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CHESHIRE WEST: THE SUPREME COURT DECIDES

The Supreme Court today ruled unanimously that P, a profoundly disabled man, was deprived of his liberty by virtue of the complete control exercised over his life by those looking after him. They rejected the comparator introduced by Munby J, overturned the Court of Appeal decision and reaffirmed the decision of Baker J in the Court of Protection. The hearing took place between 21 and 23 October last year before seven Justices reflecting the immense importance of the issue to legal, medical and social services practitioners. The administrative implications for social services departments, the Official Solicitor and the Court of Protection will be significant. We acted for P, by his litigation friend, the Official Solicitor and during our preparations, an appeal relating to P&Q (formerly referred to as MIG and MEG) was added, so the two cases proceeded together.

The lead judgment was delivered by Lady Hale. Setting the theme, she states that the Mental Capacity Act 2005 could be seen as the completion of a circle starting with the Mental Deficiency Acts of 1913 and 1927. The reformers of the 19th century not only sought to provide more and better institutions where the mentally disordered could live but also recognised the need for judicial authorisation to protect against unjustified confinement. Thus, there developed a system of legal oversight dealing with the detention of the mentally disordered in hospital including those who consented to the arrangements made for them. The problem remained in respect of those without the capacity to consent or who were outside the 'institution' of a hospital. Eventually we received the ruling in *HL v UK* (also known as Bournewood). The Strasbourg court was “struck by the difference between the careful machinery for authorising the detention and treatment of compulsory patients under the Mental Health Act and the complete lack of any machinery for compliant incapacitated patients like HL”.

Parliament chose to deal with the issue by inserting ss 4A and 4B into the Mental Capacity Act 2005 (MCA) which set out that no one can be deprived of their liberty under the Act save in circumstances which included Schedule A1 known widely as the “DOLS” regime. Lady Hale refers to the “appearance of bewildering complexity” of the provisions but notes the purpose is to ensure, "professional assessment from people independent" of the placement. She goes on to say that it is not surprising that those doing their best to care for the incapacitated would be reluctant to stigmatise those in their care as being deprived of their liberty as well as exposing themselves to the administrative burden of the standard authorisation process. It was agreed that the cases could be seen as the very antithesis of normalisation, which the mental health and mental capacity legislation seek to promote.

After stating the facts, Lady Hale turns to the heart of the matter by asking, “What is a deprivation of liberty?”

First, she confirms the supremacy of the Strasbourg jurisdiction. Although s.2(1) of the Human Rights Act 1998 states that the domestic courts only need to "have regard" to Strasbourg judgments, s.64(5) MCA states that deprivation of liberty has the same meaning as Article 5(1) of the Human Rights Convention, which, coupled with the need to address the violation identified in *HL*, leads to the conclusion that it is to Strasbourg we must look for the law. Unfortunately, none of the Strasbourg decisions met the all the facts of the cases here. However, six principles can be identified:

First, the issue is one of degree or intensity, not nature or substance, for which the concrete facts are to be examined (*Guzzardi v Italy* 1980 3EHRR.)

Second, detention can take place regardless of the openness of the conditions: (*Ashingdane v UK* 1985 7 EHRR).

Third, consent is relevant (*Storck v Germany* 2005 43 EHRR)

Fourth, there are the situations which have been held to amount to a deprivation of liberty where (a) having been admitted by a lawful representative, the person tries to leave (*Shtukaturov v Russia* 2008 54 EHRR), (b) a person initially consents but then tries to leave (*Storck*) and (c) the incapacitated person who does not try to leave (*HL* / "Bournewood").

Fifth, liberty is too important to be lost for the simple reason that the person has given himself up to detention, especially where he lacks capacity to object (*De Wilde v Belgium No1*, 1971 1 EHRR).

Sixth, the state has a positive obligation to protect those within its jurisdiction, of whom it knows or ought to have known, from arbitrary detention. This extends to the activities of a guardian (*Storck* and *Shtukaturov* above).

Lady Hale then deals with the "difficult"' case of *HM v Switzerland* (2002) 32 EHRR where there was no deprivation of liberty, mainly due to the placement in a foster home with satisfactory living conditions where necessary medical treatment and care could be provided, and because it was comparable to the circumstances in *Nielsen v Denmark* (1989) 11 EHRR. Lady Hale noted the "powerful dissent" of Judge Jorundsson who had observed that HM was unable to go home and if she tried she would be brought back.

Lady Hale concludes that the Strasbourg case law is clear in some respects but not in others (para32) and that neither the Supreme Court nor the European Court of Human Rights have had to deal with the circumstances as presented in these cases, when dealing with issues of deprivation of liberty. The novel area raised in these cases is that of an incapacitated person who does not object to their placement in a small group or domestic setting which provides as far as possible a normal home like environment and which has been determined as being in their best interests.

The "relative normality" approach is rejected as being inconsistent with the fundamental principle that people with disabilities have the same rights as everyone else. Liberty is the same for everyone and human rights apply universally. She says (at para 46),

"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 under close supervision and unable to move away without permission even if such an opportunity became available, then it must be a deprivation of liberty for 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."

At paragraph 49 of the judgment she seeks to identify the particular features of the appellants' concrete situation, in order to determine what amounts to a deprivation of liberty. The answer is whether a person is "under continuous supervision and control and not free to leave."

Rather than try to set out an acid test, Lady Hale adopts the approach advanced by MIND and the National Autistic Society as to the features which are *not* relevant namely, a person's compliance or lack of objection, the relative normality of the placement and the reason or purpose behind a particular placement.

It is accepted that the local authorities have acted with the best of intentions for the appellants in making their placements but this is not enough. At para 56, Lady Hale sets out that

"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…. It is to set the cart before the horse to decide that because they do indeed lack capacity and the best possible arrangements have be made, they are not in need of those safeguards."

Her final point addresses policy, in that vulnerable people require an approach which errs on the side of caution so they are subject to periodic review. At para 57, Lady Hale states that:

"because of the extreme vulnerability of people like P, MIG and MEG, I believe we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests ….. [but we should not]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."

Lords Sumption, Neuberger and Kerr all confirmed their agreement with Lady Hale, with the latter two setting out their reasons for disagreeing with an alternative approach adopted by Lords Carnwath and Hodge, endorsed by Lord Clarke.

Lords Carnwath and Hodge were of the view that in the absence of authoritative guidance, or even an indication, as to how a decision would be made in Strasbourg in this area, the Supreme Court should be cautious about extending a concept as sensitive as deprivation of liberty beyond the meaning which it would be regarded as having in ordinary usage. They would not therefore support the general test proposed by Lady Hale (ie "continuous supervision and control and not free to leave") as they do not consider this to be borne out by the European case law. Further, they do not consider that anyone using ordinary language "would describe people living happily in a domestic setting as being deprived of their liberty." They consider that this is the approach Baker J in Cheshire West and Parker J

in P&Q took in their first instance decisions and for this reason, Lords Carnwath and Hodge would not interfere with those decisions, accordingly allowing the appeal in Cheshire West and dismissing that of P&Q. While they may not agree with the conclusion Baker J reached that P's placement amounted to a deprivation of liberty, they were satisfied, as was Lord Clarke, that the judge had directed himself correctly as to the legal principles and that his conclusion was one which was reasonably open to him on the particular facts of the case.

So, following the lead judgment in this case, we now know that the answer to the question as to what is a deprivation of liberty is that the issue is one of degree and intensity, not nature or substance. Continuous supervision and control and a lack of freedom to leave are the key issues. Relative normality is irrelevant, as are purpose and reason for the measures.

We now have clearer parameters with which to assist us to address the DOL question but what comes out most clearly in this exhaustive and thoughtful appeal is that decision makers must err on the side of caution. Standard authorisations are not to be avoided due to perceptions of stigma. The process of standard authorisation should cause decision makers to give the "concrete situation" the attention it deserves. The DOLS procedures are so complex that they inhibit that process. Coming only a week after a devastating criticism of the DOLS regime by a House of Lords Select Committee, this judgment adds pressure on Parliament to address this issue urgently.