"A GILDED CAGE IS STILL A CAGE:"
SOME THOUGHTS ON THE SUPREME COURT JUDGMENT IN *P V CHESHIRE WEST AND CHESTER COUNCIL* AND *P AND Q V SURREY COUNTY COUNCIL*

Introduction

1. The long-awaited judgment in *P v Cheshire West and Chester Council* and *P and Q v Surrey County Council* [2014] UKSC 19 was handed down by the Supreme Court on 19 March 2014. The judgment clarifies the meaning of 'deprivation of liberty' in the context of social care and has fascinating practical and legal implications for the future of the Mental Capacity Act 2005 (MCA) and the application of Article 5 of the European Convention on Human Rights (ECHR).

The Strasbourg context

2. Before turning to the facts and judgment in the *Cheshire West* and *Surrey* appeals, a brief review of the landscape of the European Court of Human Rights case law in this area is necessary. There are two reasons for this: first, under section 64(5) MCA the definition of deprivation of liberty (DOL) in the UK is explicitly linked to the definition of deprivation of liberty in the European Court case law and so it is relevant to start in Europe before returning to the domestic courts. Second, the Appellants in the Supreme Court, supported by the interveners (Mind, the National Autistic Society, the Equality and Human Rights Commission and the AIRE Centre), argued that there was a clear line of principle emerging from the Strasbourg cases that could readily be applied to the facts of the appeals. That approach was supported by the majority in the *Cheshire West/Surrey* case, but rejected by the minority.

3. The essential elements for a 'deprivation of liberty' to arise are those set out in the leading ECtHR case of *Storck v Germany* (2005) 43 EHRR 96. The basic propositions derived from *Storck* are that a deprivation of liberty requires three elements:
   a. 'The objective element of a person's confinement to a certain limited place for a not negligible length of time';
   b. The 'additional subjective element [that] they have not validly consented to the confinement in question'; and
   c. That the confinement must be 'imputable to the state'.

4. In the two cases before the Supreme Court there was no dispute about criteria (b) and (c); the judgment was therefore confined to criteria (a). However, as we will explain, those other two criteria are likely to be critical when considering whether the consequences of the Supreme Court's judgment in determining whether there is a deprivation of liberty in other, similar settings.

5. As to criteria (a), the factors relevant to the objective element are those first set out by the ECtHR in *Guzzardi v Italy* (1980) 3 EHRR 333, in which the ECtHR established that the starting point of any case where deprivation of liberty is in issue must be the individual's 'concrete situation', taking account of matters such as the 'type, duration, effects and manner of implementation of the measure in question'. *Guzzardi* also established that the difference between a deprivation of liberty and a mere restriction was 'one of degree or intensity, and not one of nature or substance'.

6. That test has been applied in all cases since then. However, it was unclear on the case-law what factors were relevant in applying that test. In particular, was it relevant to consider matters such as the purpose of the restriction; whether the restriction was necessary and proportionate to achieve that purpose; or whether the circumstances were relatively 'normal' for the individual given the particular group to which he belonged? These factors had been raised in cases such as restrictions placed upon soldiers as part of regular army discipline (*Engel v Netherlands* (1979-1980) 1 EHRR 647), "kettling" of protestors by the police (*Austin v United Kingdom* (2012) 55 EHRR 14), restrictions placed upon a child by his parents (*Neilsen v Denmark* (1989) 11 EHRR 175) and restrictions placed upon suspected criminals (*Guzzardi v Italy* (1980) 3 EHRR 333).

7. In the social and health care sphere there had been some suggestion in the case of *HM v Switzerland* (2004) 38 EHRR 17 that the fact that restrictions had been imposed for a benign purpose was relevant to the question of whether there was a deprivation of liberty. However in *HL v United Kingdom* (2005) 40 EHRR 761, (the 'Bournewood' case), the ECtHR established that the central factor to consider is whether the individual is 'free to leave' and the institution is exercising 'complete and effective control' over the individual: if so then there will be a DOL, regardless that the purpose of the measure is for health and welfare. This must be considered in a practical sense, examining the whole regime of restrictions

which may be put in place for an individual, not merely certain more obvious restrictions such as a locked door.

8. Thereafter in such social welfare cases the ECHR had consistently applied a test of whether the individual was 'free to leave'. Moreover, just because a person is able to leave a placement for periods of time, for example to go on home leave, does not mean that they are not under the complete and effective control of the institution and therefore deprived of their liberty: see *Stanev v Bulgaria* (2012) 55 EHRR 22 at [128] and *Kedzior v Poland* (2012) 55 EHRR 22 at [57].

9. The decision of the ECtHR Grand Chamber in *Stanev v Bulgaria* was perhaps the most relevant to the arguments before the Supreme Court, and its influence on the majority opinions is clear. Stanev concerned a man who was placed in a care home in Bulgaria. The ECtHR held that the system governing leave of absence at the home which resulted in Mr Stanev only having a few short visits home over many years, coupled with his constant supervision and inability to leave when he wished, amounted to a deprivation of liberty.

10. The objective element of the test was considered by the Grand Chamber at [124]-[129]. The factors which persuaded the ECtHR that the objective element of the test for deprivation of liberty in Mr Stanev's case had been met were as follows:
    a. Mr Stanev needed express permission to leave the home and go to the nearest village, [124].
    b. Any time he spent away from the home and the places he was allowed to go were always subject to controls and restrictions, [124].
    c. Any leave of absence for short visits to his home town was entirely at the discretion of the home's management, who retained his identity papers and managed his transport costs, [125].
    d. On an occasion where Mr Stanev did not return from a leave of absence, the staff called the police and returned him to the home without regard for his wishes, [127].

11. These factors led the ECtHR to conclude at [128] that Mr Stanev was 'under constant supervision and was not free to leave the home without permission whenever he wished'. The only other factor taken into account by the ECtHR in considering the objective element was the duration of the measure, which was held at [129] to be 'sufficiently lengthy for [Mr Stanev] to have felt the full adverse

effects of the restrictions imposed upon him'.

12. The approach of the Grand Chamber in *Stanev* has been mirrored in other recent ECtHR judgments:
    i. *DD v Lithuania* [2012] MHLR 209, where the key factor in establishing a deprivation of liberty for the applicant was that the home's management had 'exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement', see [146].
    ii. *Kedzior v Poland* [2013] MHRL 115, where similarly the key factor was that the care home management had exercised 'complete and effective control over [the applicant's] treatment, care, residence and movement' and as such a deprivation of liberty arose, see [57].
    iii. *Mihailovs v Latvia*, application no.35939/10, 22 January 2013, where again the key factor was said to be 'whether [the hospital's] management exercised complete and effective control over his treatment, care, residence and movement'. The ECtHR followed *Stanev* in concluding that there was a deprivation of liberty because the applicant was under constant supervision, was not free to leave the institution without permission and the duration of the measure was sufficiently long for him to have felt its full adverse effects.

13. In all these cases, as in *HL* and *Stanev*, the touchstone for a DOL was whether the individual was 'not free to leave' in the sense that he was subject to continuous and effective supervision and control. The fact the restriction was for a benign purpose, and the relative normality of the restrictions for others with the same level of disability, were not considered relevant to that question.

14. It was against this background of uncertainty as to the relevance of 'purpose' and relative normality in assessing whether there was a DOL that the Cheshire West and P & Q cases fell to be decided.

<u>The facts in Cheshire West and Surrey</u>

15. There were three appellants in the case, all of whom lacked capacity for the purposes of the MCA. P and Q are sisters, otherwise known as MIG and MEG respectively. MIG has a learning disability at the lower end of the moderate range or upper end of the severe range, she has difficulty communicating, limited understanding and is unaware of danger. MEG has a learning disability bordering

on the mild, her communication difficulties are better than her sister's and her emotional understanding is quite sophisticated, but she has autistic traits and exhibits challenging behaviour.

16. MIG (aged 18 at the time of the final hearing) lived with a foster mother who provided her with intensive support in most aspects of her daily living. MIG never tried to leave the home by herself but if she had done, the foster mother would have restrained her. MIG attended a further education unit daily and was not on any medication.

17. MEG (aged 17 at the time of the final hearing) lived in a residential NHS home for learning disabled adults with complex needs. MEG sometimes required physical restraint, she was on tranquilising medication and her care needs were only met as a result of continuous supervision and control. MEG showed no wish to go out on her own and so did not need to be prevented from doing so. She was accompanied by staff wherever she went and attended the same education unit as her sister.

18. The third appellant, P, is an adult with cerebral palsy and Down's syndrome who requires 24-hour care to meet his personal care needs. P was accommodated in local authority accommodation, which was a bungalow shared with two other residents. P received 98 hours of one-to-one support each week, as well as general support from the care home staff. He was able to leave the house whenever he wanted with the assistance of his carers. He went out most days and saw his mother regularly. P required prompting and help with all of the activities of daily living, he wore a 'body suit' of all-in-one underwear to prevent him from pulling at his continence pads and intervention was sometimes required to deal with his challenging behaviour. P was not on any tranquilising medication.

The judgment of the Supreme Court

19. The question for the Supreme Court was whether the appellants' living arrangements amounted to a deprivation of their liberty for the purposes of the MCA. The significance of this question is that if the appellants were deprived of their liberty, they were entitled to the safeguards introduced into the MCA by the Mental Health Act 2007. These safeguards impose a periodic independent check

to ensure that the deprivation continues to be in the person's best interests and is not in violation of their right to liberty under Article 5 ECHR.

20. In two separate judgments, the Court of Appeal had found that none of the appellants were deprived of their liberty. In MIG and MEG's case, the Court held that the sisters were not deprived of their liberty because of the "relative normality" of their lives compared to the lives they might have led at home with their family and because the sisters were not objecting to their living arrangements. Smith LJ stressed that, "what may be a deprivation of liberty for one person may not be for another."

21. In P's case the Court of Appeal adopted the "relative normality" approach, considering that P was not deprived of his liberty because his life was no more restricted than that which anyone with his disabilities and difficulties might be expected to lead.

22. The Supreme Court unanimously overruled the Court of Appeal in P and overruled the Court of Appeal in MIG and MEG's case by a majority of 4-3.

23. The lead judgment is given by Baroness Hale with whom Lords Sumption, Neuberger and Kerr agree. Lords Hodge, Carnwath and Clarke give dissenting judgments.

24. At the outset of her discussion at [45], Baroness Hale states:

> "[I]t is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race…This flows inexorably from the universal character of human rights, founded on the inherent dignity of human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities."

25. Baroness Hale conducts an analysis of the ECtHR case law in this area. From this analysis she identifies that in cases where there is no valid consent to the

living arrangements, the twin ingredients of a deprivation of liberty are that the person is:

i. Not free to leave; and
ii. Under continuous supervision and control.

26. This is therefore the 'acid test' for whether or not a person is deprived of their liberty. Applying this test to the facts of these cases, the majority held that all three appellants were deprived of their liberty. Lords Hodge, Carnwath and Clarke dissented in MIG and MEG's case, taking the view that the sisters were not deprived of their liberty.

27. The Supreme Court declined to lay down a prescriptive set of criteria for determining whether the two limbs of the test are made out, instead focussing on those factors which are not relevant to the assessment, namely:

i. Whether or not the person is objecting to their living arrangements;
ii. The "relative normality" of the placement; and
iii. The reason or purpose behind the placement.

28. In relation to (i), Lord Neuberger states at [67] that if the presence of objection was relevant to the assessment of whether someone was deprived of their liberty it would mean that, "however confining the circumstances, they could not amount to a deprivation of liberty if the person concerned lacked the capacity to object. That cannot possibly be right."

29. With regards to factor (ii), Baroness Hale makes it clear that the "relative normality" concept infringes the universality of human rights. It is this factor which Lords Hodge, Carnwath and Clarke rely on as the basis for their dissenting view that MIG and MEG were not deprived of their liberty. Lords Hodge and Carnwath state at [99], "We are concerned that nobody using ordinary language would describe people living happily in a domestic setting as being deprived of their liberty." For the minority, the fact that MIG and MEG were in domestic-type settings and that the degree of intrusion and confinement was no more than was necessary for the protection of their welfare, meant that their liberty was merely restricted.

30. Turning to factor (iii), Baroness Hale states at [40] that, "The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could

possibly be, should make no difference. A gilded cage is still a cage." In this regard Baroness Hale laments the stigma that is attached to the "deprivation of liberty" label, observing that local authorities will usually have done the best they can to make disabled people's lives as happy, fulfilled and safe as possible, but that this cannot detract from the purpose of Article 5 ECHR which is to ensure that people are not deprived of their liberty without proper safeguards. She explains that, "It is to set the cart before the horse to decide that because they do indeed lack capacity and the best possible arrangements have been made, they are not in need of those safeguards" (at [56]).

31. In concluding her judgment, Baroness Hale makes the following observation at [57], under the heading "Policy":

> "Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case."

Comment

32. There are a number of issues raised by the judgment that are worthy of comment, some of which will be discussed here. The views we advance are necessarily tentative, and we hope will stimulate debate.

i. The end of the relative normality approach

33. One of the most troubling features of the Court of Appeal judgments was the reliance on the "relative normality" of the appellants' lives. This raised issues of practice and principle. How were social workers and care professionals supposed to identify the relevant comparator and carry out an assessment of what was normal? Anyone who has been involved with cases of this nature will know that there is no fixed normality for a disabled person, whose capacity for independence, fulfilment and participation may be radically enhanced by the right care package. To suggest that there are some disabled people whose normality will always be that they are in extremely restricted living arrangements is unattractive at best and inaccurate and discriminatory at worst. The Supreme Court's rejection of this approach and reaffirmation of the universality of human rights is therefore welcome. If the restrictions would amount to a deprivation of

liberty for a person who is not disabled then they will also be so in the case of a disabled person, however well-intentioned.

ii. The interpretation of 'deprivation of liberty'

a. The source of the definition of 'deprivation of liberty'

34. When dealing with the interpretation of Convention rights, it is well-known that section 2(1) of the Human Rights Act 1998 obliges domestic courts 'to take into account' the jurisprudence of the ECtHR. There is a topical argument about when and the extent to which domestic courts ought to do so, which, in these proceedings, did not arise.

35. Section 64(5) of the MCA states that a 'deprivation of liberty' is to have the same meaning as Article 5(1) ECHR. While this would not of itself oblige domestic courts to strictly follow Strasbourg's interpretation(s), given that the deprivation of liberty safeguards were specifically implemented to obviate the mischief raised by the decision of the ECtHR in *HL v UK*, Baroness Hale found that the interpretation of 'deprivation of liberty' must accord with Strasbourg's interpretation of Article 5 (see [19]).

36. Lords Carnwarth and Hodge were able to come to the same conclusion without the need to refer to *HL v UK* – Parliament's reference to Article 5 ECHR in section 64(5) ties domestic courts to Strasbourg's jurisprudence as 'the Strasbourg court is the authoritative interpreter of the Convention':

> "In effect Parliament has decided that it is to the Strasbourg jurisprudence that we must turn to find out what is meant by deprivation of liberty." ([91])

37. This may be a useful point of principle in future cases where domestic statute refers to specific Convention articles or, as is more usual, borrows language from the Convention, its protocols or decisions of the ECtHR.

b. Going beyond Strasbourg?

38. Having decided (albeit for slightly differing reasons) that Strasbourg's jurisprudence is the appropriate source for the interpretation of a 'deprivation of liberty', the Supreme Court was nonetheless facing a deprivation of liberty scenario which has not been before the ECtHR. In such a scenario, what are domestic courts to do? Lords Carnwarth and Hodge referred to the principle outlined by Lord Dyson in *Ambrose v Harris (Procurator, Oban)* [2011] that domestic courts may be able to make an educated guess or find a 'sufficiently clear indication' as to what Strasbourg would do. However, they found nothing in Strasbourg's case law supportive of extending the meaning of deprivation of liberty 'beyond the meaning which it would be regarded as having in ordinary usage' [93]. Assuming that no sufficiently clear indication could be gleaned from Strasbourg's case law, should this really estop our domestic courts from developing the law? Lord Kerr gives this argument fairly short shrift:

> "86. … This court, in common with all public authorities, has the duty under section 6 of the Human Rights Act not to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it. This court must therefore resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the Strasbourg court does not disclose a clear current view."

39. So, when faced with the interpretation of Convention rights, the courts aren't just able but in some circumstances will be obliged to go where Strasbourg has not gone before.

c. Since when were rights not universal?

40. Lords Carnwarth and Hodge further felt that the 'universal test' propounded by Baroness Hale goes against the grain of Strasbourg's decisions being case-specific, focussing on the 'concrete situation', and that such an approach clashes with Strasbourg's much repeated mantra that the difference between a restriction and a deprivation of liberty is one of 'degree and intensity, not nature or substance' [94]. It is interesting to recall Lord Brown's warning in *Al-Skeini* that

there is ‘a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly’. Possibly this is a concern that Lords Carnwarth and Hodge had in mind here. As their Lordships state at [99]:

> “We are concerned that nobody using ordinary language would describe people living happily in a domestic setting as being deprived of their liberty. We recognise that the concept in the Convention may be given an autonomous meaning by the Strasbourg court. But we are struck by how the judges in the courts below, with far more experience than we ourselves can claim, have laboured to keep the concept of deprivation of liberty in touch with the ordinary meaning of those words.”

41. Consequently, it would seem that Lords Carnwarth and Hodge are sticking to the Lord Bingham principle that national courts must ‘keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less,’ (*R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, 350 at [20]) or the Lord Brown contortion of ‘no less, but certainly no more’ (*Al-Skeini and others v SSD* [2007] UKHL 26 at [106]). Regardless of how one looks at it, Carnwarth and Hodge find Baroness Hale’s reasoning a step too far.

42. Baroness Hale’s brief reasoning in relation to the universality of human rights law to include those who are disabled seems compelling:

> “36. The whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to “everyone” (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws. The same philosophy underpins the United Nations Convention on the Rights of Persons with Disabilities (CRPD), ratified by the United Kingdom in 2009. Although not directly incorporated into our domestic law, the CRPD is recognised by the Strasbourg court as part of the international law context within which the guarantees of the European Convention are to be interpreted. Thus, for example, in *Glor v Switzerland*, Application No 13444/04, 30 April 2009, at para

> 53, the Court reiterated that the Convention must be interpreted in the light of present-day conditions and continued:
> "It also considers that there is a European and Worldwide consensus on the need to protect people with disabilities from discriminatory treatment (see, for example, Recommendation 1592 (2003) towards full inclusion of people with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29 January 2003, or the United Nations Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008).""

43. Lord Neuberger was not troubled by this proposition (at [69]). Neither was Lord Kerr (at [75]). Moreover, in a former role as Senior President of Tribunals, Lord Carnwarth did not appear to see an issue with human rights extending to all finding not only that "the CRPD prohibits discrimination against people with disabilities and promotes the enjoyment of fundamental rights for people with disabilities on an equal basis with others," but also found that the UK was bound by it (see: *AH v West London MHT* [2011] UKUT 74 (AAC) at [15]).

44. In reality, the dissenters are bothered by the application of a fairly uncontroversial interpretation of the law to facts, the consequences of which seem *prima facie* odd. However, merely because it is difficult to reconcile the concept of children being looked after in their best interests in a domestic setting with a finding that they are deprived of their liberty, does not mean that there is not a deprivation of liberty: critical logic can make us question, even reverse, hitherto accepted norms.

iii. <u>Type 1 and Type 2 deprivations of liberty</u>

45. Moving to the essential ingredients of a deprivation of liberty, as we outlined above, these are threefold: (i) the objective component of confinement for a not negligible period of time, (ii) the subjective component of lack of valid consent (in these appeals because the individuals cannot consent), and (iii) the attribution of responsibility to the state (see Baroness Hale at [37]). The component under the microscope in this case was the objective component of confinement, although as Lord Kerr notes, the ascertainment of subjective valid consent can only be assessed on an objective basis [76]).

46. In relation to the objective component of confinement, an argument put forward by the Equality and Human Rights Commission (the Commission), was that under the Convention, there are two 'types' of deprivation of liberty: Type 1 deprivation involves someone being deprived of their liberty for any of the purposes contained in Article 5(1)(a)-(f): so long as the detention or deprivation of liberty pursues one or more of these aims, the deprivation is potentially justifiable. In such cases, the touchstone of a deprivation of liberty is if the individual was not free to leave and was subject to continuous supervision and control. Questions as to the purpose of the restrictions, the proportionality of the restrictions or the relative normality of the individual's situation are not relevant at this stage, although they are clearly relevant to the question of justification under Articles 5(1)(a)-(f).

47. Type II cases involve deprivations of liberty, the purpose(s) of which do not fall within Article 5(1) (a)-(f). In such cases, where a restriction on liberty is tantamount to a deprivation, the deprivation is *ipso facto* unlawful as it cannot be justified. Any support in the case-law for the proposition that the 'purpose' of detention or the 'relative normality' of the circumstances might be relevant to the objective question – even where s/he was not free to leave and was subject to continuous supervision and control - was to be found only in Type II cases such as *Austin v United Kingdom* (2012) 55 EHRR 14 and *Engel v Netherlands* (1976) 1 EHRR 647. In these cases the purpose, proportionality or 'normality' of the restrictions could not be considered as part of the justification under Articles 5(1)(a)-(f). The Strasbourg Court has, instead, introduced these concepts in determining whether there is a deprivation of liberty at all.

48. While acknowledging that such a distinction does not appear in the Strasbourg case law, Baroness Hale stated that:

> "Nevertheless, we may find it helpful in understanding some of its decisions: for example, why it was not a deprivation of liberty to "kettle" people at Oxford Circus for some seven hours (*Austin*) while it was a deprivation to confine a person for several hours in a police station (*Creanga)* or in a sobering up centre (*Litwa v Poland* (2001) 33 EHRR 1267)."

49. Baroness Hale concluded that it was most helpful, therefore, to look at cases on deprivation of liberty in the same or a similar context to the one before the court; in this context, those concerning the detention of persons of unsound mind which fall to be justified under Article 5(1)(e) (like *Stanev*). And, of course, as we explain above it is in that context that the Strasbourg Court had consistently found the purpose and relative normality of the restrictions to be irrelevant to the objective question of whether there had been a deprivation of liberty: whether s/he was free to leave was the touchstone.

50. The Type I/ Type II distinction can be very helpful in determining whether a deprivation of liberty arises in other contexts that have yet to be considered by the courts, as we discuss below.

iv. Deprivation of liberty in domestic settings

51. As noted by the Supreme Court, Strasbourg has not yet considered a case concerning a domestic or quasi-domestic setting. Their decision is therefore a new departure, albeit one that follows a distinct line of principle from the European Court. This aspect of the judgment will have implications for all those who are cared for in domestic and quasi-domestic settings, and demonstrates that the 'Bournewood Gap' was not entirely closed by the Deprivation of Liberty Safeguards (DoLS) introduced into the MCA 2005 by the MHA 2007, which only apply to deprivations of liberty in hospitals and registered care homes. For many, this will be seen as welcome extension of the safeguarding obligations that the DoLS represent. In particular, the application of the DoLS to supported living arrangements and the breakdown of the distinction between domiciliary care and care provided in a residential facility will enable parity of care across contexts that are frequently comparable in substance.

52. A question raised by this aspect of the case is whether it will apply to domestic settings in which the state has no role at all, a concern which undeniably underpinned the conclusions of the minority. It is theoretically possible that, given that the state can be responsible for deprivations of liberty created by third parties (see *Storck v Germany* and *Shtukaturov v Russia* (2012) 54 EHRR 27). Does this mean that incapacitous people receiving care from their families at home could be within the definition of deprivation of liberty?

53. Lords Carnwath and Hodge raised this question in their dissenting judgment, asking whether Mr HL (of *Bournewood* fame) would have been deprived of his liberty when he was returned to his foster carers from hospital ([100])? Although Baroness Hale is right to say that no one ever suggested that he was, it seems likely that, as the minority state, this "was because it had not occurred to anyone (including the court) that such a placement in an ordinary home environment could constitute a deprivation of liberty for the purposes of Article 5, even though the degree of control for practical purposes would be the same as before."

54. In *Stanev v Bulgaria*, at [121], the Grand Chamber considered it unnecessary to determine when a deprivation of liberty of an incapacitated adult might occur in a private setting, preferring to leave the point open until an appropriate case presented itself.

55. We are prepared to suggest that there may be some circumstances in which restrictions imposed in a purely private, domestic setting upon an incapacitated adult may constitute a deprivation of liberty for Article 5 purposes, but these will be in very unusual cases. That is because of the third of the requirements of a deprivation of liberty identified in *Storck* above, namely that the restriction must be 'imputable to the State'. This requirement is clearly met where the state is responsible for imposing the restriction (as in *Cheshire West*); but where it is not, the requirement is only met if and in so far as the state is under a positive obligation to take steps under Article 5 (*Storck* at [89]).

56. A positive obligation will arise where the state knows, or ought to know, of circumstances giving rise objectively to a deprivation of liberty, whereupon it will come under a duty to take such steps as are reasonable within its powers to bring the DOL to an end. The assessment of what is 'reasonable' in these circumstances will involve a balancing exercise between competing rights, namely Articles 5 and 8 ECHR. It will also be relevant, in this context (and by contrast with the first, objective question under Article 5), to consider the purpose of the restrictions and whether they are no more than reasonably necessary to meet that purpose. Where the measures imposed are no more than reasonably necessary to ensure an individual's health and welfare there will be no further positive obligation on the state to intervene and, therefore, no deprivation of liberty.

57. We suggest that where a public authority knows of the existence of circumstances which may amount to a deprivation of liberty the positive obligations are likely to be those set out by Munby LJ in *Re A (EHRC Intervening)* [2010] EWHC 978 (Fam) at [95], namely a duty to investigate; a duty to provide services so as to allow restrictions to be minimised; a duty to monitor; and a duty in the final instance to refer the matter to a court. It does not impose a duty or power to "regulate, control, compel, restrain, confine or coerce" ([96]). If the state is not aware of those circumstances, and cannot be expected to know, then there is no positive obligation.

58. However, it is likely that this point will need to be tested.

v. <u>Deprivation of liberty for children at home and in foster care</u>

59. Lord Neuberger addresses the position in relation to children, observing that the ordinary family set up will not engage Article 5 ECHR because there is no state involvement but that where a child is looked after by foster parents, Article 5 will be engaged and there may be a deprivation of liberty. Lord Neuberger states that such deprivations will usually be easy to justify ([72]).

60. We are inclined to agree with Lord Neuberger, if not for the reasons he gives. In the case of a child who is subject to the ordinary restrictions that a parent may impose for their safety or discipline, the 'type' of restriction is one which does not fall within any of the exceptions in Articles 5(1)(a)-(f) – it is a Type II restriction, where concepts such as 'purpose' and 'relative normality' are relevant: see above, paras 41ff. This is one way to understand the decision of the ECtHR in *Neilsen v Denmark* (1988) 11 EHRR 175, in which the admission of a 12 year old child to a hospital at the parent's request, against his wishes, for 5 ½ months was held not to constitute a deprivation of liberty but rather an aspect of the exercise of parental rights under Article 8. Unquestionably the same measures applied in the context of an adult would meet the objective criteria of a deprivation of liberty. We doubt, however, whether *Neilsen* would be followed today on its facts: that is not because in principle restrictions placed upon a child are not properly categorised as Type II restrictions so that something more than being 'not free to leave' is required, but because even applying that approach the purpose of the restrictions, and the length of time involved, were such that it would amount to a deprivation of liberty.

61. However, even where the restrictions placed upon the child were such as to give rise objectively to a deprivation of liberty, the circumstances will still need to be "imputable to the state", i.e. they must be such as to give rise to a positive obligation on the state. If the child's situation is not known about; or if the restrictions placed upon the child are no more than reasonably necessary to safeguard his health or welfare there will be no positive obligation on the state to do more than investigate, monitor and provide services to enable restrictions to be kept to a minimum. If the restrictions go beyond that then there will be a positive obligation to draw the situation to the Court's attention.

62. As regards foster placements, these will be 'imputable to the state' if made by a local authority. However, the same principle will apply as outlined at para 54 above: restrictions placed on a child for the purposes of education, welfare or discipline are likely to be Type II measures where something more than being 'not free to leave' will be required: if the measures go beyond what is reasonable and proportionate (or 'normal') then that is likely to amount to a DOL.

vi. <u>Restrictions on incapacitated persons in ordinary hospital settings</u>

63. A further scenario that falls to be considered is the patient in an ordinary hospital setting who may be subject to restrictions for their own health or welfare. In the case of a patient who agrees to be admitted to hospital for an operation, and who is then sedated, although not 'free to leave' and subject to the complete and effective control of the hospital the patient has consented to being there, so there is no deprivation of liberty on that basis alone.

64. More difficult is the situation of a patient injured in a road accident who is brought to hospital in a coma. There is no consent, express or implied and s/he is not 'free to leave'. In this situation we consider that the Type I/ Type II distinction may again be helpful. Restrictions on such a patient do not fall within any of the exceptions in Articles 5(1)(a)-(f); this is a Type II restriction where something more than being not 'free to leave' is required. As long as the restrictions are necessary and proportionate for the purpose of the patient's health or welfare, and do not go beyond what is 'normal' in such a case, there will be no DOL.

65. The last scenario to consider is that of an incapacitated adult (such as an elderly person with dementia) who is brought to hospital, say, by a family member and who must be continually supervised while there for her own safety while ordinary

treatment is administered. Again, we think the context or 'type' of restriction may be critical here – this could be a Type I or a Type II situation. If this is properly considered to be a case falling within Article 5(1)(e) (at Type I case) then the fact s/he is not 'free to leave' will be determinative and there will be a DOL. If, on the other hand, the context is one of a restriction in an 'ordinary' hospital then it is a Type II measure and something more than being not 'free to leave' is necessary. This one is too difficult for us to call.

vii. Towards a more progressive approach to community care?

66. One interesting effect of the Supreme Court decision is already being seen, namely that people are starting to think more creatively and carefully about how depriving a person of their liberty can be avoided. One reason for this is that the DoLS are a resource-intensive regime that place a significant burden on responsible authorities and the effect of the Supreme Court judgment is that many more people will be deprived of their liberty than was previously thought to be the case. This can have a positive effect on care planning because it may force authorities to think very hard about whether there is a less restrictive option that can be put in place. One aspect of this is a growing emphasis on supported decision making and the promotion of capacity, something which may enable people to live more autonomously and independently than they might previously have done.

67. The need to consider the least restrictive alternative may also have a harder legal edge: it may be possible to argue that Article 5 requires public bodies to put in place less restrictive measures where possible. For example, in *Witold Litwa v Poland* (2001) 33 EHRR 53*,* the ECtHR stated at [78] that:

> "[The] detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained."

68. This approach is clearly in line with the UNCRPD, which by Article 19 requires the promotion of independent living. Implicit within this is the principle that the

least restrictive alternative, i.e. the one that promotes independent living the most, must be supreme.

69. It may be possible to take this argument further. In order to make the obligation to consider less restrictive alternatives a practical and effective one, it can be argued that the state is obliged to provide those alternatives where possible. This would involve developing a substantive positive obligation analogous to that in the enforced disappearance case law where the Article 5 obligation to safeguard people in state detention extends to a substantive duty "to take effective measures to safeguard against the risk of disappearance".

70. Applied to the social care context, an argument could be made that public bodies have a duty to take effective measures to safeguard against the need to deprive someone of their liberty by providing community care services.

71. The UNCRPD could be invoked effectively to endorse this development of the Article 5 jurisprudence. Not only does the right to independent living under Article 19 presuppose that services to promote independent living must be available, but the right to habilitation and rehabilitation under Article 26 makes explicit that participation, inclusion and independence are reliant on state provision of community care services:

> "1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:
> a. Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
> b. Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

> 2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services."

72. This may mean that families and carers are able to advocate for more intensive, specialised community care packages so as to avoid a deprivation of liberty, but also that public bodies may be willing to provide such packages so as to avoid the resources involved in the DoLS regime.

viii. The interface between the MHA and the MCA

73. We already know that confusion abounds about the interface of the MCA with the Mental Health Act 1983 (MHA). The Supreme Court decision may clarify the meaning of deprivation of liberty in one sense, but it does not necessarily help professionals with the question of which statute takes primacy, when. The most obvious example here is the compliant, informal patient who is being treated under the MHA but who may not have capacity to decide whether to remain in hospital or receive treatment. This appears to be a Type I case given that detention on mental health grounds is specified in Article 5(1)(e). On the state of the law now, that person should be under a DoL. It is readily imaginable that this may create a confusing situation for professionals, patients and families. A less obvious example relates to coercive treatment under the MHA in the community, namely Community Treatment Orders. It may be that the terms of some CTOs are so restrictive that they meet the acid test for a DoL.

ix. The complexity of the Deprivation of Liberty Safeguards and their future

74. Baroness Hale is clear in her criticism of the Deprivation of Liberty Safeguards under the MCA, stating:

> "The safeguards have the appearance of bewildering complexity, much greater than the comparable provisions for detaining mental patients in hospital under the Mental Health Act." [9]

and

> "Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards

(which could in due course be simplified and extended to placements outside hospitals and care homes).” [57]

75. This judgment arrived just days after the House of Lords Committee on the MCA published their post-legislative report. The key finding of the report concerns the Deprivation of Liberty Safeguards. The Committee found that the evidence suggests that tens of thousands of people are being deprived of their liberty without the protection of the law and that “the Government needs to go back to the drawing board to draft replacement provisions that are easy to understand and implement, and in keeping with the style and ethos of the MCA”.

76. The combination of the Supreme Court judgment and the House of Lords report may spur Parliament into enacting major reforms of the safeguards.

x. <u>The stigma of deprivation of liberty</u>

77. The Supreme Court was anxious to reassure people that the stigma around deprivation of liberty in the care context is misplaced. As Baroness Hale states, “It is no criticism of [local authorities] if the safeguards are required. It is merely a recognition that human rights are for everyone, including the most disabled members of our community, and that those rights include the same right to liberty as has everyone else.”

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