

Case Summary

Re X (Court of Protection Practice) [\[2015\] EWCA Civ 599](#)

Issue

Deprivation of liberty procedure

Facts

In *Re X and others (Deprivation of Liberty)* [\[2014\] EWCOP 25](#) (and *No 2* [\[2014\] EWCOP 37](#)), Sir James Munby, the President of the Court of Protection sought to devise a streamlined process to seek to enable the court to deal with DoL cases in a timely, just, fair and ECHR-compatible way. The Court of Appeal has now held that Sir James Munby P had not been entitled to proceed in the fashion that he did, and that his ‘judgments’ were in fact not authoritative statements of the law.

Decision

The Court of Appeal held that it did not have jurisdiction to hear the appeals brought against the decisions in *Re X Nos 1 and 2* [\[2014\] EWCOP 25](#) and [\[2014\] EWCOP 37](#). In essence this was because the Court of Appeal considered that the President had not in fact made any decisions against which an appeal could lie.

Although lacking in jurisdiction, the Court of Appeal went on to consider some of the substantive issues raised in the appeal. Whilst, strictly, these comments are not legally binding, they were very strongly expressed and it is likely that very considerable weight will be placed on them by any subsequent court (Baker J in *HSE Ireland v PD* [\[2015\] EWCOP 48](#) considered that they were the “strongest possible indication of how the Court of Appeal would rule on the question before it, in the event that the issue returns to that Court as part of a legitimate appellate process”. Importantly, all three members of the Court of Appeal were clear that, at least as the Court of Protection Rules stood when the appeal was before them the requirements of the ECHR demanded that the person concerned to be a party to proceedings for authorisation of deprivation of liberty.

Practice implications

Quite where this leaves practitioners and the Court is, at present, not entirely clear. A number of cases have been listed before the Vice-President of the Court of Protection on 30-31st July to consider the implications of the judgment, and also the impact of Rule 3A of the Court of Protection Rules which came into force on 1st July and may mean that directions can be made to secure the participation of the person concerned (‘P’) without their needing to be joined as a party.

Notwithstanding the uncertainties, local authorities and CCGs who are responsible for care arrangements that give rise to deprivations of liberty outside hospitals and care homes should not delay in making applications until the Court of Protection has put in place a replacement for the *Re X* procedure. This decision does not alter the obligation on such bodies to seek authorisation from the Court where such is necessary, nor does it alter the nature of the evidence that must be put before the Court – what it alters is what the Court must then do in order to ensure compliance with Article 5(1)(e) ECHR.

The full version of this case report can be found [here](#). Further reports, articles and guidance notes can be found on our dedicated Mental Capacity Law Resources Page by [clicking here](#).