Mental Capacity Law Newsletter April 2014: Issue 45

Court of Protection: Health, Welfare and DOLS

Introduction

Welcome to the April issue of the Mental Capacity Law Newsletter. The Newsletter has a new look this month, and, in a step upon which we would welcome feedback, we have decided to split the newsletter into five members of a family: (1) CoP: Health, Welfare and Deprivation of Liberty; (2) CoP Property and Affairs; (3) Practice and Procedure; (4) Capacity outside the CoP; and (5) Scotland. Each will be available separately, but it is always possible to read the entirety as one newsletter. The introduction will also always be the same across each of the members of the family.

The division comes at a vital time for the MCA 2005 – in one week in March we had first the report of the House of Lords Select Committee on the MCA 2005 (covered in more detail in the Capacity outside the CoP newsletter), and then the landmark decision of the Supreme Court in *Cheshire West* and *P and Q* (to which we devote almost the entirety of the Health, Welfare and Deprivation of Liberty newsletter). The Supreme Court also handed down an important decision in relation to litigation capacity and the settlement of civil proceedings, covered in detail in the Capacity outside the CoP newsletter, as are two important decisions on testamentary capacity. In the Property and Affairs newsletter, we cover important cases on gifts and the notification requirements in relation to statutory wills. In our Practice and Procedure newsletter we cover, amongst other things, the evidence given by the President and Vice-President of the Court of Protection to the Justice Select Committee. Last, by very much no means least, we cover in the Scottish newsletter the implications of the decision in *Cheshire West* for Scotland and also the consultation on draft proposals for a Mental Health (Scotland) Bill.

As if this were not enough, we also this month offer guidance notes: (1) on the implications of *Cheshire West*; and (2) on capacity assessments; the second part of Adrian's note on Scottish adult incapacity law; and an article by Simon Edwards on testamentary capacity and the MCA 2005.

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Perspectives upon *Cheshire West*

Given the ramifications of the decision in Cheshire West, we wanted to go beyond the legal bubble to ask what those on the ground see as its implications. The majority of this issue is therefore dedicated to a wide range of such perspectives.[1] We start, though, with a summary of the case itself. We should note that there is – unusually – no single editorial comment upon the judgment.

Cheshire West – the judgment

(1) P v Cheshire West and Chester Council and another; (2) P and Q v Surrey County Council [2013] [2014] UKSC 19 (Supreme Court ((Lord Neuberger, Lady Hale, Lords Kerr, Clarke, Sumption, Carnwath and Hodge))

Article 5 ECHR – Deprivation of liberty

Summary

The Supreme Court has now determined the Official Solicitor's appeals against the conclusions of the Court of Appeal that MIG, MEG and P were not deprived of their liberty. The appeals were allowed unanimously in the case of Mr P, and by a majority of 4 to 3 in the cases of P and Q (or MIG and MEG). The lead judgment was given by Lady Hale, with whom Lord Sumption agreed. Lords Neuberger and Kerr expressly agreed with Lady Hale in their separate concurring judgments. Lords Carnwath and Hodge gave a joint dissenting judgment in the cases of P and Q; they were, however, satisfied that Baker J had directed himself as to the correct legal principles in the case of Mr P (even if they might not have reached the same decision), so the decision of the Supreme Court was unanimous in relation to allowing the appeal on P's behalf. Lord Clarke also dissented in the case of P and Q, giving a separate judgment. In total, therefore, there are four judgments for the majority, albeit all of them state themselves to be in agreement with Lady Hale.

The ultimate question

The ultimate question before the Supreme Court was, in some ways, simple to pose: does liberty mean something different to an adult who is (for reasons of disability) unable to take advantage of it? Or does liberty mean the same for all? As Lady Hale put it (at paragraph 33): "*The first and most fundamental question is whether the concept of physical liberty protected by article 5 is the same for everyone, regardless of whether or not they are mentally or physically disabled*."

Lady Hale had no hesitation in holding that it was:

> *"45. [.] axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all 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.*

[1] Disclaimer: all views expressed by those who have kindly provided a contribution are their own with which the editors may (or may not) associate themselves.

> *46. Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focussed right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. 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."*

Lord Kerr, who agreed with Lady Hale and Lord Neuberger (and who had posed the ultimate question during the course of argument), noted that:

> *"Liberty means the state or condition of being free from external constraint. It is predominantly an objective state. It does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity" (paragraph 76).*

Guidance from Strasbourg

Parliament by enacting s.64(5) MCA 2005 tied the operation of the DOLS regime not to a statutory definition of when it was to operate, but rather to a definition that required judges to seek to determine what, exactly, the European Court of Human Rights would consider constituted a deprivation of liberty. Both s.64(5) MCA 2005 and the consequent requirement identified to seek to find clear guidance from Strasbourg gave rise to considerable discussion in the judgments. Indeed, perhaps the main point of division between the majority and the minority was whether such guidance existed and, if did not, what the Supreme Court should do in consequence.

It was common ground that, as Lady Hale – rightly – noted after summarising the jurisprudence of the ECtHR:

> *"32. The Strasbourg case law, therefore, is clear in some respects but not in others. The court has not so far dealt with a case combining the following features of the cases before us: (a) a person who lacks both legal and factual capacity to decide upon his or her own placement but who has not evinced dissatisfaction with or objection to it; (b) a placement, not in a hospital or social care home, but in a small group or domestic setting which is as close as possible to "normal" home life; and (c) the initial authorisation of that placement by a court as being in the best interests of the person concerned. The issue, of course, is whether that authorisation can continue indefinitely or whether there must be some periodic independent check upon whether the placements made are in the best interests of the people concerned."*

The majority went on to find that it was possible to discern clear principles from the Strasbourg jurisprudence which were applicable to the circumstances of the cases before them.

The acid test

Lady Hale "*entirely sympathised*" with the desire of Munby LJ to produce an acid test and thus to avoid the minute examination of the living arrangements of each mentally incapacitated person for whom the state makes arrangements which might otherwise be required. Asking herself what the particular features of their

concrete situation on which focus is needed, she held that:

> *"The answer, as it seems to me, lies in those features which have consistently been regarded as 'key' in the jurisprudence which started with HL v United Kingdom 40 EHRR 761: that the person concerned 'was under continuous supervision and control and was not free to leave' (para 91)" (paragraph 49)*

Lady Hale found to be helpful the intervention of the National Autistic Society and Mind, in which they listed the factors which each of them has developed as indicators of when there is a deprivation of liberty. As she noted:

> *"Each list is clearly directed towards the test indicated above. But the charities do not suggest that this court should lay down a prescriptive list of criteria. Rather, we should indicate the test and those factors which are not relevant. Thus, they suggest, the person's compliance or lack of objection is not relevant; the relative normality of the placement (whatever the comparison made) is not relevant; and the reason or purpose behind a particular placement is also not relevant. For the reasons given above, I agree with that approach" (paragraph 50).*

Lord Neuberger, in a separate judgment agreeing with Lady Hale, recognised the importance of having as much authoritative guidance as possible to decide whether the circumstances of a particular case involve a deprivation of liberty falling within article 5 or a restriction on liberty falling outside article 5. As he noted (paragraph 60), "[w]*hether a particular case involves deprivation or restriction must depend on the specific facts of that case, but that does not mean that there can be no focussed guidance. It is also true that, however clear the guidance, there will be cases where it will be difficult to decide which side of the line the facts fall, but that is not a reason for the courts not seeking to minimise the uncertainty. On the contrary*."

Lord Neuberger, who agreed with Lady Hale that the Strasbourg court decisions indicated that the twin features of continuous supervision and control and lack of freedom to leave are the essential ingredients of deprivation of liberty (in addition to the area and period of confinement), went on to dissect the reasons advanced by Lords Carnwath and Hodge for distinguishing the facts of the cases before the Supreme Court from those Strasbourg cases in which those propositions had been repeated. They identified four factors, and against each we give the reasons why Lord Neuberger disagreed with them:

(a) the person concerned lacks capacity to decide upon her placement but has not evinced dissatisfaction with or objection to it.

As Lord Neuberger noted, this conclusion would mean:

> *"67… 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. Alternatively, there would be a different test for those who were unable to object and those who could do so. That would be a recipe for uncertainty.*
>
> *68. In addition, the notion that the absence of objection can justify what would otherwise amount to deprivation of liberty is contrary to principle. It is true, and indeed sensible, that a person's consent (provided that it is freely and properly given) may serve to defeat a contention that she has been deprived of her liberty. However, it involves turning that principle on its head to say that the absence of objection will justify what would otherwise be a deprivation of liberty – save in those rare circumstances where the absence of objection*

can be said to amount to consent, as in Mihailovs v Latvia, paras 138-139." He further found that it would tend to undermine the universality of human rights to which Lady Hale referred.

(b) the placement is in a small group or domestic setting which is as close as possible to "normal" home life;

As Lord Neuberger noted (at paragraph 71), "*it is a fair point that the Strasbourg court has never had to consider a case where a person was confined to what may be described as an ordinary home. However, I cannot see any good reason why the fact that a person is confined to a domestic home, as opposed to a hospital or other institution, should prevent her from contending that she has been deprived of her liberty*."

Lord Neuberger noted that, in the case of children living at home, what might otherwise be a deprivation of liberty would normally not give rise to an infringement of article 5 because it will have been imposed not by the state, but by virtue of what the Strasbourg court has called "*the rights of the holder of parental authority*." He noted, though, that it was fair to say that;

"while this point would apply to adoptive parents, I doubt that it would include foster parents (unless, perhaps, they had the benefit of a residence order). But in the great majority of cases of people other than young children living in ordinary domestic circumstances, the degree of supervision and control and the freedom to leave would take the situation out of article 5.4. And, where article 5.4 did apply, no doubt the benignly intimate circumstances of a domestic home would frequently help to render any deprivation of liberty easier to justify."

(c) a court authorised that placement for the best interests of the person concerned;

Lord Neuberger was not impressed:

"The court's involvement in cases such as those to which these appeals relate is not equivalent to that of a court sentencing a criminal to a specific term of imprisonment. It is deciding that the circumstances of an innocent and vulnerable person, suffering from disability, are such that there must be an interference with his liberty. If that interference would otherwise amount to a deprivation of liberty, I find it hard to understand why it should be otherwise simply because the court has approved it. The court's approval will almost always justify the deprivation from its inception, but, again, it is hard to see why it should continue to justify it for a potentially unlimited future. The only reason which can be advanced to justify such a conclusion is, as I see it, based on the purpose of the interference with liberty which brings one back to the observations in the Grand Chamber referred to in para 8 above."

(d) the regime is no more intrusive or confining than is required for the protection and well-being of the person concerned.

As Lord Neuberger noted (paragraph 66), 'purpose' was comprehensively rejected by Strasbourg in *Austin* and, more recently, *Creanga v Romania* (2012) 56 EHRR 361

Lord Kerr agreed with Lady Hale and Lord Neuberger, concluding that:

"87. … for the reasons given by Lady Hale, it is apparent that two central features of the current Strasbourg jurisprudence point clearly to the conclusion that there is a deprivation of liberty in these cases. These are that the question of whether there has been a deprivation is to be answered primarily by

> *reference to an objective standard and that the subjective element of the test is confined to the issue of whether there has been a valid and effective consent to the restriction of liberty. I do not accept that this clear guidance can be substituted with an "ordinary usage" approach to the meaning of deprivation of liberty. If deprivation of liberty is to be judged principally as an objective condition, then MIG, MEG and P are unquestionably subject to such deprivation, no matter how their situation might be regarded by those "using ordinary language."*

The individual cases

Mr P

P was an adult born with cerebral palsy and Down's syndrome who requires 24 hour care. Until he was 37 he lived with his mother but when her health deteriorated the local social services authority obtained orders from the Court of Protection that it was in P's best interests to live in accommodation arranged by the authority. Since November 2009 he had lived in a staffed bungalow with other residents near his home and had one to one support to enable him to leave the house frequently for activities and visits. Intervention was sometimes required when he exhibits challenging behaviour. Baker J had held that these arrangements did deprive him of his liberty but that it was in P's best interests for them to continue. On the Council's appeal, the Court of Appeal substituted a declaration that the arrangements did not involve a deprivation of liberty, after comparing his circumstances with another person of the same age and disabilities as P.

Lady Hale found that Baker J had, in substance, applied the right test, derived from *HL v United Kingdom*, and his conclusion that "*looked at overall, P is being deprived of his liberty*" (para 60) should be restored (paragraph 51).

Lords Neuberger and Kerr did not address the specific facts of the case of Mr P, simply agreeing with Lady Hale.

Lords Carnwath and Hodge indicated that they considered that Baker J had directed himself correctly as to the law, and even if they might not have reached the same decision, agreed that Mr P's appeal should be allowed.

P and Q (MIG and MEG)

P and Q (otherwise known as MIG and MEG) were sisters who became the subject of care proceedings in 2007 when they were respectively 16 and 15. Both had learning disabilities. MIG was placed with a foster mother to whom she was devoted and went to a further education unit daily. She never attempted to leave the foster home by herself but would have been restrained from doing so had she tried. MEG was moved from foster care to a residential home for learning disabled adolescents with complex needs. She sometimes required physical restraint and received tranquillising medication. When the care proceedings were transferred to the Court of Protection in 2009, Parker J held that these living arrangements were in the sisters' best interests and did not amount to a deprivation of liberty. This finding was upheld by the Court of Appeal.

Lady Hale, considering their cases, held that:

> *"54. If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty. Furthermore, that deprivation is the responsibility of the state. Similar constraints would not necessarily amount to a deprivation*

> *of liberty for the purpose of article 5 if imposed by parents in the exercise of their ordinary parental responsibilities and outside the legal framework governing state intervention in the lives of children or people who lack the capacity to make their own decisions."*

Lady Hale noted that:

> *"55. Several objections may be raised to the conclusion that both MIG and MEG are being deprived of their liberty. One is that neither could survive without this level of supervision and control: but that is to resurrect the comparison with other people sharing their disabilities and to deny them the same concept of liberty as everyone else. Another is that they are both content with their placements and have shown no desire to leave. If the "tacit acceptance" of the applicant was relevant in Mihailovs, why should the same tacit acceptance of MIG and MEG not be relevant too?*

Lady Hale distinguished *Mihailovs* because:

> *"he had a level of de facto understanding which had enabled him to express his objections to his first placement. The Strasbourg court accepts that there are some people who are not capable of expressing a view either way and this is probably the case with both MIG and MEG. As HL 40 EHRR 761 shows, compliance is not enough. Another possible distinction is that, if either of them indicated that they wanted to leave, the evidence was that the local authority would look for another placement: in other words, they were at least free to express a desire to leave" (paragraph 55).*

Lady Hale held that none of these suggested distinctions were very satisfactory, however, as she went on:

> *"56… Nor, in my view, should they be. It is very easy to focus upon the positive features of these placements for all three of the appellants. The local authorities who are responsible for them have no doubt done the best they could to make their lives as happy and fulfilled, as well as safe, as they possibly could be. But the purpose of article 5 is to ensure that people are not deprived of their liberty without proper safeguards, safeguards which will secure that the legal justifications for the constraints which they are under are made out: in these cases, the law requires that they do indeed lack the capacity to decide for themselves where they should live and that the arrangements made for them are in their best interests. 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. If P, MIG and MEG were under the same constraints in the sort of institution in which Mr Stanev was confined, we would have no difficulty in deciding that they had been deprived of their liberty. In the end, it is the constraints that matter."*

Lady Hale concluded with an observation upon policy. Because of the extreme vulnerability of people such as P, MIG and MEG, she believed that it was necessary to err on the side of caution in deciding what constitutes a deprivation of liberty in their case:

> *"56. They need a periodic independent check on whether the arrangements made for them are in their best interests. 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). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their*

equal dignity and status as human beings like the rest of us."

Lord Neuberger did not address the specific facts of the cases of MIG and MEG, simply agreeing with Lady Hale.

Lord Kerr in his separate concurring judgment was the only member of the majority to rely upon a comparator, in order to answer the question of whether MIG and MEG were deprived of their liberty:

"77. The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.

78. All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are – and have to be – applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is – and must remain – a constant feature of their lives, the restriction amounts to a deprivation of liberty.

79. Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable – curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because they can – and must – now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty."

The case for the majority

Alex has expressed his support for the decision of the majority in posts upon his website. He, Tor and Anna would associate themselves with the following comment that has been provided by Fenella Morris QC and Ben Tankel, both of whom appeared on behalf of P and Q (MIG and MEG).

All seven judges of the Supreme Court subscribed to the fundamental premise that the human rights of disabled people should be protected to the same degree as the human rights as everybody else. The decision of the majority is the only logical conclusion that can follow from this universally accepted premise: if to be subjected to total and effective control and shorn of my freedom of leave would be a deprivation of liberty for me, then why should it not be a deprivation of liberty for someone who lacks capacity?

This unavoidable logical conclusion at long last properly fills the *Bournewood* gap which, despite *HL* and the subsequent introduction of the DOLS regime, had continued to swallow many thousands of individuals who were deprived of their liberty in places other than psychiatric words

or care homes. In such cases, the State is interfering to the greatest extent imaginable in the lives of the most vulnerable. That large imbalance of power demands a level of procedural protection. Even if in our civil society the State usually exercises this power benignly, the majority judgment guarantees this is so by requiring the State to demonstrate in each case that the arrangements it makes are justified. The dangers of a lack of this type of protection have sadly been all too plain to see in recent years – see, for example, the Winterbourne View scandal.

The neat logic of the majority approach is reflected in many aspects of the various judgments: (1) It guarantees equality of rights for all; (2) It brings the law up to date by recognising the reality that more and more of those lacking capacity were falling into the *Bournewood* gap by – in line with current policy - being accommodated in foster placements, supported living arrangements, and other settings that provide them with as normal a life as possible; (3) It does away with the well-intentioned but conceptually problematic comparator approach advocated by the Court of Appeal, while retaining the aim of articulating a simple, workable, and authoritative test; (4) It supplants the notoriously slippery amorphous, multi-factorial approach that decision-makers had been required to adopt to date; (5) On an analytical level, it properly separates issues of justification from the definitional question of the objective components of a deprivation of liberty; And (6) it confronts, head-on, the "bewildering complexity" of the DOLS regime and places reform of an inadequate system firmly on the government's agenda.

Still, one cannot but sympathise with the criticisms that are now being levelled against the majority judgment. That they are not to be dismissed lightly is attested by the fact that even now they have attracted three justices of the Supreme Court. But the criticisms take as their starting point the practical problems that the majority approach might cause, and work backwards from there. In doing so, they are required to depart from the simple logic of the majority approach. As such, they simply do not stand up to the same analytical scrutiny as the majority view. Witness Lord Neuberger's comprehensive dismantling of the joint dissenting judgment of Lords Carnwarth and Hodge, which he achieves within the space of a handful of paragraphs.

The major criticisms fall into three area. First, it is said that the extension of the DOLS system will be put under strain. But where the State is interfering so heavily in the life of an individual, this seems a small price to pay for guaranteeing the protection of their human rights. Adults with capacity would accept no lesser level of protection, as demonstrated for example by our very well-developed (and no doubt very burdensome) criminal justice system. If this means that DOLS requires reform (and the recent report of the House of Lords Select Committee suggests it does), then it is quite right for the Supreme Court to point this out to the lawmakers across Parliament Square.

The second area of criticism is that it is difficult to digest that those placed in a loving and relatively normal environment should be described as being deprived of their liberty. The simple answer to this is that, as Lady Hale put it, "a gilded cage is still a cage". After over five decades of living with the ECHR we should be well used by now to human rights terms – such as "deprivation of liberty" having autonomous meanings that do not correlate exactly with their ordinary usage. Moreover, on an analytical level, this criticism confuses questions of justification with the definition of deprivation of liberty: relative normality might help justify a deprivation of

liberty, but it does not impact whether the deprivation of liberty has arisen in the first place.
The third main area of criticism is that the majority judgment begs the question of what is meant by "control" and "freedom to leave". No doubt lawyers and judges will attempt to refine the definition of these terms over time. In the meantime, they provide a much more straightforward test than the previous multi-factorial approach. They also give decision-makers on the ground some necessary flexibility – those examining the facts of individual cases are far better placed than the Supreme Court to assess whether, applying the Supreme Court's "acid test", a particular set of facts amounts to a deprivation of liberty. It is also worth noting that part of the reason the Official Solicitor brought these three particular cases forward was because they provide a good range of facts, at or around the borderline, for testing the point of principle. The way in which the Supreme Court applied its test to the facts of the cases before it should therefore serve as a model for future decision-making, without much need for further elaboration of the test.

The case for the minority

The following comment is provided by Jenni Richards QC and Neil Allen, both of whom were instructed (along with Peter Mant) on behalf of the local authority respondents to both appeals.

According to Lady Hale, "*these cases are not about the distinction between a restriction on freedom of movement and the deprivation of liberty*" (paragraph 48). For the respondents, at least, that distinction went to the very heart of the appeals.[2] Indeed, this was the seventh time in as many years that the highest Court had been approached for guidance on it. The distinction is reflected in the European jurisprudence between Article 2 of Protocol 4 and Article 5 ECHR. It can be seen in the Mental Capacity Act 2005 between s.6 (restriction on movement) and s.4A (deprivation of liberty), despite s.4A being confusingly entitled, "restriction on deprivation of liberty."

So why does the distinction matter? "Depriving" liberty is unlawful unless the procedural and substantive safeguards of Article 5 are met. Care homes, hospitals, supported living schemes, and foster parents, for example, cannot care for a "deprived" person unless a prescribed legal procedure is first followed and their detention is justified on one of six grounds. Lord Kerr helpfully defined "liberty": it is "the state or condition of being free from external constraint. It is predominantly an objective state. It does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity" (paragraph 76). Liberty is intrinsic to the person: whether they be running around an open park or lying in a persistent vegetative state on a hospital bed, the degree of liberty remains the same.

The threshold at which the constraints upon such liberty are so intense as to constitute a deprivation of it is the same throughout the justificatory grounds in Article 5 and throughout the Council of Europe. Indeed, Parliament in MCA 2005 s.64(5) expressly aligns our domestic threshold with that of Strasbourg. Thus, whether it is a man with schizophrenia being kept in a Bulgarian care home, or a man with autism informally kept in Bournewood psychiatric unit; whether it is a woman kettled by police at Oxford Circus for 7 hours; or someone with a brain injury in a medically induced coma, the threshold for

[2] It is not known why Lord Neuberger's judgment focused on Article 5(4) rather than Article 5(1), the former only being relevant if the latter is engaged (see paragraphs 60 and 73 of the judgment)

triggering Article 5 remains the same. In our opinion, that threshold cannot alter depending on whether the deprivation is potentially justifiable (type 1) or not (type 2)[3]: this puts the cart before the horse. It conflates the primary question of whether Article 5 is engaged with the secondary question of whether it can be justified.

The relevance of Strasbourg

Domestic courts must usually "take into account" European jurisprudence: Human Rights Act 1998 s.2. Doing no less but certainly no more than the ECtHR avoids judicial legislation and prevents member states from forging ahead out of kilter, albeit with the risk of falling behind in trying to stay level. Uniquely, however, MCA s.64(5) expressly gives "deprivation of a person's liberty" the same meaning as in Article 5(1). Parliament's intention was thereby to align our judicial definition with that of Strasbourg. It was, essentially, to give Strasbourg decisions direct effect in domestic law. Our threshold for Article 5 thereby rises and falls with every Strasbourg decision with no margin of appreciation.

This has the potential to create significant legal uncertainty. Strasbourg does not follow the doctrine of precedent. Its case law is not even binding upon itself. And yet Parliament has required our courts to abide by it. The Supreme Court accepted that there was an absence of direct authoritative guidance from across the water. None of the ECtHR decisions concerned the Article 5 threshold in "ordinary" homes, only institutional (and often isolated) settings like social care homes and psychiatric hospitals. Moreover, the case law that was available was "clear in some respects but not in others" (paragraph 32). The majority of four lowered the threshold beyond that recognised – thus far - by Strasbourg; the minority of three did not.

Key Aspects of the Decision

Relative normality and the vexed question of a comparator

The concept of relative normality originates from *Engel* and resonates in some of the previous House of Lords decisions. It was embraced in the *Surrey* proceedings. And the more controversial yardstick of disabled normality originated in the *Cheshire West* proceedings. But none of the parties in the appeals supported a disabled comparator and its disappearance is welcome.

Disabled normality has gone; and so too has relative normality, in the sense used by the Court of Appeal in the *Surrey* case. Lady Hale considered comparing lives of MIG and MEG with the ordinary lives which young people of their ages might live to be "both sensible and humane" (paragraph 47), although it did not answer the question. Indeed, "the relative normality of the placement (whatever the comparison made) is not relevant" (paragraph 50). As for comparisons, paragraph 46 of her judgment suggests that an appropriate comparator is Lady Hale herself: "if it would be a deprivation of my liberty … then it must also be a deprivation of liberty of a disabled person".

Lords Carnwath and Hodge recognised that "the comparator should in principle be a person with unimpaired health and capacity" (paragraph 80), whereas Lord Kerr's comparator compared the person's age and station in life[4]. Thus, for MIG and MEG the relevant comparator was "a teenager of the same age and familial background as them". Lord Clarke, by contrast, expressly endorses the

[3] See paragraph 43 in the judgment of Lady Hale.

[4] It is not clear to us what factors the term "station in life" is intended to embrace.

approach of Parker J. which considered the sisters' lives as dictated by their own cognitive limitations. What role a comparator now plays in determining whether there is a deprivation of liberty is, we suggest, not as clear as it could be.

Objections

Both the English and the Strasbourg courts have often referred to the relevance of the person's objections. And, of course, the "effect" of the measures is one of the criteria to be taken into account, according to the consistent jurisprudence of the ECtHR. However, objection or lack of objection is now irrelevant. The right to liberty is of course too important for a person to lose the benefit of protection for the single reason that he may have given himself up to detention. But ruling out objection entirely seems to render redundant the Strasbourg court's "effect" criterion.

Purpose or Context?

In the control order case of *JJ,* Lady Hale held that, "… restrictions designed, at least in part, for the benefit of the person concerned are less likely to be considered a deprivation of liberty than are restrictions designed for the protection of society". But benevolence is now irrelevant. It is also unclear whether the context of the restrictions is relevant: at best they "may not" be irrelevant (paragraph 43).

The Acid Test

The Supreme Court's decision winds the law back to the time before the deprivation of liberty safeguards came into force. We have an acid test. But its parameters and contents are not as clear as was hoped. Lady Hale refers to "complete supervision and control" and "not free to leave" (paragraph 54). For Lord Neuberger, the essential ingredients are "continuous supervision and control and lack of freedom to leave" as well as "the area and period of confinement" (paragraph 63). What is meant by area of confinement is not explained. For Lord Kerr the duration of the restriction seemed paramount (paragraph 78).

Regrettably the twin concepts are not straightforward. Practitioners have been told which factors are irrelevant. But no guidance is given as to when "supervision" is not "control"; or when "supervision and control" are not "complete" or "continuous." There is no analysis as to what it means to be "free to leave" or its inter-relationship with its twin concept. Reference is made to Munby LJ's, "*I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses…* " But that does not take us much further, particularly if there is no alternative to go to or no-one else to live with or if the person is living in their own home.

If the person lacks capacity to take these decisions, someone else will decide what is in their best interests. Thus, someone lacking such capacity is not free to leave by operation of the MCA. That seems clear. Finally, the area and period of confinement is said to be essential, but there is no guidance as to what this means or how these relate to complete supervision and control without freedom to leave. The most helpful aspect of the acid test is that its application to the particular facts of these individuals amounted to a deprivation. The facts of the individual cases may therefore offer some touchstone or guidance for practitioners.

We note with interest a decision of the ECtHR that post-dates the Supreme Court hearing – *Chosta v Ukraine* (Application no. 35807/05, 14 January 2014) – in which the ECtHR observed that "relevant objective factors to be considered include the possibility to leave the restricted area,

the degree of supervision and control over a person's movements *and the extent of isolation*" (emphasis added). Whilst the first two of these factors are consistent with the twin components of the acid test, the reference to the extent of isolation seems to us to reflect precisely those aspects of relative normality put forward by the Court of Appeal in the *Surrey* case but rejected by the majority in the Supreme Court.

Implications

The fact that the acid test identified these "ordinary" placements as deprivations of liberty has far-reaching implications. According to the Alzheimer's Society, there are 200,000 people with dementia in care homes in England and Wales. In addition, between 2012 and 2013 there were over 28,000 people aged 18-64 with learning disability in care and nursing homes. It would seem that all of those unable to give valid consent are now likely to be deprived, necessitating a DOLS authorisation. The same must surely apply to hospitals, with resulting ineligibility issues. It seems particularly odd to think of the unconscious hospital patient receiving life-sustaining treatment as deprived of their liberty, but that may be the consequence of this decision.

The impact of dropping the Article 5 threshold will also reverberate throughout supported living and shared lives schemes. All disabled and vulnerable adults lacking the relevant capacity who receive care or support funded by, or arranged by, a public body may now need to be reviewed to see if the acid test satisfied. Foster carers, children in local authority care, and family members receiving support from health or social services may now be acting unlawfully unless the procedural and substantive safeguards in Article 5 are met. Indeed, the implications for children are far-reaching. Given the relatively limited avenues for authorising a deprivation of liberty in the case of a child, the possibility of a new Bournewood gap – this time for children - arises.

Whether they will "retract the surprise" at being told that a person living in their domestic setting could complain of deprivation of liberty after the consequences are explained, as Lord Neuberger foresees, remains to be seen. If overcoming the ordinary usage of "deprivation of liberty" was difficult for hospital and care home managers, imagine how difficult it will be in these more familial settings. After all, the Court of Appeal has, in a different case, found that those with parental responsibility cannot consent to their child's deprivation of liberty: *RK v BCC* [2011] EWCA Civ 1305, [14]. Moreover, according to the MCA Code of Practice, everyone working with and/or caring for an adult who may lack capacity must comply with the MCA (including therefore spouses or other family members).

Going beyond Strasbourg also has implications for the use of the Mental Health Act. Incapacitated informal patients are not free to leave if others are deciding what is in their best interests. Guardianship is vulnerable because patients have no choice over their place of residence and the intensity of their package of care may tip their regime into Article 5. No one can lawfully be deprived under that prescribed legal procedure because, amongst other things, the burden of proof is on the patient not the detaining authority. Although the point has yet to be argued, it is likely to be similarly unlawful to deprive liberty under a community treatment order. The judgment also makes it more difficult for restricted patients to be lawfully conditionally discharged from hospital detention: *Secretary of State for Justice v RB* [2011] EWCA Civ 1608.

The MCA seeks to strike a careful balance between empowerment and protection. No-one would deny the importance of safeguards. The

controversy surrounds the extent to which those safeguards found in Article 5 should be used by manipulating the language of "deprivation of liberty". Whether the increased juridification of care resulting from this decision will lead to better safeguards for those that need it is a question for a later day. Some might say the best safeguards would be regular, unannounced inspections of these care settings with the threat of criminal sanction for ill-treatment and wilful neglect. And let it not be forgotten that those at Winterbourne View were tortured by "carers" despite having the benefit of their procedural and substantive safeguards of Article 5.

Practical guidance

Notwithstanding their editorial differences as to the correctness of the decision, the team has pooled their collective wisdom to pull together practical guidance for front-line staff (both social work and clinical) as to the questions that they should be asking themselves in light of the decision. It is available here.

For further discussion of some of the implications, please see here for a free video featuring Jenni Richards QC, Fenella Morris QC, Nicola Greaney and Ben Tankel.

The DOLS lead

It's been quite a week in the DoLS world with the House of Lords scrutiny report followed by the ruling on *Cheshire West* and *P and Q*. We have gone from the depths to the heights in six days.

Does the Supreme Court judgment help us in practice as BIAs and as DoLS leads? It does indeed, it both helps us and challenges us with the implications.

When the earlier Court of Appeal judgment in *Cheshire West* came out, many professionals expressed the view that this heralded the "death of DoLS" a view I never subscribed to. So what is the Supreme Court judgment - the rebirth and resurrection of DoLS? Rebirth to live another day in a purer, simplified form. Something like that I feel.

The decision is superficially quite simple and straightforward. Watching it live at a Regional DoLS Leads group there was no surprise at all about Cheshire West we were unanimously agreed about that and resolved to the decision that it was a deprivation of liberty, but P and Q…well that raised a few more eyebrows and as the ripples of reflection went round the room, one after the other we began to say "so this means" ….

Reading the full judgment helps and I am sure many learned people will summarise it, so for practitioners I only make reference here to its implications. Before I do I want to say that on a personal level I think that the best part of the judgment is the clear declaration that human rights are universal, physical liberty is the same for everyone regardless of whether or not they have a physical or mental disability. My 17 year old daughter was an ordinary sixth form student with all the rights and responsibilities of the human race on the 26th September 2010. The following day she was hit by a car and sustained a massive brain injury as a result of which she is now significantly impaired. It was anathema to me that also she lost the right to be treated equally overnight.

How do practitioners now decide on deprivation of liberty?

In establishing whether the objective element is met we will now in practice consider whether the arrangements result in the person being under

continuous supervision and control and we will determine whether they are not free to leave.

The continuous supervision and control do not need to be reason that the person is not free to leave, it appears these are two self-standing requirements which both need to be met. The judgment says for example it is possible to imagine situations where someone is under continuous supervision and control but free to leave should they choose to.

We will still begin with the concrete situation of the individual and examine the type, duration, effects and manner of implementation of the measures in questions, in order to answer the acid test is the person under continuous supervision and control and are they not free to leave

You can immediately see why the DoLS Leads group began to go into meltdown. This applies much more widely at least on the face of it to older people detained in EMI units, most of them meet this criteria although we do have to balance it with the fuller meaning of free to leave including whether there is viable home to go to. There is no doubt that this judgment at least for the moment has simplified and relaxed the concept of deprivation of liberty.

The ripples will spread far and wide I feel - in Adult Learning Disability settings we need to revisit decisions on deprivation, we need to return to those we have assessed as not being deprived of liberty based on *P and Q*, we also need to assess those in Adult placement, small group homes and supported living based on this criteria and consider making many more applications to the Court of Protection. Can there genuinely be an incapacitated informal patient in a mental health setting now?

The indicators of deprivation in the Code of Practice need to be revisited to give continuous supervision and control highest importance, a matter which will no doubt be considered by the full review of the Code.

For assessors I feel we will be freed from the constraints of increasingly conflicting case law and as such will be able to independently assess the situations we are called to with the professionalism which has developed within the role of BIA. This remains a skilful carefully balanced assessment which requires critical analysis of a range of factors and opinions. It was never the case that the Court of Appeal decision in *Cheshire West* screened everybody out neither is it the case that this judgment screens everybody in but it will increase the workload of an already overstretched BIA resource.

The DoLS have risen from the ashes with a new-slim line body and will live on (until redrafted). However I truly feel the value of the safeguards and the protection which was intended is now more likely to be applied where it should be.

Lorraine Currie,
MCA/DoLS Manager,
Shropshire County Council

The NHS lead

To ensure the dignity and rights of vulnerable groups are recognised is a notable aim. Taken alongside the House of Lords review, this judgment gives us the opportunity to realise that aim. It also brings dangers.

The new test will mean I have to change the way I think about what liberty means in a legal discourse (what triggers the safeguards) whilst continuing to use a critical concept of liberty as socially constructed when deciding on best interest and what opportunities a person actually has open to

them (when seeking the best care and opportunity for someone).

The test does raise some questions: To what degree does each, of the two parts, need to be met? Does a condition of residence meet it or can paragraph 49 be read so, in itself, it does not? What about people who are long term unconscious? How relevant is the period of time of the placement?

There is a danger in widening the net. It is therefore key that the right test for capacity is applied and capacity is promoted, best interest starts with the world through the person's eyes and public bodies do not use the safeguards to enforce their will. Perhaps more CPRD compliant supported decision making could be part of the new safeguards? Maybe, also a more independent authoriser and tribunals?

We are at a crossroads, shouldering a burden of care. Will the structures we introduce fulfil this or just fill the silk pockets of the guards that patrol freedom's ramparts, with the gilding from the cages of the vulnerable?

Richard Murphy
Social Care, Mental Health Act and Mental Capacity Act Lead
Solent NHS Trust

The Acute Hospital Trust

Mental capacity and deprivation of liberty are pertinent issues in acute hospitals, particularly within the brain injury population where cognition for decision making capacity is often severely affected by acute stroke or trauma.

The current MCA and DoLS processes are useful tools to assist clinicians in thinking about the complex issues and to safeguard patients and their human rights.

Assessing capacity in the acute clinical setting for patients with highly complex needs continue to be a challenge when faced with uncertainties whether the patient has capacity to understand the risks associated with serious medical decisions. The strategy should be to take on a more person-centred approach and heed the advice of Peter Jackson J that *"unpalatable dilemmas- for eg indecision, avoidance or vacillation – are not to be confused with incapacity*" (*Re JB* [2014] EWHC 342 (CoP)), and that where there are serious identified risks, the courts, rather than the public authorities, should decide outcomes (*Re M* [2013] EWHC 3456 (COP)).

However, often there is a lack of expertise and limited resources for managing these issues within the acute setting. Therefore, at times, added processes and paperwork may add considerable burden and delay acute procedures and plans.

Due to the limited resources, there is a "disconnect" between the process of making DoLS applications and the local authorities who are responsible for determining their appropriateness.

Putting in too many safeguards without the necessary amount of resources can sometimes leave the clinicians feeling lost and doubting their clinical judgement in determining what is in the patient's best interest.

Although we welcome the recent Supreme Court judgment in *Cheshire West*, we consider it vital to that the Department and Health and the NHS provide additional resources to address the implications for the judgment for the additional numbers of patients who will be brought within the scope of the DoLS process, and also to support the MCA more generally.

Dr Edgar Chan, Neuropsychologist
Betsey Lau-Robinson, Trust Lead for Safeguarding & the Mental Capacity Act, University College London Hospital Foundation Trust

The independent social worker

A Triumph for Social Justice

> *'The most far-reaching human rights case heard in the UK for a decade' (Burrows, 2014)*

The Fog Clears:

This judgment reunites us with our Bournewood roots, established by the European Court. Namely, that the 'acid test' in determining a deprivation of liberty, is whether the person concerned is under continuous supervision and control and is not free to leave.

Implications:

Many are concerned that the aftermath of this judgment will effectively capsize existing DoLS and Court of Protection infrastructures. Whilst I agree that this presents an enormous challenge. I cannot accept that it is proportionate to subject many thousands of adults at risk, to the unscrutinised use of restrictive practice, in a manner that resembles this judgment's 'acid test'. Surely, equitable access to a right of review by an independent body 'should be effectively afforded to all those who properly require it' (Ruck Keene, 2014). Rather than punish adults at risk by reducing access to vital protection; why not lobby the Government for meaningful and effective investment in safeguarding human rights in this country (perhaps some re-distribution of the £4.26 billion allocated to the HS2 project, (BBC News, 2014).

Few involved in the complex, heart-wrenching, labyrinthine process of assessing deprivation of liberty, would refute the complexity and inaccessibility of the scheme. Most acknowledge the need to protect individuals' right to liberty and security of person, in accordance with Article 5 of the European Convention on Human Rights (ECHR). The sticking point it seems, is how best to achieve this.

For me, any extension of the sound, person-centred principles of the MCA 2005 will suffice, provided it achieves what has to be the founding safeguard:

> *'…that those whom we commit to the complete and effective control of others, enjoy safeguards to ensure it is exercised in a legitimate and proportionate fashion'* (Series, 2013).

Whilst we await a response from Government as to the House of Lords Select Committee recommendations concerning MCA/DoLS. We continue to rely upon case law as guidance for practice. Gladly, now at least, we have case law that is itself fit for purpose.

Dawn Whitaker was the Independent Social Worker in the Cheshire West case, and is a Lecturer in Social Work in the Department of Sociology at Lancaster University.

The paid carers

In December 1997 the Appeal Court ruled that HL (L) was being deprived of his liberty. In July 1998 Lord Steyn in his judgment at the House of Lords stated *"in my view 'L' was detained because the health care professionals intentionally assumed control over him to such a degree as to amount to complete deprivation of his liberty'"* and *"'The only*

comfort is that counsel for the Secretary of State has assured the House that reform of the law is under active consideration.'"

Six years on and with no 'reform of the law' in sight the ECHR in *HL* ruled: *"Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as 'stretching credulity to breaking point' and as a 'fairy tale'."*

Ten years further on and after 5 months deliberation the Supreme Court says of the acid test for deprivation of liberty, analysing the 'concrete situation' that *"the answer lies….in the jurisprudence which started under HL v UK 'that the person concerned was under continuous supervision and control and was not free to leave.'"*

The HoL Report on MCA particularly in relation to DoLS contains nothing that we haven't said to DoH over many years. The apparent unwillingness of managing authorities and local authorities to engage must not continue. Information and support for families/carers also needs to significantly improve. Whether safeguards remain as they are or are 'simplified' there needs to be a penalty for non-compliance with the law. The proliferation of supported living arrangements many of which are nothing more than unregistered care homes requires that their vulnerable occupants are protected under the same safeguards.

Seventeen years on since 'Bournewood' and the dithering looks likely to continue as professionals look for more 'clarification' rather than get on and make things work.

Mr and Mrs E – the carers of Mr L

The judge and father

For whose benefit?

When Alex asked me to contribute to this issue of the Newsletter about the implications of the judgment of the Supreme Court in Cheshire West he no doubt expected to receive the views of a (now retired) district judge who sat in the former and the present Court of Protection. I make no apology for disappointing him. Instead I wish to put on record my views as parent of a child with severe learning disabilities and challenging behaviour who encountered almost all forms of adult care before dying in the Bournewood gap at the age of 28 years due to inadequate supervision.

Such parents seek the re-assurance of suitable care for the life of their child, but whilst there are many examples of quality care for those who are compliant there is scarce good provision for those who are not. This is partly due to lack of adequate funding for what may need to be one-to-one care, but there is also a shortage of professional carers with the skills and tolerance required to cope with the demands made upon them. It goes without saying that these (adult) children need total supervision and cannot make their own choices as to the care regime even if they can indicate some preferences within it. The same might be said of elderly adults with severe dementia. The Deprivation of Liberty safeguards (DoLS) have nothing to offer them and seem little more than a sham to the parents, being designed to reassure society and the lawyers that personal human rights have not been infringed whilst failing to ensure that suitable care provision has indeed been achieved. Even the Court of Protection is impotent in this respect because in making a best interests decision for the individual it is restricted to the care plan or plans put forward by the funding authority, although an enterprising judge can seek reports as to what other options have

been considered and why they have been rejected. In one of my last cases I even threatened to invite the press in to the 'secret court' to hear an explanation as to why only institutional care was being proposed for a young man whose whole future was in question. The court of public opinion may be more powerful than the judge's court!

For these adults what really matters is the package of care provision that is to be provided rather than the somewhat academic issue as to whether they are justifiably being deprived of their liberty. It upsets me as a parent to see so much of the available funding being spent on this issue on a periodic basis. For whose benefit is that? The parents have no confidence that those involved in the assessment process are concerned with securing better care provision, and would be appalled if there was no effective restriction on the liberty of their mentally incapacitated child. The problem is that the 'best interests' assessor is merely required to determine whether it is in the best interests of the individual to be detained in this way, not whether it is in his or her best interests to accept this particular care package. In any event, I cannot believe that an assessor under the DoLS process has any more influence on the nature of care provision than a judge of the Court of Protection.

Certainly safeguards are required for some vulnerable adults, but for those like my son I would sooner see all this professional expertise expended on securing adequate care provision rather than justifying the fact that he was confined for most of his time between four walls.

So what was my approach as a judge? I simply concentrated upon the care options that could be available and sought to achieve what appeared to be in the 'best interests' of the adult. The balance between empowerment and protection is always difficult especially when a young life is involved, and there is a difference which has to be coped with between the perspective of the parents and that of professional care workers. I love the expression: 'What is the point of wrapping someone up in cotton wool if it merely makes them miserable?' When there was a dispute I sometimes, but not always, supported the authorities against the parents but only after strenuous efforts to achieve a consensus by mediation or conciliation or any other form of discussion. Unless there was a specific application relating to DoLS (and in my day these were reserved to High Court Judges) I treated these safeguards as a parallel process and declined to become involved.

I have no doubt that the approach of Lady Hale in the Supreme Court is the only possible interpretation of the present legislation despite the understandable efforts of the Court of Appeal to reduce the number of people to whom the safeguards applied. The practical and funding issues that now arise are such that a re-think is inevitable. In my view the question should, in layman's terms, be: 'Is this adult being justifiably and appropriately cared for', rather than is he or she being improperly deprived of personal liberty. The emphasis should shift towards whether the care being provided meets all the needs of the individual because that can be the only proper justification for depriving someone of their liberty. If the safeguards had been in existence when my son died the outcome should have been a better standard of care rather than mere acquiescence in that which was being provided because a deprivation of liberty was justified. We all knew that.

Gordon R Ashton OBE
Co-author of Mental Handicap & the Law (1995), Mental Capacity – Law & Practice (2012), Elderly People & the Law (2nd ed. 2014)

Assaults in care homes and best interests

Re RGS (No 3) [2014] EWHC B12 (COP) (District Judge Eldergill)

Best interests – residence – Media

Summary

As District Judge Eldergill says in his introduction, "*these proceedings have a long history.*" They concern an elderly man (now 84 years old), RGS who suffers from vascular dementia and his son, RBS. They have involved a 'seek and find' order for RGS when RBS removed him from a care home, financial mismanagement, the sale of a Pissarro painting and issues related to the media reporting of COP cases.

We summarised the two previous cases here (November 2012 case) and here (July 2013).

This time the proceedings focused on the following issues:

1. RGS's residence at X Care Home;

2. Contempt of court;

3. Media attendance, reporting and publicity;

4. Contact and Article 8.

RGS's residence at X Care Home

In July 2013, District Judge Eldergill found that it was in RGS's best interests to reside at the X Care Home. Shortly after the judgment, RGS was assaulted on three occasions over a period of three days by a fellow care home resident with dementia. RGS was hit on each occasion with a walking stick resulting in bruising, a skin tear and a broken tooth. Following these incidents Y was closely monitored and no further incidents occurred. Y was sectioned under the Mental Health Act 1983 on 22 August 2013. He did not return to the X Care Home and the court was informed that he would not be returning there.

The incidents were reported to RBS and the county council so that they could be investigated under the council's safeguarding procedures. On 15 November 2013 the court commissioned a report from the county council as to the circumstances which was produced on 29 November 2013. The report found that "there was a failure to ensure that RGS's safety needs were met. An action plan was put in place to ensure that practice at the home was improved and further placements at the home were suspended". On 13 December 2013 the court considered of its own motion that it was in RGS's best interests for the court to review the existing arrangements.

The court commissioned a best interests report from one of its social work General Visitors who was asked to file a report reviewing whether it continues to be in his best interests to reside at X Care Home.

District Judge Eldergill held that it remained in RGS's best interests to reside at X Care Home. That conclusion was based on clear evidence (from a large number of independent sources) that RGS was content at X Care Home and that transferring him to a different environment would add to his confusion and would be likely to make him more agitated.

District Judge Eldergill also added the following comment of more general application when P is to be placed in a residential setting:

"*Having spent almost 30 years in mental health, chaired inquiries and worked as a Coroner, I can*

say without qualification that it is a sad fact that assaults and other serious incidents do sometimes occur at well-run care homes, nursing homes and psychiatric units because of the mental ill-health of someone receiving care or treatment there. That is one important factor to consider when deciding whether it is in someone's best interests to be at home or in a shared environment".

Contempt of court issues

RBS was held to be in clear contempt of court – publishing court documents online (the Official Solicitor's position statement had already been published online at the time of the hearing) and releasing information to the press. District Judge Eldergill held (as he had on previous occasions) that despite many and persistent breaches, he was not going to take action against RBS due to his significant mental health problems and the fact that his father, RGS, would (if he had capacity) have been likely to take a forgiving approach to his son's actions as he had done in the past.

Media attendance, reporting and publicity

The judgment considers in detail the competing interests of privacy and transparency and makes reference to the President of the Court of Protection's recent guidance.

The judge held that there were good reasons in this case to allow the press to attend the hearings, report what was said in court and publish the court's judgments because the case involved important matters such as the rights of people incapacitated by dementia, the quality of their care, laws which permit the sale of private property to finance their care and the way in which the Court of Protection functions.

As well as the important issues which were aired, the judge also felt that there needed to be a balancing of RBS's publishing of information which was inaccurate, unfair and one sided.

The judgment adopts a detailed balance sheet approach to assessing the arguments for and against broadening identification of those involved in the proceedings. District Judge Eldergill concluded that current reporting restrictions (which allowed the local authority and experts to be identified but no other party) struck the correct balance.

Contact and Article 8

The contact issues turn on the specific facts of this case. Since the seek and find order was made contact between RGS and RBS has been supervised and regulated by the local authority and/or the care home and temporarily suspended by them *"if in their professional opinion it is necessary to do so*."

District Judge Eldergill emphasised that it continued to be important to restore normality but that RBS would have to demonstrate that he could be trusted before unsupervised contact could be authorised. The local authority was asked to file a short report in three months' time setting out any ways in which a relaxation of the existing restrictions was possible.

The judge acknowledges that his decision interferes with the family's Article 8 rights but that such an interference was lawful, necessary and proportionate and that the purpose for which the decisions are needed cannot be achieved in a way which is less restrictive of RGS's freedoms.

Comment

The issues which this case raises are typical of many Court of Protection cases: disagreement between family members and professionals about

P's best interests; tensions within P's family about financial and welfare issues; media interest and the balance between privacy and transparency. But in this case, these issues are heightened by the mental health problems of P's son, RBS.

This third judgment (as previous judgments) resonates with both sympathy for and exasperation with RBS. In a previous hearing RBS was held not to have capacity to litigate and to a certain degree, the judgment seeks to consider his best interests whilst formally adjudicating on his father's best interests. In our view, this case is a good illustration of the Court of Protection grappling pragmatically, sensitively and comprehensively with difficult and emotive issues. It is interesting in a broader sense for its comments in relation to decisions to place people in care homes. District Judge Eldergill makes clear that the fact that even in well run homes there is the possibility of serious incidents is an 'important factor' when assessing whether it is in someone's best interests to be placed in a care home or cared for at home.

The judgment also deserves to be read in detail in relation to its assessment of the pros and cons of publically naming parties to the proceedings. This is an issue which will no doubt continue to be raised as the court grapples with the balance between privacy and transparency.

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Conferences at which editors/contributors are speaking

5th anniversary conference for the National Preventive Mechanism (Optional Protocol to the Convention against Torture)

Jill is chairing the session on de facto detention at this conference to mark this important anniversary, being held in Bristol on 8 April. Details are available here.

The Assisted Suicide Bill: Does Scotland Need to Legislate?

Adrian is speaking at a medico-legal seminar at the Mason Institute of the University of Edinburgh Law School on the subject of assisted dying on 24 April 2014 at the Royal College of Physicians in Edinburgh. Details can be found here and initial details can be found here.

A Deprivation of Liberty: Post Cheshire West and P and Q

Neil is speaking with Jenni Richards QC at the conference arranged by Langleys on 1 May on the *Cheshire West* judgment. Full details are available here.

Annual private law conference convened by the Royal Faculty of Procurators

Adrian will be speaking at the annual private law conference convened by the Royal Faculty of Procurators in Glasgow on 29 May 2014. Full details are available here.

Hot topics in adult incapacity law

Adrian will be speaking on hot topics in the incapacity field at the Solicitors' Group Wills, Trust & Tax conference in Edinburgh on 7 May 2014. Full details are available here.

The Deprivation of Liberty Procedures: Safeguards for Whom?

Neil is speaking at the conference arranged on 13 June by Cardiff University Centre for Health and Social Care Law and the Law Society's Mental Health and Disability Committee. The conference will focus on the implications of the ruling of the Supreme Court *Cheshire West* as well as the likely impact of the Report of the House of Lords Committee on the

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Mental Capacity Act. Other speakers include Richard Jones, Phil Fennell, Lucy Series, Professor Peter Bartlett, Sophy Miles and Mark Neary. Full details are available here.

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Chambers Details

Our next Newsletter will be out in early May. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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