IN THE UPPER TRIBUNAL **Case No. HM/771/2014**
ADMINISTRATIVE APPEALS CHAMBER

Before Mr Justice Charles (President of the UT(AAC))

YA v CENTRAL and NORTH WEST LONDON NHS TRUST and Others

[2015] UKUT 0037 (AAC)

Attendances

For the Appellant: Roger Pezzani instructed by Guile Nicholas Solicitors

The First Respondent: did not appear

For the Second Respondent: Jack Anderson instructed by the Department

For the Third Respondent: Aswini Weereratne instructed by the Law Society

Decision:

(1) The First-tier Tribunal erred in law in the manner set out in this Decision.
(2) In exercise of my discretion under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 I do not set aside the decision of the First-tier Tribunal.

OVERVIEW

(1) This case concerns the appointment and duties of a legal representative appointed by the tribunal under Rule 11(7) of the Tribunal Procedure Rules at First-Tier Tribunal) (Health, Education and Social Care Chamber) 2008 (the Rules).

(2) The first points I wish to emphasise are that:

a. In practice appointments pursuant to Rule 11(7) appear to work well to further the underlying purposes of (a) Article 5 and its procedural requirements, (b) the MHA and (c) common law principles of fairness.

b. So, the legal representatives, the tribunal and hospitals have therefore demonstrated that in most cases their respective experience and expertise enables them to operate the Rule effectively and it is important not to create complications and problems into what is intended to be a user friendly investigative system by reference to over-analysis or the introduction of a too rigid approach.

(3) However, the argument on this appeal demonstrates that some of the relevant analysis is not straightforward.

(4) I have dealt with the issues under headings and set out my conclusions under each heading.

(5) My main conclusions are set out below and in the body of the Decision.

(6) Assessments of capacity are to be made applying the approach set out in the MCA and so the presumption that the patient has the relevant capacity. The identification of the specific decision, issue or activity that is the subject of the capacity assessment is important because it identifies the matters that have to be sufficiently understood, taken into account and weighed by the decision maker.

(7) An assessment of a person's capacity to appoint a representative must involve an assessment of their capacity to decide whether or not to appoint one, and it is this choice that identifies the specific decision that is the subject of the capacity assessment set as the trigger to the power conferred by in Rule 11(7)(b). To have the capacity to make that choice the decision maker has to be able to sufficiently understand, retain, use and weigh the reasons for and against the rival decisions and thus their advantages, disadvantages and consequences. So to have capacity to appoint a representative a patient needs to have more than only an understanding that they can make an application to a mental health review tribunal or have someone else make it for them, and thus the limited capacity referred to in *R(H) v SSH* [2006] 1 AC 441.

(8) Although there is substantial overlap between them a person's capacity (a) to appoint a representative and (b) to conduct proceedings himself are not mutually exclusive concepts. But, in this context, the differences between them are theoretical rather than real because a relevant factor to be taken into account in deciding whether or not to appoint a representative is the capacity of the patient to conduct the proceedings and an inability by the patient to appreciate that he or she lacks the capacity to conduct the proceedings themselves effectively determines that he or she does not have the capacity to make that choice. A distinction between these two issues of capacity would found an argument that Rule 11 does not provide a procedure that complies with Article 5(4).

(9) Rule 11(7)(a) and (b) envisage and provide that if an appointment of a legal representative for a patient is made under Rule 11 that patient will or may (a) not have capacity to give any instructions, or (b) not have the capacity to give instructions on all relevant matters relating to the conduct of the proceedings.

(10) When the tribunal appoints a legal representative for a patient who lacks capacity to instruct him on all relevant matters relating to the conduct of the proceedings it thereby authorises that legal representative to act for, and so take instructions from, that patient. And, it is clear from the best interests test in Rule 11(7)(b) and the general requirement to act in the best interests of a person who lacks relevant capacity that the legal representative is not only appointed in the patient's best interests but must act in them (having regard to the relevant issues of fact and law that are relevant in the proceedings).

When the patient has capacity to give instructions on all relevant matters relating to the conduct of the proceedings.

(11) The position of a solicitor acting for a patient with capacity to instruct him to conduct the proceedings whether appointed by the patient or the tribunal is effectively the same as that under any other retainer for the purposes of proceedings, including the consideration of the capacity of the client to give and terminate instructions for that purpose. Generally, in such a case the appointment by the tribunal would have been under Rule 11(7)(a) and so based on the wish or request of the patient and so the patient effectively has the right to terminate the appointment even if formally the tribunal has to end it. Exceptionally, after an appointment under Rule 11(7)(b) it may be found as a result of change or an initial error that the patient has capacity to instruct the solicitor to conduct the proceedings and in such a case the patient would also effectively have a right of termination because the original basis for the appointment would have gone even if formally the tribunal has to end it.

(12) Such a retainer would be to advise on and conduct the tribunal proceedings pursuant to the patient's instructions and subject to the solicitor's professional obligations and duties.

When the patient does not have the capacity to instruct the solicitor on all relevant matters relating to the conduct of the proceedings.

(13) The position is more complicated.

(14) The appointment enables the solicitor to act for the patient in the proceedings and so seek his instructions and ascertain his views, wishes, feelings, beliefs and values. The best interests test in Rule 11(7)(b) and the general requirement to act in the best interests of a person who lacks relevant capacity mean that the legal representative is not only appointed in the patient's best interests but must also seek to promote them (having regard to the relevant issues of fact and law that are relevant in the proceedings).

(15) The main problems are likely to arise when (a) the legal representative's views on what is in the patient's best interests and those of the patient diverge in respect of issues where factors that the patient does not have capacity to give instructions on are relevant, (b) the patient wants the legal representative to advance an unarguable point and/or (c) the patient maintains that he does not want to be represented. In all of those situations it is to be noted that as approved by the Court of Appeal and found by the ECtHR in *RP* [2012] ECHR 1796, [2013] 2 FCR 77:

- withdrawal of representation or the advancement of unreasoned or hopeless argument may well not promote (a) the patient's best interests, or (b) an effective and practical review of a deprivation of liberty, and thus the underlying purposes of Article 5 and its procedural safeguards,

- representation of a patient by another against the patient's wishes as to any representation, or parts of it, is not contrary to Article 6 or in my view Article 5(4), although the departure from the views and wishes of the patient should only be when this is necessary, and

- the failure to provide assistance to a litigant who lacks capacity may itself result in a breach of procedural safeguards.

(16) The points that:

- the grounds for the detention and its continuation should be tested and reviewed as effectively as is practicable, and

- in many cases this can be done effectively by reference to the relevant statutory provisions and existing reports (and evidence from their authors and others)

strongly support the view that the appointment of the legal representative should continue and that the legal representative should act as follows:

i) so far as is practicable do what a competent legal representative would do for a patient who has capacity to instruct him to represent him in the proceedings and thus for example (a) read the available material and seek such other relevant material as is likely to be or should be available, (b) discuss the proceedings with the patient and in so doing take all practicable steps to explain to the patient the issues, the nature of the proceedings, the possible results and what the legal representative proposes to do,

ii) seek to ascertain the views, wishes, feelings, beliefs and values of the patient,

iii) identify where and the extent to which there is disagreement between the patient and the legal representative,

iv) form a view on whether the patient has capacity to give instructions on all the relevant factors to the decisions that found the disagreement(s),

v) if the legal representative considers that the patient has capacity on all those factors and so to instruct the representative on the areas of disagreement the legal representative must follow those instructions or seek a discharge of his appointment,

vi) if the legal representative considers that the patient does not have or may not have capacity on all those issues, and the disagreements or other problems do not cause him to seek a discharge of his appointment, the legal representative should inform the patient and the tribunal that he intends to act as the patient's appointed representative in the following way:

- he will provide the tribunal with an account of the patient's views, wishes, feelings, beliefs and values (including the fact but not the detail of any wish that the legal representative should act in a different way to the way in which he proposes to act, or should be discharged),

- he will invite the tribunal to hear evidence from the patient and/or to allow the patient to address the tribunal (issues on competence to give evidence are in my view unlikely to arise but if they did they should be addressed before the tribunal),

- he will draw the tribunal's attention to such matters and advance such arguments as he properly can in support of the patient's expressed views, wishes, feelings, beliefs and values, and

- he will not advance any other arguments.

(17) In such circumstances, the tribunal should not in my view delve into the areas of disagreement or why the legal representative is of the view he cannot properly draw matters to the attention of the tribunal or advance argument. These may be apparent from the account of the patient's wishes or what they say directly to the tribunal but in my view the decisions on what the legal representative can and cannot argue are matters for the legal representative and not the tribunal who are charged with deciding whether the legal representative it has appointed should continue to act and not with how he should do so.

(18) Where there is no conflict between the wishes of the patient and his views the legal representative should still consider whether or not the patient has capacity to instruct him on all relevant factors and act on the patient's instructions if he concludes that the patient has that capacity. But if the legal representative concludes that the patient does not or may not have such capacity generally he should advance all arguable points to test the bases for the detention in hospital. In those circumstances it may or may not be appropriate to invite the tribunal to hear directly from the patient.

(19) Having determined the capacity test set by Rule 11(7)(b) the most important guiding principles to be applied under the best interests test (and so in deciding whether to exercise the power) are:

- the underlying purpose and importance of the review and so the need to fairly and thoroughly assess the reasons for the detention,

- the vulnerability of the person who is its subject and what is at stake for that person (i.e. a continuation of a detention for an identified purpose),

- the need for flexibility and appropriate speed,

- whether, without representation (but with all other available assistance and the prospect of further reviews), the patient will practically and effectively be able to conduct their case, and if not whether nonetheless

- the tribunal is likely to be properly and sufficiently informed of the competing factors relating to the case before it and so be able to carry out an effective review. (As to this the tribunal should when deciding the case review this prediction).

(20) To those I add (a) the nature and degree of the objections and of the distress caused to a patient if his or her wishes are not followed, (b) the likely impact of that distress on his or her well being generally and (c) the prospects that if a legal representative is appointed or not discharged that legal representative will seek a discharge of the appointment.

REASONS FOR DECISION

1. This appeal raises points of general application and importance relating to the approach to be taken by the First-tier Tribunal (the FtT) to the appointment of a legal representative in mental health cases under Rule 11(7) of the Tribunal Procedure Rules at First-Tier Tribunal) (Health, Education and Social Care Chamber) 2008 (the Rules), the role of a solicitor who is so appointed, the conduct of the hearing after any such appointment (or if one has been considered and not made) and generally when a patient is indicating that he or she does not wish to be represented and issues arise as to the patient's capacity.

2. The nature of the general issues raised merited the joinder of the Secretary of State for Health and the Law Society. I am grateful for their assistance. The Law Society are in the process of updating their Practice Note "Representation before mental health tribunals" (13 August 2009) which together with the decision of the UT(AAC) in *AA v Cheshire Wirral Partnership NHS Foundation Trust* [2009] UKUT 195 (AAC) is mentioned in the notes to Rule 11(7) in the 17th edition of the Mental Health Act Manual (Jones). That note shows that the Law Society does not accept an aspect of the decision of Upper Tribunal Judge Rowland in *AA* concerning the duties of a solicitor. That note also records, as stated in *AA,* that the Official Solicitor does not act as a patient's legal representative under Rule 11(7). Appointments of legal representatives under that rule are made from the Law Society's Mental Health Panel.

3. In my view, when a party who lacks or may lack capacity to conduct proceedings does not accept this a court or tribunal is often faced with difficult issues on procedural and substantive fairness. In the Court of Protection and other civil courts, there are major issues relating to the representation of persons who lack capacity to litigate and in ensuring, where relevant, that the court or tribunal is properly informed of their views, wishes and feelings and so can properly take them into account. These issues include the appointment of a litigation friend, the role, duties and risks (e.g. as to costs) of the litigation friend, whether he needs to appoint a person with a right of audience and the public and private funding of representation. Some of these issues arise in, or are relevant background to, the appeal in *Re X and Others (Deprivation of Liberty)* [2014] EWCOP 25 which is to be heard shortly and concerns the authorisation by the Court of Protection of a deprivation of liberty of a person other than in a hospital or a care home.

4. The equivalent to Rule 11(7) and a panel of solicitors who can be appointed under it to represent a patient in a mental health case (before the FtT and the Upper Tribunal – where a rule in the same terms apples) do not at present exist elsewhere and so the general problems and issues in other courts related to ensuring that litigation involving persons who lack capacity is conducted fairly having regard to the

competing interests involved is only part of the background landscape to this appeal.

5 The arguments before me were advanced under a number of headings identified at a directions hearing. I shall, with some alterations, adopt such headings but firstly I shall set out and comment on the most relevant Rules.

The most relevant Rules

6 Rule 1(3) defines a "legal representative" as a person who for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act. There has always been a similar definition relating to earlier legislation.

7 Rule 4(1) provides that: staff appointed under section 40(1) of the 2007 Act (tribunal staff and services) may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal.

8 Rule 11 provides that:

> (1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.
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> (2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party written notice of the representative's name and address.
>
> (3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except—
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> (a) signing a witness statement; or
>
> (b) signing an application notice under rule 20 (the application notice) if the representative is not a legal representative.
>
> (4) A person who receives due notice of the appointment of a representative—
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> (a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and
>
> (b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.
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> (5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who, subject to paragraph (8) and with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.
>
> (6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).

(7) In a mental health case, if the patient has not appointed a representative, the Tribunal may appoint a legal representative for the patient where—

(a) the patient has stated that they do not wish to conduct their own case or that they wish to be represented; or

(b) the patient lacks the capacity to appoint a representative but the Tribunal believes that it is in the patient's best interests for the patient to be represented.

(8) In a mental health case a party may not appoint as a representative, or be represented or assisted at a hearing by—

(a) a person liable to be detained or subject to guardianship, or who is a community patient, under the Mental Health Act 1983; or

(b) a person receiving treatment for mental disorder at the same hospital as the patient.

9 At the time this case was before the FtT Rule 34 provided that:

(1) Before a hearing to consider the disposal of a mental health case, an appropriate member of the Tribunal must, so far as practicable—

(a) examine the patient; and

(b) take such other steps as that member considers necessary to form an opinion of the patient's mental condition.

(2) For the purposes of paragraph (1) that member may—

(a) examine the patient in private;

(b) examine records relating to the detention or treatment of the patient and any after-care services;

(c) take notes and copies of records for use in connection with the proceedings.

10 Rule 34 now provides that:

(1) Where paragraph (2) applies, an appropriate member of the Tribunal must, so far as practicable, examine the patient in order to form an opinion of the patient's mental condition and may do so in private.

(2) This paragraph applies:

(a) in proceedings under section 66 (1)(a) of the Mental Health Act 1983 (application in respect of an admission for assessment), unless the Tribunal is satisfied that the patient does not want such an examination;

(b) in any other case, if the patient or the patient's representative has informed the Tribunal in writing, not less than 14 days before the hearing that:

(i) the patient; or

(ii) if the patient lacks the capacity to make such a decision, the patient's representative, wishes there to be such an examination; or

(c) if the Tribunal has directed that there be such an examination.

11 So, as appears from Rule 11, an appointment by the FtT under Rule 11(7) is limited to the appointment of a *legal representative* (as defined by Rule 1(3)). It should also be noted that the power to do so only exists when the patient has not appointed a representative (who need not be a legal representative).

12 For sensible pragmatic reasons the appointment under Rule 11(7) is regularly made by a member of staff pursuant to Rule 4 and practice direction. Even if no application has been made to discharge such an appointment under the practice direction (or otherwise) it is clear that the FtT should deal with any issues that are raised before it in respect of such an appointment.

13 This was a section 66(1)(a) case so the change in Rule 34 has no impact, but needs to be remembered when it does.

Briefly the facts of this case

14 YA was detained under s. 2 of the Mental Health Act 1983 (the MHA) and, on 30 October 2013, applied to the FtT under s. 66(1)(a). On 1 November 2013, a staff grade psychiatrist (who also gave evidence at the FtT on behalf of YA's responsible clinician) concluded that she lacked the capacity to refuse legal representation at her tribunal and Ms Butler-Brewster (Ms B-B) of Guile Nicholas was appointed as her legal representative under Rule 11(7)(b).

15 Ms B-B attended the hospital on the day of the FtT hearing (5 November 2013) at 8.30 am and sat in the waiting room to consider the reports provided to her. At about 9.30 am she went to the ward to meet YA. When she arrived YA was with the medical member of the tribunal who informed Ms B-B that YA had firmly indicated that she did not want to provide instructions to a solicitor. Ms B-B then gave an explanation of the role of a solicitor at the hearing that she thought YA appeared to understand and YA was adamant that she did not want representation. Ms B-B returned to the waiting room expecting to be called to the hearing. At 10.50 am she asked why the hearing had not started and was informed that it had and she attended the hearing at 11.00 am.

16 On her arrival Ms B-B requested that the issue of capacity be clarified because in her view the capacity assessment provided before the hearing was inadequate. The hearing was then adjourned. After a short adjournment the parties were called back and informed that the FtT thought that Ms B-B should remain at the hearing in case there was any advice or guidance YA wanted from her. YA did not seek any such advice or guidance and so Ms B-B took no part in the hearing as her appointed legal representative.

17 In paragraph 4 of their Decision the FtT, having recorded that YA had made clear to the medical member and Ms B-B that she did not want to be represented state:

> This was reviewed with the patient again before the tribunal commenced and she remained adamant, but did not object to the solicitor sitting in the tribunal in case there was any advice of guidance that she wanted. This was the course of action followed.

18 This review took place before Ms B-B was present. It is not clear from the various accounts in the papers whether the recorded non-objection to the solicitor being present took place before or after the adjournment. The FtT had been told incorrectly that Ms B-B had left and this is why they started without her being there. She arrived at the hearing when the staff grade psychiatrist was giving evidence. In addition to the pre-hearing review a factor leading to the delayed start was that the relevant reports had been provided to Ms B-B and not handed on to YA who was given time to read them.

19 No objection was made by YA or Ms B-B to the course of action proposed and adopted. YA conducted the hearing on her own behalf. She was invited to and did ask questions of the witnesses and make a final statement. In her witness statement on this appeal she says that she thought the panel did their best to help her but that she found parts of the hearing difficult to follow and feels that she should have asked more questions.

20 There is no finding by the FtT on YA's capacity to appoint a representative or decision or direction on the appointment of Ms B-B pursuant to Rule 11(7)(b) on the basis that YA lacked capacity to appoint her and it is unclear whether the FtT concluded and proceeded on the bases that:

i) contrary to the view of the staff grade psychiatrist who gave evidence YA did not have the relevant capacity, Ms B-B's appointment was effectively discharged and she was invited to remain in case YA (with the relevant capacity) sought her assistance,

ii) YA did not have the relevant capacity, Ms B-B's appointment was effectively discharged because the FtT concluded that it was not in YA's best interests to be represented and she was invited to remain in case YA (with or without capacity to appoint her) sought her assistance, or

iii) YA did not have the relevant capacity, Ms B-B's appointment remained in being but the only part she could play was if YA sought her assistance.

21 The FtT accepted that YA had a mental disorder the exact nature of which had not been conclusively assessed and concluded that the nature and degree of her illness were evidenced by the impact that her mental disorder had had on her health and were sufficient to warrant her detention in hospital for assessment.

22 As she explains in her witness statement dated 28 May 2014, YA was disappointed with this result, instructed Ms B-B to represent her and felt that the result might well have been different if she had been represented before the FtT. I pause to comment that that is a matter of speculation and there were powerful arguments in favour of the view reached by the FtT.

23 YA also explains that her way of thinking relating to her lifestyle and goals had changed since the hearing on 5 November 2013, and as a result she was claiming welfare benefits, had accommodation and was attending medical appointments for her physical problems. She states that she was given a diagnosis of personal delusional disorder and schizophrenia that she does not agree with, was subject to a community treatment order and was taking her medication although she does not believe that it makes any difference.

24 So significant changes have occurred since October and early November 2013 and a re-examination of the situation then is not warranted or appropriate.

25 On this appeal YA has been represented by Ms B-B and her capacity to instruct her and to litigate in these proceedings has been confirmed by certificates from a consultant psychiatrist which accord with the view of Ms B-B.

The approach to be taken on this appeal

26 Initially the Department of Health argued that it should not be a party and that if any Government Department should be a party it should be the Ministry of Justice as it was responsible for promulgating tribunal rules. I was unimpressed by this argument and indicated that I would not replace one Department with another and run the risk that the new Department would argue that the Department of Health was the more appropriate Department because of its responsibilities relating to patients and hospitals. I pointed out that it seemed to me that the indivisibility of the Crown and common sense dictated that the relevant Departments should discuss the issues and not try to "pass the parcel". They have had such discussions and there is a short statement from a civil servant at HMCTS dealing with the appointment of legal representatives by tribunal staff.

27 In his skeleton argument the Secretary of State argued that I should not address and seek to resolve wider issues than those required to determine the appeal and cited *R (Burke) v General Medical Council* [2005] EWCA Civ 1003 particularly at paragraph 21. Naturally, I acknowledge the force of those comments, the guidance they give and the points made that (a) issues relating to both capacity and Article 5 are fact sensitive, and (b) issues raised on this appeal may warrant consideration by the Tribunal Rules Committee. But, in my view, to answer the "narrow" issues identified by the Secretary of State it is not possible to exclude consideration of most of what I understand he

seeks to exclude as "wider" issues. For example, the wide range of potential factual scenarios and the general approach to be taken to issues relating to capacity and deprivation of liberty clearly inform the correct legal approach to the application of Rule 11(7) and the conduct of proceedings before the FtT, as does the impact of the MCA and the ECHR.

28 Further, in agreement with the appellant and the Law Society, I consider that the issues on this appeal raise points of general application upon which guidance from the Upper Tribunal is appropriate.

29 However, as appears below, I have concluded that the issue whether a tribunal can appoint a litigation friend for a party who lacks capacity to conduct proceedings before it should be left to a case in which it has been raised and argued fully.

The assessment of capacity - The relevance of the Mental Capacity Act 2005 (the MCA) to the determination of capacity for the purposes of Rule 11(7)

30 I agree with the common ground before me that although they have not been applied directly the principles and approach set out in the MCA (see in particular sections 1 to 3) and its associated statutory guidance in the Code of Practice: Mental Capacity Act 2005 (see in particular Chapter 4) should be applied.

31 The Supreme Court in *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18, [2014] 1 WLR 933 confirmed (at paragraph 13) that the general approach taken at common law is confirmed by the MCA and so the cases under the common law remain relevant. The approach recognises the importance of autonomy. Section 2(1) of the MCA provides that a person lacks capacity: "*if at the material time he is unable to make a decision for himself in relation to the matter because of a permanent or temporary impairment of, or disturbance in the functioning of, the mind or brain*".

32 What follows is not intended to be a full description of the factors to be taken into account when determining capacity.

33 The cause for the inability to make a decision under the MCA test (and the common law it reflects) sets a diagnostic threshold which covers a wide range of conditions. (Whether as suggested in written argument by the Law Society lack of capacity to appoint a representative under Rule 11(7)(b), where capacity is not defined by reference to the MCA, could be based on another cause (e.g. coercion) was not argued before me and is outside the ambit of this decision).

34 There is a presumption in favour of the person having capacity and a decision specific approach (sometimes also referred to as an issue or activity specific approach) is to be taken to determining a person's capacity. A person is not to be treated as lacking capacity merely

because he makes an unwise decision. The impact of all practicable steps to help the person to make the decision needs to be considered.

35 The decision maker lacks capacity if he is unable to understand the information relevant to the decision, to retain that information, to use and weigh that information as part of the process of making the decision or to communicate his decision.

The impact of the European Convention on Human Rights (the ECHR) to the application of Rule 11(7)

36 The main purpose of Article 5 is that no one should be deprived of their liberty in an arbitrary manner (see, for example, *X v UK* (1981) 4 EHRR 188 at paragraph 43).

37 Detention under the MHA is a detention of a person of unsound mind under Article 5(1)(e). The reasons warranting such detention may cease or change and so it requires subsequent reviews of its lawfulness (see, for example, *R(H) v SSHD* [2006] 1 AC 441 at paragraph 17, and *X v UK* at paragraph 52). The reviewing body must consider whether the reasons that initially justified detention continue and review the substantive and procedural conditions that are essential for the deprivation of liberty to be lawful (see, for example, *Brogan v UK* 1989) 11 EHRR 1177 at paragraph 65 and *Reinprecht v Austria* (2007) 44 EHRR at paragraph 39).

38 Article 5(4) applies to those reviews and is directed to ensuring that there is a fair procedure for reviewing the lawfulness of a detention (see, for example, *Waite v UK* (2003) 36 EHRR 54). It is aimed at guaranteeing a speedy review of the lawfulness of a deprivation of liberty and this aim provides a contrast with Article 6 and a basis for requiring flexibility and stringency in respect of speed. A leading authority on the procedural rights conferred by Article 5(4) is *Winterwerp v The Netherlands* (1979) 2 EHRR 387 (see in particular paragraphs 54 and 60). *Winterwerp* is commented on in the later cases which confirm that the procedural rights under Article 5(4) do not necessarily mirror those under Article 6 and in *Megyeri v Germany* (1992) 15 EHRR 584 the court stated (with my emphasis):

> 22. The principles which emerge from the Court's case law on Article 5 (4) include 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 has a judicial character and gives 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* (my emphasis) 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.
>
> (d) Article 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.
>
> 23. It follows from the foregoing that where a person is confined in a psychiatric institution on the grounds of the commission of acts which constituted criminal offences but for which he could not be held responsible on account of mental illness, he should - unless there are special circumstances - receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what is at stake for him - personal liberty - taken together with the very nature of his affliction - diminished mental capacity - compels this conclusion.

39 Paragraph 23 of *Megyeri* does not give examples of what would be special circumstances or indicate the importance to the issue of representation of the detained person having committed, or the likelihood that he would if released from detention commit, acts that would be criminal (if he could be held responsible for them). However, the “special circumstances” qualification is an indication that:

i) it is necessary to look at all the relevant circumstances to determine whether in a given case compliance with Article 5(4), and so its objectives, requires that a person who lacks capacity has legal representation before the reviewing body, and

ii) where, as in *Megyeri,* the combination of circumstances founds the view that it is doubtful to say the least that the detained person, acting on his own, would be able to marshal and present the points in his favour on the facts, medical evidence and opinion and proportionality, it will only be in special circumstances that it can be said that the person does not need legal representation.

40 To my mind, particularly when it is read with the passages in paragraph 22 of its decision that I have emphasised, the approach of the court in *Megyeri,* recognises and preserves the necessary flexibility in the

application of Article 5(4) and reflects, for example, the approach taken in an Article 6 case, *P, C and R v the UK* (2002) 35 EHRR 31 where, at paragraph 89, the court commented that failure to provide the assistance of a lawyer may breach Article 6 where such assistance is indispensable for effective access to court by reason of the complexity of the procedure or the type of case. And so, for example, in all the relevant circumstances it was unrealistic to suppose that the party could effectively conduct her own case despite the assistance afforded by the judge to a litigant in person.

41 The more recent cases of (a) *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* (Application no 47848/08 reported on 17 July), which cites *Stanev v Bulgaria* (2012) 55 EHRR 22, and (b) *Ivinovic v Croatia* (Application no 13006/13 reported on 18 September 2014) which cites *Campeanu* at paragraph 45 do not in my view found a different approach under any of the procedural safeguards of the ECHR. Read in their context, paragraph 161 of the judgment (and paragraph 11 of the concurring opinion) in *Campeanu* and the last sentence of paragraph 45 of the judgment in *Ivinovic* do not in my view found a conclusion (which would be contrary to that reached in other cases) that States must ensure that <u>in every case</u> mentally disabled persons are afforded independent representation. Indeed, such an absolute approach would run counter to:

i) the need to have flexibility to promote a quick and effective review for the purposes of Article 5,

ii) the points I have emphasised in paragraph 22 of the citation from *Megyeri,*

iii) the points made by the court in *MH v UK* (2014) 58 EHRR 35 at paragraphs 82, 92 and 93 (which reflect paragraph 22(c) of the judgment in *Megyeri*) that where a person is not fully capable as a result of mental illness of acting for themselves the special procedural safeguards *may* (my emphasis) include empowering or requiring some other person or authority to act on their behalf, but it was not for the court to dictate what form the special procedural safeguards should take provided that they make the right guaranteed by Article 5(4) as nearly as possible as practical and effective for detainees who lack legal capacity to institute proceedings before judicial bodies as it is for other detainees (see also *Shtukaturov v Russia* (2012) 54 EHRR at paragraph 123), and

iv) the conclusion of the court in *RP (and others) v UK* [2012] ECHR 1796, [2013] 2 FCR 77 which concerns the role of a litigation friend in family proceedings.

42 I shall return to *RP* and the decision of the Court of Appeal in that case later. The most relevant conclusions of the court (with my emphasis) are:

61. The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey v. Ireland*, 9 October 1979, § 24, Series A no. 32 and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 59, ECHR 2005-II).

62. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal-aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure (see *Airey v. Ireland*, cited above, pp. 14-16, § 26; and *McVicar v. the United Kingdom*, no. 46311/99, § 50, ECHR 2002-III).

63. However, the Court recalls that the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" (*Golder v. the United Kingdom*, 21 February 1975, § 19, quoting the "*Belgian Linguistic*" judgment of 23 July 1968, Series A no. 6, p. 32, para. 5). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (*Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 24, para. 57).

64. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see the above-mentioned *Golder* and *"Belgian Linguistic"* judgments, *ibid.*, and also *Winterwerp v. the Netherlands*, 24 October 1979 , §§ 60 and 75, Series A no. 33). Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

65. In cases involving those with disabilities the Court has permitted the domestic courts a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the health of the person concerned (see, for example, *Shtukaturov v. Russia*, no. 44009/05, § 68, 27 March 2008). This is in keeping with the United Nations Convention on the Rights of Persons with Disabilities, which requires States to provide appropriate accommodation to facilitate the role of disabled persons in legal proceedings. However, the Court has held that such measures should not affect the very essence of an applicant's right to a fair trial as guaranteed by Article 6 § 1 of the Convention. In assessing whether or not a particular measure was necessary, the Court will take into account all relevant factors, including the nature and complexity of the issue before the domestic courts and what was at stake for the applicant (see, for example, *Shtukaturov v. Russia*, cited above, § 68).

66. It is clear that in the present case the proceedings were of the utmost importance to R.P., who stood to lose both custody of and access to her only child. Moreover, while the issue at stake was relatively straightforward - whether or not R.P. had the skills necessary to enable her successfully to parent K.P. - the evidence which would have to be considered before the issue could be addressed was not. In particular, the Court notes the significant quantity of expert reports, including expert medical and

> psychiatric reports, parenting assessment reports, and reports from contact sessions and observes the obvious difficulty an applicant with a learning disability would have in understanding both the content of these reports and the implications of the experts' findings.
>
> 67. In light of the above, and bearing in mind the requirement in the UN Convention that State parties provide appropriate accommodation to facilitate disabled persons' effective role in legal proceedings, the Court considers that it was not only appropriate but also necessary for the United Kingdom to take measures to ensure that R.P.'s best interests were represented in the childcare proceedings. Indeed, in view of its existing case-law the Court considers that a failure to take measures to protect R.P.'s interests might in itself have amounted to a violation of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *T. v. the United Kingdom* [GC], no. 24724/94, §§ 79 - 89, 16 December 1999).

43 As appears from that citation, protection of procedural rights before the FtT (and elsewhere) is also secured by the United Nations Convention on the Rights of Persons with Disabilities (the UNCRPD) and in particular by Articles 12 and 13 thereof (see, for example, *AH v West London HT* [2011] UKUT 74 at paragraph 16 and the citation of the UNCRPD in *Surrey County Council v P and others* [2014] 2 WLR 642).

44 In the present context the UNCRPD reinforces the procedural rights under the ECHR and the common law.

45 To my mind the most important principles to take forward from this discussion when a tribunal is applying Rule 11(7) are:

i) the underlying purpose and importance of the review and so the need to fairly and thoroughly assess the reasons for the detention,

ii) the vulnerability of the person who is its subject and what is at stake for that person (i.e. a continuation of a detention for an identified purpose),

iii) the need for flexibility and appropriate speed,

iv) whether, without representation (but with all other available assistance and the prospect of further reviews), the patient will practically and effectively be able to conduct their case, and if not whether nonetheless

v) the tribunal is likely to be properly and sufficiently informed of the competing factors relating to the case before it and so be able to carry out an effective review. (As to this the tribunal should when deciding the case review this prediction).

Whether a person's capacity (a) to appoint a representative and (b) to conduct proceedings are mutually exclusive concepts and, if not, what are the differences between them? If they are different can the power under Rule 11(7)(b) be exercised if the person has the capacity to appoint a

representative but does not have the capacity to conduct proceedings and if not what steps can the First-tier Tribunal take in respect of the representation of the patient?

46 As a matter of language and ordinary meaning the concepts of being able "to conduct proceedings" and "to appoint a representative" are different. Indeed that difference is reflected in the purpose of the argument that failed in *Dunhill.*

47 The merger or the extent of their overlap depends on what factors have to be taken into account in determining the capacity of a person to appoint a representative.

48 To have capacity to make a decision a person has to be able to sufficiently understand the information that is relevant to the making of the decision, and to sufficiently retain, use and weigh that information as part of the process of making the decision (and be able to communicate the decision).

49 As pointed out by Baroness Hale in *R(H) v SSH* at paragraph 4 of her judgment most patients who are admitted to hospital under the formal procedures of the MHA do have:

> the very limited capacity required to make an application to a mental health review tribunal or have someone else who can make it for them

50 That observation was directed to the ability to "take proceedings" in the context of the issue whether s. 2 MHA was compatible with the ECHR and was not determinative of that issue (see paragraphs 23 to 26) because it was recognised that in some cases a patient would not have that capacity. However, on one level it might be said that that observation points to a conclusion that very limited capacity is required to appoint a representative.

51 *R(H)* was not referred to or cited in *Dunhill v Burgin (Nos 1 and 2)* which concerned the claimant's capacity to conduct proceedings. An issue was whether a person would have that capacity if they had the capacity to consult a lawyer about the problem underlying the litigation and to understand and act on (bad) advice given by the lawyer. The Supreme Court concluded that the test for determining capacity to conduct proceedings for the purpose of CPR Pt 21 is the capacity to conduct the claim or cause of action which the claimant in fact had rather than to conduct the claim formulated by their lawyers (see paragraph 18). At paragraph 15 of her judgment, having recognised that the test is decision or activity specific and that proceedings may take many twists and turns, develop and change as the evidence is gathered and the arguments are refined, Baroness Hale concluded that:

> But a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no

> sense to apply a capacity test to each individual decision required in the course of proceedings, nor, to be fair, did the defendant argue for that.

52 This demonstrates the need to take a sensible and workable approach to the identification of the specific decision (issue or activity) in question. The conclusion in *Dunhill* demonstrates that the identification is important because it informs the nature and extent of the information that is relevant to the decision making process and so the factors that have to be sufficiently understood, retained, used and weighed when making the relevant decision or decisions to act in a particular way (there decisions about the cause of action the claimant in fact had rather than the claim as formulated by her lawyers). Those factors were not discussed by the House of Lords or the Supreme Court in respectively *R(H)* and *Dunhill*.

53 The importance of the identification of the relevant decision or activity means that the observation relating to very limited capacity to take proceedings in *R(H)* cannot be transported into and applied to the ability to appoint a representative under Rule 11(7), or as *Dunhill* shows to the ability to conduct proceedings with or without help from a legal or other representative.

54 In my view, an assessment of a person's capacity to appoint a representative must involve an assessment of their capacity to decide whether or not to appoint one, and it is this choice that identifies the specific decision that is the subject of the capacity assessment set as the trigger to the power conferred by in Rule 11(7)(b).

55 It should also be remembered that in the context of the capacity to appoint a representative under Rule 11(7)(b) the patient has not appointed a representative and is not expressing a wish not to conduct the proceedings themselves or to be represented. This means that the choice is whether the patient should have a legal representative or conduct the proceedings himself.

56 Often the assessment of the ability of a party to conduct proceedings and so in the civil courts whether he or she should have a litigation friend is conducted on the basis that the party will have the benefit of advice. Such an assessment of capacity can arise in tribunal proceedings after a solicitor has been appointed to act under Rule 11(7), or on or after a solicitor has accepted instructions from a patient (see for example *AMA v Greater Manchester West Mental Health NHS Foundation Trust* [2015] UKUT 0036 (AAC), which I heard shortly after this appeal). As appears below, in those situations the specific issue is whether the patient has the capacity to instruct the solicitor to conduct proceedings on his behalf.

57 To have the capacity to make the choice whether or not to appoint a representative the decision maker has to be able to sufficiently understand and weigh the reasons for and against the rival decisions and thus their advantages, disadvantages and consequences. So to

have capacity to appoint a representative a patient has to have more than only an understanding that they can make an application to a mental health review tribunal or have someone else make it for them and thus the limited capacity referred to in *R(H) v SSH*.

58 Accordingly, the distinction between the capacity to appoint a representative and the capacity to conduct proceedings narrows. This is because, to assess the advantages, disadvantages and consequences of choosing whether or not to appoint a representative, the decision maker has to be able to sufficiently understand, retain, use and weigh the assistance a representative will or may be able to give on the issues in the proceedings having regard to their nature and complexity. So factors that the patient will have to be able to sufficiently understand, retain, use and weigh will be likely to include the following:

i) the detention, and so the reasons for it, can be challenged in proceedings before the tribunal who, on that challenge, will consider whether the detention in justified by the provisions of the MHA,

ii) in doing that, the tribunal will investigate and invite and consider questions and argument on the issues, the medical and other evidence and the legal issues,

iii) the tribunal can discharge the section and so bring the detention to an end,

iv) representation would be free,

v) discussion can take place with the patient and the representative before and so without the pressure of a hearing,

vi) having regard to that discussion a representative would be able to question witnesses and argue the case on the facts and the law, and thereby assist in ensuring that the tribunal took all relevant factual and legal issues into account,

vii) he or she may not be able to do this so well because of their personal involvement and the nature and complication of some of the issues (e.g. when they are finely balanced or depend on the likelihood of the patient's compliance with assessment or treatment or relate to what is the least restrictive available way of best achieving the proposed assessment or treatment),

viii) having regard to the issues of fact and law his or her ability to conduct the proceedings without help, and so

ix) the impact of these factors on the choice to be made.

59 It is always dangerous to say never on fact sensitive issues but it is difficult to think of any circumstances in which:

i) a patient has the capacity to conduct proceedings himself but not to appoint a representative, and

ii) a patient does not have the capacity to appoint a representative but would have the capacity to conduct proceedings himself or with a representative.

That leaves the question whether a person can have the capacity to appoint a representative but not the capacity to conduct proceedings without one and thus the possibility that in a case such as this, where the patient is asserting that she does not want to be represented, the distinction could found a conclusion that there is no power to appoint a legal representative for a patient who wants to but does not have the capacity to conduct the proceedings before the tribunal without the assistance of a representative.

60 Again it is dangerous to say never, but in my view, in this context this possibility is theoretical rather than real. This is because:

i) the ability of the decision maker to conduct the proceedings himself is a relevant factor to take into account in making the choice whether or not to appoint a representative (see paragraph 58), and

ii) an inability of the decision maker to appreciate a lack of capacity to conduct proceedings without help (as opposed to making an unwise decision to represent oneself) is effectively determinative of, the question of capacity of that person to appoint a representative.

61 Further, and in any event, in the context of Rule 11(7)(b) a result that the tribunal could not appoint a legal representative for a person on the premise that he or she has capacity to appoint a representative but not to conduct the proceedings themselves would run counter to the principles of procedural fairness relating to the provision of an effective and practical review of a detention to guarantee the core objective of Article 5 that no one should be deprived of their liberty in an arbitrary manner. So such an interpretation of Rule 11(7) would found the argument referred to paragraph 67 of the judgment in *RP* that the rule fails to provide appropriate measures to facilitate the result that the patient has an effective role to protect and advance his or her interests.

62 *The references to a representative in Rule 11.* I should also mention that the power of the tribunal is to appoint a *legal representative* and it is triggered when a patient has not appointed a *representative* by either (a) a statement that the patient does not wish to conduct their own case or that they wish to be represented, or (b) a conclusion by the tribunal that the patient lacks the capacity to appoint a *representative* and that it is in their best interests for the patient to be represented. Unlike the position in Rule 11(1) the reference in the introduction to Rule 11 and Rule 11(7)(b) to a *representative* is not qualified by the

phrase “whether a legal representative or not” but in my view that qualification applies as a matter of language and purpose to those and all references to a *representative* in Rule 11. If that was not so, an appointment of a representative by a patient who lacked capacity to do so would preclude an appointment under Rule 11(7)(b). However, in my view, when no purported appointment of a representative has been made, the focus of the capacity issue under Rule 11(7)(b) should be on the capacity of the patient to appoint a legal representative (as defined) because (a) this is what the power and its best interests test are directed to, and (b) under Rule 11(7)(a) a legal representative can be appointed by the tribunal when a patient with capacity to appoint a representative of any type expresses the wish set out therein.

63 In my view, in practice the distinction between a legal and a non-legal representative is very unlikely to have any effective impact because the factors to be taken into account and weighed (see paragraph 58 above) include a sufficiently informed assessment of the issues involved that engage the skills of, and so the benefits of appointing, a legal representative and thus of receiving the advice and assistance such a representative can give.

64 *Conclusions on (and raised by) the questions in this heading*:

(1) Although there is substantial overlap between them a person’s capacity (a) to appoint a representative and (b) to conduct proceedings himself are not mutually exclusive concepts.

(2) In this context, the differences between them are theoretical rather than real because a relevant factor to be taken into account in deciding whether or not to appoint a representative is the capacity of the patient to conduct the proceedings and an inability by the patient to appreciate that he or she lacks the capacity to conduct the proceedings themselves effectively determines that he or she does not have the capacity to make that choice.

(3) A distinction between these two issues of capacity would found an argument that Rule 11 does not provide a procedure that complies with Article 5(4).

(4) Although, it accords with the view reached by Underhill J in *Johnson v Edwardian International Hotels* [2008] UKEAT 0588-07-0205, I think that the view expressed in paragraph 12 of the Decision in *AA* that the UT (and so also the FtT) as creatures of statute do not have power to appoint a litigation friend for a party who lacks capacity merits further consideration. In view of my conclusions on Rule 11(7), it may well be that this issue is more relevant in cases other than mental health cases, and so when that rule does not apply and a party lacks or may lack relevant capacity. Accordingly, issues relating to whether and how a claimant who lacks capacity to appoint a representative or to conduct proceedings in other tribunal cases can be assisted to present their case have the potential for far reaching effects

and it seems to me merits consideration at an oral hearing with argument on both sides. Any appointment could not be forced on anyone and in my view the penultimate paragraph in the note on Rule 11 in the 17th edition of the Mental Health Act Manual (Jones) is directed to a different point. In stating this conclusion I acknowledge that I agree that in *AA* it was not necessary or appropriate to appoint a litigation friend for the patient, and comment that in my view any such reconsideration would be likely to include a consideration of the role of a litigation friend.

(5) Further or alternatively it seems to me that the problems faced by tribunals in dealing with cases where parties lack capacity to appoint a representative or to advance their claims or arguments, which despite the informality and investigative nature of their procedure, overlap with problems faced in the courts, merit consideration by the Tribunal Rules Committee. Chapter 4 of Sir Andrew Leggatt's report and *Re X* may be relevant on any such review.

The duties of a representative appointed under Rule 11(7) to (i) the patient, and (ii) the Tribunal

65 Naturally these arise after the appointment has been made and issues of capacity arise in the context that an appointment has been made. As I have already mentioned this provides a different focus to the capacity issues that arise.

66 The Law Society has given and proposes to give more guidance on this.

67 It is apparent that Rule 11(7) contemplates the tribunal appointing a legal representative for the patient when:

i) the patient has the capacity (a) to appoint one himself and (b) to conduct the proceedings alone or with the help of a legal representative, but has not appointed any representative, and

ii) the patient does not have the capacity to appoint one himself.

68 At paragraphs 18 to 20 of the decision in *AA,* Upper Tribunal Judge Rowland states:

> 18. Nonetheless, rule 11(7)(b) plainly contemplates the possibility of a solicitor being appointed to represent a patient who does not have the capacity to give any instructions at all. In such a case, the rule must, as the Law Society's guidance plainly expects, anticipate that the solicitor will ascertain any relevant wishes that the patient may be able to express, will inform the tribunal of such wishes, make such points in support of them as can properly be made and generally ensure that the tribunal has all the relevant material before it and does not overlook any statutory provision. However, in the absence of the patient's capacity to give valid instructions, the rule must, in my view, also anticipate that the solicitor will exercise his or her judgment and advance any argument that he or she considers to be in the patient's "best interests", which, as the Law Society's guidance

> recognises, will not necessarily involve arguing for the patient's discharge. In those circumstances, it seems to me that the solicitor has the same freedom of action as a litigation friend in the courts.
>
> 19. What, then, is the position if the patient does have the capacity to give instructions on some matters but not others? The Law Society's guidance is unequivocal: a solicitor is bound to act in accordance with the instructions that have been given. Therefore, the more a patient has the capacity to give detailed instructions, the less the solicitor has complete freedom of action.
>
> 20. However, even where a patient has full capacity, a solicitor may be entitled, and in some circumstances may be under a duty, to draw a tribunal's attention to significant matters – particularly points of law – that appear to be in the patient's best interests despite his or her instructions and which it appears the tribunal might otherwise overlook. A solicitor has a duty not just to his or her client but also to the tribunal or, perhaps more accurately, to the administration of justice. A distinction is to be drawn between merely drawing a matter to a tribunal's attention and fully arguing it.

69 I agree that Rule 11(7)(b) envisages and provides that if an appointment of a legal representative for a patient is made under it that patient will or may (a) not have capacity to give any instructions, or (b) the capacity to give instructions on all relevant matters relating to the conduct of the proceedings.

70 Also, in my view, Rule 11(7)(a) envisages and provides for the same thing, although in many cases such an appointment will relate to a patient who has capacity to give instructions on all relevant matters.

71 *The position when the patient has capacity to give instruction to the legal representative on all matters relating to the conduct of the proceedings.* The Law Society submits (as it asserts in its Practice Note) that paragraph 20 of the decision in *AA* is incorrect in suggesting that even when the patient has full capacity and despite their instructions a solicitor may be under a duty to draw the tribunal's attention to particular matters that appear to be in the patient's best interests. I agree that that is incorrect and is inconsistent with the judge's correct comment at paragraph 15 that:

> A patient may be capable of giving valid instructions and, where valid instructions are given, a solicitor must act in accordance with them.

72 As the Law Society points out exceptions to that are that:

i) a solicitor must refuse to advance an argument that is not properly arguable (see *Buxton v Mills-Owens* [2010] EWCA 122 at paragraph 43). And, in this context it is also important to remember that as the Court of Appeal confirm at paragraph 45 that a solicitor should not advance a point using coded language to indicate that he thinks it is weak or hopeless, and

ii) a solicitor can withdraw from a case on grounds of professional embarrassment, if for example he is instructed to take steps that are in his view contrary to the patient's best interests, or on an

appointment under Rule 11(7)(a) by a patient with capacity to conduct the proceedings if the patient no longer wants the solicitor to act.

73 In my view, the point that coded language should not be used applies to arguments and submissions including those on the relevance of evidence and thus an account of the patient's wishes and feelings. However, it is likely that a simple account of those wishes and feelings can be introduced without the need for any code or signal.

74 The position of a solicitor acting for a patient with capacity to instruct him to conduct the proceedings whether appointed by the patient or the tribunal is in my view effectively the same as that under any other retainer for the purposes of proceedings, including the consideration of the capacity of the client to give and terminate instructions for that purpose. Generally, in such a case the appointment by the tribunal would have been under Rule 11(7)(a) and so based on the wish or request of the patient and so in my view the patient effectively has the right to terminate the appointment even if formally the tribunal has to end it. Exceptionally, after an appointment under Rule 11(7)(b) it may be found as a result of change or an initial error that the patient has capacity to instruct the solicitor to conduct the proceedings and in such a case the patient would also effectively have a right of termination because the original basis for the appointment would have gone even if formally the tribunal has to end it.

75 Such a retainer would be to advise on and conduct the tribunal proceedings pursuant to the patient's instructions and subject to the solicitor's professional obligations and duties.

76 *The position when patient does not have capacity to give the solicitor instructions on all relevant issues that arise in the proceedings*. I say "all" because it may well be that within the changing and developing issues described by Baroness Hale the patient, with the assistance of the solicitor, will have the capacity to make decisions and so give instructions on "some" of them.

77 As I have already indicated, this lack of capacity and the difficulties relating to it is not confined to appointments under Rule 11(7)(b).

78 At this stage (i.e. after the solicitor has been appointed) the decision, issue or activity specific approach focuses on the capacity to give instructions on the conduct of the proceedings to the solicitor rather than on the capacity of the patient to conduct the proceedings themselves. So the focus of the capacity issue is whether the patient is capable of sufficiently understanding, retaining, using and weighing with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which the patient's instructions on the case (he or she actually has) are or are likely to be necessary in the course of the proceedings (see for

example *RP* in the ECtHR at paragraph 68 to which I have added the phrase in brackets to reflect *Dunhill*).

79 As appears above, I have concluded that Rule 11(7) gives a power to the tribunal to appoint a legal representative for a patient who lacks capacity to instruct him on all relevant matters relating to the conduct of the proceedings and, that when the tribunal makes such an appointment it authorises that legal representative to act for, and so seek instructions from, that patient. Further, it is clear from the best interests test in Rule 11(7)(b) and the general requirement to act in the best interests of a person who lacks relevant capacity that the legal representative is not only appointed in the patient's best interests but must also seek to promote them (having regard to the relevant issues of fact and law that are relevant in the proceedings).

80 Rule 11(3) makes provision on what a representative can do. But the primary and secondary legislation is silent on how a tribunal appointed legal representative under Rule 11(7)(b) is (i) to take instructions from a patient who does not have the capacity to give them, and (ii) to represent and so conduct the proceedings on behalf of such a patient.

81 I agree with Upper Tribunal Judge Rowland that a close analogy can be made between a legal representative appointed under Rule 11(7) for a patient who lacks capacity to give instructions on all relevant matters and that of a litigation friend appointed by the civil courts for a party. This is because, albeit that their roles are differently described both are appointed pursuant to rules to perform functions on behalf of and in the best interests of a party to proceedings who lacks capacity to conduct them. In my view, the purpose and effect of Rule 11(7) is to provide in mental health cases an equivalent procedure to the appointment of a litigation friend by civil courts to provide that a patient has an effective role in the proceedings and his best interests are advanced and considered in them. It follows that the cases on the approach to be taken by a litigation friend, who in the cases has instructed solicitors, provide applicable guidance.

82 I acknowledge that, as for example appears from some of the commentaries in Court Rules relating to the appointment of a litigation friend, relevant differences may exist in some circumstances in respect of the extent of the respective roles and duties of a litigation friend and a tribunal appointed representative (e.g. when a litigation friend has instructed a solicitor, the relationship between such a solicitor and (i) the litigation friend and (ii) the patient, the position of a litigation friend as a decision maker for or agent of the patient, the gathering of evidence, in respect of the professional duties of a legal representative (who has been appointed as such by the tribunal) to the patient (who is in the position of his client) and to the tribunal). But, in my view any differences should be addressed as and if they arise. As I have already mentioned, the role, status and duties of a litigation friend are shortly to be the subject of consideration by the Court of Appeal in *Re X.*

83 *Cases on litigation friends.* In *Re E* [1984] 1 WLR 320 at 324 D to H Megarry VC by reference to commentaries on practice and procedure says that the main function of a next friend *appears to be* (my emphasis) to carry on litigation on behalf of the plaintiff and in his best interests and for that purpose *he must make all decisions that the plaintiff would have made, had he been able* (my emphasis). He may do anything on behalf of the plaintiff which the rules require or authorise, he does not become a litigant himself, his functions are essentially vicarious and under RSC 80 Rule 2 he must act by a solicitor. The decision of the Court of Appeal in that case (see [1985] 1 WLR 245) does not address these views. In *Masterman - Lister* Chadwick LJ at paragraphs 63 to 66 describes the role of a litigation friend by reference to the RSC, which at Order 80 Rule 2(2) contained a provision equivalent to Rule 11(3) of the Rules.

84 In *RP v Nottingham CC* [2008] 2 FLR 1516 the Court of Appeal consider the position of the Official Solicitor as the litigation friend of a mother whose child was the subject of proceedings in which a care and placement order was made. The court concluded that the evidence was overwhelmingly in favour of both orders being made and that the Official Solicitor as litigation friend had acted rightly in:

i) not advancing an unarguable case on the mother's behalf,

ii) in conceding that (a) the threshold criteria for a care order were met (b) a placement order was in the best interests of the chid and (c) the mother was not in a position to give informed consent to it, and

iii) in putting before the court the mother's manifestly unrealistic views.

85 The Court of Appeal also approved the opinion of counsel obtained by the Official Solicitor and his submissions (see paragraphs 134 to 142). They attach that opinion to the judgment together with the Official Solicitor's statement which covers his role as a litigation friend (see paragraphs 18 to 21). That statement and opinion do not in this context rely on the common law or *Re E* or *Masterman-Lister.* Rather, they refer to the relevant rules and counsel borrows from the Practice Direction to CPR Part 21 at that time in stating that:

> It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of the non-subject child patient ------ and all steps and decisions he takes in the proceedings must be taken for the benefit of the non-subject child or patient

He goes on to say:

> The meaning of "conduct proceedings on behalf of" is not further defined, but the statement encapsulates the two magnetic influences upon the conduct of the litigation friend. The prime motivating factor is beneficence - acting for the parent's benefit. The second is competence - acting according to proper professional standards.

> ---------- and the Official Solicitor is not obliged to withdraw simply because he is unable to act as a parent would wish. Nor can he put up an unreasoned opposition simply because the parent might approve. Neither stance would be to a parent's true benefit, nor would they amount to fair and competent conduct of the litigation nor would they serve the interests of justice.
>
> I believe that in the absence of any special features calling for distinctive treatment, the correct course for the Official Solicitor to take is to present any realistic arguments and relevant evidence that may be available on behalf of (i.e. in support of) the parent in relation to the issues before the court, ---------- The criterion should be whether the point is reasonably arguable, not whether it is likely to succeed.

86 The present Practice Direction to CPR Pt 21 no longer contains a definition of the duty of a litigation friend but the notes to it assert that having regard in particular to Rule 21.4(3)(a) the duty must be to fairly and competently conduct the proceedings. I agree. The notes also state that there is no requirement that a litigation friend must act by a solicitor in High Court proceedings. The terms of the CPR Part 21, the FPR Part 15 and the Court of Protection Rules Part 17 on the appointment of a litigation friend all differ but they all refer to a litigation friend being appointed to conduct proceedings on behalf of the protected party and do not further elaborate or define what that means. They do not replicate all of RSC Order 80 or contain an equivalent provision to Rule 11(3) of the Rules.

87 The notes to the Court of Protection Rules assert that there is a difference between the roles of a litigation friend and a solicitor but do not give reasons for this view. They also refer to the potential for tension between the duty not to take hopeless points that the party wishes to be fully argued, referring to *RP.* The opinion attached to the judgment in *RP* refers to this in the context of a parent who lacks litigation capacity but has the capacity to give or refuse consent to a placement order and adoption. Counsel's approved submissions are at paragraphs 138 to 140 which accord with his approved opinion where he said:

> The requirement that a person under a juristic disability should have a litigation friend does not in itself breach that person's rights under Article 6 of the European Convention: see for example Stewart Brady v UK (1997) 24 EHRR CD 38. Nevertheless, there can be no doubt that to avoid such a breach, the litigation friend must act properly and with due regard to the person's rights and wishes. This in my view translates into an obligation, when departing from the person's wishes, to oppose, frustrate or negate them to the least necessary extent. ----------

88 I have already referred to and cited part of the judgment of the ECtHR in *RP.* Later in that judgment the court found (with my emphasis):

> 68. It falls to the Court to consider whether the appointment of the Official Solicitor in the present case was proportionate to the legitimate aim pursued or whether it impaired the very essence of R.P.'s right of access to a court. In making this assessment, the Court will bear in mind the margin of appreciation afforded to Contracting States in making the necessary

> procedural arrangements to protect persons who lack litigation capacity (*Shtukaturov v. Russia*, cited above, § 68). ----------
>
> 75. With regard to the role of the Official Solicitor in the legal proceedings, the Court recalls that he was to act "for the benefit of the protected party". The Court has taken note of R.P.'s concerns about his focus in the present case on "what was best for K.P.". However, the Court accepts that the best interests of K.P. were the touchstone by which the domestic courts would assess the case. Thus, in determining whether a case was arguable or not, it was necessary for the Official Solicitor to consider what was in K.P.'s best interests. Consequently, the Court does not consider that the fact the Official Solicitor "bore in mind" what was best for K.P. in deciding how to act amounted to a violation of R.P.'s rights under Article 6 § 1 of the Convention.
>
> 76. Moreover, the Court does not consider that "acting in R.P.'s best interests" required the Official Solicitor to advance any argument R.P. wished. On the contrary, it would not have been in R.P.'s - or in any party's - best interests for the Official Solicitor to have delayed proceedings by advancing an unarguable case. Nevertheless, in view of what was at stake for R.P., the Court considers that in order to safeguard her rights under Article 6 § 1 of the Convention, it was imperative that her views regarding K.P.'s future be made known to the domestic court. It is clear that this did, in fact, occur as R.P.'s views were referenced both by the Official Solicitor in his statement to the court and by R.P.'s counsel at the hearing itself.

89 This confirms the approach taken by the Court of Appeal and although in that case the test related to the best interests of the child (KP) that where a conflict arises between a best interests test and the views, wishes and feelings of a party who lacks capacity to make decisions on matters to be taken into account the person appointed to represent that party because of their lack of capacity does not have to and indeed should not argue the unarguable but should put that party's views, wishes and feelings before the court or tribunal.

90 *Conclusions under this heading.* The position is different depending on whether the patient has or does not have capacity to give instructions on all relevant matters relating to the conduct of the proceedings.

91 *When the patient has capacity to give instructions on all relevant matters relating to the conduct of the proceedings.* My conclusions are:

i) The position of a solicitor acting for a patient with capacity to instruct him to conduct the proceedings whether appointed by the patient or the tribunal is effectively the same as that under any other retainer for the purposes of proceedings, including the consideration of the capacity of the client to give and terminate instructions for that purpose. Generally, in such a case the appointment by the tribunal would have been under Rule 11(7)(a) and so based on the wish or request of the patient and so in my view the patient effectively has the right to terminate the appointment even if formally the tribunal has to end it. Exceptionally, after an appointment under Rule 11(7)(b) it may be found as a result of change or an initial error that the patient has capacity to instruct the solicitor to conduct the proceedings

and in such a case the patient would also effectively have a right of termination because the original basis for the appointment would have gone even if formally the tribunal has to end it.

ii) Such a retainer would be to advise on and conduct the tribunal proceedings pursuant to the patient's instructions and subject to the solicitor's professional obligations and duties.

92 *When the patient does not have the capacity to instruct the solicitor on all relevant matters relating to the conduct of the proceedings.* The position is more complicated.

93 The appointment enables the solicitor to act for the patient in the proceedings and so seek his instructions and ascertain his views, wishes, feelings, beliefs and values. The best interests test in Rule 11(7)(b) and the general requirement to act in the best interests of a person who lacks relevant capacity mean that the legal representative is not only appointed in the patient's best interests but must also seek to promote them (having regard to the relevant issues of fact and law that are relevant in the proceedings).

94 Unsurprisingly, it can be seen that there is a considerable overlap between many of the points raised and decided in the cases relating to the role and duties of a litigation friend (e.g. a duty to act fairly and competently and in the patient's best interests) and the duties of a legal representative. Also, the approach taken by the Court of Appeal and the ECtHR in *RP* to the approach to be taken by a litigation friend has considerable overlap with that to be taken by a solicitor acting for a patient who has capacity (see paragraphs 72 to 74 above). Both cannot advance unarguable points but both can (without using coded language) put that party's views, wishes, feelings, beliefs and values before the court or tribunal. However, a solicitor acting for a party with capacity cannot contrary to instructions make concessions and may have to cease to act if he is professionally embarrassed by his instructions.

95 In *RP* points were conceded by the litigation friend. To my mind, there are in practice qualitative albeit fine differences between the impact of a concession, an express non-objection and a stance that argument is not advanced on a point. In my view:

i) the appointment of a legal representative by the tribunal does not mean that the representative is acting for the tribunal and is thus in a different position to a legal representative appointed by a party, and so

ii) a legal representative appointed by the tribunal should not concede points if the party he represents objects to that or does not have the capacity to consent to a concession.

Rather, such a representative should inform the tribunal that he is only advancing arguable points.

96 The informality of a tribunal and its investigative function enables it to hear directly from the patient as well as from a tribunal or party appointed representative. This provides flexibility and perhaps greater flexibility than in some or all courts.

97 The main problems are likely to arise when (a) the legal representative's views on what is in the patient's best interests and those of the patient diverge in respect of issues where factors that the patient does not have capacity to give instructions are relevant, (b) the patient wants the legal representative to advance an unarguable point and/or (c) the patient maintains that he does not want to be represented.

98 In all of those situations it is to be noted that as approved by the Court of Appeal and found by the ECtHR in *RP*:

i) withdrawal of representation or the advancement of unreasoned or hopeless argument may well not promote (a) the patient's best interests, or (b) an effective and practical review of a deprivation of liberty, and thus the underlying purposes of Article 5 and its procedural safeguards,

ii) representation of a patient by another against the patient's wishes as to any representation, or parts of it, is not contrary to Article 6 or in my view Article 5(4), although the departure from the views and wishes of the patient should only be when this is necessary, and

iii) the failure to provide assistance to a litigant who lacks capacity may itself result in a breach of procedural safeguards.

99 As mentioned later there will be some cases in which the distress and harm caused to a patient will mean that it is not in their best interests for a legal representative to be appointed for them. Equally, in such a situation and potentially others the judgmental or balancing act involved could found a decision to terminate such an appointment and thus an application by the legal representative for such a termination. If such a situation exists the legal representative should raise it with the tribunal.

100 However, even if such a situation exists the force in the points that:

i) the grounds for the detention and its continuation should be tested and reviewed as effectively as is practicable, and

ii) in many cases this can be done effectively by reference to the relevant statutory provisions and existing reports (and evidence from their authors and others)

strongly supports the view that the appointment of the legal representative should continue and they should act as set out in the next paragraph.

101 The legal representative:

i) should so far as is practicable do what a competent legal representative would do for a patient who has capacity to instruct him to represent him in the proceedings and thus for example (a) read the available material and seek such other relevant material as is likely to be or should be available, (b) discuss the proceedings with the patient and in so doing take all practicable steps to explain to the patient the issues, the nature of the proceedings, the possible results and what the legal representative proposes to do,

ii) seek to ascertain the views, wishes, feelings, beliefs and values of the patient,

iii) identify where and the extent to which there is disagreement between the patient and the legal representative,

iv) form a view on whether the patient has capacity to give instructions on all the relevant factors to the decisions that found the disagreement(s),

v) if the legal representative considers that the patient has capacity on all those factors and so to instruct the representative on the areas of disagreement the legal representative must follow those instructions or seek a discharge of his appointment,

vi) if the legal representative considers that the patient does not have or may not have capacity on all those issues, and the disagreements or other problems do not cause him to seek a discharge of his appointment, the legal representative should inform the patient and the tribunal that he intends to act as the patient's appointed representative in the following way:

a) he will provide the tribunal with an account of the patient's views, wishes, feelings, beliefs and values (including the fact of any wish that the legal representative should act in a different way to the way in which he proposes to act, or should be discharged),

b) he will invite the tribunal to hear evidence from the patient and/or to allow the patient to address the tribunal (issues on competence to give evidence are in my view unlikely to arise but if they did they should be addressed before the tribunal),

c) he will draw the tribunal's attention to such matters and advance such arguments as he properly can in support of the patient's expressed views, wishes, feelings, beliefs and values, and

d) he will not advance any other arguments.

102 In such circumstances, the tribunal should not in my view delve into the areas of disagreement or why the legal representative is of the view he cannot properly draw matters to the attention of the tribunal or advance argument. These may be apparent from the account of the patient's wishes or what they say directly to the tribunal but in my view the decisions on what the legal representative can and cannot argue are matters for the legal representative and not the tribunal who are charged with deciding whether the legal representative it has appointed should continue to act and not with how he should do so.

103 Where there is no conflict between the wishes of the patient and his views the legal representative should still consider whether or not the patient has capacity to instruct him on all relevant factors and act on instructions if he concludes that the patient has that capacity. But if he concludes that the patient does not or may not have such capacity generally he should advance all arguable points to test the bases for the detention in hospital. In those circumstances it may or may not be appropriate to invite the tribunal to hear directly from the patient.

What procedure should be adopted where the First-tier Tribunal identifies a case in which there is an issue relating to the patient's capacity to appoint a representative: whether and if so when the Tribunal should direct of its own motion a capacity assessment; if so, who should be responsible for conducting that assessment, and how should it be funded

104 This heading is not directed to an appointment by a member of the tribunal's staff but to the position of the tribunal and so to issues that may arise after an appointment by a member of staff (or the tribunal) or in a case where no appointment has been made.

105 This capacity issue should be considered and kept under review by all involved and so the responsible clinician, the hospital managers, a tribunal appointed representative, any representative who has been or has purportedly been appointed by the patient and the tribunal itself.

106 Rule 37(1) provides that the hearing of an application under s. 66(1)(a) MHA (a s. 2 case) must start within 7 days of the receipt of the application and subject as provided by s. 2 a detention thereunder is for 28 days. This is an example of cases that need to be dealt with more quickly than others and in all cases the relevant timeframe needs to be taken into account.

107 As explained above, the capacity test has a diagnostic cause but if a patient has such a diagnosis as, for example, Chadwick LJ explains at

paragraph 66 of his judgment in *Masterman - Lister* the test needs to be (and I add is) one that an experienced solicitor can apply.

108 If and when anyone involved considers that a relevant issue relating to the capacity of the patient (a) to appoint a representative, or (b) to give instructions to a representative arises they should as soon as is practicable draw it to the attention of the tribunal. I say relevant because if the appointment has been made under Rule 11(7) it is likely that the issue can be dealt with in the manner set out above

109 Once raised or identified by the tribunal it must deal with it as soon as is practicable. In a case where the patient wants to be represented it may well be that the issue need not be resolved and upset in dealing with it can be avoided by an appointment being made under Rule 11(7)(a) in place of an earlier appointment by the patient.

110 If, as here, the patient is objecting to the appointment his or her capacity to do so and the continuation of the appointment must be addressed by the tribunal, and I deal with this under the next heading.

What factors should the First-tier Tribunal take into account in determining whether to exercise the power under Rule 11(7)(b) to appoint or to discharge the appointment of a legal representative when the patient is objecting to the appointment

111 The power only arises if the patient lacks capacity to make the appointment and in the case of an objecting patient it is unlikely that it would be safe to proceed on the hypothesis that he or she lacks that capacity because (a) the patient is unlikely to agree to that hypothetical approach and there would be doubt as to his or her capacity to do so and (b) the reasons why the patient lacks capacity are likely to be relevant to the "best interests" test.

112 However, the "best interests" second limb of the test, together with the need for speed is likely to inform the approach to be taken to the determination of the capacity issue and whether an appointment should be made or discharged on the basis of the existing or immediately available evidence relating to whether the patient lacks capacity to appoint a representative.

113 If a conclusion can be based on that evidence, it is likely that the tribunal will be able to address the central issues in the case, namely the application of the relevant tests under the MHA, more quickly. This will promote the stringency in respect of speed required by Article 5(4).

114 The existing evidence is likely to include views from the treating team (including managers) and in a section 2 case the medical member. In other cases, and perhaps in section 2 cases, the tribunal should determine whether the medical member should consider or further consider the issue of capacity to appoint a representative. When the medical member has carried out such an assessment it is important to

remember that the decision on capacity is one for the tribunal and not the medical member and so those involved must be informed of the views of the medical member and the reasons for them and thereby be given the opportunity to address them. This is a basic requirement of a fair procedure namely that the parties must know the case they have to meet and so matters that the tribunal will or may be giving weight to.

115 Subject to legal professional privilege, the legal representative may also be in a position to assist the tribunal without conflict with the patient if he has formed the view that the patient has capacity to conduct the proceedings without help.

116 It seems to me unlikely that a need for independent expert evidence of capacity to appoint a representative will arise in many cases and so I agree that the Law Society should as it intends review paragraph 4.1 of the present guidance relating to obtaining independent expert opinion.

117 In a case where a legal representative has formed the view that the patient does not have capacity to give instructions on all relevant matters, the approach set out above will apply.

118 Having determined that the patient lacks capacity to appoint a representative the best interests test has to be applied.

119 In my view, the most important guiding principles on the application of that test are set out in paragraph 45 above, namely:

i) the underlying purpose and importance of the review and so the need to fairly and thoroughly assess the reasons for the detention,

ii) the vulnerability of the person who is its subject and what is at stake for that person (i.e. a continuation of a detention for an identified purpose),

iii) the need for flexibility and appropriate speed,

iv) whether, without representation (but with all other available assistance and the prospect of further reviews), the patient will practically and effectively be able to conduct their case, and if not whether nonetheless

v) the tribunal is likely to be properly and sufficiently informed of the competing factors relating to the case before it and so be able to carry out an effective review. (As to this the tribunal should when deciding the case review this prediction).

120 To those I add (a) the nature and degree of the objections and of the distress caused to a patient if his or her wishes are not followed, (b) the likely impact of that distress on his or her well being generally and (c) the prospects that if a legal representative is appointed or not discharged that legal representative will seek a discharge of the appointment.

The errors of law in this case

121 The FtT was faced with a difficult situation. I have sympathy with them and can see that their solution had pragmatic force, avoided upset to YA and enabled the hearing to continue in a way that accorded with YA's expressed wishes. However, in my view it created a situation in which the FtT failed to address or failed to explain how they had addressed relevant issues relating to the conduct of the hearing, namely:

i) YA's capacity to appoint a representative,

ii) if she lacked that capacity, whether it was in YA's best interests to be represented,

iii) the role of the representative, and

iv) whether it had any power to suggest or direct how a representative appointed under Rule 11(7)(b) should take part in the hearing.

122 The pragmatic approach taken effectively sought to dictate how the legal representative should act and in my view the tribunal is not empowered to do that and it should have either continued the appointment or discharged it. It seems to me highly likely that if they had addressed this choice the tribunal would have discharged the appointment applying the approach I have set out above and so the result would have been effectively the same, namely that YA represented herself.

Remedy

123 I acknowledge that that view on the outcome is not one that I can say a FtT would be bound to have reached. But I agree with the common ground before me that I should not in the exercise of my discretion set aside the decision because there is now no point in doing so.

Dated 4 February 2015

Mr Justice Charles

(Signed on the original)