters. He said:

> "35. Each of the matters I have been considering is, for the reasons I have given, within the proper ambit of the Committee. They are all, in my judgment, matters that can properly be regulated by the 2007 Rules. They are all issues which, as it seems to me, require urgent consideration by the Committee, both as a matter of principle and also to achieve the necessary clarity for which [counsel for the Law Society] appropriately called. Some, it may be, might also merit consideration by both the Civil Procedure Rules Committee and the Family Procedure Rules Committee."

8. In §36, the President commented that it was not for him to advise the Committee how to proceed but invited particular attention to features that would need their careful consideration.

b) Further detail in relation to the hearings on 8 May 2014 and 5 June 2014

9. The Official Solicitor provided us with a little more detail of the context for the directions hearing on 8 May 2014 and the substantive hearing on 5 June 2014 ("the June hearing").

10. In early May 2014, HMCTS wrote to a number of local authorities that had made applications to the Court of Protection relating to deprivation of liberty, informing them that the President "has arranged for all these applications to be listed without notice, for a directions hearing in open court on Thursday 8 May", and that the Official Solicitor and the Department of Health had been invited to take part. The local authorities were asked to confirm their attendance, which could be by "collective representation".

11. The Official Solicitor told us that it is difficult now to identify precisely how many applications were in fact before the President. This is unsatisfactory. It does not assist that apparently no order was ever drawn up following the June hearing. Perhaps the best that can be done is to take the order of 8 May and the two judgments as a guide.

12. The order of 8 May is headed with the numbers of thirteen applications and it appears that on that day eight local authorities were represented, as well as one independent provider of care, the Secretary of State for Health, the Official Solicitor and one individual patient. Neither of the applications relating to the two patients who ultimately appealed to this court (AC and GS) had been issued by then.

13. The order gave directions for the June hearing. It provided, inter alia:

> "1. The applications before the Court are adjourned to 5 June 2014 to a hearing to be listed before Sir James Munby P in open court (time estimate 2 days) to consider the issues set out at the Annex to this order, and such other issues as have been identified prior to that hearing as requiring resolution as a matter of principle or practice going to the proper procedure for the authorisation by the Court of Protection of deprivations of liberty…..
>
> 2. Such other applications for authorisations of deprivation of liberty as are issued by the Court of Protection between today's date and that of the hearing at paragraph 1 are also to be listed for directions at that hearing. The parties to such applications are not required to attend or to make submissions in advance of that hearing, but may do so if advised… "

14. Provision was made in the order for "the parties (and any body given permission to become a party pursuant to [an application to the President on the papers])" to file position statements, evidence and other supporting materials, and skeleton arguments "going to all or any of the issues identified in the Annex to this order". The parties were directed to "use their best endeavours to ensure that there is no unnecessary duplication in [the material filed], including by focusing upon the issues to which they can bring specific expertise and evidence". The order made provision for the filing of bundles, which were *not* to include "evidence going to the specific facts of individual cases save and to the extent that such is necessary to address the general issues for consideration at the hearing, but shall include an agreed schedule identifying in concise form each individual 'P', the class of case into which they fall (by reference to the classes set out in the Annex to this Order), the core issues upon the application, and the relief sought". I have not found any such schedule in our papers for the appeal.

15. The Annex to the May order began:

> "By way of preliminary indication, the Court identified three classes of case giving rise to applications to it for authorisation (some of which may give rise to sub-classes and/or situations where an individual will fall between two classes or sub-classes):
>
> (1) Persons deprived of their liberty by the State who fall within the scope of Schedule A1 to the MCA 2005, but in respect of whom the requirements of Part 9 of Schedule A1 cannot be met for reasons of lack of resources because of the

> high number of such persons and consequent high volume of assessments which post-Cheshire West are and will be required;
>
> (2) Persons deprived of their liberty by the State who fall outside the scope of Schedule A1 to the MCA 2005 (because they are residing other than in a hospital or care home), with the result that their deprivation of liberty would have to be authorised as giving effect to [sic] an order of the Court of Protection under section 16(2)(a) of the MCA in relation to a matter concerning their welfare;
>
> (3) Those aged 16 and over deprived of their liberty while being cared for in a family home (whether with relatives, foster carers, adult shared lives providers or other arrangements for their care, but with a sufficient degree of State involvement to engage Article 5(1) ECHR) such that their deprivation of liberty would have to be authorised as giving effect to an order of the Court of Protection under section 16(2)(a) of the MCA 2005 in relation to a matter concerning their welfare."

16. The Annex said that each of these classes would fall to be considered at the hearing and invited assistance on matters affecting them. The twenty five questions formulated by the President with the assistance of Mr Ruck Keene then followed. The full list can be found attached to the President's first judgment which is available on bailii.org.uk ([2014] EWCOP 25). Together, the questions cover most of the procedural issues that could be expected to arise in relation to a deprivation of liberty application, including the issues which have been the subject of the present appeals.

17. By the time of the June hearing, there were more participants in the process. The first and second judgments are headed: "Case No: [the case number of the individual patient who had been represented on 8 May] and 28 others". It seems that the other cases included those of AC and GS, applications by now having been issued in relation to them. According to the front sheets of the judgments, ten local authorities, two NHS bodies and four patients were represented at the hearing, along with the Secretary of State for Health, the Secretary of State for Justice, the Law Society, the Association of Directors of Adult Social Services and, as advocate to the court, the Official Solicitor. Written submissions were filed on behalf of Mind.

18. My understanding is that the June hearing was concerned with procedure in general terms and not with the situation in individual cases. Amongst the participants in the June hearing were some of the counsel who appeared in front of us on the appeals. There was also available a transcript of the two days of the June hearing. We were not, however, taken to any instance of counsel and the court debating specific issues in relation to the cases of individual people. Nor, it seems, was any order made pursuant to the hearing in relation to issues of practice, procedure or substance in individual cases, except that some reporting restrictions were imposed.

The issue over jurisdiction

19. The overriding impression gained from the President's description of the process in front of him, and from the information that we have about the surrounding circumstances, is that he was intent upon establishing a workable procedure which would cater for the influx of work in the Court of Protection, pending the making of appropriate rules. It is entirely understandable that he should have wished to achieve this. However, I will have to address the question of whether he had jurisdiction/power to do so in the way that he did and the allied question of whether this court has jurisdiction to entertain the present appeal. All parties wished us to decide the issues placed before us but that does not resolve the issue of whether we are entitled do so.

The ambit of the appeals

20. Not all of the President's answers to the twenty five questions were put in issue before us. The permitted grounds of appeal focussed upon his views on two matters:

    i) Whether the person who may be deprived of his liberty ("P") must always be joined as a party; the President said not and this was appealed by AC and GS and the Law Society;

    ii) Whether the initial decision and subsequent reviews require an oral hearing; the President said not necessarily and this was appealed by the Law Society.

21. The Official Solicitor sought permission to bring his own appeal in relation to a further matter, namely whether a litigation friend for P may conduct the litigation without a solicitor.

22. Neither the question of oral hearings nor the Official Solicitor's application for permission was reached at the appeal hearing. It was therefore agreed that they would be left in abeyance until after this judgment, with the parties meanwhile considering whether the present appeal is an appropriate vehicle for determining the questions that arise in this respect. When I come to look at the substance of the appeal, I will therefore deal only with the first question, namely whether the person who may be deprived of his liberty must always be joined as a party to the proceedings in which the court considers whether deprivation of liberty should be authorised.

Jurisdiction before the President and in this court

23. I must turn first to the vexed questions of whether the President had jurisdiction to proceed as he did and whether this court can/should entertain an appeal against his determinations.

a) The cases of AC, GS and MG

24. An examination of the question of jurisdiction necessitates an understanding of what proceedings and issues were before the President. I have set out already what is known in general terms about the origin and structure of the hearings (see §4 et seq above). I need now to return to look at the individual cases that featured in the litigation.

25. The only individual cases about which we were given any real detail were those of AC and GS. From what we were told, it is clear that they proceeded independently of the June hearing.

26. In AC's case, the application was made on 9 May 2014 by the NHS body responsible for commissioning and funding AC's care package, which proposed moving AC from a care home (where his liberty was restricted pursuant to a standard authorisation) to a supported living placement where he would also be deprived of his liberty. The NHS body applied for an order authorising the move as being in AC's best interests and, in particular, authorising the deprivation of liberty that the new care arrangements would involve. AC was specified as a "respondent" to the application. I need not address what effect this would have had under the Court of Protection Rules 2007 because an order joining him as a party was made by a district judge sitting in the Court of Protection on 14 July 2014 (therefore before the first judgment) "of the court's own initiative without a hearing and without notice". The intention, as disclosed in the application and the attached draft consent order, was that AC's mother would be his litigation friend; the order of 14 July 2014 provided that the court would consider at the first directions hearing whether she was suitable to act in this capacity. The next hearing seems to have been on 13 August 2014. The preamble to the order made by the district judge that day set out that there were "no objections to [AC's mother] acting as AC's litigation friend in these proceedings" and she was duly appointed. AC was represented at the hearing by counsel. Final declarations were made authorising AC's move and associated deprivation of liberty, and provision was made for a review to be listed six months after the move. The next review was in fact scheduled for March 2015.

27. In GS's case, she was being deprived of her liberty in a supported living placement but no application had been made for authorisation. Through her proposed litigation friend (her mother), she made an application in order to bring the matter before the court. She was represented by a solicitor. On 14 July 2014, preliminary directions were given by a district judge sitting in the Court of Protection. A further order was made by another district judge on 6 August 2014. It recorded that there was agreement that GS's mother should act as her litigation friend and she was appointed accordingly. As with AC, GS had legal representation at the hearing. Declarations were made on an interim basis as to what was in GS's best interests by way of accommodation and care, including authorising deprivation of liberty. A review hearing was held on 8 October 2014. Again GS was represented. The district judge sanctioned a forthcoming change of accommodation, again on an interim basis. A further hearing was scheduled for January 2015 to look at how matters had progressed, but was postponed when GS's move did not proceed as quickly as expected. A further hearing was proposed for mid-April.

28. In the light of this short procedural history of the two cases, I think it is fair to say that in neither case had any particular issues become apparent by the time of the June hearing, or indeed by the time of the first judgment on 7 August, in relation to the twenty five matters addressed by the President. There was no question of either AC or GS not being a party to the proceedings concerning them and, before the President's first judgment, both were. Both had legal representation so no issue arose over their litigation friends conducting litigation. The decisions about their liberty took place at oral hearings so there was equally no issue over that. It was

submitted that nevertheless, in each case, certain of the matters (itemised by Ms Lieven QC and Ms Scott in their note on the two cases) "arose for consideration". The cases were continuing after the President gave judgment and therefore, they submitted, his ruling had the capacity to influence the future conduct of them.

29. The Official Solicitor invited our attention to a further case from among those listed before the President, that of MG. His principal purpose in calling attention to this case was to support his argument that an acceptable course for this court to take, if we could not accept that we had jurisdiction to hear the appeal in the ordinary way, would be to transform the present appeal proceedings into judicial review proceedings. Although the other appellants had not been directly affected by the President's judgments, MG had been, he said, and would therefore be an appropriate claimant in judicial review proceedings. The details of MG's case are scanty but it seems that the foundation for the Official Solicitor's view was that, following an order by a district judge on 9 September 2014 which I presume joined MG as a party with the Official Solicitor as her litigation friend and provided for an oral hearing, the local authority made an application to court for a review of these provisions in the light of the President's judgments. To my mind, the question of whether we should change horses from appeal to judicial review midstream depends on more fundamental considerations than whether a suitable claimant could be found. Nevertheless, MG's case provided a useful illustration of the practical implications for individual cases of the President's judgments.

b) The parties' approach to the question of whether the Court of Appeal has jurisdiction to hear these appeals

30. The parties were all in agreement that this court did have jurisdiction to hear the appeal. The initial arguments advanced in support of that were based upon section 53 of the MCA 2005 but, having sought further assistance, we received additional submissions on the second day of the hearing. The parties remained unanimous in attempting to persuade us that we should accept that we had jurisdiction to hear the appeal in the ordinary way or, failing that, that we should find a way to give judgment on the substantive issues. It is obvious that there are powerful arguments that can be mounted against there being conventional appellate jurisdiction, and that the alternative bases upon which we were invited to give judgment on the substance of the case also have shortcomings which need to be considered. It was disappointing, therefore, that the Official Solicitor, in his role as advocate to the court, did not advance the arguments against the course that the other parties commended to us, as well as those in favour of it. It is vital that an advocate to the court should not be swayed by a desire for a particular outcome – here that this court should give its view upon the merits of the appeal. What the court needs is neutral assistance covering the ground from all angles. The absence of such assistance in this case made a difficult issue much more difficult and time-consuming to resolve.

c) Section 53 Mental Capacity Act 2005

31. I start with the parties' proposed answer to the jurisdiction question, namely section 53 of the MCA 2005. This sets out the rights of appeal in cases under the Act. It provides

> "(1) Subject to any provisions of this section, an appeal lies to the Court of Appeal from any *decision* of the court." [my italics here and in the following quotations]

One need look no further than this, argued the parties, because a "decision" is not synonymous with a "judgment or order" and the President's rulings in his judgments were "decisions" of the Court of Protection, attracting an appeal to the Court of Appeal. This submission necessarily involved an implicit assertion, I think, that the President himself had jurisdiction to rule as he did, on the basis that judges sitting in the Court of Protection are not restricted to making conventional orders but can make "decisions" and that is what he was doing.

32. Reliance was placed on *R (Jones) v Ceredigion CC* [2005] EWCA Civ 986 [2005] 1 WLR 3626 where it was held that the word "decision" in section 13(2) of the Administration of Justice Act 1969 (concerning leapfrog appeals to the House of Lords) could have a different meaning from "judgment or order" in section 16(1) of what was then the Supreme Court Act 1981, now the Senior Courts Act 1981. I would be prepared to accept that, as a matter of language, "decision" need not always be the same as "judgment or order" as *R (Jones) v Ceredigion CC* demonstrates. However, context is all important and *R (Jones) v Ceredigion CC* throws little light on what the word means in the MCA 2005.

33. I turn therefore to the Act and the associated Court of Protection Rules 2007. It was suggested that the word "decision" may deliberately have been chosen in the MCA 2005 because courts may be reluctant to make orders in cases under the Act because, in contrast to "decisions", they may lead to penal sanctions. I am cautious about accepting (i) the idea that orders are different from decisions in terms of their consequences and (ii) the idea that, in this respect, a different regime was intended in mental capacity cases from that applicable to other litigation, but I have these possibilities well in mind in examining the relevant provisions.

34. The Act and the Rules are not uniform in their use of the terms "order" and "decision". Section 53 itself does refer consistently to decisions rather than orders throughout. It may be of note, however, that section 53(4) refers to a "decision" of a higher judge of the Court of Protection on an appeal. Whatever the sensibilities of a first instance Court of Protection judge about making an "order" as opposed to a "decision", it seems likely that decisions made on appeal will need to be encapsulated in an order. This lends support to the idea that "decisions" and "orders" may not have been considered by the draftsmen of the Act to be markedly different.

35. An apparent convergence of the two terms can be found elsewhere in the Act as well. Section 16 is an example. It confers power on the court to make decisions on behalf of an incapacitated adult or to appoint a deputy for him or her. Section 16(2) contemplates that this will be done by making an "order". It provides:

> "(2) The court may:
>
> (a) by making an *order*, make the *decision or decisions* on P's behalf in relation to the matter or matters, or

> (b) appoint a person (a 'deputy') to make decisions on P's behalf in relation to the matter or matters."

It is interesting to see that elsewhere in the same section "orders" are apparently differentiated from "directions", as in section 16(5) which reads:

> "(5) The court may make such further or other *orders* or give such *directions*, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an *order* or appointment made by it under subsection (2)."

36. The Court of Protection Rules adopt a similarly serendipitous approach. I found in them what I consider to be examples of the word "decision" being used in the sense of "order". One such example can be found in Rules 59 and 60 where "order" and "decision" appear to be used interchangeably.

37. Rule 59 provides:

> "**Service of an order giving or refusing permission**
>
> The court will serve –
>
> (a) the *order* granting or refusing permission;
>
> (b) if refusing permission without a hearing, the reasons for its *decision* in summary form; and
>
> (c) any *directions*,
>
> on the applicant and on any other person notified of the application who filed an acknowledgment of notification."

It can be seen that it refers to both the "*order* giving or refusing permission" (see (a)) and (in (b)) a "*decision*" refusing permission. There is similarly a reference to the "permission *decision*" in Rule 60.

38. There is an equally relaxed approach to language in Rule 89 which concerns "an *order*" made without a hearing or without notice (see the heading of the rule and Rule 89(1)). It provides that certain people may apply for reconsideration "of the *order* made" (Rule 89(2)) but also says that reconsideration may be by any judge of the court "including the judge who made the *decision* in respect of which reconsideration is sought" (rule 89(6)).

39. Elsewhere in Rule 89, "decision" is used in what may be a slightly different way. For example, Rule 89(5) provides that where an application is made in accordance with Rule 89, the court may "affirm, set aside or vary any *order* made". The court's determination under Rule 89(5) is then referred to in Rule 89(7) and (8) as "a *decision* made under paragraph (5)", although in Rule 89(9) a decision under paragraph (5) seems to be aligned again with an order, the provision beginning:

> "(9) Any *order* made without a hearing or without notice to any person, other than one made under paragraph (5)….. "

40. The appeal provisions of the Rules are no doubt particularly worthy of examination, having been made under section 53 itself. Again they reveal a mixture of language.

41. Rule 172(1) provides that, subject to Rule 172(8) (which deals with committal orders), "an appeal against a *decision* of the court may not be made without permission". Rule 172(2) provides that permission can be sought by "[a]ny person bound by an *order* of the court by virtue of rule 74". Rule 74 provides that P and "any person who has been served with or notified of an application form [sic]" in accordance with the Rules "shall be bound by any *order* made or directions given by the court in the same way that a party to the proceedings is so bound".

42. Having surveyed the Act and the Rules as a whole, I cannot accept that those responsible for drafting section 53(1) intended the word "decision" to have the special, wider meaning for which the parties contended, and in particular to confer appeal jurisdiction in a case such as the present. The general context of applications under the MCA 2005 does not support this any more than does the wording of the Act and the Rules. The purpose of the Act is to allow decisions to be taken for individuals. It proceeds upon the basis that there is an individual who lacks capacity, "P". It is P and certain others associated with him who can apply without permission to the court for the exercise of its powers under the Act (section 50(1)). Anyone else must seek permission to apply and the court determining that application must have particular regard to the position of the person to whom the application relates (section 50(2) and (3)). There are applicants and respondents in the proceedings just as there are in other forms of litigation. In that context, in my view, "decision" cannot mean just any decision made by the Court of Protection; it must mean a decision taken in a lis involving P or in some way about P. If the meaning of the word was intended to be broader than that, distancing the role of the Court of Protection so far from the normal role of courts as to enable the judges of that court to decide points of law and practice on a hypothetical basis, that would, in my view, need to have been clearly indicated in the Act and/or the Rules. I can detect no such clear indication.

43. If reinforcement were needed, it might perhaps be found in the provisions of Part 52 of the Civil Procedure Rules 1998 (CPR) which regulate appeals to this court in all manner of civil cases. Like section 53 of the MCA 2005, they too refer to appeals from "a decision" of a judge of the county court or High Court, see for example Rule 52.3. Nobody suggests that this implies that the Court of Appeal has a jurisdiction to entertain appeals other than from judgments or orders.

44. In short, therefore, I am not prepared to accept the parties' argument that because the President decided something when he was sitting in the Court of Protection, that something was "a decision" within the meaning of section 53 and can be appealed to this court. The President's rulings were only decisions giving rise to an appeal, in my view, if it can be said that he was determining issues in the cases before him. I will return later to that question, which is not straightforward given that no one has been able to identify any case in which the issues that he ruled upon had actually arisen by the time he heard argument and gave judgment.

d) Other possible bases for jurisdiction considered but rejected

45. I have reviewed other possible bases for us to exercise jurisdiction in this case. Two quite separate types of jurisdiction required consideration. The first is the normal jurisdiction to entertain an appeal from a judgment or order of a lower court. The second is the jurisdiction to entertain judicial review proceedings, which is what the parties urged us to do if we decided that we did not otherwise have appeal jurisdiction.

46. The parties sought to persuade us that we should approach the question of our appeal jurisdiction in what they submitted was the rather more expansive (my word not theirs) way apparent in modern appellate decisions. They suggested that, as the notes in the White Book (9A-77) state, in modern times the courts have shown a greater willingness to entertain cases which raise points of law which, although academic or hypothetical, are points of general public interest. Modern authorities of relevance in this connection include *R v Canons Park Mental Health Review Tribunal ex parte A* [1995] QB 60, *R v Secretary of State for the Home Department ex p Salem* [1999] 2 WLR 483, *Bowman v Fels* [2005] EWCA Civ 226; [2005] 4 All ER 609, and *Gawler v Raettig* [2007] EWCA Civ 1560.

47. I do not think that the jurisprudence goes so far as to establish that this court should entertain an appeal in a case in which the lower court was itself only ever engaged upon a determination of hypothetical or academic issues. In each of the cases to which I refer in the preceding paragraph, the matter began as a real dispute between parties to conventional litigation of one sort or another, before a court which undoubtedly had jurisdiction to rule upon the dispute, but the issue had been settled or otherwise resolved before the case reached the appeal court. I note the authorities, therefore, as a useful reminder that a pragmatic approach to litigation may sometimes be appropriate, particularly in the light of the overriding objective set out in today's procedural rules, but they do not, to my mind, constitute a licence to ignore jurisdictional and procedural rules completely nor do they permit the courts to be used to determine issues just because it would be useful to have an authoritative answer.

48. The fundamental question therefore is whether the President had jurisdiction to proceed as he did. I considered whether the proceedings before him might be characterised as an application for declaratory relief, albeit that the declaration (indeed any order at all) is missing. It was a possibility well worthy of consideration because proceedings for declaratory relief do not conform entirely to the profile of normal run of the mill litigation, it being well established that a claimant does not need to have a subsisting cause of action against a defendant before the court will grant him a declaration, see *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536. However, the characterisation is not appropriate here, in my view.

49. *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318 and *Milebush Properties Ltd v Tameside MBC* [2011] EWCA Civ 270 are relatively recent decisions of this court which consider the principles applying to declaratory relief. It is plain that the law on declarations has developed since Lord Diplock spoke about it in *Gouriet v Union of Post_Office Workers* [1978] AC 435 at 501. It can no longer be said that the jurisdiction of the court is "confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation

before it and not those of anyone else". But I do not think there has been a change in what Lord Diplock said immediately before this, namely that "the jurisdiction of the court is not to declare the law generally or to give advisory opinions". I have not discovered an example of the court making a declaration without a litigant first having put before it an issue. In the present case, that did not happen. The impetus for the hearing came from the President and not from any of those involved in the various proceedings that were picked out and listed together for his purposes. He made use of the cases in order to give a judgment on points which were (very understandably and properly) of concern to him, but there is no evidence that the parties to the cases were themselves needing assistance with them at that time.[1]

50. There is no need to burden this judgment with the entirety of my exploration of the routes by which it might be concluded that the President/this court had jurisdiction. Along the way, I considered, but discarded, for example, the possibility that the President was acting under section 52 of the MCA 2005 which concerns practice directions. It is difficult to see the process he adopted as coming within the ambit of the section at all, but if it did, the proper means to challenge section 52 guidance would surely have been by judicial review, not by appealing. The possibility that the President's hearing was a judicial review hearing can be put aside as well – there were no judicial review proceedings and no one was challenging any of the existing rules or practice directions. As for this court permitting some fancy footwork which might result in the proceedings before us being reconstituted as judicial review proceedings, I would be against such a course because a) it would be wholly artificial b) some inventive procedural steps would be required and c) it is unclear what might legitimately be nominated as a suitable target for review by this court, although one possibility I suppose would have been the new Practice Direction 10A which came out in November 2014, reflecting the President's rulings in August and October.

e) Concurrent case management of claims with common issues?

51. Part 19 of the CPR enables a group litigation order to be made, providing for the "case management of claims which give rise to common or related issues of fact or law" (Rule 19.10). Various formalities attend a group litigation order including the establishment of a group register on which the claims managed under the order are entered (Rule 19.11). Once the group litigation order has been made, directions can be given providing for one or more of the claims on the register to proceed as test claims (Rule 19.13). When the court gives a judgment or order in relation to one or more of the group litigation order issues, it is normally binding on the parties to all other claims that are on the group register (Rule 19.12).

52. Obviously there was no group litigation order in the present case but the President did have multiple cases listed in front of him and, striving to find some legitimate basis for the process which occurred before him, I looked at the group litigation process to see whether it was instructive in any way. It does give an interesting insight into the way in which courts handle issues that are common to a number of cases. Furthermore, before the introduction of group litigation orders as such, the courts had developed ad hoc procedures for managing such litigation and I see no

[1] As to the power of the Court of Protection to make declarations, see also § 87 et seq of *Re MN (Adult)* [2015] EWCA Civ 411, a decision of this court handed down after argument was concluded in the present case.

reason in theory why the President should not similarly have made use of the ordinary case management powers under the Court of Protection Rules to marshal cases pending in the court with a view to dealing with common issues in a single judgment.

53. However, what is clear from the group litigation provisions is that they are there to deal with common or related issues of fact or law to which the claims in question actually give rise (Rule 19.10 of the CPR). That is, of course, in keeping with the normal approach to litigation in our courts and I think it must also apply to the giving of rulings in relation to case management issues which are common to a number of cases.

54. The question therefore becomes whether the process adopted by the President was sufficiently related to issues in real cases to treat it as a manifestation of the sort of collective case management procedure to which I have just referred. Ms Lieven invited attention to the fact that there were eighty cases before the President and argued that it was quite possible to interpret his judgments as his conclusions on how those cases were to proceed on key issues that arose (or would arise) in all or some of them. Putting it another way, one might say that he was giving case management directions for the group of cases listed before him. In Ms Lieven's submission, the answer to each of the President's twenty five questions would directly affect at least one of the cases before him. The problem is that it is not possible to know this with any degree of confidence and it certainly does not appear to be true of the two cases that we have been able to examine in detail and which are the subject of the appeals to this court. Even to begin upon this route would therefore require a leap of faith in accepting that there was, lurking somewhere in the proceedings listed before the President, a case in which there was a live issue (or perhaps an inevitable future issue would do) as to whether P should be a party to the proceedings.

55. It will be apparent from my earlier review of other potential jurisdictional bases that it has been my objective to find a foundation for this court to exercise its appellate jurisdiction if at all possible. I might, perhaps, just be able to bring myself to accept that the two issues which have featured in this appeal, that is party status and oral hearings, were sufficiently prevalent that they must have needed resolving in some of the cases listed before the President. But this would not be sufficient to overcome the jurisdictional problems we face because they did not arise in relation to the appellants, AC and GS, who are before us. There was no need for the President to make a decision in relation to party status or oral hearings in AC's or GS's cases and no foundation for him to have done so. We therefore have before us appellants who have no determination against which they need to appeal, whereas those (if any) who might have had a legitimate appeal against a decision of the President have not appealed.

56. The Law Society filed a separate appeal notice and were given permission to appeal, their appeal and that of AC and GS being consolidated by order of McFarlane LJ on 28 November 2014. The Law Society said in their skeleton argument of 12 January 2015 that they were joined as a party in the proceedings. No order to that effect is available and the Law Society do not say whether they were joined in one particular case, in some of the cases that were before the President, or in all of the cases. It is said that the matters under consideration in the appeal were "of considerable interest

to the [Mental Health and Disability] Committee and the Society as a whole, especially as they relate to the application of the rule of law, access to justice and access to legal representation for persons who lack capacity". This no doubt accounts for the Law Society's wish to make submissions to the President. However it is not immediately apparent to me that the Law Society had an interest in the proceedings before the President of such a nature as to entitle them formally to be parties to the first instance proceedings, as opposed to being permitted to make submissions at the hearing (see, Rule 73(2) of the Court of Protection Rules which permits the court to order a person to be joined as a party "if it considers it desirable to do so **for the purpose of dealing with the application"**, my emphasis). Nor is it readily apparent that they are adversely affected by the determinations made by the President in such a way as to entitle them to appeal to this court. No submissions were offered to us to persuade us that, no matter what jurisdictional issues arose in relation to the appeal of AC and GS, the Law Society had no such difficulty in pursuing their appeal. Had such submissions been made, I would have sought to explore the precise terms upon which the Law Society were joined in the first instance proceedings, and the legal and procedural rules applicable to appeals by those in the Law Society's position. As it is, nothing has been said to persuade me that the Law Society's appeal has any more standing than that of AC and GS.

57. I have considered whether, taking a more expansive contemporary approach to jurisdiction (see above), we should be persuaded to put to one side this finicky analysis and just accept that we can determine the issues that arise, because they were bound to affect someone in one of the cases before the President and/or because it is in the general public interest that we should do so. I am not prepared to depart so far from conventional principles. This case demonstrates the problems that can arise where formalities take second place to expediency, even when that happens for the very best of reasons. As we have heard such full argument on the substantive issues in the appeal, I am prepared to set out what I would have decided, had this court had jurisdiction, and I do so immediately below. I do not, however, feel able to go further.

58. It is with regret that I reach this conclusion as I have much sympathy with the President's determination promptly to devise and introduce a procedure to cater for the anticipated increase in the workload of the Court of Protection following the *Cheshire West* decision. However, the particular course he adopted was not one that was open to him, in my view. Furthermore, it was unnecessary to proceed in this way when there was a well established method available by which he could regulate the procedure for deprivation of liberty cases, namely by means of a Practice Direction of the type that was, indeed, made in November 2014. Had that route been adopted, the legal status of the guidance would have been clear and the means of challenging it plain.

Must the person who may be deprived of his liberty ("P") always be joined as a party?

a) The President's answer

59. The President explained his reasoning for his view that it was unnecessary for P to be a party in short form in his first judgment as follows:

> "18. Neither the Rules (see Rule 7 (4)) nor the Convention require P to be joined as a *party* to the proceedings, though Article 5(4) of course entitles P to "take proceedings".
>
> 19. What the Convention requires is that P be able to participate in the proceedings in such a way as to enable P to present their case "properly and satisfactorily": see *Airey v Ireland* (1980) 2 EHRR 305, para 24. More specifically, "it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty'.": *Winterwerp v Netherlands* (1979) 2 EHRR 387, para 60. P should always be given the opportunity to be joined if they wish and whether joined as a party or not must be given the support necessary to express views about the application and to participate in the proceedings to the extent that they wish. So long as that demanding standard is met, and in my judgment it can in principle be met without P being joined as a party, there is no need for P to be a party."

60. Returning to the question in his second judgment, the President first determined that there was no requirement in principle in domestic law that P be a party. The detail of his reasoning can be found in §§5 – 10 of the judgment but, in essence, it was as follows:

    i) The proceedings in question are analogous to welfare proceedings concerning children.

    ii) There is no requirement for a ward to be a party to the wardship proceedings or for the child to be joined as a party in private law proceedings under the Children Act 1989.

    iii) This is because of the special nature of welfare proceedings.

    iv) No distinction should be drawn between children and adults who lack capacity.

61. As for the position under the ECHR, the President's reasoning is at §11 - 15. The essential steps in it were:

    i) In matters going to deprivation of liberty, P is entitled to the procedural safeguards mandated by Article 5 and, because deprivation of liberty goes to a civil right, by Article 6.

    ii) The court must also have regard to Articles 13 and 14 of the Convention on the Rights of Persons with Disabilities.

    iii) Strasbourg jurisprudence requires strict scrutiny of the deprivation of liberty and lays down a demanding standard, see *Airey v Ireland* (1980) 2 EHRR 305,

Winterwerp v Netherlands (1979) 2 EHRR 387, *Megyeri v Germany* (1992) 15 EHRR 584.

iv) P should always be given the opportunity to be joined as a party if he wishes and, whether joined or not, must be given the support necessary to express views about the application and to participate in the proceedings to the extent he wishes, typically also needing some form of representation, professional though not necessarily always legal.

62. These steps led the President to the following conclusion at §15:

> "So long as these demanding standards are met, and in my judgment they can in principle be met without P being joined as a party, there is, as a matter of general principle, no requirement, whether in domestic law or under the Convention, for P to be a party."

63. He also took the view (§19) that there was no obstacle to P participating and being represented in proceedings in the Court of Protection without being joined as a party, and that if he was participating other than as a party, he would not need a litigation friend (§21). If joined as a party, Rule 141(1) of the Court of Protection Rules 2007 ("the Rules") requires him to have a litigation friend (§25).

b) The terms of Articles 5 and 6 ECHR and their role in this appeal

64. Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to liberty except in certain cases and in accordance with a procedure prescribed by law. Article 5(4) establishes the right of a detained person to speedy access to a court which can order his release if his detention is not lawful. Article 6 deals with the right to fair trial.

65. So far as material here, Articles 5 and 6 are as follows:

> **Article 5**
>
> Right to liberty and security
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …..
>
> (e) the lawful detention of …. persons of unsound mind;
>
> …..
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

> **Article 6**
>
> Right to a fair trial
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …..

66. In formulating his streamlined process, the President considered both Article 5 and Article 6 and satisfied himself that what was proposed did not fall foul of either. Similarly, much of the concentration of the arguments before us was upon the two articles, and particularly upon Article 5. My focus will be similar but this does not mean that I have overlooked what was said by the Supreme Court in *R (Osborn) v Parole Board* [2014] AC 1115. The court there observed that the submissions made to it had paid comparatively little attention to domestic administrative law, concentrating instead on Article 5.4. Lord Reed (with whom there was complete agreement) said that that approach did not properly reflect the relationship between domestic law (considered apart from the Human Rights Act 1998) and Convention rights (§54). He observed that the guarantees in the Convention are expressed at a very high level of generality and have to be fulfilled at national level through a substantial body of much more specific domestic law (§55). The Convention does not supersede the protection of human rights under the common law or statute or create a discrete body of law based on the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate (§58). The legal analysis of the problems cannot therefore begin and end with Strasbourg case law (§63).

67. In the instant case, a tour of the domestic law returns one, in due course, to the Convention and to the Strasbourg jurisprudence. That is entirely appropriate, in my view, given that the MCA 2005 points very clearly in that direction by explicitly providing, in section 64(5), that references in the Act to deprivation of a person's liberty have the same meaning as in Article 5(1) of the ECHR.

68. However, it is necessary to look first at the provisions of the MCA 2005 and the associated rules and also to consider whether any other area of domestic law provides assistance in determining the issue that is before us.

c) The domestic context: MCA 2005 and the Court of Protection Rules 2007

69. What follows is, for the most part, intended to be merely a broad description of the relevant features of the legal framework established by the MCA 2005. It should not be taken as a substitute for the very detailed provisions of that Act and the associated statutory instruments.

70. Baroness Hale described, in *Cheshire West*, the background to the introduction of deprivation of liberty safeguards into the MCA 2005 by the Mental Health Act 2007 and, at §§8 and 9, summarised the present provisions.

71. Central to the scheme is the elaborate procedure set out in Schedule A1 of the MCA 2005. Where stringent conditions are met, it allows the managing authority of a

hospital or care home to deprive a patient or resident of their liberty. The managing authority has to request the "supervisory body" (in England, a local authority) for a "standard authorisation" of the deprivation of liberty. The supervisory body commissions assessments in order to satisfy itself that the qualifying requirements for the authorisation (Sch A1 Part 3) are met, including a best interests assessment by someone who is not involved in the care of the relevant person or in making decisions about his care. If P has no one to speak for him other than someone engaged in providing care or treatment for him in a professional capacity or for remuneration, the supervisory body has to instruct an independent mental capacity advocate ("IMCA") to represent P during the process (section 39A MCA 2005). As soon as practicable after the authorisation is granted, the supervisory body must appoint someone to act as P's representative during the term of the authorisation ("the relevant person's representative", Sch A1 Part 10). The relevant person's representative is to maintain contact with P and support and represent him in relation to the authorisation, including where appropriate requesting a review of it or applying to the Court of Protection on his behalf. Section 21A of the MCA 2005 provides for a review by the Court of Protection of the lawfulness of the detention on the application of the person who is the subject of a standard authorisation or their representative.

72. Where authorisation is required for deprivation of liberty in other settings, outside a hospital or care home, application has to be made to the Court of Protection for an order under section 16(2)(a) of the MCA 2005. It was in relation to such applications that the President was considering whether P must be made a party.

73. Section 16 applies where P lacks capacity in relation to a matter concerning his personal welfare (section 16(1)). By section 2(1) of the MCA 2005, a person lacks capacity in relation to a matter if at the material time, "he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain". By section 3(1), a person is unable to make a decision for himself if he is unable:

> "(a) to understand the information relevant to the decision;
>
> (b) to retain that information;
>
> (c) to use or weigh that information as part of the process of making the decision, or
>
> (d) to communicate his decision (whether by talking, using sign or any other means)."

74. Section 16(2)(a) provides that the court may "by making an order, make the decision or decisions, on P's behalf, in relation to the matter". The powers of the court under section 16 are subject to the provisions of the MCA 2005 and, in particular, to sections 1 and 4 (section 16(3)).

75. Section 1 of the MCA 2005 sets out the principles on which the Act is based. They include that an act done or decision made under the Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests (section 1(5)).

76. Section 4 expands upon "best interests". Section 4(4) provides that the person determining what is in a person's best interests must, "so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him". By virtue of section 16(3), the court is under the same duty.

77. The Court of Protection Rules 2007 commence with a statement of the overriding objective in terms similar to those found in other procedural rules. The Rules have the overriding objective of enabling the court to deal with the case justly; dealing with a case justly includes, so far as is practicable, ensuring that P's interests and position are properly considered and ensuring that the parties are on an equal footing (Rule 3).

78. Rule 73 deals with parties. By Rule 73(1), the parties are the applicant and any person who is named as a respondent in the application form and who files an acknowledgment of service in respect of it. Rule 73(4) provides that unless the court orders otherwise, P shall not be named as a respondent to any proceedings. However, Rule 73(2) provides that the court may order a person to be joined as a party if it considers that it is desirable to do so for the purpose of dealing with the application. Even where he is not a party, P is bound by any order made or directions given by the court just as a party is (Rule 74).

79. If P becomes a party, all documents to be served on him must generally be served on his litigation friend or other person duly authorised to conduct proceedings on his behalf (Rule 33). Where P is not a party, he must still be notified of certain things, including that an application form has been issued by the court and of the date on which a hearing is to be held in relation to the matter, when the hearing is for disposing of the application (Rule 42(1)). The person notifying P has to give various explanations about the process and also inform P that he may seek advice and assistance in relation to the matter (Rule 42(2) – (4)). P must similarly be notified of a final order of the court (Rule 44). In each case, the information has to be given to P personally and in a way that is appropriate to his circumstances (Rule 46).

80. Part 10A of the Rules deals with deprivation of liberty. It contains only one rule, Rule 82A which is a signpost to the Practice Direction to Part 10A which sets out procedure governing applications for orders relating to the deprivation or proposed deprivation of liberty of P and proceedings connected with or consequent upon such applications. Practice Direction 10A was redrafted following the President's judgments, the new version making its appearance in November 2014. In its original form, it set out the procedure to be followed in relation to applications for orders under section 21A of the MCA 2005. The revised version deals with those applications and applications under section 16(2)(a) and requires reference to the *Cheshire West* decision and to the judgments of the President in the instant case. New application forms were also designed for section 16(2)(a) applications.

81. Part 12 of the Rules is entitled "Dealing with Applications" and regulates the handling of any application in court, including providing the court with the power to give directions on all aspects of the case including as to the joinder and removal of parties and the appointment of a litigation friend if P is joined as a party (Rule 85). Rule 88 provides that whether or not he is a party to the proceedings, the court may

hear P on the question of whether or not an order should be made, but that it can proceed with a hearing in P's absence if it considers that would be appropriate.

82. Part 15 deals with experts and Part 16 with disclosure. Both are drafted with the focus upon the parties to the proceedings rather than upon P when he is not a party. Part 17 deals with litigation friends. If a party to the proceedings, P generally must have a litigation friend (Rule 141). A person may act as a litigation friend for P if he can fairly and competently conduct proceedings on his behalf and has no interests adverse to his (Rule 140). The litigation friend must be appointed by court order (Rules 142 and 143).

83. Standing back from the detail, it is noteworthy that P is not routinely made a party to Court of Protection proceedings concerning him, though he can be joined (with a litigation friend) and he will, in any event, be bound as if he were a party. A degree of participation by P is contemplated in that he is to be informed of certain things and may be heard sometimes but it is nothing like the degree of participation that a party has in proceedings. If we were to be of the view that it was necessary for P to be a party to Court of Protection proceedings relating to his liberty, the MCA 2005 and the Rules present no obstacle and he could be joined. Those who drafted them do not, however, appear to have been persuaded that there was any situation in which P's joinder as a party was a necessity.

d) The domestic context: other provisions

84. The President's reasoning in this case depended in part upon drawing an analogy between cases involving adults who lack capacity and cases involving children, and he looked at various forms of domestic applications concerning children. In my view, however, the situation concerning children was of very limited assistance in determining whether P, an adult, should be joined as a party in proceedings relating to his own liberty. I say this in the light of *Cheshire West* which, to my mind, invites a comparison instead with the position of adults who do have capacity.

85. In *Cheshire West*, the Supreme Court was, of course, directly looking at Convention rights, rather than domestic law, but, in my view, the decision nevertheless sheds light upon the approach that should be taken in domestic law. It makes it clear that the starting point in considering the Convention rights of an adult with disabilities must be the same as the starting point for any other adult. Baroness Hale, with whom three others of the seven-strong court agreed, said:

> "45. In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.

> 46. Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focussed right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."

86. Counsel were unable to identify any situation where the issue before a court or tribunal was an adult's liberty, in which the person would not, themselves, be a necessary party to the proceedings. As far as children are concerned, secure accommodation proceedings under section 25 of the Children Act 1989 are perhaps the closest parallel to proceedings in the Court of Protection concerning deprivation of liberty, certainly closer than wardship and private law proceedings. In secure accommodation proceedings, as indeed in care proceedings, the child is a party. What this might indicate, it seems to me, is that it is generally considered indispensable in this country for the person whose liberty is at stake automatically to be a party to the proceedings in which the issue is to be decided. The President's conclusion that it was unnecessary for this to be so in relation to an adult without capacity appears therefore to run counter to normal domestic practice. It might, therefore, be thought to require very firm foundations if it is to be regarded as acceptable.

d) Article 5 considered further

87. *Winterwerp v The Netherlands* (1979) 2 EHRR 387 is of central importance in interpreting Article 5. The ECtHR (European Court of Human Rights) said at §60:

> "The judicial proceedings referred to in Article 5.4 need not, it is true, always be attended by the same guarantees as those required under Article 6 (1) for civil or criminal litigation. Nonetheless, *it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation*, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty'. Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves." (my italics)

88. Very shortly after the hearing before us, the judgment of the ECtHR in *M.S. v Croatia (No. 2)* (Application no. 75450/12) (2015) ECHR 196 became available and

I am grateful to counsel for the Official Solicitor for bringing it to our attention. It is interesting both for the way in which the court characterised the applicant's complaint and the way in which it determined it.

89. The applicant relied upon Article 5.1(e) and Article 5.4, complaining that she had been unlawfully and unjustifiably interned in a hospital where she was compulsorily confined, and that the judicial decision in that regard had not been accompanied by adequate procedural safeguards. Deciding to examine her complaint under Article 5.1(e) rather than Article 5.4, the court explained (§114):

> "While Article 5.4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty (see, for example, *M.H. v. the United Kingdom*, no. 11577/06, §74, 22 October 2013), Article 5.1 (e) of the Convention affords, *inter alia*, procedural safeguards related to the judicial decisions authorising an applicant's involuntary hospitalisation (see *Winterwerp v. the Netherlands*, 24 October 1979, §45, Series A no. 33, and *Rudenko v. Ukraine*, no. 50264/08, §104, 17 April 2014)."

90. The ECtHR emphasised the need for domestic courts to subject deprivations of liberty to thorough scrutiny so that the detained person enjoys effective procedural safeguards against arbitrary detention in practice (§146), speaking of the requirement that proceedings provide "clearly effective *guarantees* against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights" (§147, my italics).

91. The court found that the procedural requirement necessary for the applicant's involuntary hospitalisation had not been met by the national authorities because "they did not ensure that the proceedings were devoid of arbitrariness", as required under Article 5.1(e) (§160). The problem lay in the inactivity of the legal aid representative assigned to the applicant to represent her interests in the proceedings. He never met her, did not take her instructions or advise her, made no submissions on her behalf and, although he attended the hearing, acted only as a passive observer. The domestic authorities failed to take the necessary action to deal with this and thereby deprived the applicant of effective legal assistance in the proceedings (§156). The judge visited the applicant but it could not be shown that he had made "any appropriate accommodations to secure her effective access to justice" and, in particular, there was no evidence that he informed her of her rights or gave any consideration to the possibility of her participating in the hearing (§157). Furthermore, she was not given the opportunity to comment on the expert's findings at the court hearing (§159). There was no valid reason for her exclusion from the hearing, particularly since, in her interview with the judge, the applicant had not demonstrated that her condition was such as to prevent her from directly discussing her situation (§159).

92. Expressing itself once more in the terms which I have italicised in the extract from *Winterwerp* above, the court said that:

> "153. This implies, *inter alia*, that an individual confined in a psychiatric institution because of his or her mental condition should, unless there are special circumstances, actually receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement. The importance of what is at stake for him or her, taken together with the very nature of the affliction, compel this conclusion (see *Megyeri v. Germany*, 12 May 1992, § 23, Series A no. 237-A). Moreover, this does not mean that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having recourse to a court (see *Winterwerp*, cited above, § 66).
>
> 154. Thus the Court, having constantly held that the Convention guarantees rights that are practical and effective and not theoretical and illusory (see, *inter alia*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV), does not consider that the mere appointment of a lawyer, without him or her actually providing legal assistance in the proceedings, could satisfy the requirements of necessary "legal assistance" for persons confined under the head of "unsound mind", under Article 5 § 1 (e) of the Convention. This is because an effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts (see paragraph 45 above, Principle 18 of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care).
>
> 155. Accordingly, as to the way in which the applicant was represented in the proceedings, the Court is of the opinion that given what was at stake for her proper legal representation, contact between the representative and the applicant was necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant's legitimate interests protected (see *Sýkora v. the Czech Republic*, no. 23419/07, §§ 102 and 108, 22 November 2012, with further references)."

93. Article 5 is not, of course, drafted in terms which reflect our domestic procedure and practice and nor does the jurisprudence of the ECtHR speak in those terms. It is not surprising therefore that it is not said explicitly that a person whose liberty is the subject of proceedings must be a party to those proceedings. It is necessary to consider the substance of what is said in the Article and the decisions concerning it and to determine how the required guarantees can be delivered in the procedural framework of the domestic legal system.

94. What is essential is that the person concerned "should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation". In so far as special procedural safeguards are required because the person is not fully capable of acting for himself, they are there to secure the right and must not impair the "very essence" of it. *M.S. v Croatia* is a practical demonstration of what is expected.

95. The President did not, of course, have the advantage of seeing the decision in *M.S. v Croatia*. However, he had the Strasbourg jurisprudence in mind in the form of *Winterwerp* and recognised that it set a demanding standard. He considered that this could be met without P being joined as a party to the proceedings, provided that P was always given the opportunity to be joined if he wished and, whether joined as a party or not, given the support to express views about the application and to participate in the proceedings to the extent that he wished, typically with some form of representation, albeit professional rather than necessarily always legal.

96. I can accept that, in theory, P need not always be a party to the proceedings if his participation in them can reliably be secured by other means. The question is, however, whether this can be done and, more importantly, whether the streamlined procedure contemplated by the President could be sufficiently relied upon to achieve it. In considering this, it has to be borne in mind that the President was establishing a process which was to be universal. It would be translated into action by many who were expert and efficient but, inevitably, also by some who were lacking in time or expertise or judgment. In what follows, I am not suggesting bad faith on the part of those involved in the process, merely acknowledging the pressures and realities of everyday practice.

97. The President's route to ensuring that P will always be given the required opportunity to be heard was to be the new Practice Direction 10A and new forms, designed to ensure that the applicant for an order authorising the deprivation of liberty provides the necessary information and documentation so that the court can recognise cases in which the streamlined procedure was inappropriate and act accordingly. Although the new Practice Direction and forms came into existence later, it would be artificial to examine the President's scheme without reference to them. The unusualness of having recourse to such material in an appeal does, however, underline how out of the ordinary was the process that took place before the President.

98. The President detailed in his first judgment, particularly at §35, the matters that needed to be set out in the new application form. They included information as to the steps that had been taken to notify P and all other relevant people in P's life of the application and to canvass their wishes, feelings and views, and information about any relevant wishes and feelings expressed by P. The applicant was to be under a duty to make full and frank disclosure to the court of all facts and matters which might impact upon the court's decision, being factors needing particular judicial scrutiny or suggesting that the arrangements may not in fact be in P's best interests, or be the least restrictive option, or otherwise indicating that the order sought should not be made. On the front page of the form, it was to be indicated whether or not there was reason to believe that P or someone else challenges or is likely to challenge any of the matters set out in support of the application or to object to the order being sought.

99. Once the application is made, the burden under the streamlined process shifts to the court which has to scrutinise it to ensure that P's position is appropriately safeguarded. The President identified, in §13 of his first judgment, six triggers which would indicate the need for an oral hearing, including "any objection by P" and a contest about or concern arising in relation to certain of the matters set out in his §35. In the course of the hearing before us, although supporting the President's

approach entirely, the Secretary of State recognised that the list of triggers might need to be expanded to include a further circumstance, namely where there is no one appropriate to consult P about his views.

100. The problem with the President's scheme, in my view, is at least twofold. First, it is heavily dependent upon P conveying a wish to be joined in the proceedings or opposition to the arrangements proposed for him, or someone else who has his interests at heart taking these points on his behalf. Secondly, it depends entirely on the reliability and completeness of the information transmitted to the court by those charged with the task. In many cases, this will be the very person/organisation seeking authorisation for P to be deprived of his liberty and the possibility of a conflict of interest is clear.

101. It is instructive to compare the streamlined process contemplated by the President with the position as it would be if the Schedule A1 scheme applied. In that event, assessments would be carried out, an IMCA would be appointed where needed and, once a standard deprivation of liberty authorisation had been given, there would be a relevant person's representative who would represent and support P in all matters relating to the deprivation of liberty, including, where appropriate, making an application to the Court of Protection for a variation or termination of the authorisation.

102. A critical feature of the relevant person's representative is that he or she is independent of those who commission and provide the service that P is receiving and is charged, amongst other things, with making such application to the Court of Protection as is appropriate. This degree of independence and duty is lacking in the procedure followed in respect of an application to the Court of Protection under section 16(2)(a) for the court to authorise a deprivation of liberty. In a section 16 case, as I have already observed, the application is likely to be made by the body commissioning or providing care to P which has already formed the view that the deprivation of liberty is necessary in the best interests of P. As applicant, that body bears the primary responsibility for obtaining and providing to the court the information to enable the court to decide whether the case is appropriate for the streamlined procedure and ultimately, of course, if the streamlined procedure continues to apply, whether to grant the order sought. It is the applicant who sets out on the relevant court form why the proposed course is said to be required. Consultation with people with an interest in the application is also the responsibility of the applicant and the views of those consulted are reported to the court in Annex B to the application form filed by the applicant.

103. It is only in relation to the obligatory consultation with P that any significant degree of detachment is introduced. Annex C deals with this process and the notes to it advise that the consultation should be by someone who knows P and is best placed to express their wishes and views. The suggestion is made on the form that this could be a relative or close friend or someone the person has previously chosen to act on their behalf or, if no suitable person is available, then an IMCA or similar should be appointed. The results of the consultation are to be noted on the Annex C form and filed by the applicant with the application form. This consultation process has its limitations, however, as a safeguard for P. There is no equivalent to the relevant person's representative and no one whose role includes challenging the proposed deprivation of liberty. P may not have any family members or friends to

advocate for him, or none with the detachment (or drive or competence or knowledge) required to safeguard his interests in respect of his liberty. It may be, for example, that P's family is simply happy to go along with the management of the case by those caring for P or is unaware of the existence of alternatives. Even if he does have family members or friends, or if an IMCA is appointed for him as Annex C suggests, it is vital to keep in mind the characteristics of someone in the position of P. The court will only be involved in making the decision to approve the proposed deprivation of liberty under section 16(2) if P has a difficulty of the type set out in section 3(1), which I set out above. Consulting him about his views, canvassing his wishes, explaining what it means to be a party to the proceedings (or not to be a party), and finding out whether he wishes to be joined can be anticipated to present significantly greater challenges than it would with a person of full capacity. Inevitably, even when consulted very skilfully, he is not likely to be in a position to make an *informed* decision himself about his participation in the proceedings or indeed about his living circumstances, particularly as he may have no conception of the alternatives that might be available for his care. In the light of all of this, it is not appropriate, in my view, for P's participation in proceedings to turn in any way upon whether he wishes to participate or indeed upon whether he expresses an objection to the form of care that is being provided or proposed. There is too high a risk of slip ups in such a scheme. Article 5 requires a greater guarantee against arbitrariness.

104. I do not go so far as to say that no scheme in relation to deprivation of liberty would comply with Article 5 unless it provided for deprivation of liberty proceedings in which P was formally a party. The Schedule A1 procedure (with the initial authorisation conferred by the local authority but with provision for a challenge under section 21A) has been accepted as providing appropriate safeguards in relation to deprivation of liberty and I entirely accept that it could be extended to cover a wider category of case. Furthermore, I accept that it might be possible to take the best of that procedure and to devise a less complex process which will still protect those whose liberty is in the balance. I cannot agree with the President, however, that the streamlined scheme he devised provides the elements required for compliance with Article 5. I stress that I am only concerned, at present, with whether P must be a party to the deprivation of liberty proceedings. Given the tools presently available in our domestic procedural law, I see no alternative to that being so in every case.

105. If he is joined, P will necessarily have a litigation friend who must have no interests adverse to his and who will look after his interests in relation to the litigation. He will be served with documents and, where necessary, will be able effectively to question the premise upon which the proceedings are brought and, if matters cannot be resolved without a contested hearing, to challenge the case put before the court, including by obtaining his own expert evidence where required. What is more, the court will have done what is reasonably practicable to permit and encourage him to participate as fully as possible in any decision affecting him, fulfilling section 4 of the MCA 2005.

106. The President was confident that the system that he set up would ensure that where this sort of participation was required, the streamlined procedure would not be used and P would be able to be a party to the proceedings and, in that sense, would have

"the opportunity to be heard" and the Secretary of State, in his submissions to this court, supported that conclusion. In my view, however, it is not possible to place sufficient reliance on the process devised for it to be said to constitute such an opportunity. It is not only that there is too significant a risk that cases would slip through the net, going unrecognised by the applicant and by the court despite the best efforts of all involved. In addition, I agree with the submission that the process set up by the President amounts to placing an additional hurdle in the way of P participating in the proceedings – instead of being a party automatically, there is an additional process to be gone through before he is joined, namely the collection/provision of material to persuade the court that he wishes/needs to be joined. I remind myself that no other example could be found of an adult whose liberty was in question in proceedings before a court or tribunal not being automatically a party to those proceedings. P is therefore in a position which is the opposite of what the Strasbourg jurisprudence requires, namely that the essence of the Article 5 right must not be impaired and there might, in fact, need to be additional assistance provided to P to ensure that it is effective.

107. Lest it be thought that the argument about party status is academic, two examples provided by the Official Solicitor (drawn from unreported cases under section 21A of the MCA 2005) demonstrate readily the sort of serious practical consequences that there might be for P if he were to be without the necessary safeguards. The first was a case in which P was found to have capacity following a review conducted during the course of proceedings, contrary to the evidence advanced by the local authority in support of its application. The second was a case in which the full extent of the use of physical restraint was not identified by the local authority or the best interests assessor and only came to light because of the actions of P's litigation friend and solicitor.

108. The concern about the increased workload that may be generated by the *Cheshire West* decision is understandable and I do not doubt that the joinder of P as a party would be more burdensome to the system in various ways than the President's scheme and may import greater delay. The extent of the increased burden would only become apparent over time. The President's arrangements were designed with the intent that where there was a contest about the proposals or P wished to be joined as a party, he would be. There is no reason to suppose that the automatic joinder of P as a party would be likely to generate dispute where there would not otherwise have been dispute and, where P and his litigation friend are content that what is proposed is necessary in his best interests, the proceedings need not be protracted or elaborate. In any event, pressure on resources and even considerations of increased delay are not material to a determination of whether there are adequate safeguards to satisfy Article 5. For the reasons I have explained, had I been in a position to determine the issue in these proceedings, I would have held that in order that deprivations of liberty are reliably subjected to thorough scrutiny, and effective procedural safeguards are provided against arbitrary detention in practice, it is presently necessary for P to be a party in the relevant proceedings.

Articles 6 and 14 ECHR

109. Given my conclusions about Article 5, and given the lack of jurisdiction of this court formally to determine this appeal, I will not go on to consider Article 6, upon which reliance is placed by all parties except the Secretary of State, who does not

accept that proceedings concerned with Article 5 rights inevitably engage Article 6. Nor, in the circumstances, will I express a concluded view upon the submission that the President's scheme is discriminatory and gives rise to a breach of Article 14 because P is treated differently from an adult with full capacity who would always be a party to proceedings which would determine their liberty, though I would observe that the argument is a powerful one.

Outcome

110. For the reasons which I set out in the first half of this judgment, I do not consider that we have jurisdiction to entertain the appeals that are before us. The views I have expressed in the second half of the judgment on the question of whether P should always be joined as a party to deprivation of liberty proceedings are merely what I would have decided had we had jurisdiction.

GLOSTER LJ:

111. I have had the advantage of reading the judgments of Lady Justice Black and Lord Justice Moore-Bick in draft. I agree with both of those judgments save to the extent that my conclusions in paragraph 127 below go further than what Lady Justice Black has decided. I contribute this short judgment of my own because of my disquiet in relation to the undisciplined manner in which these proceedings were structured and conducted both in the court below and in this court.

112. As Lord Justice Moore-Bick says in paragraph [137] of his judgment, and Lady Justice Black says in paragraphs [14] – [18] of hers, it is wholly unclear if, and, if so, to what extent, the 25 issues set out in the annexe to the order dated 8 May 2014 ("the 8 May order") actually arose as live issues in the 13 numbered applications referred to in the heading to that order, or in case number 12488518 and the 28 other applications referred to in the heading to the two judgments dated respectively 7 August 2014 ("the 7 August judgment") and 16 October 2014 ("the 16 October judgment"). No consideration appears to have been given to that question, either by the President or by any members of the lengthy cast of leading and junior counsel appearing, no doubt at considerable public expense, for the various parties listed on the first page of the two judgments.

113. If, and to the extent that, such issues did not arise as real issues in the numbered applications technically listed as before the court, the President had no jurisdiction to hear the matter. As Lord Loreburn L.C. stated in *Glasgow Navigation Company v Iron Ore Company* [1910] AC 293, HL at 294:

> "…it was not the function of a court of law to advise parties as to what would be their rights under a hypothetical state of facts."

In that case the House of Lords (despite having heard full argument) refused to entertain an appeal on the grounds that the action itself (a claim by owners against charterers in respect of time lost in discharge of owners' vessel) was incompetent, because it was based, not on the actual contract between the parties, but on an assumed, hypothetical one. The House of Lords not only refused to make any order on

the appeal but also dismissed the action, with no order as to costs.[2] Moreover, where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing[3]. Jurisdiction must be acquired before judgment is given[4]. Those cases are an instructive lesson even in today's more flexible times.

114. The two appeals before us, namely *AC*, No. 12498611 and *GS*, No. 11777733, were solely concerned with the issues: (i) as to whether a person who might be deprived of his liberty must always be joined as a party to the proceedings in which the court considers whether deprivation of liberty should be authorised; and (ii) as to whether a P's litigation friend was able to conduct litigation and advocacy services in person ("the relevant issues"). As Lord Justice Moore-Bick describes in paragraphs [143] and [144] of his judgment, in reality neither of the relevant issues had ever been, or was likely to become, a live issue in either of the two cases.

115. In the case of *AC* both the application form issued by NHS Chiltern CCG on 9 May 2014 and the draft proposed consent order (which had been signed on behalf of both NHS Chiltern CCG and his mother as his litigation friend) identified AC as a proposed respondent and referred to his mother as his proposed litigation friend. The order made by the court on 14 July 2014 provided for AC's joinder as a party and directed that his mother's suitability to act as his litigation friend was to be determined at a subsequent hearing. By that time, and thereafter, his mother as his proposed litigation friend, had solicitors acting for her. There was thus never any question that she would conduct proceedings on AC's behalf in the absence of his being a party, nor any issue as to whether AC or she would be legally represented. On 13 August 2014 she was formally appointed as litigation friend and an order was made approving the deprivation of AC's liberty, subject to a review in March 2015. There were no appeals against any of these orders.

116. Similarly, the relevant issues never arose as live issues in relation to the case of *GS*. On 5 June 2014 GS, by her mother and litigation friend, LS, issued an application seeking various directions. As applicant, GS was clearly the party and was represented by solicitors. On 14 July 2014, a hearing took place at which various directions were given, leading to a further hearing on 6 August 2014. At that hearing, on the application of Sheffield City Council, Sheffield City Council was substituted as applicant and GS became first respondent acting by LS as her litigation friend and Sheffield CCG became second respondent. Again there was no issue as to GS not being a party or as to she or LS not being legally represented. At the hearing declarations were made as to GS' capacity and in relation to her care and accommodation and an order made authorising the deprivation of her liberty. LS was appointed her litigation friend. There were no appeals against any of these orders.

117. Thus even if the President or the legal representatives for the parties had turned their minds to drawing up an order giving effect to the terms of the 7 August judgment and/or the 16 October judgment (which they did not), by those dates no order could

[2] See also Halsbury's Laws of England, Courts and Tribunals (Volume 24 (2010))2, paragraph 623 and the cases cited in footnote [2].

[3] *A-G v Lord Hotham* (1827) 3 Russ 415.

[4] *Thompson v Shiel* (1840) 3 Ir Eq R 135.

have been made which would have impacted, or have had any bearing, on the proceedings in the cases of *AC* and *GS*. As Lord Justice Moore-Bick says in his judgment, in those circumstances it is not surprising that, in the cases of *AC* and *GS*, there was no order capable of being identified in the notice of appeal giving effect to either of the President's judgments; those cases were not being managed together in any real sense with the other 27 applications referred to, as appears from the fact that the proceedings relating to AC and GS proceeded both independently of each other and independently of the rest of the applications.

118. It follows that, in my judgment, so far as the cases of *AC* and *GS* were concerned, the President had no jurisdiction to determine the relevant issues in their cases and accordingly this court has no jurisdiction to determine their appeals. Like Lord Justice Moore Bick and Lady Justice Black I agree that there was no effective "decision" in relation to the cases of the two appellants which would support an appeal.

119. Even if I were to be wrong about that, and the President could originally be said to have had jurisdiction in relation to those two cases (for example because, at the time, the relevant issues were arguably live issues in relation to those two cases), even putting to one side the fact that the President made no "decision" in relation to such cases, there are currently no outstanding live issues in relation to them. Accordingly, in my judgment, this court has no jurisdiction to determine, alternatively should not as a matter of discretion determine, what would be entirely academic appeals.

120. But the broader question arises as to whether, nonetheless, this court should entertain the appeal against the President's determination of the relevant issues on the basis that such issues *might* have arisen as real issues in the 27 other cases technically before the court. The argument would be (although it was not presented in these terms by counsel) that this court could somehow assume that such issues were real live issues in some of the numbered cases before the President, that the President's judgment should be regarded as a "decision" in relation to those issues, and that, accordingly, this court should entertain the appeals.

121. I am not prepared to adopt that course for the following reasons:

i) It is not possible to ascertain from the information with which this court was provided whether the relevant issues arose as real issues in any of the other 27 applications or, if they did, on what, if any, evidential basis.

ii) The transcripts of the hearings before the President on 5 and 6 June 2014 demonstrate that, whatever evidence or position statements had been filed on behalf of individual applicants, no regard was had by the President or counsel to any evidence relating to individual cases. Certainly in relation to the relevant issues, a proper consideration of a real-life factual scenario might well have informed the scope or detail of the legal argument.

iii) Certainly neither the President nor the legal representatives for the parties appear to have addressed the question whether the relevant issues arose as live issues in the applications actually listed before the President. Nor was any consideration given as to how the resolution of the issues could impact on the

individual factual situations of any of the listed applications. The argument proceeded on a high level of generality in an academic vacuum without being based on any real-life problems. As Lord Justice Moore-Bick says, the applications were simply used as a convenient vehicle for mounting arguments which had no direct bearing on them.

iv) That in my view is a recipe for disaster. How in such circumstances could the respective legal aid authorities genuinely have considered that the necessary criteria were satisfied to permit them to grant legal aid to the applicants in question? Likewise, how in such circumstances could the respective Councils or Clinical Commissioning Groups have considered that it was appropriate to fund legal representation for their participation in the proceedings unless they could have been satisfied that such proceedings would actually resolve problems that were real-life issues in relation to genuine applications?

v) In circumstances where no orders were made in relation to the 29 applications reflecting what, if anything, the 7 August and 16 October judgments had actually decided in relation to those particular cases, it would in my judgment be wholly artificial to treat one or more of those unspecified applicants as having a genuine interest in prosecuting an appeal before this court.

122. The Court of Protection has wide powers actively to manage cases (see for example rule 5 of the Court of Protection Rules 2007 ("the Rules")). But case management has to be done in order to further the overriding objective of dealing with cases justly; see rule 3. That includes, so far as practicable, ensuring that a P's interests and position are properly considered. The court also has power to make declarations not only as to the capacity of the P to make decisions but also, under section 15 (1)(c) of the Act as to "the lawfulness or otherwise of any act done, or yet to be done, in relation to that person" where an act "includes an omission and a course of conduct". But none of those powers, in my judgment, entitled the court in this case to make general declarations or give general directions in a vacuum, wholly divorced from the case specific circumstances of the particular applications and not purporting to be effective orders in those specific applications. On no basis could such an approach be said to further the overriding objective.

123. Even where a relevant court does have a power to give directions to a particular person (e.g. to an officeholder under the Insolvency Act 1986[5], or to a trustee under the Trustee Act 1925[6]), for example as to whether or not the officeholder or trustees should issue proceedings against a beneficiary or a third party, whether a certain class of creditors should be paid in priority to others, or whether a certain property should be sold, such directions, even though they might not necessarily involve the determination of a particular party's rights or obligations, are nevertheless always addressed to a particular issue in question, which arises in the context of the particular insolvency or administration of an estate or trust.

[5] See e.g. section 35 (power of a receiver or manager to apply to the court for directions), section 112 (application to the court by a liquidator or contributory or creditor in a voluntary liquidation), section 168 (application to the court for directions by a liquidator in a compulsory winding up), Schedule B 1, paragraph 63 (power of an administrator to apply to the court for directions in connection with his functions).
[6] For example pursuant to CPR Part 64.2.

124. In the present cases, if the legal representatives had properly addressed their minds as to how to have structured the proceedings, and, on the assumption that real issues giving rise to the questions of law actually arose in the individual cases, it would have been perfectly possible to have devised a legitimate, and procedurally practicable, method of resolving at least those issues that currently arose in the existing 29 applications. For example, as is a frequent procedure in the Commercial Court and the Chancery Division, the proceedings could have been structured as representative proceedings pursuant to CPR 19.6, which would have enabled various issues to be determined, provided that the relevant applicants could have satisfied the requirement that, in relation to the various issues, they, as representative applicants, had "the same interest" for the purposes of CPR 19.6(1) as the other persons whom they were seeking to represent. The recent case of *Emerald Supplies Ltd v British Airways Plc* [2011] Ch 345, in which this court upheld the decision of the Chancellor, Sir Andrew Morritt in *Emerald Supplies Ltd v British Airways Plc* [2010] Ch 48, shows that, although the approach to representative actions is far more flexible than it was in previous decades, nonetheless for a representative action to be brought under CPR 19.6(1), there is a non-bendable rule that the representative party itself has to have an interest in the claim and that interest has to be the same as that of the party it is proposed the former should represent.

125. An alternative approach would have been the making of a Group Litigation Order ("GLO") pursuant to CPR 19.11, either by the President on his own initiative or on the application of the parties. That procedure is appropriate where there are a number of claims which give rise to common or related issues of fact or law. But although there is no requirement (as there is in a representative action for the representative party to have "the same interest" in a claim as a represented party), and the procedure is more flexible than a representative action, nonetheless a GLO requires compliance with certain formalities. These include, for example: the specification of the GLO issues, which will identify the particular claims which are to be managed as a group under the GLO; the establishment of a register ("the group register") in which the claims to be managed under the GLO will be entered; the establishment of criteria by reference to which parties can be added to the process of multiparty litigation; and a clear identification of which participants in the GLO are affected by, and bound by the determination of, which issues.

126. Both those procedural routes under the general provisions of the CPR were available pursuant to rule 9 of the Rules, which apply the CPR with any necessary modifications "insofar as it is necessary to further the overriding objective". Thus if the court had genuinely been satisfied for the purposes of rule 3(3) that the generic determination of certain common issues, which arose as real issues in some or all of the 29 cases, would, for example, have ensured that a particular applicant's case was dealt with more expeditiously or more fairly, that his interests and position would be properly considered, and would have saved expense, it could in my view have adopted such an approach. Compliance with the conditions relating to representative actions or GLOs would have avoided the type of problems to which my Lord and my Lady have referred.

127. In conclusion, in my judgment, at least so far as the relevant issues are concerned, because the President engaged in an illegitimate approach to the determination of

what he and all legal representatives regarded as generic academic issues without any, or any proper, identification of the particular issues which arose in the specific cases before him, he had no jurisdiction to make the determinations which he did. In consequence and, with respect, what are merely his opinions in relation to those matters cannot be regarded as authoritative. I am supported in this conclusion by the views of Lord Justice Moore-Bick and Lady Justice Black, with which I agree, that in any event the President's conclusion - that a patient need not be made a party in order to ensure that the proceedings are properly constituted (even though he may be joined as a party at his request) - is not consistent with fundamental principles of domestic law and does not provide the degree of protection required by the Convention and the Strasbourg jurisprudence.

128. For the above reasons I do not consider that we have jurisdiction to entertain the appeals against the judge's determination of the relevant issues. In the alternative, even if it could arguably be said that the judge had jurisdiction to make the determinations which he did, as a matter of discretion for the reasons which I have already given, this court should not entertain these appeals.

129. I should also add that I concur with the views expressed by Lady Justice Black in paragraph 30 of her judgment that unfortunately the court did not receive the benefit of impartial objective submissions from counsel for the Official Solicitor as advocate to the court.

MOORE-BICK LJ:

130. Black L.J. has described the background to this appeal and has explained why, at the conclusion of the hearing, only two questions called for decision. The first is whether a person who lacks mental capacity must be joined as a party to any proceedings which may result in an order depriving him of his liberty. The second is whether the President was entitled to follow the particular procedure he devised for the purpose of obtaining answers to various questions designed to underpin a 'streamlined' procedure, which he wished to introduce in the Court of Protection for dealing with applications for orders approving deprivation of liberty, and whether this court can and should hear an appeal against the decisions of law contained in the two judgments he delivered in the course of answering those questions. Despite the obvious importance of the first question, I prefer to begin by considering the procedural questions, if only because they provide the context in which that question falls to be considered.

The proceedings below

131. As Black L.J. has explained, in the light of the decision of the Supreme Court in *Surrey County Council v P and others (Equality and Human Rights Commission and others intervening), Cheshire West and Chester Council v P and another (Same intervening)* [2014] UKSC 19 *("Cheshire West")* the President became understandably concerned that the Court of Protection would face a flood of applications for orders approving the deprivation of liberty of persons lacking capacity. As he explained in paragraph 5 of the judgment he delivered on 7th August 2014:

> "The immediate objective, in my judgment, is to devise, if this is feasible, a standardised, and so far as possible 'streamlined', process, compatible with all the requirements of Article 5, which will enable the Court of Protection to deal with all DoL [deprivation of liberty] cases in a timely but just and fair way. The process needs, if this is feasible, to distinguish between those DoL cases that can properly be dealt with on the papers, and without an oral hearing, and those that require an oral hearing."

132. As the President pointed out in paragraph 7 of his judgment, there is no statutory committee charged with making rules governing proceedings in the Court of Protection. That responsibility rests with the President himself, assisted by an informal ad hoc committee established to provide him with advice. He considered that, in order to establish a streamlined procedure of the kind he had in mind, it was necessary to form a view on various questions of substantive law to which the new procedure would be obliged to give effect, or at any rate comply with. One way of doing that might have been to convene a meeting of lawyers practising in the Court of Protection to discuss and decide upon the law and the manner in which a new streamlined procedure could best give effect to it while at the same time achieving the objects which the President had in mind. Another might have been to take formal legal advice. A third might have been for the President himself, probably in discussion with the senior judges of the Court of Protection, to reach his own decisions on those questions and produce whatever rules seemed to him appropriate in the light of them.

133. In the event, however, the President did not choose to follow any of those courses. Instead, he chose to use a hearing for directions as a means of obtaining answers to the questions he posed. As he explained in the judgment delivered on 7th August 2014, he arranged for a number of applications to be listed before him for initial directions on 8th May 2014 and in that context formulated 25 questions for the specific purpose of assisting him to produce the new streamlined procedure. Those questions were set out in an annexe to the order made on 8th May 2014, to which I shall refer in greater detail at a later stage.

134. Thirteen application numbers are set out in the heading to the order dated 8th May 2014, those being the applications listed for directions on that date. There is nothing objectionable, of course, in managing a large number of cases together or in holding directions hearings in all of them concurrently (provided the proper procedures are followed in each case), but it is necessary always to bear in mind that each case is separate and that the issues to which they give rise may not be in all respects identical. Where cases are likely to benefit from being managed together it will normally be sensible to make common directions in all of them, but whatever orders are made should be directed to the eventual disposal of those cases, rather than with some other objective in mind.

135. We were given very little information about the particular characteristics of the cases that were listed for directions on 8th May or the issues to which they gave rise. What seems reasonably clear, however, is that the questions formulated for consideration at the hearing on 5th June 2014 were designed to enable a new streamlined procedure to be devised rather than to further the progress of the cases then before the court. The

order drawn up to give effect to the court's decision included the following provisions:

> "1. The applications before the Court are adjourned to 5 June 2014 to a hearing to be listed before Sir James Munby P. in open court (time estimate 2 days) to consider the issues set out at the Annex to this order, and such other issues as have been identified prior to that hearing as requiring resolution as a matter of principle or practice going to the proper procedure for the authorisation by the Court of Protection of deprivations of liberty . . .
>
> 2. Such other applications for authorisations of deprivation of liberty as are issued by the Court of Protection between today's date and that of the hearing as paragraph 1 above are also to be listed for directions at that hearing. The parties to such applications are not required to attend or to make submissions in advance of that hearing, but may do so if so advised . . .
>
> . . .
>
> 4. In respect of the hearing referred to at paragraph 1 above, the following directions shall apply:
>
> a. Any body, with a sufficient interest, which wishes to become a party for the purposes of filing evidence for or making submissions at (or both) the hearing provided for at paragraph 1 above (by paper or otherwise) shall file an application identifying the basis upon which they wish to become parties, and the nature of that evidence or those submissions or both, by 4 pm on 23 May 2014 . . .
>
> . . .
>
> d. The parties shall file agreed:
>
> i. Bundles of position statements, evidence and other supporting materials and skeleton arguments; and
>
> ii. Bundles of authorities
>
> by 4 pm on 2 June 2014 . . .
>
> e. The bundles identified above shall not include evidence going to the specific facts of individual cases save and to the extent that such is necessary to address the general issues for consideration at the hearing . . ."

136. It can be seen that all the directions given on 8th May 2014 were designed to promote the efficient determination of the questions set out in the Annex to the order, but it is not clear whether, and if so to what extent, answers to any of those questions were required in order to further any of the proceedings then before the court. The annex itself began by identifying three classes of cases which were expected to come before the Court of Protection as a result of the decision in *Cheshire West*: (1) those relating to persons deprived of their liberty by the state as residents in hospitals or care homes, in relation to whom insufficient resources were available to carry out the assessments required by Part 9 of Schedule A1 to the Mental Capacity Act 2005; (2) those relating to persons deprived of their liberty by the state, but who resided in places other than hospitals or care homes and deprivation of whose liberty would have to be authorised by an order of the Court of Protection under section 16(2)(a) of the Act; and (3) those aged 16 and over cared for within a family home and deprived of their liberty with the involvement of the state, deprivation of whose liberty would also have to be authorised by an order under section 16(2)(a) of the Act. The order made it clear that each of those classes would be considered at the hearing and the court invited the provision of certain information about them, including the number of people likely to fall within each class and the costs likely to be incurred by local authorities in obtaining the required authorisations. There was also a request for information relating to a wide range of matters which have a bearing on the procedure for obtaining authorisation for deprivation of liberty, including the requirements of the existing court process, the existence of public funding for the person in respect of whom the application is made, the existence of public funding for those acting as litigation friends and the ability of the Official Solicitor to accept a greatly increased number of invitations to act as a litigation friend.

137. The annexe then sets out 25 issues for consideration. It is not necessary to set them out in detail, but it is right to record that they were couched in general terms and were clearly designed to enable the court to identify the minimum requirements needed in order for any new procedure to comply with article 5 of the European Convention on Human Rights. Among the questions raised for decision were questions concerning the extent to which existing Court of Protection forms would require amendment in order to give effect to a 'streamlined' procedure. Read as a whole, the tenor of the annex is that of an attempt to obtain a robust basis for the introduction of a new procedure, rather than to provide a basis for procedural directions relating to the applications before the court. That is, perhaps, unsurprising given the President's own explanation of the purpose behind the proceedings. It is not clear whether, and if so to what extent, the questions were relevant to the proceedings relating to any of the thirteen applications then before the court.

138. A hearing took place on 5th June 2014 at which submissions were made on behalf of the Secretary of State for Health, the Lord Chancellor and Secretary of State for Justice, the Law Society of England and Wales, the Association of Directors of Adult Social Services, Mind, eight local authorities, two NHS clinical commissioning groups, an NHS trust and four individuals. The President also received the assistance of counsel for the Official Solicitor acting as advocate to the court.

139. On 7th August 2014 the President delivered a preliminary judgment in which he answered most of the questions set out in the order of 8th May 2014. He explained the position at that stage as follows:

> "8. This is a preliminary judgment, setting out briefly my answers to those of the 25 questions which require an early decision if the objective I have identified is to be carried forward. It concentrates on the issues directly relevant to what I will call the 'streamlined' process. It sets out no more than the broad framework of what, in my judgment, is required to ensure that the 'streamlined' process is Article 5 compliant. Additional, detailed, work needs to be carried out as soon as possible by the Court of Protection in conjunction, where appropriate, with the Committee."

140. On 16th October 2014 the President delivered a second judgment in which he supplemented and elaborated on his answers to three of the questions dealt with in his first judgment.

141. For reasons which were probably not unconnected with the purpose of the exercise, no order was drawn up following the delivery of those judgments. As a result, there is no formal document which gives effect to the outcome of the proceedings and no directions were given for the future conduct of the 13 applications which were then before the court. In those circumstances I find it difficult to avoid the conclusion that what had been listed as a hearing for initial directions was in truth nothing more than a vehicle for obtaining an informed insight into the legal principles that would underpin any new procedure for obtaining approval for deprivation of liberty. In my view it was not an appropriate course to take and has given rise to a number of difficulties to which I shall return in a moment.

142. On 28th August 2014 solicitors representing two of the persons in respect of whom applications had been listed for directions, AC and GS, filed a joint notice of appeal seeking to challenge certain aspects of the President's judgments. In the part of the form which asks the appellant to set out the order or part of the order against which he wishes to appeal the solicitors wrote:

> "Given the circumstances of this case which considers procedural issues only, the court may decide not to issue an order. Therefore it is the judgment of [the President] dated 7th August 2014 that is appealed against."

143. Two grounds of appeal were identified: (i) that the President had been wrong to hold that a person in respect of whom an application is made for approval to depriving him of his liberty need not always be joined as a party to the proceedings; and (ii) that he had been wrong to hold that a litigation friend could conduct proceedings on behalf of a person who lacks capacity. However, both AC and GS became parties to the proceedings involving them before the first of the President's judgments had been delivered and in neither case was the litigation friend seeking to conduct the proceedings on their behalf. Moreover, orders disposing of the applications relating to them were made in July and August 2014, none of which are the subject of any appeal. It follows that neither of the appellants has, or at the date of the judgments had, any interest in the answers to the President's questions. As far as they are concerned the present appeal is entirely academic, although it is possible that at some date in the future proceedings might be instituted in respect of one or other of them to which the answers might be relevant.

Procedural complications

(a) The proceedings below

144. I can well understand why the President was attracted by the idea that adversarial argument would provide the best means of clarifying his thinking on the various questions that had to be considered when establishing a new form of streamlined procedure for dealing with applications to approve deprivations of liberty. If he had had the benefit of argument on those questions as a result of a need to determine issues arising in connection with some or all of the applications before him, that would have been all well and good and no doubt an order would then have been made reflecting the court's decision as it applied to those applications. But that was not what happened. The applications were simply used as a convenient vehicle for mounting an argument which had no direct bearing on them. They were not being managed together in any real sense, as appears from the fact that the proceedings relating to AC and GS proceeded both independently of each other and independently of the rest of the applications. Thus, on 14th July 2014 orders were made in the proceedings relating to AC joining him as a party and directing that his mother's suitability to act as his litigation friend was to be determined at a subsequent hearing and on 13th August 2014 that question was determined in her favour and an order was made approving the deprivation of AC's liberty, subject to a review in March 2015. Also on 14th July 2014 there took place the first hearing before a district judge of an application relating to GS, at which directions were given leading to a further hearing on 6th August 2014 at which a decision was made in relation to her care and accommodation and an order made authorising the deprivation of her liberty. In those circumstances it is not surprising that in the cases of AC and GS no order capable of being identified in the notice of appeal was made giving effect to either of the President's judgments.

145. The procedure adopted by the President in this case resembled an action for declaratory relief more closely than a hearing for directions and, had it taken that form, would almost certainly have resulted in orders being made in each of the applications that could have been the subject of an appeal if and to the extent that the parties' individual interests were affected. However, the proceedings could not be structured in that way, because it was not clear that any of the questions included in the annex to the order of 8th May 2014 reflected matters in issue in any of the applications before him. As a result, no order declaratory of the parties' rights could be made.

146. Whether viewed in terms of jurisdiction or permissible practice, I consider that the course taken by the President involved an inappropriate use of the court's process. The court's essential function is to determine disputes between the parties to the proceedings before it. Although there are circumstances in which it will decide questions in a consultative capacity (for example in relation to the conduct of an administration or winding up or in relation to the disposal of trust assets), such cases always involve the determination of questions of immediate practical significance to those who have brought the proceedings. That is not the same as being asked to decide questions of law in the abstract. Although it has wide and flexible powers to manage those proceedings, including the power to add or remove parties and to decide the manner in which issues are to be determined, the court does not have jurisdiction to generate proceedings independently for its own purposes. In my view that was the

true nature of the order of 8th May 2014, which, although nominally made in the applications before the court, was not designed to dispose of issues arising in those applications or to give directions for their determination. It was in substance a consultative exercise intended to promote the development of new rules of procedure and for that reason it was not in my view one which the court was entitled to undertake.

(b) The jurisdiction of the Court of Appeal

147. My conclusion concerning the propriety of the proceedings below inevitably has a bearing on the question whether this court can or should entertain an appeal against decisions made by the President in his two judgments. The jurisdiction of the Court of Appeal is statutory. In relation to decisions of the High Court it is contained in section 16 of the Senior Courts Act 1981, which provides that it shall have jurisdiction to hear and determine appeals from any "judgment or order" of that court. There is no judgment or order in this case, but that is not necessarily fatal (as the authorities to which I shall come in a moment demonstrate) and in any event this is not an appeal from the High Court. It is an appeal from the Court of Protection, in respect of which the court's jurisdiction is governed by section 53 of the Mental Capacity Act. Section 53(1) provides that the court shall have jurisdiction to hear an appeal against any "decision" of the Court of Protection.

148. All counsel, including Mr. Gordon acting as advocate to the court, sought to persuade us that in that context "decision" should be construed broadly and was capable of extending to decisions of the kind to be found in the judgments under consideration. In this context Miss Lieven Q.C. drew our attention to two authorities, *R (Jones) v Ceredigion County Council* [2005] EWCA Civ 986, [2005] 1 WLR 3626 and *Re A (A Patient) (Court of Protection: Appeal)* [2013] EWCA Civ 1661. *Jones* concerned section 13 of the Administration of Justice Act 1969 which provides for "leapfrog" appeals from the High Court to the House of Lords (now the Supreme Court). Section 13(2)(a) provides that where leave is granted by the House for a leapfrog appeal "no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal." The judge granted the appellant a leapfrog certificate on two issues and gave contingent permission to appeal to the Court of Appeal in case the House of Lords refused leave. Their Lordships gave leave in respect of one issue, but the appellant subsequently withdrew that appeal and appealed to the Court of Appeal on the other. A question arose whether, in the light of section 13(2)(a) the court had jurisdiction to entertain the appeal. The court held that the purpose of section 13(2)(a) was to ensure that there was no litigation before the Court of Appeal in relation to a matter for which permission had been given to appeal to the House of Lords and that therefore "decision" was not to be construed as synonymous with "judgment or order" but meant a decision on a discrete issue in respect of which the House of Lords had granted leave to appeal. That decision reflects the fact that an order of the court may rest on the determination of more than one issue and therefore on more than one "decision", but it does not support the conclusion that the subject matter of the appeal is anything other than the order made by the lower court. In a case of the kind under consideration in *Jones*, a successful appeal, whether in the House of Lords or the Court of Appeal, would result in setting aside the order below.

149. *Re A* concerned an application to the Court of Appeal for permission to appeal against the refusal of a High Court judge sitting in the Court of Protection to grant permission

to appeal against the order of a circuit judge exercising the powers of that court. The question for the court was whether it had jurisdiction to hear an appeal against an order of that kind. Gloster L.J., with whom Black and Moses L.JJ. agreed, held, applying *Lane v Esdaile* [1891] A.C. 210, that although section 54(4) of the Access to Justice Act 1999 did not apply in that case, the refusal by the High Court judge of permission to appeal did not constitute a "decision" of the Court of Protection within the meaning of section 53(1) of the Mental Capacity Act. In my view the decision sheds no light on the question we have to consider, beyond demonstrating that the meaning of the word "decision" in this context is a matter of statutory interpretation and may be more limited than would be the case in another context.

150. For his part Mr. Gordon Q.C. drew our attention to a series of cases in which the scope of the Court of Appeal's jurisdiction has been considered. The first was *Ex parte the County Council of Kent and the Council of the Borough of Dover, In re the Local Government Act 1888* [1891] 1 Q.B. 725, an unusual case in which Kent County Council sought to appeal against a decision of the High Court on certain questions submitted to it under section 29 of the Local Government Act 1888. The attempt failed because the court held that the jurisdiction of the High Court in that case was consultative rather than judicial. Its "decision" therefore did not constitute an "order or judgment" and consequently no right of appeal arose. Although the case supports the proposition that there is a distinction between a "decision" and a "judgment or order", it does so in the very particular context of the unusual legislative provision in which it is found and in my view provides no assistance in relation to the point now under consideration.

151. In *Re B (A minor) (Split hearings: Jurisdiction)* [2000] 1 W.L.R. 790 a judge hearing care proceedings decided to conduct a fact-finding hearing to determine the cause of injuries to a child as a first step towards reaching his final decision. Having heard evidence and argument, he made certain findings, without making any declaration or other specific order, and adjourned the proceedings for further argument and final disposal. This court held that, although not embodied in a formal order, the judge's findings amounted to the determination of a preliminary issue and that the Court of Appeal therefore had jurisdiction to hear an appeal without waiting for the final disposal of the case. It was said that the decision supports the conclusion that the court has jurisdiction to hear an appeal against a decision that is not embodied in a formal order, but I do not think that it provides an answer to the present question. It certainly supports the conclusion that the court is entitled to look at the substance of the matter rather than merely the form, but two things in particular stand out: the first is that there was a dispute between the parties over the cause of the child's injuries, which was determined by the judge's decision; the second is that the findings of fact could have been embodied in an order of a declaratory nature. I do not think that the case supports the conclusion that "decision" in section 53(1) of the Mental Capacity Act extends to a decision of the kind with which we are concerned.

152. In *Cie Noga d'Importation at d'Exportation S.A. v Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142, [2003] 1 W.L.R. 307 the question arose whether a party could appeal against certain findings made by the judge in the course of a trial of preliminary issues. This court held that a decision of a court on the trial of a preliminary issue is a "judgment or order", even if limited to a finding of fact, and that the Court of Appeal therefore had jurisdiction to hear an appeal against it. If,

however, the court went on to make a decision in relation to the legal consequences of that finding in favour of one or other party, he could not appeal against the finding of fact on which the decision was based. These are important principles, but the case does not, in my view, shed any useful light on the nature of a "decision" within the meaning of section 53(1) of the Mental Capacity Act.

153. It is quite true, of course, that in one sense the President was making a series of decisions when he answered the questions that he had set himself, but I do not think that it follows that they were "decisions" within the meaning of section 53(1). As Black L.J. has pointed out, the draftsman of the Act has not drawn a clear distinction between decisions and orders, so the mere choice of the word "decision" cannot be taken as indicating an intention to embrace decisions that are not, or could not be, embodied in an order of the court. In those circumstances it is necessary, in my view, to identify the purpose of the provision in order to decide how the expression is to be understood.

154. Section 53(1) contains general provisions governing appeals both within the Court of Protection and from the Court of Protection to the Court of Appeal. As such it is comparable to section 16 of the Senior Courts Act and section 77(1) of the County Courts Act 1984. The former uses the expression "judgment or order" and the latter "determination", but in each case it refers to a decision on a matter in dispute between the parties to the proceedings.

155. Section 53(2) provides that the Court of Protection Rules may provide that in cases where the decision has been made by a court officer, district judge or a circuit judge an appeal shall lie to a higher judge of the court rather than to the Court of Appeal. In that respect it is comparable to the arrangements governing civil appeals set out in the Access to Justice (Destination of Appeals) Order 2000, which also uses the expression "decision". A "decision" is defined for those purposes as "any judgment, order or direction". I think it likely that the word "decision" may have been chosen in part to reflect the decisions in *Re B* and *Noga*. More importantly, however, section 53(1) is concerned with "appeals" and the established concept of an appeal involves a party to proceedings seeking to challenge a decision which in some way affects him. All this points to the conclusion that in section 53(1) a "decision" means the ultimate decision of the court on a matter in issue between the parties, but not steps in the court's reasoning by which that decision is reached. As Waller L.J. said in paragraph 27 of his judgment in *Noga*:

> " . . . if the decision of the court on the issue it has to try . . . is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not [sic] one he or she does not like."

156. The importance of all this for present purposes is that it means that in order for there to be a "decision" capable of supporting an appeal there must be the determination of an issue arising between two or more parties to proceedings before the court. However, for reasons already indicated none of the questions set out in the order of 8th May embodied or reflected issues arising in the applications involving the present appellants. A party has no right to appeal against an order which does not affect him and the court has no jurisdiction to entertain an appeal if he seeks to do so. Accordingly, I do not think that this court has jurisdiction to entertain an appeal at the

suit of either of the present appellants. An appeal has also been filed by the Law Society, but it can be in no better position if, as I think, there is no decision against which an appeal will lie.

(c) Discretion

157. One obvious question which arises in this case is whether the court should as a matter of discretion hear the appeal, even if it has jurisdiction to do so. The argument for not doing so is strong and arises out of the fact that the President's answers to the questions posed in the order of 8th May do not represent determinations of issues arising between the parties. They could not sensibly have been embodied in orders in each of the applications and, as far as one can see, had no relevance to their ultimate disposal. In that sense an appeal is entirely academic and will serve no useful purpose as far as the appellants are concerned.

158. In *Ainsbury v Millington* [1987] 1 W.L.R. 379 Lord Bridge of Harwich said at page 381:

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved. Different considerations may arise in relation to what are called 'friendly actions' and conceivably in relation to proceedings instituted specifically as a test case."

159. That passage was cited with approval by Lord Slynn of Hadley in *R v Home Secretary, Ex parte Salem* [1999] 1 A.C. 450, but with the qualification that in a case involving a public authority as to a question of public law, the House had a discretion to hear an appeal, even if by the time it reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties. However, he continued at page 457A:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so . . . "

160. In general, therefore, the court will decline to entertain appeals which are academic as between the parties, but there are exceptional cases in which it will do so. In *R v Canons Park Mental Health Review Tribunal, Ex parte A* [1995] Q.B. 60 the applicant applied to a mental health tribunal for an order that she be discharged from detention in a mental hospital as a psychopath. The tribunal dismissed her application, but its decision was quashed by the Divisional Court on the grounds that she could not be detained for treatment if it was not likely that such treatment would alleviate or prevent a deterioration in her condition. Following her discharge the applicant was again detained on the basis that she was mentally ill. On the tribunal's appeal against the decision of the Divisional Court the question arose whether this court should hear the appeal, since whatever its outcome, the applicant would remain liable to detention. The appeal was therefore academic. The court held that, although the tribunal's decision could not be reinstated as a basis for the applicant's detention, it should hear

the appeal because other consequences might flow from the quashing of the Divisional Court's decision and because the applicant might be reclassified or she might again be found to be suffering from a psychopathic disorder. There was therefore a real possibility that the same issue could arise again in relation to the applicant and so the issues raised by the appeal were not hypothetical or academic.

161. Our attention was also drawn to the decision in *Rolls-Royce Plc v Unite the Union* [2009] EWCA Civ 387, [2010] 1 W.L.R. 318. The case concerned a question relating to the implementation of two collective agreements entered into between the appellant company and the respondent union. Following the coming into force of the Employment Equality (Age) Regulations 2006, which, broadly speaking, prohibited discrimination between employees or potential employees on the grounds of age, the appellant considered that it would be unlawful to implement certain aspects of the agreements which related to the criteria to be adopted within a selection matrix for redundancy. As a result, the appellant brought proceedings seeking a declaration that the inclusion of a length of service criterion agreed with the union would contravene the regulations. The judge held that it would not and the appellant sought to appeal against his decision. The court held that it should exercise its discretion to hear the appeal, despite the fact that there was no current dispute between the parties, because question was one of general public importance and was not academic, since it was likely to lead to a dispute between the parties if it were not resolved (see per Wall L.J. at paragraphs 54-55.

162. The principles underlying the court's approach to this question were considered in *Gawler v Raettig* [2007] EWCA Civ 1560. In that case the defendant driver of a motor vehicle involved in a road accident in which the claimant had been seriously injured sought permission to appeal in order to challenge the conventional 25% reduction in damages for contributory negligence in cases where an injured passenger has failed to wear a seat belt. However, the parties had agreed that whatever the outcome of the appeal the defendant would not seek to recover from the claimant any part of the sum paid by way of damages. The defendant had also agreed to indemnify the claimant in respect of his costs of defending the appeal. The appeal was therefore entirely academic. The court considered the authorities on the question whether it should hear an academic appeal, including *Ainsbury v Millington*, *Ex parte Salem* and *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All E.R. 609. The court held that ultimately the question whether it should hear an academic appeal depended on whether it was in the public interest to do so, though it recognised that it would rarely be appropriate to do so in a case involving the private rights of private parties. One important factor is whether all sides of the argument will be fully and properly put, which will usually involve counsel being instructed by solicitors instructed by a party with a real interest in the outcome of the appeal.

163. These cases show that the court will sometimes exercise its jurisdiction to hear an appeal, even though the issues to which it gives rise have become academic as between the parties to the appeal. However, as Lord Bridge observed, the discretion must be exercised with caution. I am not persuaded that in this case, if the court does have jurisdiction to hear the appeal, it should exercise its discretion in favour of doing so. This is not a case like *Canons Park*, in which issues which were live when the appeal was launched have become academic by the time of the hearing. Nor is it a case like *Rolls-Royce*, in which there was an existing or incipient disagreement

between the parties which needed to be resolved by the disposal of current proceedings. It is not even a case of the kind envisaged by Lord Slynn of Hadley in *R v Home Secretary, Ex parte Salem*, which raises a question of public law in relation to a public authority. It involves a decision on certain questions of law designed to inform those responsible for drafting the procedural rules of the Court of Protection.

164. The question, therefore, is whether it is in the public interest in this case for the court to hear the appeal, having regard to whether all sides of the argument have been fully and properly put. The question whether a person lacking capacity must be joined as a party to any application for approval of measures depriving him of his liberty is of considerable general importance and one which, in my view, having had the benefit of full argument, the court ought in the public interest to decide, if it has jurisdiction to do so. However, for the reasons I have given I do not think that is the case.

165. I should, perhaps, add that I am unable to accept that, if the President had jurisdiction to adopt the procedure that was followed in this case, this court necessarily has jurisdiction to entertain the appeals in the applications relating to AC and GS. This court's jurisdiction depends on whether there is a "decision" of the Court of Protection to which they are parties. Whatever may be the position in relation to other applications, for the reasons I have already given I do not think that there is any such decision in the cases of AC and GS.

166. For these reasons, in agreement with my Ladies Black and Gloster L.JJ., I have reached the conclusion that the court has no jurisdiction to entertain either of the appeals before it. Before leaving this part of the case, however, I wish to associate myself with all that Black L.J. has said in paragraph 30 of her judgment, echoed by Gloster L.J. in paragraph 129 of her judgment. I have not found this part of the case at all easy and should have welcomed greater assistance from counsel acting as advocate to the court. One important function of counsel acting in that capacity is to assist the court in testing the arguments advanced by those parties who are interested in the outcome. It is no part of his function to seek to persuade the court to a particular conclusion, otherwise than in order to prevent it from making a decision that is unsound in law. Since the advocate to the court exercises a role which is independent of the parties to the proceedings, I do not think it is desirable for counsel who represents one of the parties (in this case the Official Solicitor acting as an intervener) also to act as advocate to the court.

167. It follows that in my view the court cannot entertain these appeals, but nonetheless I propose to express my conclusion on the only substantive question on which we heard argument, namely, whether a person who is the subject of an application to the court seeking its approval to depriving him of his liberty must be joined as a party to the proceedings.

168. In paragraphs 64-83 of her judgment Black L.J. has summarised the effect of articles 5 and 6 of the Convention, so far as they bear on the present question, as well as the procedure prescribed by the Mental Capacity Act 2005 and the Court of Protection Rules for obtaining approval to the deprivation of a person's liberty. She draws the conclusion in paragraph 83 that as things now stand the person in respect of whom proceedings of that kind are brought is not expected to participate in the proceedings to the same extent as he would if he were a party. In paragraph 84 she expresses the view that the domestic approach to cases involving children, on which the President

placed some reliance, were of limited assistance, primarily because disabled people are entitled, as far as possible, to be treated in the same way as those without disability.

169. I agree that wardship and other forms of welfare proceedings offer only limited assistance in this field. *Scott v Scott* [1913] A.C. 417, on which the President relied to support the analogy between wardship proceedings and proceedings concerning those lacking mental capacity (then described as "lunatics"), certainly drew a parallel between such proceedings and treated them as examples of the court's exercising a welfare jurisdiction, but it did so in the context of discussing the principle of open justice. The question whether it was necessary for the lunatic to be a party to any proceedings directly concerning his welfare did not arise. Given that the wardship jurisdiction normally involved children of a young age, in respect of whom it was necessary for someone to exercise parental rights, I do not find it surprising that it became established practice not to join children as parties unless the court ordered otherwise. Different considerations apply in the case of those who lack mental capacity and neither we, nor, as far as I can see, the President, had our attention drawn to any similar practice relating to them.

170. These are essentially practical considerations, but they invite consideration of what is actually meant by being a party to proceedings. In my view a party can best be described for these purposes as a natural or juridical person who has come before the court in order to obtain vindication of his rights and relief of some kind (usually described in the proceedings as a claimant) or who has been brought before the court by another under compulsion in order that the court's powers may be invoked against him (usually described as a defendant). Such persons are directly affected by the court's decision and are therefore entitled to play a full part in the proceedings in accordance with the rules of procedure. Other persons whose interests are directly affected may sometimes be joined as parties to ensure that they are bound by the outcome (usually as defendants), in which case they are also entitled to play a full part in the proceedings. The decision of the court on matters in issue binds all parties to the proceedings, but not others. In order to obtain a decision which binds a person of full age and sound mind it is necessary to make him a party to the proceedings and in the light of the approach adopted in *Cheshire West*, it is difficult to see why the same should not be true of a person who lacks capacity, despite the fact that he must act by a litigation friend, when his liberty is at stake.

171. The decision in *Winterwerp v The Netherlands* (1979) 2 E.H.R.R. 387 makes it clear that a person who lacks capacity must have access to a court and an effective opportunity to be heard, either in person or by means of representation. The fullest right to participation in proceedings is that which is enjoyed by the parties, but the streamlined procedure envisaged by the President contemplates that there will be cases in which a person lacking capacity will not be made a party because someone considers that it is unnecessary for that step to be taken. I agree with Black L.J. for the reasons she gives that a procedure under which such a person need not be made a party in order to ensure that the proceedings are properly to constituted (even though he may be joined as a party at his request) is not consistent with fundamental principles of domestic law and does not provide the degree of protection required by the Convention and the Strasbourg jurisprudence.

172. For these reasons, as well as those expressed by Black L.J., I would answer this question in the affirmative.