



Neutral Citation Number: [2024] EWCOP 41 (T3)

Case No: COP13362968

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Date: 6 August 2024

Before :

MR JUSTICE POOLE

Re PQ (Court Authorised DOL: Representation During Review Period)

Between :

Newcastle City Council

Applicant

- and -

- (1) PQ (By her Litigation Friend, the Official
Solicitor)
(2) RS
(3) TV

Respondents

Arianna Kelly (instructed by the Applicant Local Authority) for **the Applicant**
Joseph O'Brien KC (instructed by BHP Law, Darlington on behalf of the Official Solicitor) for
the First Respondent
The Second and Third Respondents not appearing and being unrepresented

Hearing date: 12 July 2024

APPROVED JUDGMENT
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This judgment was delivered in public but a transparency order is in force. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of

PQ and members of her family, including the Second and Third Respondents must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Poole :

1. These proceedings concern a 23 year old woman, PQ. She has a Learning Disability which has led to her being vulnerable to sexual exploitation. The Local Authority applied to the Court of Protection as long ago as December 2018 due to concerns about PQ’s contact with her then boyfriend. During the complex proceedings that have followed, PQ has moved placements and had a number of relationships. In early 2024, the Court was in a position to make “final” orders. The order of HHJ Smith on 15 January 2024 records:

“IT IS ORDERED AND DECLARED PURSUANT TO
SECTIONS 15 AND 16 OF THE

MENTAL CAPACITY ACT 2005 THAT:

1. PQ lacks capacity to:

a) Make decisions about her care and support;

b) Make decisions about her residence;

c) Make decisions about her use of the internet and social media; and

d) Make decisions about her contact with people she has met online.

2. It is in PQ’s best interests to reside at Placement 3 and to receive care and support there as described in the care plan dated 1 December 2023.

3. The care package described in paragraph 1 above amounts to a deprivation of PQ’s liberty; that deprivation of DT’s liberty is hereby authorised as being in her best interests and reasonable and proportionate.”

2. Placement 3 is in the community. Thus the authorisation was for what is sometimes referred to as a community DOL. The care arrangements are such that PQ is under continuous supervision and is not free to leave her placement.

3. Notwithstanding that final orders and declarations as to capacity and best interests have been made, there remains an outstanding issue which HHJ Smith later directed should be determined by a Tier 3 Judge, namely that of the arrangements that should be in put in place for PQ’s participation and for reviewing the deprivation of her liberty. That is the issue for me now to determine. I shall address the factual and legal contexts for the outstanding issue in some detail in this judgment, but the position can be summarised as follows:

- i) It is not disputed that compliance with Article 5(4) of the European Convention on Human Rights (“ECHR”) requires the authorisation of the

Court ordered deprivation of a person's liberty to be reviewed at reasonable intervals.

- ii) During the period between "final" order and a planned review ("the review period"), circumstances may change requiring reconsideration of PQ's capacity and/or the necessity and proportionality of the restrictions amounting to a deprivation of her liberty, and whether they remain in her best interests.
- iii) In the present case there is no family member willing and able to act as a rule 1.2 representative for PQ and the Local Authority will not fund a professional representative. It is not clear that the Legal Aid Agency ("LAA") will continue to fund the Official Solicitor to act as PQ's Litigation Friend or, alternatively, an Accredited Legal Representative ("ALR"). Without that funding the Official Solicitor or an ALR will not have the necessary security for their costs to allow them to act for PQ.
- iv) Hence, the central questions for the Court are:
 - a) Whether PQ's continued participation during the review period requires her to have some form of representation, whether by a Litigation Friend, an ALR, or a r1.2 representative, in order for there to be compliance with ECHR Art 5.
 - b) If so, what form of participation should the court require given the options available; and
 - c) If the LAA refused to fund PQ's representation during the review period, whether by a Litigation Friend or an ALR, what steps should the Court then take?

Factual Background

4. Prior to PQ turning 18 there were concerns in relation to her vulnerability to sexual exploitation and risks associated with social media use. She was very trusting and quick to strike up relationships without the ability to recognise and manage risks. One man was arrested for grooming after contact with PQ via social media when she was aged 15. PQ was living with a relative, RS the Second Respondent, with whom she had what was in effect a mother/daughter relationship. That relationship was under strain when PQ turned 18. PQ then developed a relationship with a man about ten years her senior. Evidence came to light of arguments, controlling behaviour, and violence within the relationship. PQ revealed to a teacher that she and the man were having unprotected intercourse. In late 2018, RS refused to have her back in the house and insisted that alternative accommodation be found for PQ. A hurried mental capacity assessment concluded that PQ lacked capacity to make decisions about residence, care, contact with others and engagement in sexual relations. The Local Authority brought proceedings within the Court of Protection seeking best interest decisions to place PQ into residential care and to manage her contact with others.

5. Over twenty Court orders have followed, not including third party disclosure orders and an order for a s49 report. Placement 3, in which PQ now resides, is a self-contained flat with an “enhanced concierge”/supported living setting with 24 hour staffing. PQ is in receipt of 14 hours of 1:1 support each day. The Local Authority and Official Solicitor agree that the arrangements which amount to a deprivation of PQ’s liberty are in her best interests. HHJ Smith recorded in January 2024 that PQ was happy in her placement. An attendance note from January 2024 records that PQ considered that it was best for her that the deprivation of liberty was authorised because it kept her safe.

Legal Framework

6. Section 4(4) Mental Capacity Act (“MCA”) 2005 provides:

“He [the best interests decision-maker] 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.”

7. By the Court of Protection Rules 2017 (“COPR”):

“Participation of P

1.2.—(1) The court must in each case, on its own initiative or on the application of any person, consider whether it should make one or more of the directions in paragraph (2), having regard to—

- (a) the nature and extent of the information before the court;
 - (b) the issues raised in the case;
 - (c) whether a matter is contentious; and
 - (d) whether P has been notified in accordance with the provisions of Part 7 and what, if anything, P has said or done in response to such notification.
- (2) The directions are that—
- (a) P should be joined as a party;
 - (b) P's participation should be secured by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct;

(c) P's participation should be secured by the appointment of a representative whose function shall be to provide the court with information as to the matters set out in section 4(6) of the Act and to discharge such other functions as the court may direct;

(d) P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur;

(e) P's interests and position can properly be secured without any direction under sub-paragraphs (a) to (d) being made or by the making of an alternative direction meeting the overriding objective.

(3) Any appointment or directions made pursuant to paragraph (2)(b) to (e) may be made for such period or periods as the court thinks fit.

(4) Unless P has capacity to conduct the proceedings, an order joining P as a party shall only take effect—

(a) on the appointment of a litigation friend on P's behalf; or

(b) if the court so directs, on or after the appointment of an accredited legal representative.”

8. Rule 17.10 provides:

“Rule 1.2 representative by court order

17.10.—(1) The court may make an order appointing a person to act as a representative, or an accredited legal representative, for P.

(2) The court may make an order under paragraph (1)—

(a) either of its own initiative or on the application of any person; but

(b) only with the consent of the person to be appointed.

(3) The court may not appoint a representative or an accredited legal representative under this rule unless it is satisfied that the person to be appointed satisfies the conditions in rule 17.9.

(4) The court may at any stage of the proceedings give directions as to the terms of appointment of a representative or an accredited legal representative.”

9. COPR Practice Direction 1A provides:

“12. In other cases their nature and complexity, the issues raised or likely to be raised in them and the stage they have reached could mean that the assistance of an accredited legal representative is not required or is inappropriate and that P’s participation is best secured and the court will be properly informed by the appointment of a representative under rule 1.2(2)(c) (who could be a friend, an IMCA, an advocate appointed under the Care Act 2014, a family member or anyone with relevant knowledge) or by directions being made under rule 1.2(2)(d) or (e).”

10. It is conventional to refer to a “r1.2 representative” as shorthand for a r1.2(c) representative. A r1.2 representative may be a lay person, usually a member of P’s family or a friend, or a professional. ALRs are representatives who may be appointed in accordance with r1.2(2)(b). Although appointed under r1.2 they are referred to as ALRs rather than r.1.2 representatives. I shall follow convention in this judgment.

ECHR and Strasbourg Jurisprudence

11. Articles 5(1) and (4) of the European Convention on Human Rights (“ECHR”) read as follows:

“(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.”

12. There is no dispute that PQ is deprived of her liberty and is a “person of unsound mind”. Her detention has been and continues to be authorised by the Court in these proceedings and is therefore in accordance with a procedure prescribed by law. There is no issue arising in relation to Art 5(1). As for Art 5(4), although the proceedings have taken several years to reach the present point, the Court has carefully but speedily considered interim declarations and orders during the proceedings and no issue is taken as to the effective exercise by PQ of her entitlement to take proceedings to challenge the lawfulness of her detention to date. The issue is whether future arrangements, in particular those during the review period, will comply with Art 5(4).

In *Winterwerp v The Netherlands* (Applicant 6301/73) 24 October 1979, the European Court of Human Rights (“ECtHR”) held at [60]:

“The judicial proceedings referred to in Article 5 para. 4 (art. 5-4) need not, it is true, always be attended by the same guarantees as those required under Article 6 para. 1 (art. 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.”

And at [65] to [66]:

65. In paragraph 11 (b) of their memorial the Government state that a person who has "substantial and well-founded grounds for denying the lawfulness of his detention" is able under Netherlands legislation to have counsel present these grounds to the court. In their submission, Mr. Winterwerp had ample opportunity, especially during his various periods of leave from the hospital, to consult a lawyer of his own choosing. Since he apparently never elected to apply to the courts through a lawyer either at the moment of the periodic review of his confinement or as regards his requests for release, it cannot be said, so the Government argue, that he has been refused his right "to take proceedings" as guaranteed by Article 5 para. 4 (art. 5-4).

66. The Court does not agree with this line of reasoning. Having "substantial and well-founded grounds for denying the lawfulness of [the] detention" cannot be a pre-condition for access to the proceedings contemplated by Article 5 para. 4 (art. 5-4), since this is precisely the issue that the domestic court should decide. Furthermore, Article 5 para. 4 (art. 5-4) does not require 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.

The applicant cannot therefore be regarded as having failed to avail himself of the right set forth in Article 5 para. 4 (art. 5-4) simply because he never instructed a lawyer to represent him; in point of fact, he certainly did claim this right in that on four

occasions he sought a review of the lawfulness of his confinement (see paragraph 64 above).”

13. In *DD v Lithuania* (Application no. 13469/06) 9 July 2012, the ECtHR summarised the Strasbourg case law on Art 5(4):

“163. Among the principles emerging from the Court’s case-law on Article 5 § 4 concerning “persons of unsound mind” are the following:

(a) a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings “at reasonable intervals” before a court to put in issue the “lawfulness” – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place;

(c) the judicial proceedings referred to in Article 5 § 4 need not 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. 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 (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; also see *Stanev*, cited above, § 171).

164. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances of the present case, where the applicant’s placement in the Kėdainiai Home was initiated by a private individual, namely the applicant’s guardian, and decided upon by the municipal and social care authorities without any involvement on the part of the courts.

165. The Court accepts that the forms of judicial review may vary from one domain to another and may depend on the type of the deprivation of liberty at issue. It is not within the

province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere. However, in the present case the courts were not involved in deciding on the applicant's placement in the Kėdainiai Home at any moment or in any form. It appears that, in situations such as the applicant's, Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him in an institution like the Kėdainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.

166. The Government claimed that the applicant could have initiated legal proceedings through her guardians. However, that remedy was not directly accessible to her: the applicant fully depended on her legal guardian, her adoptive father, who had requested her placement in the Kėdainiai Home in the first place. The Court also observes that the applicant's current legal guardian is the Kėdainiai Home – the same social care institution, which is responsible for her treatment and, furthermore, the same institution which the applicant had complained against on many occasions, including in court proceedings. In this context the Court considers that where a person capable of expressing a view, despite having been deprived of legal capacity, is deprived of his liberty at the request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation...”

14. In *Raudevs v Latvia* (Application no. 24086/03) 17 December 2013, the ECtHR restated the *Winterwerp* principles but incorporated a further principle from the case law:

“[The Court] reiterates the principles under Article 5 § 4, namely that persons subjected to compulsory medical treatment are entitled to institute court proceedings to test the lawfulness of their detention (see, among other authorities, *Winterwerp*, cited above, §§ 60-61), and that the access to such proceedings should not depend on the goodwill of the detaining authority (see *Rakevich v. Russia*, no. 58973/00, § 44, 28 October 2003, and *Gorshkov v. Ukraine*, no. 67531/01, § 44, 8 November 2005). Moreover, the above article guarantees that the judicial decision concerning the lawfulness of detention and, where necessary, ordering the release, is taken speedily (see, among other authorities, *Van Glabeke v. France*, no. 38287/02, § 31, ECHR 2006-III).”

15. As Ms Kelly observed, the Strasbourg jurisprudence concerns persons detained in hospitals or care homes, not in the community. Most of the relevant case law also focuses on persons detained administratively or through a non-judicial process and their entitlement to access to a judicial review of their detention. That said, *Raudevs* did address Art 5(4) in the context of a detention following judicial order.
16. In domestic law, MCA 2005 Schedule A1 sets out detailed provisions for the deprivation of liberty of persons in hospitals and care homes, known as Deprivation of Liberty Safeguards (“DoLS”). The provisions allow for the managing authority to deprive the individual of their liberty subject to certain qualifying requirements and protections. A standard authorisation of the deprivation of a person’s liberty in a hospital or care home has a maximum duration of 12 months. The relevant person will have a relevant person’s representative (“RPR”) appointed. The role of the RPR is summarised in Part 10 of Schedule A1 at paragraph 140, which sets out that the RPR will:
 - “(a) maintain contact with the relevant person,
 - (b) represent the relevant person in matters relating to or connected with this Schedule, and
 - (c) support the relevant person in matters relating to or connected with this Schedule.”
17. The appointment of an RPR is subject to the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) Regulations 2008 (“RPR Regulations 2008”) which came into force in November 2008.
18. The relevant person can challenge their deprivation of liberty by using the procedure under MCA 2005 s21A. The RPR will assist P to make that challenge and to make any Court application as necessary.
19. PQ is not in a care home, as defined by statute, and so is subject to a community DOL order. A community DOL, authorised by declarations and orders made in the Court of Protection, does not fall under Schedule A1 and is not open to challenge under the MCA 2005 S21A procedure. It is helpful therefore to consider domestic case law which has concerned requirements and protections in cases of deprivation of liberty that fall outside the statutory DoLS regime.
20. In *Salford City Council v GJ* [2008] EWHC 1097 Munby J, then President of the Family Division, was considering “the appropriate safeguard to be put in place when the Court authorises the placement of an incapacitated adult in circumstances engaging Article 5 of the Convention” prior to the introduction of the DoLS regime.

“[15] Article 5(4) has to be applied in the light of the Strasbourg jurisprudence to be found set out in *Winterwerp v The Netherlands* (1979) 2 EHRR 387 and in *HL v United*

Kingdom (2004) 40 HER 761. I summarised this in *Re PS* at para [20]:

"our domestic law must give effect to the principle that an individual cannot be deprived of his liberty on the basis of unsoundness of mind unless three minimum conditions are satisfied: he must reliably be shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder."

I continued:

"Art 5(4) provides the right to an individual deprived of his liberty to have the lawfulness of that detention reviewed by a court. In the case of someone deprived of his liberty on the ground of unsoundness of mind, there are two aspects to this (*Winterwerp* at para 55, HL at paras 135, 140):

(a) First, the lawfulness of the detention has to be reviewed not merely in the light of any domestic legal requirements but also in the light of the text of the Convention, the general principles embodied in the Convention and the aim of the restrictions permitted by Art 5(1)(e). Thus the review must be wide enough to bear on those conditions which are essential for the lawful detention of a person on the ground of unsoundness of mind, in particular with a view to ascertaining whether there still persists unsoundness of mind of a kind or degree warranting compulsory confinement.

(b) Secondly, given the very nature of the deprivation of liberty under consideration in cases within Art 5(1)(e), there must be a review of the lawfulness of the detention 'at reasonable intervals'. Domestic law must provide 'speedy' and 'periodic control' at 'reasonable intervals'."

The first of these two requirements goes, as will be appreciated, to the nature and intensity of the necessary review, the second to the frequency of the reviews.

[16] There are two further passages in *Re PS* to which I should refer. The first is at para [23] where I indicated that:

"Any order authorising detention must contain provision for an adequate review at reasonable intervals, in particular with a view to ascertaining whether there still persists unsoundness of mind of a kind or degree warranting compulsory confinement."

The other is at para [26] where, referring to the judgment of Wall J (as he then was) in *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, I indicated that:

"Any order directing or authorising ... detention ... should contain an express liberty to any party (including the [person detained]) to apply to the court for further directions on the shortest reasonable notice."

21. Munby J considered that review intervals of no more than 12 months would meet the requirements of Art 5(4) and that a review process should include a multi-disciplinary team meeting about one month before the end of the review period. He observed that:

[36] ... if the final order builds in, as in my judgment it must if Article 5(4) is to be complied with, provision for further regular reviews, even if only at annual intervals, then the litigation has not concluded, albeit that it may be dormant for up to a year at a time, nor, it would seem to me, has the continuing role of the litigation friend.

37. Accordingly it follows, in my judgment, that until such time, the 2007 Act having come into force, as the proceedings have been transferred to the Court of Protection and the various mechanisms under Schedule A1 of the 2005 Act are in force, the Official Solicitor remains, as Mr Crabtree put it, as much a part of the court review process as the local authority. The Official Solicitor is, and unless released by the court remains, the litigation friend. As Mr Crabtree puts the point, and I agree, how can BJ participate in reviews which are fundamental to his rights under both Article 5 and Article 8 unless either the Official Solicitor (absent some other replacement) continues to act as his litigation friend or his rights under Article 6 (and, I would add, under Article 5(4)) are breached?"

22. Munby J continued at [43(iii)]:

"Every order must contain a liberty to apply if need be on short notice. In the event of such an application being contemplated, it is vital that the Official Solicitor is given the earliest possible notification and supplied at the earliest possible opportunity with copies of all the up to date assessments, reports, records and other relevant materials.

44. Between these reviews by the court there must be regular internal reviews. In practice – and this is a practice which the Official Solicitor supports and which I commend – these are usually held once every eight to ten weeks. Mr Crabtree suggests that quarterly reviews may suffice. Particularly in the early months and years I would incline to agree with Mr O'Brien, but I would also agree with Mr Crabtree that one cannot be too prescriptive. As he rightly says, the review structure must always be specifically tailored to the needs of the individual to whom it applies.

45. That said, and as both Mr O'Brien and Mr Crabtree observe, and again I agree, the fact that a review is planned, for example, for a specified date each month, does not obviate the need for an earlier review if, for example, there is reason to believe that the person is no longer incapacitated or that it is not in his best interests to be deprived of his liberty or that some less restrictive option may be available. As Mr Crabtree put it, no matter what internal review structure is put in place, evidence of any significant change must of itself prompt speedy consideration of the need for calling an early internal review. He adds, and I agree, that where an important change in circumstances arises, it is incumbent on the local authority to inform the Official Solicitor promptly and if either the local authority or the Official Solicitor feels it is of sufficient magnitude, bring the matter to the immediate attention of the judge.

46. At each internal review the local authority must consider the issues both of capacity and of best interests. Mr O'Brien suggests that at each internal review there will be a need to have regard to any relevant reports from the independent psychiatrist on the issues of capacity and (where appropriate) best interests and from the independent social worker on the issue of best interests. But he submits that internal reviews need not involve further full assessments from the independent experts unless there is reason to believe that there has been a change either in the person's capacity or in what his best interests require. Mr Crabtree takes essentially the same position. I agree. What is needed at any particular review in any particular case will very much depend upon the past and present circumstances of the case.

47. Mr O'Brien submits that at each internal review the interests of the person who has been deprived of his liberty should be represented by an independent person. I agree, save that for Mr O'Brien's word "should" I would substitute the mandatory "must".

23. Munby J then addressed the role of the RPR as set out in the then draft addendum to the MCA 2005 Code of Practice:

"The role of the relevant person's representative, once appointed, is:

- to maintain contact with the relevant person, and
- to represent and support the relevant person in all matters relating to the operation of the deprivation of liberty safeguards, including, if appropriate, triggering a review,

using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection. This is a crucial role in the deprivation of liberty process, providing the relevant person with representation and support that is independent of the commissioners and providers of the services they are receiving."

He agreed that pending the Schedule A1 mechanisms being in place,

"it is the Official Solicitor who should adopt the role of BJ's representative at each internal review ... without the independent oversight which only such a person can bring to the task in hand, the internal reviews will not comply with the intention behind the proposed arrangements, arrangements which ... are fundamental to a lawful process compliant with Article 5(4)."

24. In *Re NRA and Ors* [2015] EWCOP 59, Charles J considered a number of "test cases" where welfare orders under MCA 2005 s16 were to be made and, as a consequence of the implementation of regimes of care and support, P would be deprived of their liberty, asking what directions should be given in such cases. Charles J was concerned primarily with whether P should always be joined as a party to proceedings in the Court of Protection, and the application of a *Re X* or streamlined procedure. At paragraph [182] Charles J held:

"The "process prescribed by law" demanded by Article 5(1) need not involve a court or court proceedings (for example the DOLS) but the proceedings demanded by Article 5(4) must be in a court (or tribunal). As, unlike the DOLS or sectioning under the MHA, the relevant process prescribed by law for the making of a welfare order involves an application to the Court of Protection there is no mileage in making distinctions between what Articles 5(1) and 5(4) demand."

And at [191] and [194]:

"[191] The combination of the requirements of Article 5(1) and 5(4) to the initial decision making and the challenge of the decision made (see paragraph 182 above) shows that, when in reliance of Article 5(1) (e) there is or is going to be an objective deprivation of liberty, the essence of Article 5 is to provide safeguards that put a person who lacks the relevant capacity in a sufficiently equivalent position to a person who has that capacity and so who could himself:

- i) consider, test and decide between competing provisions for his care or treatment,
- ii) consent to one of them, and
- iii) keep under review and challenge the arrangements put in place.

This gives rise to the need for a process that is directed to ensuring that the steps referred to in paragraph 164 (i) to (iii) above are adequately carried out or that their subject matter is adequately investigated by the court. Namely:

- the elicitation and communication to the court of P's wishes and feelings and the matters referred to in s. 4(6) of the MCA without causing P any or any unnecessary distress,
- the critical examination from the perspective of P's best interests, and with a detailed knowledge of P, the pros and cons of a care package, and whether it is the least restrictive available option,

and

- the review of the implementation of the care package and changes in P's behaviour or health.

[194] In my view, in deciding what the minimum is in the circumstances of a given case the determinative issue is whether in practice the procedure adopted enables P's position in respect of the essence of P's Article 5 right to be properly protected and promoted by his case and his wishes and feelings on the determinative test (having regard to the consequence that the implementation of the care package will deprive him of his liberty) being fairly and appropriately put before the court when it is considering the making of the first welfare order and on its review.”

25. At paras [241] to [267] of *NRA*, Charles J considered the position where there is no family member or friend who could act as litigation friend or a rule 3A (now r1.2) representative. He said that, without joining P as a party, the better solution would be making orders for s49 reports and the issuing of witness summonses, but a “much better solution” would be the appointment of representatives identified by the local authority, albeit that solution would require funding.

26. Charles J considered the need for a representative to monitor the care arrangements and deprivation of P's liberty:

“[248] As the provisions in the DOLS concerning the possible appointment of an IMCA, and the appointment of a RPR,

recognise there are obvious advantages that flow from a person or persons not involved in providing the care or treatment in a professional capacity or for remuneration being involved (a) in the decisions made on the terms of the care package, and (b) in keeping it under review.

[249] This reflects the important points that:

i) compliance and lack of objection by a person who lacks relevant capacity cannot be equated to a consent for the purposes of Article 5, and

ii) by reason of their lack of capacity the relevant Ps cannot advance or fully advance their interests themselves.”

Charles J emphasised the benefits of having a representative who visits P and sees the care regime working in practice, and who is independent of the detaining authority – paras. [251] to [255]. He concluded that a rule 3A representative, which is the precursor to the rule 1.2 representative, would be the “obvious solution” in “non-controversial cases”:

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

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

27. In the later case of *Re VE* [2016] EWCOP 16, Charles J set out his suggested Explanatory Note to be given to a rule 3A representative on appointment. It included the following paragraph:

“You should also check from time to time that the package of care and support is being properly implemented and whether it needs to be changed because P's condition has changed, or for any other reason. If you conclude that its implementation or terms should be changed you should raise this with the applicant authority and the Court if the changes are not made.”

28. In the associated judgment of *Re JM* [2016] EWCOP 15, Charles J considered further test cases in which no family member or friend was available to be appointed as a Rule 3A (now r1.2) representative. Charles J highlighted the resource implications of appointing professional representatives but was concerned with the need to meet minimum requirements for compliance with Article 5. He considered that the appointment of a professional representative would meet those requirements. Charles J noted that in *NRA* he had found that whilst the pool of professional IMCAs, RPRs, and Care Act advocates would in principle provide an ideal source of professional representatives, usually available through providers contracted to Local Authorities, in practice that pool was very restricted and would not meet the needs for representatives for Ps under community DOLs. At [22] he expressed frustration at the fact that:

“neither central nor local government are offering to create or to try to create a practically available resource to enable the COP to meet the minimum procedural requirements by appointing professional Rule 3A representatives.”

29. The evidence before Charles J, as he recorded at [114] was that “full and investigative legal aid is not properly available for a streamlined process or any process that does not properly need a hearing.” That is not quite the evidence before me, which is that the Legal Aid Agency (LAA) “would not keep a certificate open indefinitely when there are no substantive legal issues to be resolved during a review period.” As I understand it “Legal Help” funding – for advice rather than representation - might be available but that would not be suitable for a person without capacity to make decisions about, for example, visiting a solicitor to obtain legal help.

30. At paragraph [140] of *Re JM* Charles J concluded:

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

He went on at [142] to refer to the need for someone to fight P's corner. This did not, in his judgement, require P to be a party to the proceedings but it did, at least, require P to have a representative. Charles J suggested staying applications pending the identification of an alternative procedure and joining the Ministry of Justice and Department of Health as parties.

31. In *Re KT* [2018] EWCOP 1, Charles J returned to the vexed question of how *Re X* or streamlined procedure applications should proceed where there is no one available to act as a r1.2 representative. He considered four test cases which had been stayed in accordance with his decision in *Re JM*. He noted that there were over 300 such cases in which no professional had been identified to act as P's representative. He noted that following *Re JM*, Ministers had agreed to provide funding to HMCTS to enable greater use of visitors by the COP. The Government Legal Department had written letters in stayed cases inviting the relevant Local Authorities to "liaise with the Court to take forward the process of commissioning a Court of Protection General Visitor to complete a report under s49 of the Mental Capacity Act." Charles J held that if a family member or friend is not available then,

"[81] In my view, the appointment of a professional who could act independently as a Rule 3A representative and carry out regular reviews of P's placement and care package on the ground would in most cases be likely to have advantages over the appointment of a visitor because it would provide a better basis of and for review and equivalent expertise and independence to that provided by a visitor."

However, he recognised that "in practice such professionals are not available for appointment in a significant number of cases..." Hence, the appointment of a COP Visitor, as suggested in the correspondence referred to, would be the better remaining option rather than cases remaining stayed with joinder of the Secretary of State. Charles J concluded:

"[91] In cases where a visitor is appointed (or some other available procedure is adopted to enable an application or review to proceed) there is no need to, or purpose for joining, or continuing the joinder of, the Crown. But, as soon as any such practically available process is no longer available I consider that, for the reasons given in *JM* and earlier in this judgment the COP should join the Crown to and stay such applications and reviews."

32. As the present case demonstrates, Charles J's Herculean efforts to find a practical solution that would comply with Art 5, in *NRS*, *Re JM*, and *KT*, have not yet borne fruit. The solution of using COP Visitors has not, so far as I am aware, taken hold. The information I have in the present case is that the time to secure the services of a Visitor is very often over one year and that Visitors are not being used as representatives of P during review periods. I am not aware of reported cases after *KT* in which the process there set out has been adopted. On the other hand I am not aware of there being hundreds of stayed cases. I presume therefore that in most cases, albeit not in the present case, a pragmatic solution has been found. It may be that a (misplaced) expectation of the imminent implementation of the Liberty Protection Safeguards has created some inertia in responding to Charles J's pleas for an adequate system for providing funded, professional representatives.

33. The courts have however adopted a *Re X* or streamlined procedure as set out in Practice Direction 11A and using form COPDOL11 which may allow the Court to review and authorise community DOL without the need for an oral hearing. In her judgment in *Bolton Council v KL* [2022] EW COP 24, Senior Judge Hilder considered the use of the streamlined procedure for 16 and 17 year olds deprived of their liberty. During the course of her judgment she said at [85]:

“When the position is reached that the Court is willing to grant an authorisation and conclude proceedings, the format of order should follow closely the terms of a *Re X* final order. In particular, the Court will be unlikely to discharge P as a party or the appointment of the Litigation Friend unless there is an agreed person willing and suitable to be appointed as Rule 1.2 representative for P during the review period, to monitor the implementation of the authorised care arrangements, to make an earlier application if it is considered that the authorised care arrangements no longer meet the needs of P, and to provide information for the review.”

Submissions

34. Ms Kelly, for the Local Authority, emphasises that Senior Judge Hilder’s judgment is not binding on this Court and that she only said that on making a final order it would be “unlikely” that the Court would discharge P as a party and their litigation friend without a r1.2 representative being appointed for P during the review period. She did not hold that it could never be appropriate. Ms Kelly submitted that the Strasbourg cases did not establish that a minimum requirement for compliance with Article 5(4) was the appointment of a representative during a review period nor that there was a continuing, unlimited, entitlement to challenge the deprivation of liberty before a Judge. A balance had to be struck in each case. Here, the Court has taken great pains to assess capacity and best interests. The judicially authorised deprivation of liberty will be reviewed by the Court within 12 months or such different period as the Court shall deem fit and, in standard form, the Court will order that during the review period the Local Authority will have an ongoing obligation to apply to the Court if there is a change to the care plan rendering it more restrictive. She submitted that it was not appropriate for the Court now to determine whether at the end of the review period, the review should be conducted orally. Instead, it should be left for the Local Authority to decide in the circumstances that then prevail, whether to use the streamlined procedure. Either a party will apply for an oral hearing or the Court will itself decide whether an oral hearing is required, but only depending on the circumstances as they are at that time.
35. Ms Kelly referred to long periods of several months during the currency of these proceedings when PQ has not been visited by anyone on behalf of the Official Solicitor. The Court should not be swayed by what would be a false impression of an appointed representative maintaining daily contact with P – a representative’s contact is only intermittent.

36. For the Official Solicitor, Mr O'Brien KC pointed to the protections built into the DOLS regime, in particular the appointment of an RPR. He accepted that he could not point to authority from the ECtHR to the effect that P must have a representative within the review period, but contended that the appointment of a representative should be regarded as a necessary minimum requirement for compliance with art 5 in PQ's case and that it was irrelevant that she was deprived of her liberty in the community rather than in a hospital or care home. Indeed, there may be less oversight in the community where, for example, there is no care home manager. The need for an independent representative might be all the greater where there is a DOL in the community. Without a representative, PQ's rights would be "theoretical and illusory" not "practical and effective" – see for example *Airey v Ireland* Application no. 6289/73 9 October 1979 at [24]. Mr O'Brien KC was careful to restrict his submissions to the present case. The Official Solicitor did not want to make a broader point or to address the implications for resources of a decision that Ps who are subject to Court ordered deprivation of liberty must have a representative in order to comply with Art 5(4).
37. Mr O'Brien KC said that as PQ's current representative, her solicitor (instructed by the Official Solicitor to represent PQ) has spent many hours on her case. Visits are only one part of their responsibilities – there have been many telephone attendances – 16 times when PQ called the solicitor from January 2023 to January 2024 – and there are care plans and other documentation to read and to review. Having a representative will make a significant difference for PQ.

Analysis and Conclusions

38. When the Court of Protection makes "final" best interests orders in relation to residence and care arrangements in the community which will involve P being deprived of their liberty, it must provide for a review period of no longer than 12 months – *Re NRA* (above). When the Court orders a review then the proceedings are not brought to an end. The proceedings are dormant for the review period but they remain ongoing – per Munby J in *Salford City Council v GJ* (above). The dormant proceedings may be revived during the review period if there is a need to bring to the Court's attention a significant change in circumstances. The domestic authorities cited above emphasise the need for changes in P's circumstances or capacity to be swiftly reviewed and, if necessary, brought to the Court's attention – see for example Munby J in *GJ* at [45] (above). P will be highly unlikely to be able by themselves to monitor their own care arrangements and to decide whether to make applications to revive the proceedings – Charles J in *NRA* at [248-9] (above).
39. When making a final order and/or entering a review period there is a need for the Court to consider directions for the participation of P in the ongoing proceedings and in relation to decision-making that affects them. When P has been a party during proceedings to determine their capacity or best interests, it does not necessarily follow that they must remain a party. It is now established (*NRA* and *Re JM*) that compliance with Art 5 does not require P to be a party to the proceedings. P may be discharged as a party and therefore their Litigation Friend may properly be discharged. However, whilst it is not necessary for P to retain party status, that is one of the options to secure their participation that the Court should consider. COP Rules 2017 r1.2

requires the Court to consider whether it should make one or more directions for the participation of P, including making P a party, appointing an ALR, or appointing a representative. In my judgement, the making of final orders marks a significant change in the proceedings and the decisions that have to be made affecting P, and so the participation directions ought to be reviewed and should be tailored to the new circumstances.

40. The matters that the Court must have regard to under r1.2 are:
- (a) the nature and extent of the information before the Court;
 - (b) the issues raised in the case;
 - (c) whether a matter is contentious; and
 - (d) whether P has been notified in accordance with the provisions of Part 7 and what, if anything, P has said or done in response to such notification.
41. Dealing with the last of those matters, at (d), the notification provisions apply when P is not a party to proceedings. When P is a party, they must have a Litigation Friend and that person will be provided with documents within proceedings, applications and notices of appeal. Where P is not a party, then the rules within Part 7 provide that P must be notified, in the manner prescribed, by the applicant, appellant, or “such person as the court may direct” (r7.2(d)). The rules provide that notice must be given of applications, appeals, and decisions of the court but also:
- “Other matters
- 7.7.—(1) This rule applies where the court directs that P is to be notified of any other matter.
- (2) The person effecting notification must explain to P such matters as may be directed by the court.
 - (3) The person effecting notification must also inform P that P may seek advice and assistance in relation to any matter of which P is notified.”
42. Accordingly, Part 7 gives the Court power to direct that if P is not a party, a person (the person effecting notification) must inform P of “such matters as may be directed by the court” and that P may seek advice or assistance in relation to any such matter. If P would not be able to understand, retain, or weigh or use information given to them by way of such notification, could not initiate obtaining advice or assistance, and/or if there is no such advice or assistance available, then such notification would be futile and the notice provisions ineffective. As it is, I can be satisfied that P will have been informed of the decisions of this Court, and the decision I shall make, because she has a Litigation Friend. She will be informed of the effect of those decisions and including the order for a review in 12 months.

43. As to the matters at (a) to (c), in any case in which final orders are made after hearings to determine issues of capacity and best interests, the Court will have had a substantial amount of relevant information on capacity and best interests in order to allow it to make its final orders and declarations, and having done so it will have dealt with all the significant issues in the case including any contentious matters. There will however be outstanding matters namely the arrangements for the review and the review period. There is a template order available to Judges of the Court of Protection that is designed for use upon judicial authorisation of the deprivation of P's liberty under the streamlined procedure set out in Part 2 of Practice Direction 11A. Paragraph 2 of the template order provides for the appointment of a representative under COPR r1.2(2)(c). Paragraph 12 provides that the r1.2 representative shall:

- “i) monitor the implementation of the Care Plan
- ii) provide to the court updating information on the implementation of the Care Plan ahead of the review hearing provided for in this order no later than 14 days before the date of any review and
- iii) make an earlier application for review of this order if they consider that the Care Plan no longer serves the best interests of P.”

The template also includes the following provisions relevant to the review and review period:

“Review

14. If a change or changes to the Care Plan that render it more restrictive have as a matter of urgent necessity been implemented the Applicant must apply to the Court for an urgent review of this order on the first available date after the implementation of any such changes.

15. If a change or changes to the Care Plan that render it more restrictive are proposed (but are not required as a matter of urgent necessity) the Applicant must apply to the Court for review of this order before any such changes are made.

16. In any event, the Applicant must make an application to the Court no less than one month before the expiry of the review period as defined below for a review of this order if at that time the Care Plan still applies to «pfor1» «psur1». Such application shall be made in accordance with any Rules and Practice Directions in effect at the date of the application being filed or, if not otherwise specified, on form COPDOL11.

17. Any review hearing shall be conducted as a consideration of the papers unless the Applicant or r1.2

representative requests an oral hearing or the Court decides that an oral hearing is required.

18. “The review period” shall mean the period of 12 months from the date on which this order was made or, if an application for review has been filed at Court before that date, until determination of such review application.

19. This order shall cease to have effect on the death of P.”

44. The purpose of these standard provisions is to ensure compliance with Art 5(4). They provide for the appointment of a r1.2 representative and for their role to be similar to that of an RPR under the DoLS scheme or that of the r3A representative as set out in Charles J’s explanatory note in *Re VE* (above). They should monitor the care regime and trigger applications prior to the end of the review period if they think it appropriate to do so.
45. If an RPR *must* be appointed under the DoLS regime for a P who is in hospital or a care home, then how can it be acceptable for a P under a community DOL not to have any representative?
46. In response to that question, it might be contended that an RPR is required under the DoLS scheme because the deprivation of liberty is authorised administratively whereas under a community DOL of the kind authorised in the present case the Court has already had oversight of, and has authorised, the arrangements that amount to a deprivation of liberty. However, an RPR is mandatory for the review period even if a s21A challenge to a Schedule A1 deprivation of liberty has been determined by the Court. In such cases an RPR is mandatory even after judicial scrutiny and approval of a deprivation of liberty.
47. Nevertheless, even if there are no material distinctions between the position of P under DoLS and P under a community DOL, the fact that an RPR is mandatory under the DoLS scheme does not of itself mean that a representative should be mandatory under a Court authorised community DOL. As a matter of logic, the support for P during a DoLS review period, including the mandatory provision of an RPR, is not necessarily set at the minimum level for compliance with Art 5(4). The provision of an RPR might be regarded as going beyond the minimum requirements for compliance with Art 5(4).
48. Where there is a suitable and available r1.2 representative, then in many community DOL cases it will be appropriate to appoint them for the review period. If there is a family member or friend who is suitable and willing to act then, as Charles J found in *NRA* and the subsequent cases, they will be able to fulfil the role and their appointment will satisfy the Court that Art 5 will be complied with. If no family member or friend can act, then a professional r1.2 representative could likewise fulfil the role and the procedural safeguards under Art 5 will be satisfied. Rule 1.2 representatives are able to carry out functions similar to those of an RPR and they will give the Court reassurance that someone is fighting P’s corner throughout the review period and prior to the planned judicial scrutiny of the deprivation of P’s liberty at the

end of the review period. Charles J in *Re JM* held that the appointment of a representative would ensure compliance with the requirements of Art 5 and I respectfully agree. I am sure that this is why Senior Judge Hilder recognised in *Bolton Council v KL* (above) that “the Court will be unlikely to discharge P as a party or the appointment of the Litigation Friend unless there is an agreed person willing and suitable to be appointed as Rule 1.2 representative for P during the review period”. This must be so whether the order follows oral hearings or the streamlined procedure.

49. That is not to rule out circumstances in which the Court might be satisfied that there is no requirement for P to be a party, and so to have a Litigation Friend, or to be supported by an ALR or a r1.2 representative. In principle, having regard to the matters to be considered under COPR r1.2(1), the Court might discharge P without appointing a representative if satisfied that there is no prospect of any contentious matters arising in the review period and that there will be sufficient monitoring and sufficient opportunity for P to raise concerns or to make challenges pending the planned review. Such circumstances are likely to be rare but to the extent that Charles J held in *Re JM* that it could never be Art 5 compliant for P as a non-party to have no representative when deprived of their liberty, I respectfully disagree. However, in most cases the Court will not be satisfied that P can participate without either being a party with a Litigation Friend or ALR, or as proceeding as a non-party with an ALR or a r1.2 representative.
50. A Litigation Friend will always be someone independent of the detaining authority. If P is not a party, then their representative should likewise be someone independent of the detaining authority. The ECtHR has held that access to judicial review of the deprivation of P’s liberty should not depend on the goodwill of the detaining authority – *Raudevs* (above). Thus it is not sufficient to rely on the Local Authority itself to challenge the care and other arrangements it is implementing. Both Munby J and Charles J in the judgments cited above emphasised the need for an independent representative. The representative might be funded by the detaining authority and/or work for a provider under contract with the detaining authority but their role must be to act independently and in the best interests of P.
51. In the present case, the proceedings do not end with the “final orders” being made but the court proceedings will be dormant for the review period (unless restored on application due to a change in circumstances). PQ’s participation in decision making affecting her requires to be considered for the whole of the review period, not just the last month or so when preparations for the planned review are underway. If she remains a party she will require the services of a Litigation Friend. She cannot act as a party without a Litigation Friend because she does not have capacity to conduct the litigation herself. The Litigation Friend will be able effectively to fulfil a role similar to that of an RPR under the DoLS regime. If PQ is discharged as a party, then unless she has an ALR or r1.2 representative, the Court will have to rely on other mechanisms for reassurance that her Art 5(4) rights will be upheld. By the usual Court orders made when authorising the deprivation of a person’s liberty, the Local Authority will itself be bound to apply to the Court in the event of significant changes in care arrangements rendering them more restrictive. The Court could make additional directions requiring the Local Authority to restore the matter to Court in the event of any evidence of a change in capacity. However these protections will all rely

on the detaining authority to act and PQ would not have an independent person acting as her eyes and ears during the review period.

52. I have also considered the obligations on the Local Authority imposed by the Care Act 2014. Under s67 of that Act the Local Authority would be obliged to appoint an independent advocate for PQ, due to her incapacity, when it was required to involve PQ in the exercise of a relevant function. Those functions primarily concern the preparation and revision of assessments and care and support plans. Similar provisions require the appointment of an advocate for the purposes of a safeguarding enquiry or review (s68). However, there is no particular expectation that such an obligation under either s67 or s68 would arise during the review period in PQ's case, let alone a guarantee of the involvement of an independent Care Act advocate, and the role of such an advocate would be specific to the relevant function and would not extend to a continuing oversight of the deprivation of PQ's liberty.
53. The particular circumstances which point to the need for PQ to have a representative throughout the review period, whose role would be to monitor the deprivation of her liberty and to raise concerns or make challenges as appropriate, are :
- i) PQ requires high levels of 1 to 1 support for 14 hours a day but wishes to live more independently. As part of that independence she wishes to continue to engage in a relationship with her fiancé, ZA. PQ's wishes, feelings, and behaviour are not always predictable and she has changing relationships with others at her placement. She makes contact with others online and those contacts can influence her. Hence, tensions surrounding PQ's care arrangements and the nature and extent of the restrictions on her freedom are liable to continue.
 - ii) PQ is not capable of monitoring her own deprivation of liberty, of raising concerns in an effective manner, or of challenging the arrangements or restrictions which affect her. She cannot be expected to make contact with a solicitor of her own initiative, for example.
 - iii) There is no person within PQ's family who, acting in an informal role, could be relied upon to speak up for PQ. She has had a tense relationship with RS. I am told that RS and the Third Respondent, TV, who is another close family member, tend to support all proposed restrictions on PQ. Hence, the Court cannot rely on family members to question the care arrangements or to speak up for PQ in relation to the deprivation of her liberty during the review period.
 - iv) It has taken over five years for the Court to be able to make final declarations and orders. The evidence has been complex and some of the determinations as to capacity and best interests, difficult. In November 2023, the Official Solicitor brought to the Local Authority's attention overly restrictive measures being applied to PQ in her placement. This will be the first review period after final orders and declarations. There can be no reassurance that the right balance of restrictions and freedom has now been struck on a permanent basis and that there will be no contentious matters during the review period.
 - v) It cannot be known now whether, in 12 months from now, there will be a need for an oral hearing. If an oral hearing is required, PQ will need professional

assistance and representation. If no oral hearing is required, PQ will not be able to scrutinise or take a view on the COPDOL11 form. Annexe C to that form requires detailed evidence as to consultation with P concerning the authorisation of the deprivation of her liberty. PQ could not meaningfully take part in that consultation without some form of independent representation or assistance.

- vi) It will be helpful to the Court on the planned review to have the input of a representative who has been involved throughout the review period, not just at the end of the period.
54. I should emphasise that the appointment of a representative or Litigation Friend would not solely be for the purpose of the planned review but also to carry out important functions during the whole of the review period. That is why consideration of PQ's participation for the whole period is required now, on embarking on that period.
55. I have considered carefully whether PQ's participation can be satisfactorily achieved by relying entirely on the Local Authority to monitor and review the care arrangements and PQ's deprivation of liberty, and to restore the matter to Court as appropriate. Can the Court rely on the standard directions such as those set out above following streamlined proceedings which include requirements to restore the case to Court if there is a significant change in circumstances rendering the care plan more restrictive? The Court could add requirements such as that a placement visit by a social worker is made and reported upon at least once a month, or that PQ is notified by a specified person of her right to challenge the arrangements and to seek advice or assistance (COPR Part 7). The difficulty with such arrangements, in the absence of an independent representative, is that there would be no independent oversight during the review period and all responsibility would fall on the detaining authority. Access to the Court should not depend on the goodwill of the detaining authority – *Raudevs* (above). Furthermore, the support for PQ would be reactive not pro-active. No independent person would be actively carrying out the functions of a representative to monitor, raise concerns that the Local Authority might not perceive, and if necessary initiate a challenge to the Local Authority. I have had careful regard to the particular circumstances of this case and in my judgement, without an independent representative acting for PQ during the review period, her Art 5(4) rights would be breached. Her continued effective participation requires some form of independent representation during the forthcoming review period, be it through a Litigation Friend, an ALR, or a r1.2 representative.
56. Nor do I regard it appropriate for the Court to take the role that a r1.2 representative might fulfil. The listing of, say, monthly periodic review hearings would not be a proportionate and effective use of the Court's resources. The Court lists should not be clogged up with monthly reviews of community DOL cases simply because no representative is available.
57. My conclusion that there would be no compliance with Art 5(4) without the appointment of a representative, be it a Litigation Friend, an ALR, or a r1.2 representative, is consistent with the domestic authorities, in particular the judgments of Munby J and Charles J set out above and the recent observations of Senior Judge Hilder in *Bolton Council v KL* (above). The likely need for representation for a P who

is deprived of their liberty has been recognised not only in relation to the planned review of their deprivation of liberty but also during the whole of the review period. My conclusion also sits comfortably alongside the mandatory requirement for P to have a representative when deprived of their liberty in a hospital or care home under the DoLS regime. In the present case, without some form of independent representation, PQ's Art 5 rights would be "theoretical and illusory" not "practical and effective".

58. Having determined that some form of ongoing representation is required, the question arises as to what practically can be done when, as in the present case, there is no suitable family or friend to act as a lay r1.2 representative and there is no funding available for a professional r1.2 representative.
59. With respect to Charles J, I am not attracted either to staying PQ's case pending the appointment of a r1.2 representative or to joining the Secretary of State (at least not at this stage). Charles J's view was that it was for central government to fund representation but, several years on from the test cases which Charles J had to consider, it cannot be right to put PQ's case or similar cases on hold with no prospect of central or local government providing a solution. Delay should be avoided if possible. PQ is to be deprived of her liberty in her best interests and a practical solution is required to ensure (i) that her best interests are met and (ii) that the procedural safeguards which should be guaranteed under Art 5(4) are in place.
60. Unfortunately, the Court cannot appoint a lay r1.2 representative in this case because none is available. Likewise, the Local Authority will not pay for a professional representative, be they an Independent Mental Capacity Advocate ("IMCA"), an RPR, or a Care Act Advocate acting as a r1.2 representative, and the Court does not have the power to order the Local Authority to fund a representative. I have considered whether I should refuse to authorise the deprivation of liberty unless or until a r1.2 representative is in place, but Ms Kelly has warned the Court against taking such a course. She cites *Re PQ* [2015] EWCA Civ 411, in which the Court of Appeal noted that while the family courts and Court of Protection may seek to 'persuade' public authorities to act in a way that it considers to be in a child or adult's best interests, it must not use exercise its powers in a way to 'pressure' a public body 'to allocate its resources in a particular way,' [27] and 'Rigorous probing, searching questions and persuasion are permissible; pressure is not.' [36]. I heed that warning and approach the present case as one in which the Court must strive to find a solution in PQ's best interests.
61. In *KT & Ors* [2018] EWCOP 1, Charles J considered the use of Court of Protection Visitors to fulfil the role that a representative might otherwise undertake. However, I understand from the Local Authority that the timescales for reports from Visitors can be well over one year, which renders the use of a Visitor for the present purposes impractical. Furthermore, the Office of the Public Guardian has advised the parties that Visitors are not known to have been used for the purposes for which a representative would be required in PQ's case.
62. It seems to me therefore that, given the finding that I have made that some form of independent representation must be given to PQ during the forthcoming 12 month review period, the only available options are:

- i) Retaining PQ as a party and the Official Solicitor as Litigation Friend.
 - ii) Discharging the Official Solicitor as Litigation Friend but appointing an ALR. This could be done with or without P remaining as a party.
63. On 9 July 2024 a Senior Caseworker at the Legal Aid Agency (“LAA”) wrote to PQ’s solicitor instructed by the Official Solicitor:
- “We would not keep a certificate open indefinitely when there are no substantive legal issues to be resolved during a review period. This would, for example, be unfair on any client paying a monthly contribution. If an issue did arise that satisfied the merits criteria for full representation then it is always possible to apply for a fresh funding certificate at that point and this is the approach I usually see from providers.”
64. No reviewable decision has been made by the LAA and I am not asked to consider the legality of the LAA withdrawing funding for PQ’s representation during the review period when proceedings become “dormant” but the care arrangements and deprivation of liberty require monitoring and there may be a need to raise concerns or even mount legal challenges on her behalf. The LAA has not said that it would withdraw funding. I have evidence only of a caseworker advising that the LAA would “not keep a certificate open indefinitely”, which is not something they would be invited to do – the review period would be for twelve months with further consideration at that stage as to how PQ should participate: there would not be an indefinite need for the Official Solicitor to act as Litigation Friend. However, I do have to contemplate the possibility that the LAA might withdraw funding for PQ’s representation following the making of “final” orders and declarations. I also understand that, in any event, non-means tested legal aid is not available and so there will remain a possibility that funding could be withdrawn on the grounds of PQ’s means. The Official Solicitor requires security for costs as one of the criteria for her appointment. It is possible therefore that at some point during the review period, the Official Solicitor would have to cease to act.
65. Similarly, public funding would be required for an ALR. In principle, an ALR may be appointed whether P continues as a party or is discharged as a party. The appointment of an ALR does not automatically bring funding with it. Although the LAA has not been asked about funding an ALR, I understand that funding would be subject to the merits test and be means tested. The Law Society’s online guidance states, “Where P has been joined as a party *and an oral hearing has, or is likely to be listed*, legal aid [to fund an ALR] is likely to be available to meet P’s legal costs on a means-tested basis” [emphasis added]. However, in the present case I am not prepared to direct that the review hearing in 12 months’ time must be an oral hearing, or to direct that earlier or more frequent oral hearings should be listed, simply as a device to secure LAA funding either for the Official Solicitor as Litigation Friend, or for an ALR. The Court of Protection should not be burdened with otherwise unnecessary hearings. Whether the 12 month review will require an oral hearing will depend on the circumstances as they are at the relevant time. I have not been provided with evidence as to the

comparative costs of funding a newly appointed ALR and of continuing to fund the Official Solicitor as Litigation Friend, and an instructed solicitor.

66. I do not know how many other community DOL cases have circumstances similar to those in this case and I have reached my conclusions on the basis of the facts and circumstances of this case alone. Taking all matters into consideration, having determined that PQ's participation requires either the continued role of a Litigation Friend or the appointment of a representative, each being independent of the detaining authority, and there being no option to appoint a r1.2 representative, I shall direct that P shall continue to be a party and that the Official Solicitor shall continue to act as Litigation Friend until further order. Were an ALR appointed in place of the Official Solicitor acting as Litigation Friend, and were the duties of the ALR to include monitoring the arrangements during the review period and raising challenges and making applications as appropriate, then I would be satisfied that the appointment of an ALR would meet the requirements of Article 5 for the purposes of the review period. However, the Official Solicitor is already in place. I do not have evidence that the costs of maintaining the Official Solicitor as Litigation Friend will be disproportionate or indeed that they will be higher than the costs of appointing and then funding an ALR. I would consider authorising the appointment of a suitable ALR on application if assured that funding were secured and that it would be proportionate to make the appointment and to discharge the Official Solicitor as Litigation Friend but, for now at least, I shall direct that the Official Solicitor shall continue to act as Litigation Friend for PQ.
67. Directions for P's continued participation shall be re-considered at the review hearing or, if earlier, any hearing in the proceedings on application. During the dormant period of the proceedings in the review period, the Official Solicitor as Litigation Friend must ensure that PQ has representation to fulfil a role similar to that of an RPR under the DoLS scheme or that of a r1.2 representative. The representative must monitor the implementation of the Care Plan, provide to the Court updating information on the implementation of the Care Plan ahead of the review hearing as provided for in the order which the Court will make, and must make an earlier application for review of the Court's order if they consider that the Care Plan no longer serves the best interests of PQ and that an application is required. The litigation is ongoing albeit there may be no active applications before the Court prior to the end of the review period. As Litigation Friend, the Official Solicitor will (continue to) instruct a solicitor to act for PQ. The functions I have outlined may be fulfilled by a solicitor but perhaps the solicitor could engage another kind of professional to carry out those functions insofar as they do not involve making or responding to court applications. For example, a professional RPR might be a suitable person for the purpose of monitoring the care arrangements, care plans, and the deprivation of PQ's liberty.
68. I trust that the LAA will reflect on the need for such services to be provided to secure PQ's participation and the state's compliance with Art 5. These functions are important and they are connected with ongoing proceedings. There is no alternative form of representation available. There may be a need for future oral hearings but that cannot be known in advance. The very purpose of representation would be to ensure that the need for an oral hearing during the review period was swiftly identified and appropriate applications to Court were made.

69. The outcome is unsatisfactory because, although important, the functions that a solicitor instructed by the Official Solicitor will be performing during the review period could as well be performed by a r1.2 representative. I have not been provided with comparative costs but presume that the cost of a r1.2 representative would be less than the cost of retaining a solicitor instructed by the Official Solicitor or an ALR. The costs will fall on the LAA rather than the Local Authority. There is therefore an incentive on Local Authorities to refuse to fund r1.2 representatives if they know that the LAA will fund an ALR or a solicitor instructed by the Official Solicitor. Charles J referred to these “budgetary battles” and sadly they are continuing eight years after his plea for a resolution. In the end, the state pays and the solution to which I have been compelled to arrive means that the state will probably pay more than it should pay. The Official Solicitor has not asked the Court to consider the wider ramifications for the allocation of limited resources, but the potential ramifications are plain for all to see. The solution, which lies in the hands of the state through central government and Local Authorities, is to fund a professional r1.2 representative. The failure to do so results in a solution in this case that probably imposes a higher burden on the taxpayer. However, I cannot countenance the alternative of leaving PQ with no independent representation of any kind during the review period because that would not comply with the minimum requirements of Art 5.
70. What happens if the LAA withdraws funding of a solicitor instructed by the Official Solicitor and will not fund an ALR? The Court will have to cross that bridge as and when it has to, but I would hope and expect that the Local Authority would then approve funding for a professional r1.2 representative because otherwise PQ’s continued detention *by the Local Authority* would, on my findings, be likely to contravene Art 5(4) of the ECHR. The Court itself is not equipped to substitute the function of a representative during a review period and the only form of representation that could be made available would be a professional r1.2 representative. Ms Kelly has properly warned the Court against seeking to compel a Local Authority to fund a representative, but I do raise the question of how the Court could properly authorise a deprivation of liberty knowing that during the review period there would be no compliance with Art 5(4).
71. I shall direct that, in the event of a decision by the LAA to refuse or to withdraw funding for PQ’s representation by a solicitor instructed by the Official Solicitor and/or an ALR:
- i) The matter shall be re-listed before the Court for further consideration of PQ’s participation.
 - ii) The LAA shall provide a full explanation to the Court of its decision not to fund PQ’s representation.
 - iii) The LAA shall be requested to secure ongoing funding for PQ’s representation by a solicitor instructed by the Official Solicitor or an appointed ALR pending further determination of the Court of the participation of PQ.
 - iv) The Local Authority shall review its decision not to fund a r1.2 representative and shall provide a written explanation to the Court in the event that it decides not to fund a representative even when, as a result, PQ in their care will have no independent representation.

- v) The Secretary of State for Justice shall be joined as a party and required to provide evidence as to the provision of funds for a professional r1.2 representative for PQ.
- 72. My decision relates to PQ. I do not rule out that in some cases, compliance with Art 5(4) may not require the appointment of a representative or litigation friend during a review period or at all.
- 73. I thank Counsel for their considerable assistance. I shall direct that a copy of this judgment be sent to the Legal Aid Agency and the Secretary of State for Justice with a request that they consider the implications for the provision and funding of representatives for individuals who lack mental capacity to make decisions about their residence and care and who are deprived of their liberty in the community.