Hilary Term
[2017] UKSC 22
On appeal from: [2015] EWCA Civ 411

JUDGMENT

N (Appellant) *v* ACCG and others (Respondents)

before

Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

22 March 2017

Heard on 14 and 15 December 2016

Appellant
Kerry Bretherton QC
Neil Allen
(Instructed by Dollman & Pritchard)

Respondent (1)
Hugh Southey QC
Fiona Paterson
(Instructed by Hill Dickinson LLP)

Respondent (2)
Richard Gordon QC
Alexander Ruck Keene
(Instructed by Steel and Shamash Solicitors)

Respondent (3)
Aswini Weereratne QC
Sophy Miles
(Instructed by Scott-Moncrieff & Associates Ltd)

LADY HALE: (with whom Lord Wilson, Lord Reed, Lord Carnwath and Lord Hughes agree)

1. The Mental Capacity Act 2005 established a comprehensive scheme for decision-making on behalf of people who are unable to make the decision for themselves. The decision-maker - whether a carer, donee of a power of attorney, court-appointed deputy or the court - stands in the shoes of the person who is unable to make the decision - known as P - and makes the decision for him. The decision has to be that which is in the best interests of P. But it is axiomatic that the decision-maker can only make a decision which P himself could have made. The decision-maker is in no better position than P. So what is the decision-maker to do if he has reached the conclusion that a particular course of action is in the best interests of P but the body who will be required to provide or fund that course of action refuses to do so? Specifically, what is the role of the Court of Protection where there is a dispute between the providers or funders of health or social care services for a person who lacks the capacity to make the decision for himself and members of his family about what should be provided for him?

The facts

2. MN is a profoundly disabled young man, born in November 1993, so now in his early twenties. In the words of the trial judge, Eleanor King J, at [2013] EWHC 3859 (COP), [2014] COPLR 11, para 6, he has

> "severe learning and physical disabilities together with autism and an uncommon epileptic condition resulting in frequent seizures and risk of sudden death. A nurse has to be available at all times to administer emergency drugs to MN if the need arises. MN had poor muscle tone and uses a wheelchair. He is doubly incontinent. MN has the cognitive ability of a child aged less than 1 year. He has no speech but can express his feelings by facial expression, sounds and gestures. MN needs help with feeding as he is vulnerable to choking; he requires 2:1 care with his personal care and accessing the community. Overall MN has to have his carers nearby at all times and during the night MN has one sleeping member of staff and one member of staff who stays awake to look after him."

3. MN is one of six siblings. He has two brothers, BN and DN, who are also profoundly disabled and live in residential care. He has two sisters who continue to

live with their parents and another brother who lives independently. As Bracewell J put it in care proceedings in the Family Division:

> "To care for three such children, requiring constant 24 hour supervision is a Herculean task which this family as a team has undertaken with love and total commitment. The closeness of the family is striking. The physical care and attention to safety has been exemplary. All the family have been involved with every aspect of minute by minute care and supervision. There is no doubt that love and commitment have been shown to these children to the highest degree."

4. Nevertheless, despite these heroic efforts, the family were unable to cater for all their children's needs, nor were they able to co-operate with the authorities in doing so. Hence the need for care proceedings. A care order was made in respect of MN in December 2001 when he was just eight years old. Bracewell J found that his father had a long history of obstruction of professionals, of refusal to co-operate with authority and of being intimidating to anyone with whom he disagreed. At its height, he received a custodial sentence for assaulting a social worker. An application to discharge the care order was refused in July 2005 when MN was 11. Bracewell J found that history had repeated itself in the intervening years.

5. Accordingly, MN was still in the care of the local authority in August 2011. He was due to reach the age of 18 in November 2011, on which date the care order would come to an end (Children Act 1989, section 91(12)). The local authority, predicting that the parents would not see eye to eye with the authorities about what would then be best for MN, issued proceedings in the Court of Protection, seeking orders that:

> (1) MN reside in such accommodation and receive such education and care as directed by the local authority.
>
> (2) MN's contact with his mother, father and other family members be regulated by the local authority and be supervised by such persons when appropriate as the local authority directed.

6. On MN's 18th birthday, responsibility for his care was taken over by the National Health Service, now the local Clinical Commissioning Group ("CCG") responsible for commissioning care for him. MN has been assessed as having a "primary health need" (under regulation 21 of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and

Standing Rules) Regulations 2012, SI 2012/2996). Two days later, with the permission of the Court, he moved to the residential care home where he now lives.

7. It was not in dispute that MN lacks the capacity both to conduct this litigation and to make decisions about his residence, education or the arrangements for his care or contact with his family. Declarations to that effect have been made by consent. He is represented by the Official Solicitor in these proceedings. The Official Solicitor instructed an independent social worker to report on MN's best interests in respect of his residence, care, education and contact. The social worker has produced three reports in the course of these protracted proceedings. His position since 2011 has been that the care home where MN lives provides "a safe, settled and supportive environment" for him. The parents have "for the time being" accepted that this is where he should stay, although it is clear that their ultimate aim is for him to come and live with them. Despite their difficulties in working with MN's father and mother, the care home has instigated much more relaxed arrangements for contact with MN. At the time of the hearing before Eleanor King J, the plan was that, providing they gave the home one hour's notice (as did the families of all the other residents), they could visit whenever they chose during the day. There are also periodic meetings at a café and arrangements for him to meet his brothers BN and DN, who are also in residential care.

8. Thus, by the time of the hearing, the issues between the CCG and the parents had narrowed to two. First, the parents wished for MN to come and visit them in their home, some six miles away from his care home. An occupational therapist had assessed the home and concluded that it could accommodate MN and his wheelchair for a short visit. But trained carers would have to go with him, be allowed into the home to settle him down, and wait outside while he was there (the parents have been reluctant to allow professionals into their home). One of the carers would have to be trained to administer emergency medication if required. Only the care home manager and her deputy were willing to do this, "the rest of her staff fearing that the parents would not co-operate, would interfere with the care they provided for MN and would be aggressive and intimidating towards them". Hence the care home was unwilling to facilitate MN's visits to the family home, which would therefore require alternative carers to be trained and paid to do so.

9. Second, MN's mother wished to be allowed to assist the care home staff with his intimate care when she was visiting him there. The independent social worker thought that MN's interaction with his mother in this way could form an important element in his quality of life, provided that she was able to work with the staff. Once again, the care home was not willing to allow this. This was due partly to fears as to the mother's co-operation but also because the parents had declined an offer of the necessary training in manual handling. MN is a grown man whose limbs can "thrash around", particularly if he has a fit, which can happen at any time without warning.

10. The final hearing of the application, initially made by the local authority but now maintained by both the CCG (as lead applicant) and the local authority, was listed for three days in November 2013. Voluminous evidence - no fewer than 2,029 pages, including 1,289 pages of expert evidence, contained in five lever arch files - and position statements had been filed. The independent social worker was due to attend. The CCG had written in October making its final proposals for contact between MN and his family. The CCG's position was that it was not in MN's best interests for his mother to be involved in his personal care or for him to have visits to the family home. The staff were unwilling to facilitate this and the CCG was not prepared to fund alternatives. The Official Solicitor, for MN, supported the CCG's position. The parents disputed their position and the reasons for it. In particular, they claimed that the care home's fears about lack of co-operation were unwarranted and that the mother was now prepared to undergo the necessary training.

11. At 11.32 pm on the day before the hearing was due to begin, counsel for the local authority emailed the other parties to give notice of her intention to argue that the Court of Protection had "no jurisdiction" to decide the issues. The matters that the parents wanted were "not on the table" given that the CCG had said that it was not willing to allow or to arrange them, or to commission staff or to fund the necessary resources. These were public law decisions which could only be challenged by way of judicial review. The Court of Protection could only decide between the "available options", making a choice that MN could make if he were able, and it was inappropriate to use the proceedings to try and obtain a best interests declaration in order to influence a public law decision.

12. It was, to say the least, unfortunate that the legal issue was raised so late in the day. It had been foreshadowed in a position statement from the local authority in August 2013 but at a directions hearing later that month directions were given for the filing of further evidence and the parties had prepared for a three-day trial of the disputed issues of fact. No skeleton argument raising a preliminary issue of law had been filed. The parents came to court expecting the court to consider the contact issue over three days in which witnesses would be called and cross examined, after which the court would decide whether what they wanted or what the authorities proposed was in MN's best interests. They could be forgiven for feeling a burning sense of injustice at what took place instead.

13. On the first day, Eleanor King J heard argument on the legal issue, which she labelled "jurisdictional issues" in her judgment. Counsel for the parents raised no objection, being aware of the issue and familiar with the authorities. Written submissions on human rights issues were also made on behalf of the father and responded to jointly by the CCG and local authority. The judge then spent the next day writing a judgment, correctly described by Sir James Munby P in the Court of Appeal as "detailed and careful": [2015] EWCA Civ 411; [2016] Fam 87, para 50. She delivered this on the third day (and perfected it later).

14. She accepted the argument put forward by the local authority and CCG and declined to embark upon a hearing of the evidence or resolving the factual disputes. Her conclusion was that the Court of Protection has no greater powers than the patient would have if he were of full capacity. As she explained, at para 53:

> "If MN had capacity, but required the type of nursing care he currently needs due only to his physical needs, he might wish his mother to assist with his personal care. The care providers … may, as here, be unwilling to allow this for whatever reason; perhaps health and safety issues or difficult relationships with MN's mother. MN with capacity would have the following options: (i) accept the conditions of residence at the care provider's establishment, (ii) privately fund his care elsewhere, or (iii) seek to negotiate with the ACCG in the hope of them agreeing to fund his removal to a different residential unit which would allow his mother to assist with his personal care. What MN with capacity would not be able to do is to force, by way of court order or otherwise, the care providers … to agree to his mother coming into their facility and 'assisting' with his intimate care."

Judicial review was the only proper vehicle through which to challenge unreasonable or irrational decisions made by care providers and other public authorities. In rare cases where a public authority might be acting in breach of convention rights by refusing to fund a particular form of care that could be raised in the Court of Protection by way of a formal application under section 7 of the Human Rights Act 1998. In this case, as contact at the family home was not an available option now or in the foreseeable future, the court should not embark upon a best interests analysis of contact at the parents' house as a hypothetical possibility. Hence she was satisfied that the contact plan now proposed by the CCG was in MN's best interests. She therefore made a comprehensive order, among other things, declaring (1) that it was in MN's best interests to continue to reside and receive care at his current care home or, should that come to an end for any reason or the CCG or public body responsible for his residence and care decide that it is no longer in his interests, to move to and reside and receive care at a placement identified by them; and (2) that it was in MN's best interests to have contact with his parents and other members of his family in accordance with the detailed plan set out in a schedule.

15. Both parents appealed to the Court of Appeal. The President observed that the appeal raised "fundamental questions as to the nature of the Court of Protection's jurisdiction and, in particular, the approach it should adopt when a care provider is unwilling to provide, or to fund, the care sought, whether by the patient or, as here, by the patient's family" (para 9). In his extensive review of the authorities, he took

as his starting point the principle in *A v Liverpool City Council* [1982] AC 363, that the wardship jurisdiction of the High Court in relation to children should not be used to circumvent or challenge the statutory powers and duties of local authorities in relation to children in their care (para 11). He concluded that "the judge was right in all respects and essentially for the reasons she gave" (para 79). He gave four reasons why the Court of Protection should not embark on the kind of process for which the parents contended: first, it is not its proper function to embark upon a factual inquiry into some abstract issue the answer to which cannot affect the outcome of the proceedings before it; second, it should not embark upon such an enquiry in order to provide a platform or springboard for possible future proceedings in the administrative court; third, such an exercise runs the risk of confusing the different perspectives and principles governing the exercise by the Court of Protection of its functions and the exercise by a public authority of its functions; and fourth, it would risk exposing the public authority to impermissible pressure (para 82).

This appeal

16. The father, with the mother's support, now appeals to this Court. On behalf of the father, Ms Kerry Bretherton QC makes essentially the argument that she made below. The Court of Protection has power under section 16(2)(a) of the Mental Capacity Act 2005 to make a decision on any matter in relation to which P lacks the capacity to decide. Among the examples given in section 17 of the use of the court's powers under section 16 in relation to personal welfare is deciding what contact, if any, P is to have with any specified person. Hence the court has jurisdiction to make that decision. Any decision made on behalf of a person who lacks capacity must be made in his best interests. Only once that decision is made should the funding options be considered. She accepts that the court has no power to order the CCG to fund what the court considers to be in P's best interests. But the CCG can be expected to give careful consideration to the court's findings on disputed issues of fact, such as, in this case, the willingness of the parents to co-operate with the authorities and the care home staff and what would actually be required to make their proposals viable. If the CCG maintains its refusal to fund whatever the court thinks best, that can be challenged in judicial review proceedings, albeit only on the usual judicial review grounds, or under the Human Rights Act 1998 on human rights grounds. In other words, as Eleanor King J put it, "Best interests - first; Judicial Review - second" (para 51). Otherwise, a public authority would be able to cut off the Court of Protection's best interests inquiry at the outset, simply by refusing to provide or fund anything other than its own proposals.

17. Ms Weereratne QC, on behalf of the mother, supports that case. She emphasises that there were factual disputes relevant to the two issues in the case which were important to MN's quality of life; that the individual's preferences are at the centre of the care planning process and that it is the function of the Court of Protection to substitute for the preferences of a person who cannot decide or

articulate them for himself; and that this approach would be more consistent with the equality and non-discrimination principles of the United Nations Convention on the Rights of Persons with Disabilities, which are taken into account by the European Court of Human Rights in its interpretation of the Convention rights: see, most recently, *AN v Lithuania*, Application No 17280/08, Judgment of 31 May 2016, where the court cited article 12 of the Convention (para 69) and held that where a measure of protection is necessary, it should be proportionate to the degree of incapacity and tailored to the individual's circumstances and needs (para 124).

18. The approach adopted in the courts below was supported, albeit with nuanced variations, by Mr Hugh Southey QC on behalf of the CCG and Mr Richard Gordon QC on behalf of the Official Solicitor as litigation friend of MN.

19. Despite the wealth of authority cited in the courts below, the applicable principles are readily established from a combination of the fundamental purpose and specific provisions of the 2005 Act and the decisions of this Court and its predecessor in the House of Lords.

The Mental Capacity Act 2005

20. The Mental Capacity Act 2005 had its origins in a project begun by the Law Commission in 1989, with the encouragement of, among others, the Mental Health Sub-Committee of The Law Society. The Commission published four Consultation Papers: *Mentally Incapacitated and Decision-Making: - An Overview* (CP No 119, 1991); *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (CP No 128, 1993); *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research* (CP No 129, 1993); and *Mentally Incapacitated Adults and Other Vulnerable Adults: Public Law Protection* (CP No 130, 1993). The Commission's Report, *Mental Incapacity* (Law Com No 231), was published in 1995. This was followed by a Consultation Paper issued by the Lord Chancellor's Department, *Who Decides? Making Decisions on behalf of Mentally Incapacitated Adults* (1997, Cm 3803), which followed closely the Law Commission's proposals. The Government's conclusions were set out by the Lord Chancellor's Department in *Making Decisions: The Government's proposals for making decisions on behalf of mentally incapacitated adults* (1999, Cm 4465). This adopted most of the principles put forward and recommendations made by the Law Commission. After pre-legislative scrutiny by the Joint Committee on the Draft Mental Incapacity Bill (Session 2002-03, HL 189, HC 1083), the Bill which became the Mental Capacity Act was passed by 2005 and came into force in 2007.

21. Both the Law Commission's and the Government's consultations revealed wide-spread support for legislation along the lines proposed amongst health and

social care professionals, carers and voluntary organisations catering for mentally disabled adults and their families and carers, as well as among lawyers and the judiciary. The Law Commission's project had begun before the decision of the House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. At that time, there was no person with legal authority to make decisions on behalf of an adult who was unable to make them for himself, unlike the parent of a child who lacked the competence to do so. There was no jurisdiction in any court to appoint such a person or to take the decision itself. The old but little used power of the old Court of Protection to appoint a committee of the person was abolished when the Mental Health Act 1959 came into force. But there was no statutory procedure under the 1959 Act to take its place. A person who did have capacity was not able to appoint another person to make decisions about his personal welfare, as opposed to his property and affairs, should he lose capacity in the future.

22. Hence, the decision in *In re F* was greeted with great relief, especially among health care professionals. The House of Lords held that the defence of necessity meant that it was lawful for such professionals and other carers to do what was in the best interests of a person who lacked the capacity to decide for himself whether it should be done. That principle has found its way, with qualifications, into section 5 of the 2005 Act. The House of Lords also held that the High Court had an inherent jurisdiction to make declarations in advance that a particular course of action would, or would not, be lawful in accordance with that principle.

23. Nevertheless, there was still support for legislation. This would have four main purposes: it would place the necessity principle on a statutory footing; it would clarify the tests, both for incapacity and for the best interests principle; it would provide for lasting powers of attorney in relation to personal welfare decisions as well as decisions relating to property and affairs; and it would provide a new jurisdiction, in a newly constituted Court of Protection, with powers actually to take decisions on behalf of people unable to take them for themselves, or to appoint deputies to do so, as well as to make declarations as to whether or not they lacked that capacity and as to whether or not a particular course of action or inaction would be lawful. Since that time, the inherent jurisdiction of the High Court has been held to encompass situations in which the necessity doctrine does not arise, because there is no tort to which a defence is required, but there is still jurisdiction to declare whether something is, or is not, in a person's best interests: see *St Helens Borough Council v PE* [2006] EWHC 3460 (Fam); [2007] 2 FLR 1115. It has also been held that the 2005 Act has not abolished the inherent jurisdiction, which continues to exist alongside the new jurisdiction: see *Westminster City Council v C* [2008] EWCA Civ 198; [2009] Fam 11. Nevertheless, the great majority of cases are brought in the Court of Protection.

24. It will be apparent from the above account that the jurisdiction of the Court of Protection (and for that matter the inherent jurisdiction of the High Court relating

to people who lack capacity) is limited to decisions that a person is unable to take for himself. It is not to be equated with the jurisdiction of family courts under the Children Act 1989, to take children away from their families and place them in the care of a local authority, which then acquires parental responsibility for, and numerous statutory duties towards, those children. There is no such thing as a care order in respect of a person of 18 or over. Nor is the jurisdiction to be equated with the wardship jurisdiction of the High Court. Both may have their historical roots in the ancient powers of the Crown as *parens patriae* over people who were then termed infants, idiots and the insane. But the Court of Protection does not become the guardian of an adult who lacks capacity and the adult does not become the ward of the court.

25. So what powers does the court have? By section 15(1) and (2) it has power to make declarations as to (a) whether a person has or lacks capacity to make a decision specified in the declaration; (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration; (c) the lawfulness or otherwise of any act (including an omission or course of conduct) done, or yet to be done, in relation to that person. It will be seen from this that the Act focusses on capacity in relation to a specific decision or matter. This is consistent with the underlying principles of the Act. By section 1(2), a person must be assumed to have capacity unless it is established that he lacks it. Under section 2(1), the question is whether a person lacks capacity in relation to a "matter". There will be people, of whom MN is probably one, who lack capacity in relation to virtually every decision in their life. But the Act recognises that capacity is variable and may fluctuate. A person may be perfectly capable of taking some decisions but not others. A person may be perfectly capable of taking the decision at some times or in some circumstances but not in others.

26. In the Court of Appeal in this case, Sir James Munby P pointed out that "the still inveterate use of orders in the form of declaratory relief might be thought to be in significant part both anachronistic and inappropriate" (para 88). The scope of the declarations which may be made by the Court of Protection under section 15 may be narrower than the scope of those which may be made in the High Court: see *XCC v AA* [2012] EWHC 2183 (COP); [2013] 2 All ER 988. But the Court of Protection has the much wider powers of making decisions and appointing deputies under section 16 (para 88). And declarations have no coercive effect (para 90). "All in all", he concluded "it might be thought that, unless the desired order clearly falls within the ambit of section 15 …, orders are better framed in terms of relief under section 16" (para 91). With respect, this is a view that I share.

27. Section 16 applies "if a person ('P') lacks capacity in relation to a matter or matters concerning - (a) P's personal welfare, or (b) P's property and affairs" (section 16(1)). The court may then - "(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or (b) appoint a person

('a deputy') to make decisions on P's behalf in relation to the matter or matters" (section 16(2)). But "(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances" (section 16(4)). This approach is consistent with the "least restrictive alternative" principle, enacted in section 1(6): "Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action". It also points up another distinction between the 2005 Act and the Children Act 1989: the 2005 Act does not contemplate as a norm the conferring of the full gamut of decision-making power, let alone parental responsibility, over an adult who lacks capacity.

28. Note that a court order under section 16(2)(a) simply makes the decision. There is no need to declare that the decision made is in P's best interests, and that may be another reason for preferring orders to declarations. Section 16 also confers various ancillary powers upon the court (sections 16(5), (7) and (8)). It also provides that "the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms" (section 16(6)). In this respect, the powers of the court do resemble those of the family courts in relation to children, as do its more flexible procedures (of which more later).

29. Section 17(1) provides that:

> "The powers under section 16 as respects P's personal welfare extend in particular to - (a) deciding where P is to live; (b) deciding what contact, if any, P is to have with any specified persons; (c) making an order prohibiting a named person from having contact with P; (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P; (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility."

This is not an exhaustive list and there are various limitations on the powers of deputies (sections 17(2), 20). But it is worth noting that section 17(1) does not say, for example, (a) deciding that a named care home must accommodate P, or (b) deciding that a particular person must go and see P whether he wants to or not, or (d) deciding that a person providing health care must provide a particular treatment for P, or (e) deciding that a named person must take over responsibility for P's health care.

30. This is consistent with what was said in the Law Commission's report (Law Com No 231), at para 8.19:

> "Some consultees asked whether the court's power to make an order about where the person should live might provide a route to challenge a care plan made by a local social services authority under the National Health Service and Community Care Act 1990. We trust it is clear from the draft Bill that the court only has power to make any decision which the person without capacity could have made. Its role is to stand in the shoes of the person concerned. If that person has no power, under the community care legislation, to demand the provision of particular services then the court can do no such thing on his or her behalf."

31. The Government echoed this in its white paper, *Making Decisions* (Cm 4465), at para 7.18:

> "The Law Commission stressed that the court should have no powers to make decisions which the person without capacity could not have made, even if they had retained their capacity. The court could not, for example, refuse basic care."

32. It is also consistent with what was said in this Court in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67; [2014] AC 591, at para 18:

> "The judge began in the right place. He was careful to stress that the case was not about a general power to order how the doctors should treat their patient. This Act is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further. On an application under this Act, therefore, the court has no greater powers than the patient would have if he were of full capacity. … Of course, there are circumstances in which a doctor's common law duty of care towards his patient requires him to administer a particular treatment, but it is not the role of the Court of Protection to decide that. Nor is that court concerned with the legality of NHS policy or guidelines for the provision of particular treatments. Its role is to decide whether a particular treatment is in the best interests of a patient who is incapable of making the decision for himself."

33. Eleanor King J provided an excellent example of how that principle applies to the circumstances of this particular case, in the passage quoted at para 14 above.

34. Of course, a person who has the capacity to take a decision for himself may do so for a good reason, a bad reason or no reason at all. The 2005 Act reflects this by providing, in section 1(4), that "A person is not to be treated as unable to make a decision merely because he makes an unwise decision". Courts and people who take decisions on behalf of a person who is unable to take them for himself, on the other hand, have to take such decisions in the best interests of that person. Section 1(5) provides that "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests". Section 4 then goes into some detail about the steps which must be taken to arrive at the conclusion as to what is in his best interests. These include considering his past and present wishes and feelings, the beliefs and values likely to influence his decision if he had capacity, and other factors which he would be likely to consider if able to do so (section 4(6)). In other words, it is a decision about what would be best for this particular individual, taking into account, so far as practicable, his individual characteristics, likes and dislikes, values and approach to life. He must also be involved in the decision as far as reasonably practicable (section 4(4)).

35. So how is the court's duty to decide what is in the best interests of P to be reconciled with the fact that the court only has power to take a decision that P himself could have taken? It has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the "available options". In this respect, the Court of Protection's powers do resemble the family court's powers in relation to children. The family court must also decide what is in the best interests of the child - although in the Children Act 1989 this concept is not express but implicit in the court's duty to regard the welfare of the child as its paramount consideration (1989 Act, section 1(1)). But the court cannot oblige an unwilling parent to have the child to live with him or even to have contact with him, any more than it can oblige an unwilling health service to provide a particular treatment for the child. This was explained in the case of *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7; [2009] 1 WLR 413, at para 30:

> "When any family court decides with whom the children of separated parents are to live, the welfare of those children must be its paramount consideration: the Children Act 1989, section 1(1). This means that it must choose *from the available options* the future which will be best for the children, not the future which will be best for the adults. It also means that the court may be creative in devising options which the parents have not put forward. It does not mean that the court can create options where none exist." (Emphasis supplied)

36. The *Holmes-Moorhouse case* is important for another reason. It demonstrates how the family court is operating on a different plane and on different principles from a public authority which is deciding how to exercise its statutory powers and duties to provide services. The parents of three children had separated, the mother remaining in the matrimonial home and the father being ordered to leave. The family court made a shared residence order, by consent, that the children should live with each parent. The father then applied to the local authority to be housed under its duties to the homeless under Part 7 of the Housing Act 1996. These duties vary depending, among other things, upon whether an applicant is in priority need. Those in priority need include "A person with whom dependent children reside or might reasonably be expected to reside" (section 189(1)(b)). The father argued that it was reasonable to expect the children to live with him as the family court had ordered that they should. The local authority decided that it was not. The Court of Appeal held that the shared residence order meant that it was. The House of Lords disagreed. Lord Hoffmann explained, at para 14, that the questions for the family court and for the local authority were not the same:

> "The question which the housing authority therefore had to ask itself was whether it was reasonably to be expected, in the context of a scheme for housing the homeless, that children who already had a home with their mother should be able also to reside with the father. In answering this question, it would no doubt have to take into account the wishes of both parents and the children themselves. It would also have to have regard to the opinion of a court in family proceedings that shared residence would be in the interests of the children. But it would nevertheless be entitled to decide that it was not reasonable to expect children who were not in any sense homeless to be able to live with both mother and father in separate accommodation."

The authority was entitled to take into account the fact that housing was a scarce resource, the claims of other applicants and the scale of its responsibilities, when deciding the issue of reasonableness for this purpose. Nor should a family court use its own powers as a way of putting pressure upon the local authority to decide in a particular way.

37. Other service-providing powers and duties also have their own principles and criteria, which do not depend upon what is best for the service user, although that will no doubt be a relevant consideration. The Care Act 2014, which is not relevant in this particular case but will be relevant in many which come before the Court of Protection, creates a scheme of individual entitlement to care and support for people in need of social care. But it has its own scheme for assessing those needs (section 9) and its own scheme for determining eligibility (section 13) and then deciding how

those eligible needs should be met (section 24). The Act even provides for the possibility of introducing appeals to a tribunal (section 72), although this has not yet been done. The National Health Service also has its own processes for assessing need and eligibility, albeit not in a legislative context which recognises individual legal entitlement. Decisions can, of course, be challenged on the usual judicial review principles. Decisions on health or social care services may also engage the right to respect for private (or family) life under article 8 of the European Convention on Human Rights, but decisions about the allocation of limited resources may well be justified as necessary in the interests of the economic well-being of the country (see *McDonald v United Kingdom* [2015] 60 EHRR 1). Here again, therefore, the legal considerations, both for the public authority and for the court, are different from those under the 2005 Act.

Discussion

38. So how does all this fit together in a case such as this? It is perhaps unfortunate that the issue was described in the Court of Protection as one of "jurisdiction" and that term was used in the statement of facts and issues before this Court. The issue is not one of jurisdiction in the usual sense of whether the court has jurisdiction to hear the case. After all, the Court of Protection made the orders which it was asked to make in this case and no-one has suggested that it had no jurisdiction to do so. It was seized of an application properly made by the authorities responsible for providing services for MN. The context was a care order giving the local authority parental responsibility for him which was about to come to an end. No doubt if there had been no dispute with the family about his care, there would have been no need to make an application. Section 5 of the 2005 Act gives a general authority, to act in relation to the care or treatment of P, to those caring for him who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P's best interests for the act to be done. This will usually suffice, unless the decision is so serious that the court itself has said it must be taken to court. But if there is a dispute (or if what is to be done amounts to a deprivation of liberty for which there is no authorisation under the "deprivation of liberty safeguards" in Schedule A1 to the 2005 Act) then it may be necessary to bring the case to court, as the authorities did in this case. The court clearly has jurisdiction to make any of the orders or declarations provided for in the Act. The question is not strictly one of jurisdiction but of how the case should be handled in the light of the limited powers of the court.

39. What may often follow such an application will be a process of independent investigation, as also happened in this case, coupled with negotiation and sometimes mediation, in which modifications are made to the care plan and areas of dispute are narrowed, again as happened in this case. But it does not follow that the court is obliged to hold a hearing to resolve every dispute where it will serve no useful purpose to do so.

40. The Court of Protection has extensive case management powers. The Court of Protection Rules do not include an express power to strike out a statement of case or to give summary judgment, but such powers are provided for in the Civil Procedure Rules, which apply in any case not provided for so far as necessary to further the overriding objective. The overriding objective is to deal with a case justly having regard to the principles contained in the 2005 Act (Court of Protection Rules 2007, rule 3(1)). Dealing with a case justly includes dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues and allocating to it an appropriate share of the court's resources (rule 3(3)(c) and (f)). The Court will further the overriding objective by actively managing cases (rule 5(1)). This includes encouraging the parties to co-operate with one another in the conduct of the proceedings, identifying the issues at an early stage, deciding promptly which issues need a full investigation and hearing and which do not, and encouraging the parties to use an alternative dispute resolution procedure if appropriate (rule 5(2)(a), (b)(i), (c)(i), and (e)). The court's general powers of case management include a power to exclude any issue from consideration and to take any step or give any direction for the purpose of managing the case and furthering the overriding objective (rule 25(j) and (m)). It was held in *KD and LD v Havering London Borough Council* [2010] 1 FLR 1393 that the court may determine a case summarily of its own motion, but their power "must be exercised appropriately and with a modicum of restraint".

41. The court is clearly entitled to take the view that no useful purpose will be served by holding a hearing to resolve a particular issue. In reaching such a decision, many factors might be relevant. In a case such as this, for example: the nature of the issues; their importance for MN; the cogency of the parents' demands; the reasons why the CCG opposed those demands and their cogency; any relevant and indisputable fact in the history; the views of MN's litigation friend; the consequence of further investigation in terms of costs and court time; the likelihood that it might bring about further modifications to the care plan or consensus between the parties; and generally whether further investigation would serve any useful purpose.

42. In this case, consideration along those lines would no doubt have produced the following conclusions. The issues had been narrowed. They were important for MN but not as important as the basic question of where he should live. There were good reasons, not least in the history, for thinking that the parents' wishes were impracticable and that the CCG had good reasons for rejecting them. The Official Solicitor supported this. In the light of the length of time the proceedings had already taken, and the modifications to the care plan which had been made in the course of them, it was unlikely that investigation would bring about further modifications or consensus. And it would be disproportionate to devote any more of the court's scarce resources to resolving matters.

43. Case management along these lines does not mean that a care provider or funder can pre-empt the court's proceedings by refusing to contemplate changes to the care plan. The court can always ask itself what useful purpose continuing the proceedings, or taking a particular step in them, will serve but that is for the court, not the parties, to decide.

Conclusion

44. This was not a case in which the court did not have jurisdiction to continue with the planned hearing. It was a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do. In those circumstances, the court was entitled to conclude that, in the exercise of its case management powers, no useful purpose would be served by continuing the hearing. I accept that Eleanor King J did not put it in quite these terms (no doubt reflecting the way the issue was argued before her). However, that is the substance of what she was doing and she was entitled in the circumstances to do it.

45. I would therefore dismiss this appeal and uphold the orders she made, albeit not for precisely the same reasons.