



Justice Committee

Oral evidence: [The work of the Court of Protection](#) HC 1133

Tuesday 18 March 2014

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Written evidence from witnesses:

- Rt Hon Sir James Munby, President, Family Division and President, Court of Protection; and
- Mr Justice Charles, Vice-President, Court of Protection, [High Court of England and Wales](#)

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Members present: Sir Alan Beith (Chair); Steve Brine; Nick de Bois; Andy McDonald; and John McDonnell.

Questions 1–52

Witness[es]: **Rt Hon Sir James Munby**, President, Family Division, and President, Court of Protection, High Court of England and Wales, and **Hon Mr Justice Charles**, Vice-President, Court of Protection, High Court of England and Wales, gave evidence.

Q1 Sir Alan Beith (Chair): Welcome, Sir James and Sir William. We are very glad to have you here for today's session about family justice and the Court of Protection. I will start with Sir James, but either of you should feel free to come in. You have made some very robust comments about transparency. What has been the effect of the guidance? Has it substantially changed the framework and circumstances? Has it been referred to, or has it visibly changed the conduct of the courts?

Sir James Munby: It is comparatively early days. The guidance came into effect on 3 February and the process of obtaining and correcting transcripts inevitably takes some while, but we are probably getting beyond that point now. It has had a visible effect already in both the family courts and the Court of Protection, in two ways. First, more judgments are in the public domain. If you go to the BAILII website, where judgments are published free online for the general public, and contrast the number of Court of Protection judgments this year with that for the corresponding period last year, there has been a very significant increase. More judgments are out there, and many of the judgments that are out there refer to the fact that they are out there because of the guidance.

The other visible effect—although this is impressionistic—is that many more stories are being published in the newspapers as a result of judgments being in the public domain. I think I am right in saying that on one day a couple of weeks ago—I take this merely at

random—there were four stories about family court judgments in *The Times* newspaper. I suspect that previously that would not have been the case. Although it is early days, there has been a very significant effect—and a corresponding effect in the family courts, particularly with the High Court judges. It is early days yet to detect in quantitative terms how big the effect has been with certain judges.

Q2 Sir Alan Beith (Chair): Why does the guidance draw a distinction between cases where the judge must ordinarily allow publication and those where he may allow it?

Sir James Munby: As you are aware, the approach is incremental. I took the pragmatic decision, based upon what I saw as the realities of the situation, that one had to move forward step by step—incrementally—rather than doing a big bang on one day. The guidance in relation to the issue you have just identified is simply the first step. I imagine that in future that distinction may be eroded or even removed.

The pragmatic reason for it was twofold. There are two resource implications that necessarily arise in relation to the publication of *ex tempore* judgments, in particular. One is that the judge has to approve the transcript. There were considerable concerns—particularly, and justifiably, at the circuit bench level, where judgments tend to be *ex tempore* rather than written—that the burden of correcting a huge number of transcripts might be excessive. It seemed to me that one had to monitor where we were going and to reassure the judges that the burden was not as great as they feared, and that therefore, instead of saying that all judgments should be published, one wanted to adopt a sensible balance.

The other resource implication, of course, is the cost, which falls on the public purse. Effectively, there is no cost on the public purse if a judge prepares a written judgment, because it does not have to be transcribed. If the judgment is *ex tempore*, it has to be transcribed by transcribers who have contracts with either the Ministry of Justice or HMCTS. That is a significant cost. It seemed to me that at this initial step one needed to hold a balance. The balance struck—on this point, the same balance has been struck in relation to both the family courts and the Court of Protection—is that, in essence, those judgments that already exist either in written form or because the judge has in any event directed a transcript shall be published, assuming they fall within the list, which sought to distinguish between the more important cases and the less important decisions. On the other hand, the inwardness of the draft is that the cost of obtaining the judgment in the “may” category falls *prima facie* on those asking for the judgment.

Q3 Sir Alan Beith (Chair): Not being familiar with what happens, I was slightly puzzled that if the judge makes an *ex tempore* judgment there is not some kind of written record. How is it possible for both or all parties to be sure subsequently what the judge actually ruled and not to place some confusing interpretation on it?

Sir James Munby: There is now a record, because every judgment is recorded—as, indeed, all the proceedings are recorded. They are now recorded digitally, so there is a digital record. The digital record is not available to the public or, indeed, the parties, except by means of an officially approved transcript. The consequence has been that unless there is a need for a transcript to be prepared—for example, because there is going

to be a further hearing or because there is an appeal in the case—there has not hitherto been a regular practice, let alone a requirement, that the judgment be transcribed merely because it may be of interest or use to the parties or, in future years, the child. This is something of great concern to me; I have articulated that concern on previous occasions.

One of the matters that the previous Administration canvassed in the various Green Papers that it produced was the need for judgments to be transcribed, not merely so that there could be a definitive record for the parties for immediate purposes, but even more importantly, as I see it, so that in future years—five, 10, 15, 20, 30 or 50 years into the future—a child who may, for example, have been the subject of adoption proceedings is able to see what the judge actually said. It is a very major issue.

My own view, which I have articulated before, is that we need to transcribe significant judgments, particularly in care cases—never mind, dare I say it, for the public or the media, but because there is a pressing need for the families and, in particular, the child or children involved to have the definitive record, if not for immediate use then for use in future years. So there are two separate issues here. My focus immediately is on transparency—disclosure into the public arena—but linked with that there is an equally important and, some would say, even more important need for the judgments to be made available for the families. That, of course, has enormous cost implications.

Q4 Sir Alan Beith (Chair): You said that this was an incremental process. Do you have ideas in your mind of what the further steps might be, other than the one we have just discussed?

Sir James Munby: Yes. My next step—I am proposing to issue a draft for discussion and consultation, probably within the next month or so—is to identify categories of documents that, subject to restrictions, protections and safeguards, could be made available to the media. That is one step—probably the next one—that I am contemplating. I contemplate that the categories of judgments that are in the “must” rather than the “may” category may be extended. I also contemplate that at some time the judgments of judges other than those covered by the existing guidance—that is to say, judgments of district judges and magistrates—may also be brought within the scope of the proposals.

One of the problems is that, at present, the media have access, as of right, subject to the power of the court to exclude them, in the family court. In the Court of Protection, the default starting position is the other way around—they have no right of access, unless they can persuade the judge to allow them access or the case falls into the category of a medical case. One of the difficulties is that because so much advocacy nowadays is written advocacy, in addition to oral advocacy—this is a feature both of the family courts and of the civil courts, in contrast to the criminal courts—it is very difficult for a journalist sitting in court to know what is going on. The counsel says, “If your lordship will go to the third paragraph on page 15 in bundle C, your lordship will see what it says,” but it is all double Dutch to the journalist. That is why it seems to me that, given the prevalence of written advocacy, the corollary of media access to the courtroom has to be appropriate media access to the documents that are being talked about in court.

Q5 Sir Alan Beith (Chair): For the record, can we now all be confident that committal for contempt of court will never again happen in a closed court, with no report issued?

Sir James Munby: It should not happen and, as a matter of law, it cannot happen. The law is very simple. Save in exceptional circumstances, the committal proceedings must be in public. In the context with which I am concerned, whether in the family court or the Court of Protection, I find great difficulty in contemplating a case that would justifiably be so exceptional as to permit a hearing otherwise than in public. Even if, in an exceptional case, the hearing is in private, the law requires certain information to be publicly disclosed—in particular, the name of the contemnor, the gist of the matters of contempt that have been found and proved against him or her, and the sentence that has been imposed. In that sense, a secret committal—the committal of somebody in circumstances where the public do not know it has happened, who the person is and why the person has been committed to prison—is simply not permitted by law.

Q6 Andy McDonald: Good morning. I, too, would like to focus on the issue of committal, perhaps in a bit more detail. I understand that in the Wanda Maddox case in 2012, she was committed to prison in a private hearing.

Sir James Munby: That is not so.

Q7 Andy McDonald: That is not so?

Sir James Munby: No. She was committed in an open hearing. We set this out in the memorandum that we have submitted. My understanding is that she was committed in a hearing that was, in fact, open and at which both counsel and the judge were robed. The problem was that it seems the fact that the hearing was going to be in public had not previously been disclosed on the court list. That problem has now been overcome. I have given very clear directions as to the precise form in which committal applications are now to be listed. The court list will now show that this is for hearing in open court and will spell out that it is an application for committal of a particular person, giving their full name, and who is making the application. In cases where the committal follows something that does not trigger an application with a third party—for example, if somebody is brought before the court on an arrest warrant or if there has been misconduct in the face of the court—the listing will identify that the matter is listed for hearing in open court, on the direction of a specified judge.

Q8 Andy McDonald: The conclusion from that is that there must now be many more applications for contempt in open court. Can you compare the two and say what that looks like pre-guidance and post-guidance?

Sir James Munby: I cannot, I am afraid; I do not have the material. I think I am right in saying—there is correspondence, which the Committee has seen—that for reasons that I find hard to understand, until very recently, the relevant statistics did not identify the number of committals. That fact surprised me when I discovered it. It has now been remedied, and statistics are now being kept. What precisely the statistics are of and whether they distinguish between committals by the family courts, the Court of Protection and other courts, I am afraid I do not know.

Q9 Andy McDonald: Could I ask you about the issue of “exceptional circumstances”? Do you think that is sufficiently understood? Is there a need for further guidance on what may amount to “exceptional circumstances”?

Sir James Munby: Forgive me if this appears to be a lawyer’s response, but the problem is that, by its very nature, something that is exceptional defies definition. However, what I have done—this seems to me pragmatically to be a more effective way of grappling with the problem than trying to define what is exceptional—is to make it clear that, if a judge is going to say it is exceptional, he has to explain why. Often, in my experience, requiring a judge to say why something is happening is a more effective way of controlling the undesirable than spelling out what the criteria are.

As I have already made clear, in the family context and the Court of Protection context, I have great difficulty personally imagining a situation that would be exceptional such as to justify a private hearing—not least because, what is the purpose of a private hearing, particularly when the law requires that the outcome of the hearing has to be the identification of the contemnor, the gist of the contempt and identification of the sentence? What one is contemplating as an exceptional case is a case where, although the public need to be told what has happened, including details of the contempt, there is some good reason for not allowing the public to hear every last jot and tittle of the evidence. There might conceivably be a case involving an informer where issues of that sort arise, but outside the context of national security and the public interest of not identifying informers, I find great difficulty imagining any case in the family courts or the Court of Protection where it would be justified to sit in private.

Q10 Andy McDonald: What is your assessment of the response from the media and legal commentators since the publication of the guidance? Does that cross your path? Is it the perception that this has gone some way towards addressing the issue of transparency? I wonder whether you have any comment or observation to make on that.

Sir James Munby: Perhaps unsurprisingly, the media have reacted very positively and favourably to the change in the approach to transparency. I think I am right in saying—I will spare their blushes by not identifying them—that, on the day after the guidance was published, three separate national newspapers each claimed that they were the cause of this tremendous victory. They have reacted to it with enthusiasm, both in terms of the comment, “This is a good thing,” and in terms of reporting more cases. Inevitably, I suspect that their view, which is my view, is that this is merely a start. No doubt, they are very eager to see what the next development will be. No doubt, if they are allowed to see the documents, they will react to that very positively.

Q11 Chair: Would I be wrong in thinking that the very forcefulness of the language that you used in your comments, when you said that there was “final, stark and irrefutable demonstration of the pressing need for radical changes” in relation to transparency and that “We simply cannot go on as hitherto” may have been more compelling in its consequences even than the guidance itself?

Sir James Munby: It is perhaps not for me to comment. As head of division and as president, I am in the curious position of expressing my views both judicially in judgments

and also in guidance. I have always sought to separate and distinguish between the two. Before I became president, in judgments I would sometimes refer to the fact that there was this ongoing debate about transparency, but my duty as a judge was to decide the case according to the law as it is, not the law as I or others might hope it would be. There is this fine line between cases that go to practice and procedure, where I can nudge things along by issuing guidance, and matters of law, where I cannot. My view, rightly or wrongly—I do not think anybody has challenged this—is that, although the publication of judgments is of fundamental importance and, dare I say it, almost of constitutional importance, it is, if you analyse it, a matter of practice and procedure, in relation to which I can properly give guidance, and not a matter of change in the law, thus far.

I will come to a point in the transparency agenda, particularly in the context of the Court of Protection, where I will come up against the obstacle presented by the rules. As I have already mentioned, as a result of reforms introduced in April 2009 the default starting position of the family courts is that the media have a right of access to the court, unless the court excludes them, in narrow circumstances defined by rule and practice direction. That is not the position in the Court of Protection rules, because the Court of Protection rules predate the family rules; they date from 2007, so they are behind the family rules. I am stuck with the Court of Protection rules until such time as they are changed. As you will know, one of the themes of the memorandum that Sir William and I put in jointly was our continuing concern—I use an appropriately diplomatic judicial phrase; outsiders would use a considerably stronger phrase—that the need for change in the rules that Sir William identified as long ago as 2010 in his ad hoc committee report has thus far fallen on deaf ears.

Sir Alan Beith (Chair): We may return to that.

Q12 Steve Brine: Looking at the MoJ’s assessment of the impact of the package of measures in the memorandum you have just referred to, how far have the measures that are listed here assisted you in freeing up judicial time and enabling you to dispatch 71% of your decisions within 16 weeks? Am I right in thinking that that is against your target of 75%?

Mr Justice Charles: Yes. The targets are fairly standard across most courts. There are really two things they have set out in that memorandum. One is the use of nominated or authorised officers to do a limited amount of work. That had a huge impact in freeing up judicial time.

Q13 Steve Brine: That is what they call recommendation 5.

Mr Justice Charles: That was recommendation 5 of the ad hoc committee report.

Q14 Steve Brine: Which Ministers said was their favourite. Just for the benefit of myself and the record, is that the Court of Protection’s equivalent of a delegated decision that planning officers would take, for instance?

Mr Justice Charles: The analogy is not complete. It goes back to the history of the Court of Protection, when it was an office of the High Court. There are a number of officers who

are not lawyers and are not judicially qualified who have done a lot of the authorisation work. If you ask about their training, all of those who were appointed have been in the job for over 18 years, so they have learned it man and boy as they have gone along.

Q15 Steve Brine: So you are more than happy that they are adequately trained to take on that kind of responsibility.

Mr Justice Charles: Yes, with the appropriate supervision and access to a district judge, but that is quite important. There is a real need for them to be alert to the cases that need to be referred up the chain. There is now quite a lot of important work going on with the Office of the Public Guardian to try to build an appropriate relationship between the court and the Office of the Public Guardian. When it was one office, it was all done in-house, under the label “Court of Protection,” but that was not a court as we now know it. The Court of Protection is now a statutory court and the Office of the Public Guardian is the regulator, so there needs to be communication between the two. For example, what standard terms should there be for the appointment of a deputy? What standard terms should there be for the transfer of properties into the name of whoever? How should significant amounts of money in, say, a personal injury case be held? What permission should be sought? What checks and balances should there be? That is an ongoing process. I know the Public Guardian and his office are looking at this on a regular basis, but the court needs to take a slightly more active role. It is consulted and nominated officers attend those meetings, but it is something I want to look at to see that the balance is correct.

Q16 Steve Brine: Sticking with your nominated officers, by virtue of all of those caveats being in place and their being trained to know when to refer up the chain, do you think that a broader range of matters could be dealt with by court officers, should more be appointed?

Mr Justice Charles: Not really.

Q17 Steve Brine: Has it reached its limit?

Mr Justice Charles: I would not like to say its limit, but I do not think there is much room for a vast amount more work to be done by them. You can tinker with it—you may be able to bring in other headline descriptions of cases and to widen their ability to give directions—but you will reach a stage where you slow things down rather than speed things up.

Sir James Munby: I agree with that. I know we will come to this shortly, but in terms of getting additional resources, we need to make better use of the nominated judges—district judges and circuit judges—both in but, more particularly, outside London. That is where we have unused capacity and where we can look to improve things and speed things up, rather than by putting more work on the nominated officers.

Q18 Steve Brine: Okay. The number of district and circuit judges who have been nominated to hear cases has increased significantly since the court was created; I am not sure by what

percentage, but it is a significant increase, isn't it? Has that helped to improve performance? Undoubtedly it has.

Sir James Munby: It has, up to a point, but only up to a point. The fact is that we are not making the most effective use of the district judges and circuit judges who sit outside London.

Q19 Steve Brine: When we write our report, how should we make better use of those who sit outside London?

Sir James Munby: This is what I call the regionalisation part of my agenda. If you would like me to deal with it now, I will happily do so, but I do not want to take you off your course if it is something we will come back to.

Steve Brine: With the Chair's permission, if that is relevant.

Sir Alan Beith (Chair): Go ahead.

Steve Brine: Carry on.

Sir James Munby: In broad terms—Sir William will be able to deal with the specifics—the Court of Protection has traditionally been based in London. Cases all start in London and, by and large, are dealt with in London. On the money side of things, that is right, in my view, because a very large proportion of the money cases are not adversarial. They require particular skills, and one has the advantage of those skills if the work is all concentrated in one place. The welfare jurisdiction is very different. That has tended to be dealt with in London. To an extent, it is being heard on circuit by district judges and circuit judges outside London, but not to the extent that I think is desirable—whether from my perspective, in terms of the most effective deployment of judicial resources, or, more importantly, from the perspective of those we are serving. One of the constant complaints about the court is that it is centralised, remote and slow. It seems to me that there is a pressing need for the court to go to the people, rather than the people having to come to the court. We have many circuit judges and district judges who are nominated, many of whom hear hardly any cases. That is why I am anxious to get the work regionalised, so as to meet those two objectives.

As you are aware, the Committee in the other place, which very recently published a report, addressed the question of whether, to meet these concerns, there should be a tribunal system. I am aware that it recommended against that. My personal view is that that is right. I suspect that in many quarters the drive for a tribunal system was really a drive for a system that was quicker and more local, rather than for a tribunal rather than what we have at present. The justifiable concerns about delay, remoteness and that fact that it is all dealt with in London need to be addressed urgently. They are best addressed by making the Court of Protection more flexible, rather than by setting up a tribunal system.

There is a long history to this, in which Sir William has been involved. For many years, attempts have been made to get regionalisation off the ground. There have been institutional problems, which Sir William can describe, if you want to hear about them.

The good news, which he will also be able to describe, is that within the last few days I have received material from HMCTS indicating that in some miraculous way—which, of course, has nothing whatever to do with the fact that this Committee is meeting this morning—things are on the move. It is indicating with a considerable degree of optimism that within the next month or two regionalisation will become a reality, at least in part.

Q20 Nick de Bois: Can I ask a question at this point? Sir William, you have been having discussions specifically with the MoJ and the courts on this issue, haven't you? Based on what Sir James has just said, you have made specific recommendations. What are those recommendations? Effectively, are you making changes through rule changes? Is that your preferred way?

Mr Justice Charles: For transfer to the regions, you do not need rule change.

Q21 Nick de Bois: Is what is going on at the moment ad hoc?

Mr Justice Charles: Yes, it is completely ad hoc. It is very much about knowing the person on the other end of the telephone, both judge and administrator. That has a number of effects. You do not have an even spread throughout the country. There is a significant disparity between various centres around the country. The present system is one that infuriates everybody who has to deal with it—starting, most importantly, with the parties, but also the judges and the administrators. There is a duplication of administrative work. If you want to get a hearing, you have to go through a triangle. There is extra copying of documents and so forth—it goes on and on. There really is a need for the region, once it gets a case transferred to it, to have ownership of that case—to use the catchphrase—so it is not coming backwards and forwards to and from London.

Sir Alan Beith (Chair): I remind witnesses and members to speak up. The acoustics in this room are not very good.

Mr Justice Charles: I beg your pardon. The first point is to make the court that is dealing with the case the court that deals with it administratively and judicially. The other issue that you need greater standardisation for is to ensure you get a spread around the country. That in turn means that we have yet to identify properly how many district judges and circuit judges there should be in various regions in the country to meet the work load. As I understand it, because of the pressures that those district judges and circuit judges have in doing the other parts of their work, that throughput of work is not properly worked into the system and they are not given credit for it.

As I see it, anyway, unless and until you move away from an ad hoc system, a great many of the 80 or 90 judges referred to in the memorandum will not have done a COP case. Some will have done quite a lot, if they are sitting in Manchester, Birmingham or Preston. Those in the west country will have done very few, and there are few judges there. It needs a structure to regionalise the court. A lot of it is welfare work, but quite a lot of the need for locality is also contested property and affairs work. Sir James is right, of course; it is the dog and tail I have referred to elsewhere. There are vast amounts of uncontested property and affairs work.

Q22 Nick de Bois: Going back to what Sir James said, you have had this enlightenment from the MoJ, which says that something is going to happen. Is it just responding in general to—

Mr Justice Charles: No, it is not.

Q23 Nick de Bois: So it is being quite specific in relation to proposals you have put forward.

Mr Justice Charles: There have been a number of drafts of what is termed a protocol. It will annoy me too much to tell you what number it is, but the most recent one is very similar to the last few. It is built upon experience of the ad hoc system. Staff of the Court of Protection have been to two centres that do quite a lot of this work to exchange views on how best to manage it. The system of transferring from the Court of Protection into the High Court works because they are close to one another. We have built on that as well. We have been close to this before, with a document called a protocol, and it has fallen down for reasons that, I confess, have not been fully explained to me so that I understand them, but the light at the end of the tunnel seems brighter today than it has been for some time.

Sir James Munby: Can I help with this point?

Q24 Steve Brine: Before you do, can I tempt you? There is a light at the end of this tunnel, but is it a tunnel that you want to enter? I can see why you want to spread the love, but London is the capital city and the administrative centre of the country. You have a target to meet. Presumably, you are not in a time of rising budgets as an organisation. Would you not be better just to do what you do where you do it, do it well and efficiently, meet your target and give people the service they need?

Mr Justice Charles: It depends on what we are doing.

Sir James Munby: We have to remember that we serve England and Wales.

Q25 Steve Brine: I said it only because Elfyn Llwyd is not here today and will not be able to get me.

Sir James Munby: Wales for this purpose has a capital, as England has. I entirely take your point about the lack of resources and the need to make the most efficient use of resources, but my appraisal is that the arguments in favour of regionalisation are so powerful that we need to go down that course. In fact, it will not lead to a diminution in expertise or a squandering of resources; on the contrary, it will enable us to make better use of resources that at present are not being adequately used.

I can understand why Sir William spoke about light at the end of the tunnel. He has been in this tunnel for the last three years or so. We are now very close to the end of the tunnel. I see no reason why I should not send this document to the Committee, if you would like to have it. Dated 14 March, which was Friday, it is a memorandum from the Courts and Tribunals Service, not the MoJ. It says, “Following a meeting of relevant officials on Thursday 13 March, the following actions were agreed and appropriate work will be

undertaken.” Then a number of actions are set out. The next paragraph says, “Next steps. Once this work is complete, I expect to be able to put recommendations to you for consultation at the end of April, with the aim of implementing them by the end of May.”

Q26 Chair: We are glad to have been in the sequence by scheduling this session for today.

Sir James Munby: If I may be permitted to say so, although one has to avoid falling into the post hoc, propter hoc fallacy, I cannot help thinking there is some connection—from my perspective, a very powerful and entirely beneficial connection—between the timing of today’s Committee hearing and the timing of this paper. The key point from my perspective is that there is a detailed action plan worked out, with the expectation that implementation will be at the end of May.

Sir Alan Beith (Chair): Mr Brine and Mr de Bois, are you content?

Q27 Nick de Bois: I would like to ask a question that is slightly irrelevant but would be useful. Because you have been aware of many of the difficulties you have been facing in this field, have you been able—without having to go through the courts or any other authority—to make some changes to try to alleviate them in the interim? What, if anything, have you been able to do within your existing administrative powers? Has it had much impact?

Mr Justice Charles: There are a number of things that we have tried to do. I will move away from regionalisation, but before I do—to answer your question—I think it is vital to get out of this tunnel, having been in it. The divide of the work is around 90% to 95% property and affairs. Around 90% of that does not lead to hearings. You need a centre to do that work, where you have your nominated officers and a close relationship with the Office of the Public Guardian. At the moment, that is all London-based. When you have a dispute that people have to attend court for, there are huge advantages in having it dealt with locally; to get it done more quickly and more conveniently are perhaps the two most important. If it is not, you will have to increase the work load of your circuit and district judges sitting in London. We are talking about around 1,500 cases a year. In terms of the overall case load of the court, which is around 25,000 cases a year, it is not a high percentage.

Q28 Steve Brine: As long as you feel it will be beneficial to your target and reason for being—

Mr Justice Charles: I have always thought that to be the case. It remains my expectation that it will be helpful.

Q29 Steve Brine: Excellent. We will have you back to ask again.

Sir James Munby: There is another recent example in the judicial system of regionalisation that has proved a triumphant success. That is the regionalisation of the administrative court, which until comparatively recently—three or four years ago; I cannot remember precisely when—sat in London, save for Welsh cases, where the court sat in Cardiff. I am afraid that I cannot remember whose initiative it was, but, comparatively

recently, the administrative court was regionalised and now sits in Bristol, Birmingham, Manchester, Newcastle and so on.

By all accounts—I have had experience myself of sitting in the administrative court on circuit—that has been an immense success. It has brought justice to the people. There is some evidence to suggest that it has actually increased the volume of work, because people who previously were deterred from JRing some public authority in the north-west—I take it at random—because they would have to trek to London, have a local court and are now doing so. It has been a tremendous success in terms of coping with the case load and bringing justice to the localities. In that particular instance, I believe it has enabled us to tap into an unmet demand from people who previously were deterred from litigating because of the need to come to London.

Q30 John McDonnell: Can we come on to staffing matters—the other resource? Can you confirm the number of staff the court presently employs? How does that compare with 2009?

Mr Justice Charles: I cannot give you precise figures, but I can tell you it is around 90. I do not know the figure in 2009, but I am told there has been a 25% reduction. I can check that and send you the relevant figures.

Q31 John McDonnell: That is really helpful. Do you think the court has the right mixture of staff at the moment? In the reduction of staff that has taken place, have you lost people with the experience and skills that you need? Have you been able to replace that by training up more junior staff?

Mr Justice Charles: This is not something I have a direct responsibility for, but my understanding is yes. Part of one of the questions was about appointing more authorised officers. The message I have had is that it depends on where they come from, because you might be robbing Peter to pay Paul. In answer to an earlier question, one of the steps that has been and is being taken is to try to improve telephone communication with litigants ringing the court. You need experienced people to do that, to guide them through the system. That seems to work. An obvious candidate to become an authorised officer would be somebody who has that experience, but it is about how you mix and match.

Q32 John McDonnell: The Lords Committee expressed concern that the cuts in staffing were placing a strain on the processing of applications. Can you comment on that?

Mr Justice Charles: Personally, I always have difficulty in going back to the prime performance targets, because they have a degree of artificiality within them. They undoubtedly give you an overarching picture, but I prefer to strip it down to see what each turnaround time is for an administrative act. One of the most difficult balances within the structure of the Court of Protection is trying to get a balance between cheap, easy and quick, and checking that it really is an application that should be dealt with cheaply, easily and quickly. There are waiting times—dead times, when the court can do nothing—within any overarching period of dealing with a case: returning forms, putting in evidence and so on. Personally, I prefer to focus on how long each administrative task takes. My information is that that turnaround time is quite good. It is certainly quite good in

comparison with other courts and tribunals I have knowledge of. That does not mean that it cannot be better.

In answer to a question from my right, one of the other things we have tried to build in is to inform people that, if they need something done urgently, there is a facility to do something urgently and to deal with it within a matter of days. There is quick access to be able to pay a bill or something like that.

Q33 John McDonnell: I am quite happy if you want to write to us subsequently, but the Lords were particularly concerned about the strain upon staff. Can you comment on that?

Mr Justice Charles: As I understood it, their concern about strain was a mixture—that if you had more staff you could free up judge time. They focused on authorised officers. As I understood it, they did so—correctly—because the target time is perhaps a bit too long. This is a pressure that is being felt generally. We have had the benefit of two extremely good court managers over the last four to five years, who have improved throughput. My understanding—I get this only second hand—is that the administration is coping with the pressures, but there are pressures.

Q34 Sir Alan Beith (Chair): Could you clarify what view you were expressing? Were you expressing a view on what the Lords Committee said when it said, “It is questionable whether a system which relies on District Judges deputising for non-judicial staff is cost-effective or proportionate”?

Mr Justice Charles: As I understood it, it was focusing on the fact that from time to time the district judges do work that could be done, pursuant to the relevant rule, by the nominated officers to uncork a backlog. I understood it to be saying that, therefore, it would be a better use of judicial time to let them focus on what they should be doing. That might—or, on its recommendation, should—merit consideration of the appointment of more authorised officers.

Q35 John McDonnell: It is about trying to get the balance right. There have been procedures introduced to mitigate some of the staff reductions; 25% is a sizeable staff reduction by any calculation. One of those techniques has been the lean system, which has been used elsewhere—with some bizarre consequences, I have to say, particularly in HMRC. What have those procedures consisted of? Have they helped the court maintain its levels of productivity?

Mr Justice Charles: Again, I cannot give you the details; I feel I am putting my foot in the wrong pond. What they consist of—you can see that from the Lords Committee, when it went round—is organisational features in the way in which the staff are set up; there are notice boards and target times. As I understand it, it is focused on the point that I regard as important—what is each administrative task and how long does it take you? They are stripping it down into segments. It is dependent upon the skills of the manager and the staff.

Q36 John McDonnell: But there are qualitative judgments made here. Do you think they are the appropriate techniques when you are involving qualitative judgments?

Mr Justice Charles: I have no idea because I am not involved in it—pass.

Q37 John McDonnell: Maybe you could find someone in the organisation who could respond.

Mr Justice Charles: There is a tension as to how much one should interfere in a judicial role. Only recently did my role give me any power to interfere at all.

Sir James Munby: I will make a general point, which is based upon my probably rather greater knowledge of the back office in the family courts, rather than the Court of Protection. They have gone through the same process—they are all part of the same organisation, of course—of lean, with very significant reductions in the number of staff. I have spent the last 14 months, since I became president of the family division, visiting a very large number of family courts; I have been to about 45 of them so far. When I go to a court, I always make a point of meeting the managers and, wherever possible, visiting the office and talking to the staff. My comments are therefore, in a sense, anecdotal rather than statistical.

The impression I have, and I have no reason to doubt that this is replicated broadly in the Court of Protection, is that there have been very significant cuts in the number of staff in recent years, as a result of the lean system, but that by and large—there are elaborate mechanisms that define how many staff a particular court has, the consequence of which is that some courts are marginally overstaffed and some are marginally understaffed—the office staff are able to cope, with their present resources, but only just. A comment I frequently pick up if I visit a court office is that if unexpectedly somebody is off ill for a week that can have a very significant impact, particularly if there is not that number of people in the court office. I think that at present the system has not yet been cut too far and that, by and large, it is coping, but a lot of anecdotal impressions I gather suggest that any further significant cuts in the quantity and quality of court staff would begin to have a measurable impact on the efficiency of the court office.

Mr Justice Charles: The court has also moved twice in the last three years, which has not helped, but they are happier where they are now than where they were before.

Q38 John McDonnell: It is a lean and nomadic existence.

Mr Justice Charles: It certainly is. It keeps you very fit in the courtroom.

Sir James Munby: I hope this move is the last move.

John McDonnell: Be careful.

Sir James Munby: At least, the last on my watch.

Q39 John McDonnell: Are you aware of any delays in the welfare cases awaiting acceptance by the Official Solicitor?

Mr Justice Charles: Yes.

Q40 John McDonnell: On what scale?

Mr Justice Charles: I do not know the scale, but the Official Solicitor wrote round to the family court and the Court of Protection some time ago making it clear that the Official Solicitor would not be able to take some cases at all or to take a lot of them quickly. There is undoubtedly an issue as to who pays the Official Solicitor. One of the major issues for the Court of Protection is how you will get P's views known and represented. It is one of the factors that would have to be looked at carefully in any review of the rules.

John McDonnell: That is interesting.

Sir James Munby: In medical cases, traditionally the Official Solicitor funds it himself, seeking to claw back half of his costs from the relevant hospital trust; he is usually successful in clawing those back. In non-medical personal welfare cases, which include those that generate a lot of publicity—the Neary case is an example of the kind of case I have in mind—his position is that he does not act, even if no one else is able or willing to act, unless his costs are covered. In a money case, the costs are covered out of the estate of P. That is not so in the case of a welfare issue. In the case of a welfare issue, therefore, my understanding is that the Official Solicitor will not act unless he can get legal aid. I think I am right in saying that, as a matter of law, although he fulfils the function of the litigation friend of last resort, he cannot be compelled to act, even by an order of a judge. There is therefore that problem.

There is a separate problem: that the Official Solicitor has many functions. Ignoring other functions he has, he has important functions in the family courts, particularly in care cases where one of the parents lacks capacity, where he has to act as the litigation friend. He has an important role in the Court of Protection. He is also the central authority in relation to some of this country's international family treaty obligations, so he has a very large case load. Many of the cases are by their nature complex and heavy cases. Of course, his resources are very seriously limited. If he is giving evidence, you may wish to probe with him how he sees the allocation of resources and the balance between doing this and doing that.

I do not think I am speaking out of turn if I say that there is a perception in certain quarters contrasting the limited amount of time he spends on the minutiae of care cases where he is acting for a parent with the much greater amount of time he spends on personal welfare cases in the Court of Protection. Some would say—I am merely reporting what others say and not associating myself with the comment one way or the other—that he does not spend as much time on the one as he should and that he spends more time on the other than he should. I merely report what others say about that. It is a widespread perception among commentators, particularly commentators who have experience of the family justice system and the Court of Protection. It is something that you might wish to explore with him.

He is, of course, independent. He is the Official Solicitor to the senior courts, in succession to his role as Official Solicitor to the Supreme Court, as we used to use that expression, but he independent—and rightly so. He is independent of ministerial control and independent of judicial control.

Q41 John McDonnell: Thanks for merely reporting what some would say.

Sir James Munby: It is not just someone—this is a theme one hears not infrequently from advocates who are experienced in these cases, from some judges who have experience in these cases and from others.

John McDonnell: I just like the form of words that you used.

Q42 Sir Alan Beith (Chair): Thank you, Sir James, for making that clear. You also made clear what your initial response was to the idea of inserting a tier of tribunals into the system. Do I understand that to be that it would not necessarily lead to any more effective or expeditious handling of cases than would a regionalisation of the system we now have?

Sir James Munby: Indeed. As we pointed out in our memorandum, there is one particular difficulty about this. If the example of the mental health review tribunal in its current guise—forgive me, but I have forgotten what it is now called—were to be applied, that is a tribunal that consists of three people. In terms of the logistics of a justice system, getting three people together for a case is much more difficult than getting one person together for a case, particularly if the case is ongoing. Something I am passionate about is having judicial continuity throughout the case. One of the problems with the Court of Protection, I fear, is that we do not yet have, to the same extent that we have in the family courts, the concept of judicial continuity, robust timetabling by the judge and robust and vigorous case management by the judge. That is something that we need to enforce in the Court of Protection in the same way as we are very effectively enforcing it in the family courts. Continuity is more difficult to achieve if you have three people rather than one.

Not merely do I think that, positively, if we can properly regionalise the Court of Protection, it will do a better job than a tribunal system would, but that there are very powerful pragmatic reasons suggesting that a tribunal system would not be desirable. Delay is a scourge of both the Court of Protection and the family system, and it needs to be minimised and overcome. A multimember tribunal is by its nature likely to lead to delay.

Q43 Sir Alan Beith (Chair): Do you think that there is more scope for mediation in relation to Mental Health Act cases, perhaps prior to court hearings? Is there scope for it to reduce the number of matters in contention?

Sir James Munby: I am a great supporter, in all feasible contexts, of any sensible method of alternative dispute resolution, and I am a great supporter of mediation, but one has to be realistic. I confess to some scepticism as to whether mediation—even assuming that it is available and, in the professional sense, effective—will be effective in having any significant impact upon the way in which Court of Protection cases are dealt with. As Sir William said, the huge bulk are non-controversial money cases. The cases where there is controversy tend to be cases, on the money front, where there is controversy—often very fierce controversy—within a family. Whatever our professional backgrounds, anybody who has ever had to deal with financial disputes between members of families knows from experience that they are some of the most bitter the courts ever have to deal with. My suspicion, based upon 40 years' exposure to such litigation on various fronts and in various contexts, is that mediation is unlikely to be very effective in many of those cases.

In the personal welfare cases, again there tends often—for a different reason—to be a polarisation. There is often a polarisation between a public authority, particularly a local authority, and the family. In principle, there may be more scope there for mediation. I would not want to pooh-pooh it or to discourage it, but I would sound a note of caution as to whether, in the particular context of the Court of Protection, mediation is something that will achieve a very considerable impact. Sir William may have a different view, I don't know.

Sir Alan Beith (Chair): Sir William?

Mr Justice Charles: No, I have much the same view. My experience of mediation is that for it to work the parties must enter it wanting to reach an agreement. If, in health and welfare, parties have been through the processes that the public authority already has, in truth at that stage they are not that keen to enter into an agreement. You may be putting in another layer that simply exacerbates the dispute. There is a time for a court to take over, to behave like a court, to deal with issues and find fact, and not to be an extension of a best interests meeting or a conciliation. The court itself could not run it as the family courts do because it simply is not big enough. Given the nature of the disputes, it is unlikely to make a huge reduction in the court's case load.

Q44 Sir Alan Beith (Chair): I want to pick up another couple of points. When the Lord Chancellor asked you in May 2013 to look at the transparency issue, it was apparently because you were undertaking a review of the working of the family courts at the time. The transparency issue attracted all the attention, but what was that review and what happened to it?

Sir James Munby: The Lord Chancellor wrote a letter, from which I think that phraseology derives. At that time, I was doing two things. First, as you are aware, there is a massive programme of reform of the family justice system going on. That was the result of the family justice review, chaired by David Norgrove. Effect has been given to it legislatively by the Crime and Courts Act 2013 and the Children and Families Act, which received Royal Assent last week. That process of reform in the family courts involved the setting up of a new family court and drastic changes to our procedures, particularly in relation to care cases.

As well as that, I had a view, which came as no surprise to anybody who knew what I had been saying for many years in judgments and on public platforms, that there had to be a transparency agenda, as what I called the third leg of the reform process. Whatever the Lord Chancellor may have understood, that transparency agenda was one that, as far as I was concerned, from the outset applied equally to the family courts and the Court of Protection. I do not speak for the Lord Chancellor. He may inadvertently, by the phraseology of his letter, have created the impression that I embarked upon transparency in the Court of Protection as a result of his letter, but that is not so. It had always seemed to me that transparency was a pressing matter.

Although there are obvious differences between the Court of Protection and the family courts, they are sufficiently similar to mean that you cannot sensibly have a transparency agenda in relation to one without the other. At the time the Lord Chancellor wrote his letter, I was concerned with the legislatively driven reform of the family justice system that I have briefly outlined and, on top of that, with a transparency agenda that already in

my thinking was as much a matter for the Court of Protection as it was for the family courts.

Q45 Sir Alan Beith (Chair): Thank you. The Lords Committee made observations about the ability of the court to reach its audience of practitioners, court users and potential users, and the fact that the court does not have control of the information that appears about it. It does not have its own website but is within the Government website. Is this a presentational problem or a real problem that needs some solution?

Mr Justice Charles: As long as the court has control of what goes on to the site, to my way of thinking who owns the site is not of crucial importance. Probably the best way of having control of what goes on to the site is to have your own site, rather than to be part of the wider gov. site. In my view, it is a very important means of communication so far as the court is concerned. It links to the transparency debate because, by and large, judgments will be reported in cases that are not run-of-the-mill cases. What the public need to know is how a run-of-the-mill case is dealt with administratively and the tests that are applied. A website may be the ideal place to have examples, as you have in a code of practice, of what the court will look for, what the court does and the tests that the court applies. Having control of that, particularly by the district judges who do these cases day in, day out, would be very helpful.

Q46 Sir Alan Beith (Chair): But do you have a problem? Is someone saying to you, “You can’t put that on the website,” or, “We haven’t got enough room on the website for you to put that on”?

Mr Justice Charles: Yes to both, on occasion. There is a development within what you can presently put on the new sites that are being set up. I do not have direct experience of the discussion between the staff and the website controllers in the Court of Protection, but I have more in one of the tribunals. There are issues as to the use of language—how it can be explained and what reading age you should be looking at as far as your audience is concerned. There are therefore tensions in getting out accurate information, as opposed to catchphrase information.

Q47 Sir Alan Beith (Chair): So there is editorial policy, not just management of the website, going on.

Mr Justice Charles: Yes, there are all sorts of issues such as that. As I understand it, they are in the melting pot with the move to the gov.whatever-it-is-called site.

Q48 Steve Brine: It is gov.uk.

Mr Justice Charles: Thank you very much—gov.uk.

Sir James Munby: As far as the professionals are concerned, I suspect there is no communication problem. The Lords Committee described all of this. The fact is that there are a number of private initiatives that mean there is regular dissemination, through the professional communities, of what is going on. For example, Thirty Nine Essex Street, which is a set of chambers that specialises in this, has for two or three years produced an excellent monthly newsletter that is exhaustive in its coverage of what is going on in the

Court of Protection. It seems to be able to identify everything that is going on. If I may say so, it is a very well-presented newsletter. Its commentary is very interesting and usually very well informed and to the point. It has now made itself more user-friendly by having hyperlinks, so you can get all the texts. That is only one example. As far as the professional communities are concerned, there is probably no fundamental difficulty in accessing information on what is going on.

The much greater issue is communicating to the public at large. I suspect that the reality there—this is a fact, not a criticism—is that for most of the public what they know or think they know about the Court of Protection is what they read in the newspapers. I am not challenging the newspapers, but that is the reality. How one communicates to the public is a very difficult point. One of the features of the transparency agenda is that traditionally—this applied both to the family courts and to the Court of Protection—judgments were published only if they were of technical interest to the professions, particularly the legal profession. One of my long-standing criticisms of the system was that that skewed public perception of what was going on, because if one confined it to cases that were of professional interest one was looking at a small, unrepresentative sample. That is why the guidance on transparency, for example, identifies publication on BAILII, because BAILII is a free access website that anybody can access by two clicks on Google.

There is a pressing need to communicate what we are doing to the wider world; it is the same in the COP as in the family courts. I fear the jury is out on whether gov.uk is the best way of doing that. I am not particularly familiar with its constraints, but I understand, as Sir William has explained, that there are editorial constraints upon how material is presented on gov.uk, quite apart from any of the other political and administrative constraints. That is obviously a matter of concern.

The judicial website—there is both a judicial intranet, which is accessible only by judges, and a public site called www.judiciary.whatever-it-is, which is a public-facing website open to everybody—has as part of its component a lot of detail. You can click on “crime,” “civil” and “family,” which gives you access to a vast amount of material—rules, practice directions, judges’ speeches—

Q49 Sir Alan Beith (Chair): Who runs that?

Sir James Munby: That is run by the judiciary—the Judicial Office and the judicial communications office—and therefore the editorial control is a judicial control. I think I am right in saying that at present, although that deals with “family” as a separate entry—a separate icon on the screen, as it were—it does not include the Court of Protection. It may be that as part of this wider debate on how we communicate to the world at large thought will need to be given to whether, in terms of websites, going beyond BAILII, gov.uk is the appropriate channel or whether an additional appropriate channel might not be the judicial website.

Q50 Sir Alan Beith (Chair): I hope that can be explored; we may inquire as to whether it can. Lastly, the Lords Committee expressed concerns about the potential lack of legal aid in cases where there was mental incapacity that would prevent someone from representing themselves and a dispute about whether a deprivation of liberty was taking place. Have you any concerns from experience that cases of this kind might be excluded from the court?

Sir James Munby: If you will allow me, I would prefer not to answer that question—for this reason. This is a matter of policy and one that is very much driven by Government thinking at present. I am not sure it would be appropriate for a judge to express comments on something that is highly controversial in the political and governmental arena.

Sir Alan Beith (Chair): That is an entirely proper answer for a judge to give.

John McDonnell: Except that the question was not one of comment—it was, “Are you aware of cases of this sort?”

Q51 Sir Alan Beith (Chair): I respect the judge’s decision not to answer the question. It is part of our normal relationship with the judiciary.

Mr Justice Charles: I can refer to re UF, which I decided quite recently, if you want a case that is reported. Re UF raised an aspect of public funding for a challenge to a deprivation of liberty. It is there and is in the public domain.

Q52 John McDonnell: It is on the record.

Mr Justice Charles: I hope it is in all the right places, in accordance with the guidance. If not, it should be.

Sir James Munby: There certainly have been a number of cases recently, both in the family justice system and, to an extent, in COP, where the non-availability of legal aid has been identified and where there has been a certain amount of comment by the judge as to the implications in that particular case. Sir William has identified one. If it would help the Committee, I am sure we could send a list of other recent cases.

Sir Alan Beith (Chair): That would be very helpful. Thank you very much for your help this morning.