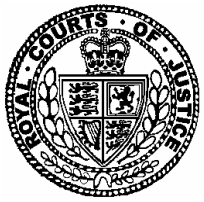

Neutral Citation Number: [2010] EWHC 785 (Fam)

CoP11627814

IN THE COURT OF PROTECTION
AND IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF MIG AND MEG

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2010

Before :

MRS JUSTICE PARKER

- -

Between :

Surrey County Council	**Applicant**
- and -	
CA	**1st Respondent**
- and –	
LA	**2nd Respondent**
- and -	
MIG (Incapacitated Adult) & MEG (Incapacitated Minor) (by their litigation friend, the Official Solicitor)	**3rd & 4th Respondents**

- -
- -

Mr Nicholas O'Brien (instructed by **Surrey County Council**) for the **Applicant**
Miss Caroline Budden (instructed by **Harney & Wells Solicitors**) for the **1st Respondent**
Miss Alev Giz (instructed by **Anthony Morris Solicitors**) for the **2nd Respondent**
Miss Fenella Morris (instructed by **Steel & Shamash Solicitors**) for the **3rd &4th Respondents**

Hearing dates: 12th, 13th, 15th, 18th, 19th, 20th May 2009 & 5th October 2009

- -

JUDGMENT

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment is being handed down in private on 15 April 2010. It consists of 54 pages and has been signed and dated by the judge. The judge gives leave for it to be reported on the basis that paragraphs 1-124 have been replaced by a short summary of the background. All references to the parties and private individuals in the judgment will remain anonymous.

MRS JUSTICE PARKER:

(Summary)

1. *These Court of Protection proceedings are brought by Surrey County Council (SCC), the local authority with social work responsibility for two girls, MIG 18 and MEG 17, each suffering from moderate to severe learning disability of unknown origin, and represented by the Official Solicitor as their litigation friend.*

2. *By the Court of Protection applications SCC sought declarations in respect of both girls that they reside in such accommodation and receive such educational provision as directed by SCC, and that contact with their mother CA and extended family be regulated by SCC and be supervised by such person as SCC approves.*

3. *The Court found that they each lack capacity to make any decisions as to:*

   i) *Residence and care;*

   ii) *Contact;*

   iii) *Education;*

   iv) *Medical treatment;*

   v) *Legal issues.*

4. *MIG and MEG were each originally received into care pursuant to the Children Act 1989 in April 2007 and made the subject of interim care orders. On 8 August 2008 Roderic Wood J transferred the proceedings to the Court of Protection.*

5. *Assessments were carried out by Triangle, a specialist agency which provides assessment of and advice for disabled young adults; Dr Xenitidis, Consultant Psychiatrist specialising in learning disability; and Mr O'Meara, independent social worker.*

6. *MIG has been living with her former respite carer JW in JW's family home since her reception into care. MEG was originally placed on her reception into care with her former respite carer JB but the placement broke down as a result of her challenging behaviour and after two short term placements she was placed in a small group home with four residents in the summer of 2008. The home is not permitted to accommodate residents over the age of 19. At the date of the hearing each was attending C College, in different years.*

7. *MIG has the cognitive ability of a child aged about two and a half. MEG has the cognitive ability of a four to five year old, with possible autistic traits, and she exhibits challenging behaviours. She receives medication, Risperidone, to calm her anxiety. She has settled considerably in the setting of her residential home where with skilled attention, and one to one and sometimes two to one support, her behaviour has gradually improved.*

8. *The Court's finding was that their family background is such that each is at risk if returned to the care of their mother CA either now or in the future. Neither can care for herself and each requires a high degree of care and support.*

9. *The Court held that it was in their best interests to remain living in their present homes and attending C College, and that the case should return to court in 2010 for further placement and educational decisions to be made.*

10. *The Court approved arrangements for them to have supervised contact with CA every six weeks and no contact with their stepfather LA. They have an older sister HG (21) who has three children and a younger sister SH (15). The Court approved arrangements for supported contact with these family members.*

11. *The Court was asked to consider whether either was deprived of her liberty.*

Deprivation of Liberty

125. At directions hearings Miss Morris flagged up the Official Solicitor's intention to argue that both MIG and MEG are deprived of their liberty in their current placements. No specific application has been made for welfare based orders as to deprivation of liberty or for a declaration as to the lawfulness of deprivation of liberty under any jurisdiction.

126. SCC does not accept that either MIG or MEG is deprived of her liberty. However, in respect of MEG SCC accepted that the administration of medication and placement in a residential home were factors which *potentially* tipped the balance in favour of a finding that she is deprived of her liberty. For reasons which I will set out below I do not agree.

The European Convention

127. Article 5 of the European Convention on Human Rights and Fundamental Freedoms is entitled "Right to Liberty and Security". By paragraph 1 :-

> "everyone has the right to liberty and security of person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants."

128. Article 5 (4) provides that:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

129. Article 5 (5) of the Convention provides that:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation".

130. Article 8 of the Convention provides that:

> "1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

131. These provisions have been the subject of consideration in both the domestic courts of this jurisdiction and the European Court of Human Rights in relation to the detention of persons with incapacity, minors, and persons considered to be in need of care and protection. They have also recently been considered in the courts of this jurisdiction in relation to control orders made in respect of those with suspected terrorist affiliations, and in respect of persons confined in a particular area by Police cordon during a political demonstration.

132. A long line of Strasbourg decisions, in a number of different and various factual situations, has developed the guiding principles. The decisions are not always easy to reconcile. However as Lord Bingham of Cornhill said in *Secretary of State of the Home Department v JJ and others* [2007] UKHL 45; [2008] 1 AC 385, (quoting *R v Gillan*): "the prohibition in Article 5 on depriving a person of his liberty has an autonomous meaning: that is, it has a Council of Europe-wide meaning for the purpose of the convention…for guidance on the autonomous convention meaning to be given to the expression national courts must look to the jurisprudence of the Commission and the European Court in Strasbourg…but that jurisprudence must be used in the same way as other authorities are to be used, as laying down principles and not mandating solutions to particular cases. It is…perilous to transpose the outcome of one case to another where the facts are different. The case law shows that the prohibition in Article 5 has fallen to be considered in a very wide range of factual situations."

Deprivation of liberty: The Principles

133. Since the decision in *Guzzardi* [1981] 3 EHRR 333, (a case involving a suspected member of the Mafia detained on a small island off the coast of Italy) the principle has been consistently expressed that that the aim of Article 5 is to ensure that no one should be dispossessed of liberty in an arbitrary fashion, as opposed to being subject to restraints on liberty. Article 5 is to be distinguished from Article 2 of the Fourth Protocol (not ratified by the UK) which deals with mere restrictions on liberty of movement. The Court in *Guzzardi* said "in order to determine whether someone has been deprived of his liberty within the meaning of Article 5, the starting point must

be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question …the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance…deprivation of liberty may . . . take numerous other forms" than "classic detention in prison or strict arrest imposed on a serviceman": This statement of principle has been repeated through a long line of authority, and specifically in cases relating to mental health, psychiatric in-patient treatment, and admission to care homes.

134. The list of factors in Article 5 (1) of the procedures by which an individual may be deprived of liberty in accordance with a procedure prescribed by law is exhaustive. *Engel v The Netherlands (no 1)* [1976] 1 EHRR 647, para 47.

135. Liberty is "individual liberty in the classic sense, that is physical liberty of the person" *Engel* para 58. The right to liberty is absolute, "in the first rank of the fundamental rights that protect the physical security of the individual…its purpose is to prevent arbitrary or unjustified deprivations of liberty (*McKay v UK 44* [2006] EHHR 827), *Engel* para 30, cited by Lord Hope in *Austin v Chief Commissioner of the Metropolis* [2009] UKHL 5, and Lord Hoffman in *JJ* at paragraph 35, "[t]he point about the right not to be deprived of one's liberty under article 5 is that, subject to the exceptions, it is unqualified".

136. Deprivation of liberty may take many forms, and does not require the detained person to be kept under lock or key. But the starting point is the "paradigm" example of the prisoner in the cell (see *JJ* per Lord Hoffmann at [37]) which "amounts to a complete deprivation of human autonomy and dignity. The prisoner has no freedom of choice about anything. He cannot leave the place to which he has assigned. He may eat only when and what his jailer permits. The only human beings he may see or speak to are his jailers and those whom they allow to visit. He is entirely subject to the view of others". It is not necessary for the detained person to be physically confined, nor that the premises or accommodation in which he is kept should be locked: *Guzzardi* is an example, as are the control order cases.

137. In *JJ* Lord Bingham, citing *Guzzardi*, said at [para 16] that there may be no deprivation of liberty if a single feature of an individual's situation is taken on its own; at [para 17] that there is no bright line separating restriction and deprivation of liberty; and [at para 18] that in assessing the impact of the measures in question on a person in the situation of the person subject to them, the court has to assess the effect of the measures on the life the person would have been living otherwise.

138. In *Austin v Chief Commissioner of the Metropolis* [2009] UKHL 5 Lord Hope of Craighead said that "it is not enough that what was done could be said in general or colloquial terms to have amounted to a deprivation of liberty. Except in the paradigm case of close confinement in a prison cell, where there is no room for argument, the absolute nature of the right requires a more exacting examination of the relevant criteria. There is a threshold that must be crossed before this can be held to amount to a breach of Article 5(1).Whether it has been crossed must be measured by the degree or intensity of the restriction" [para 18].

Deprivation of liberty in the context of care homes and treatment

139. In *Nielsen v Denmark (ECFHR)* [1988] 11 EHRR 175 a twelve year old boy was confined by his mother in a psychiatric home for therapy on what, it has since been commented, seem to have been somewhat dubious grounds. The Court held that he was not deprived of his liberty because (1) the state was not involved: he was placed by his mother, (2) the placement was in exercise of the mother's parental rights and (3) the restrictions were no more than a child would expect in any other hospital setting. Seven judges dissented.

140. In *HM v Switzerland* [2002] 38 EHRR 314 the Swiss public authority made an order placing an elderly woman in a nursing home for an unlimited period. In the nursing home she had complete freedom of movement. The court referred to the fact that the woman had been placed there in her own interests. A strong dissenting judgment from Judge Loucaides took issue with that justification, on the basis that best interests could not justify a deprivation of liberty. However later authorities focused on the fact that it also appears that she had the capacity to and did in fact consent to live there.

141. In *HL v United Kingdom* [2004], 40 EHRR 761, HL, a 48 year old man, suffered from severe autism. For most of his life he had been an in-patient at the Bournewood Hospital, a learning disability hospital. He was then placed in the care of adult foster carers for a period of about 3 years. He was readmitted to the Bournewood Hospital after he had become agitated at a day centre and the foster carers could not be contacted. He was unable to speak, was incapable of consenting or dissenting to admission, and once in hospital he made no attempts to leave. Because he did not resist admission nor seek to leave he was not detained using the compulsory powers under the Mental Health Act 1983. He thus had no right to review of his detention. His foster carers, as next friends, sought judicial review of the decision to detain him, habeas corpus directed at the Trust, and an action in damages for false imprisonment. They sought to establish that HL had been detained or subject to imprisonment and that the detention was unlawful. At first instance the application was dismissed, it was allowed in the Court of Appeal, and the matter went to the House of Lords. The House of Lords held by a majority that HL was not detained. They unanimously held that even if he had been detained his detention was justified on the grounds of common law necessity (*R v Bournewood Community and Mental Health Trust ex parte L* [1999] AC 458, HL).

142. The foster carers took his case to the European Court of Human Rights. The unanimous decision of the Grand Chamber was that HL had been deprived of his liberty contrary to Article 5(1) of the ECHR because:

i) He had been subject to the complete and effective control over his care and movement by the health care professionals treating and managing him;

ii) He had been resident with his carers for 3 years. When brought to the hospital he was sedated. Had he resisted admission or tried to leave thereafter he would have been prevented from so doing and his involuntary committal under the Mental Health Act would have been considered;

iii) The carers wished to have HL immediately released to their care and the health professionals made it clear that he would only be released as and when those professionals considered it appropriate;

iv) HL's contact with his carers had been directed and controlled by the hospital;
v) Accordingly the concrete situation was that HL was under continuous supervision and control and not free to leave;
vi) It is not determinative whether the ward is locked or lockable.

143. The Court's decision was that:
i) HL's detention was arbitrary and not in accordance with the procedure prescribed by law; and
ii) The procedures available to HL did not comply with the requirements of Article 5(4) as there was no procedure under which he could seek a merits review of whether the conditions of his detention remained applicable.

144. Specific criticisms related to the lack of any formal procedures as to:
i) who could authorise an admission;
ii) the reasons needing to be given for that admission (whether it was for treatment or assessment);
iii) the need for continuing clinical assessment and review; and
iv) who could represent the patient and be able to seek a review in an independent tribunal of the continued detention.

145. The lack of any powers specifically to deal with the position of patients admitted other than under the Mental Health Act when they are unable to withhold or give consent to treatment have come to be known as "the "Bournewood gap"".

146. The amendments to the Mental Capacity Act 2005 dealing with deprivation of liberty (the "DOL provisions") were enacted in order to fill that gap.

147. Subsequently to *HL v United Kingdom*, the Strasbourg Court, in *Storck v Germany* [2005] 43 EHRR 96, considered the case of a woman who had originally been admitted as a teenager to a private psychiatric hospital for the purpose of treatment. She had not been placed under guardianship, nor consented, nor been made the subject of any judicial decision. She was under the continuous supervision and control of the clinic personnel. The Court held that this was in breach of Article 5 and Article 8:
a. She was in a locked ward;
b. She was not free to leave it during her entire stay of 20 months;
c. It had been necessary to shackle her to keep her in the clinic;
d. When she escaped she was brought back by the police;
e. She was unable to maintain regular social contact with the outside world;
f. She must objectively be considered to have been deprived of her liberty;
g. It was held that the key factor was her lack of consent. Consent was a legal requirement of detention in the hospital under German law. Either she had capacity and had not consented, or she had not had capacity and was unable to give consent. The applicant's lack of consent must be regarded as the decisive feature distinguishing the case from *HM v Switzerland*.

148. In *JE v DE (by his litigation friend the Official Solicitor), Surrey County Council and EW* [2006] EWHC 3459 (FAM); [2007] 2 FLR 1150, Mr Justice Munby heard

proceedings brought pursuant to the inherent jurisdiction by a wife whose husband had been placed in two successive residential care homes. The man was elderly with health problems and memory loss, and was not legally capable of deciding where he should live, but had consistently expressed his wish to go to live with his wife at their home. He was not physically or chemically restrained in any way but required the assistance of another person to leave the building.

149. DE's wife sought a range of declarations: that DE was detained; that the detention had not been 'in accordance with a procedure prescribed by law'; and a declaration that the Local Authority's failure to make an application for a best interests declaration was in breach of DE's rights under Article 5(4) and/or Article 8(1) of the European Convention. The Official Solicitor then issued a cross-application seeking a declaration that DE was being unlawfully deprived of his liberty pursuant to Article 5(1) of the Convention.

150. Munby J placed reliance on the fact that in *HL v United Kingdom* the Court explained *HM v Switzerland* on the basis that the applicant had been legally capable of expressing a view and had been undecided as to whether she wanted to stay. Thus the clinic could draw the conclusion that she did not object. He pointed out that in *Storck v Germany* the Court held that the lack of consent of the applicant distinguished the case from *HM v Switzerland*. In the light of the decisions in *HL v United Kingdom* and *Storck v Germany* he also took issue with the statement of Keene LJ in *Secretary of State for the Home Department v Mental Health Review Tribunal and PH* [2002] EWCA Civ 1868 that "the purpose of any measures of restriction is a relevant consideration. If the measures are taken principally in the interests of the person who is being restricted, they may well be regarded as not a deprivation of liberty…". He said:

> "I have great difficulty in seeing how the question of whether a particular measure amounts to a deprivation of liberty can depend upon whether it is intended to serve or actually serves the interest of the person concerned…this is to confuse what I should have thought are, both as a matter of logic and as a matter of legal principle, two quite separate and distinct questions: Has there been a deprivation of liberty? And if so can it be justified?
>
> "DE seemingly lacked capacity to consent and in any event…has throughout vigorously objected to his stay in the…home."

151. He held that there were three elements relevant to the question of whether there had been a "deprivation of liberty" under Article 5(1) of the convention:

i) an objective element of confinement in a particular restricted space for a not negligible length of time;

ii) a subjective element of lack of valid consent; and

iii) that the deprivation of liberty be imputable to the state.

152. He concluded:

a. as regards the objective element:
    i. the starting point must be the concrete situation of the individual concerned (quoting the passage from *Guzzardi*, see above);

ii. in the type of case which he was here concerned, the key factor is whether the person is, or is not, free to leave (*HL v United Kingdom* [2004] 40 EHRR 761 at paragraph 91). This may be tested by determining whether those treating and managing the person exercised complete and effective control over the persons' care and movements;
iii. whether the person is in a ward which is locked or lockable is relevant but not determinative.

b. as regards the subjective element:
i. the person may give a valid consent to their confinement only if they have capacity to do so (*Storck v Germany* [2005] 43 EHRR 96, paragraphs 76 and 77);
ii. where a person has capacity, consent to their confinement may be inferred from the fact that the person does not object (*HL v United Kingdom* [2004] 40 EHRR 761, at paragraph 93 and *Storck v Germany* [2005] 43 EHRR 96, at paragraph 77, explaining *HM v Switzerland* [2002] 38 EHRR 314, at paragraph 46);
iii. no such conclusion may be drawn in the case of a patient lacking capacity to consent (*HL v United Kingdom* [2004] 40 EHRR 761, at paragraph 90);
iv. express refusal of consent by a person who has capacity will be determinative of this aspect of "deprivation of liberty" (*Storck v Germany* [2005] 43 EHRR 96, at paragraph 77);
v. the fact that the person may have given himself up to be taken into detention does not mean that he has consented to his detention, whether he has capacity (*Storck v Germany* [2005] 43 EHRR 96, at paragraph 75) or not (*HL v United Kingdom* [2004] 40 EHRR 761, at paragraph 90);
vi. the right to liberty is too important in any democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention.

153. Munby J analysed the circumstances in which DE found himself. In the first care home in which he had been placed the front door was operated by pushing a button on the wall to release the door and therefore he would have been unlikely to be able to find the exit doors and open them without assistance. In the second home he was free to leave his room unaccompanied at any time he wished. He had unfettered access to the premises. He could use a telephone, but was unable due to his needs to remember a number and dial it himself. The home had a keypad entry system so service users would need to be able to use the keypad to open the doors to get out into the local areas if they wished to go out generally they asked the staff to help them. He had never tried to leave the home nor asked the staff to open the door so that he might leave. But he had consistently expressed the wish to leave the home to live with his wife (the judge set out three pages of references from the evidence supporting that conclusion). The evidence of his wife, which the judge accepted, was that it had been made clear to her that she was not allowed to take DE home with her.

154. At [115] Munby J said that "the crucial question in this case…is not so much whether (and, if so, to what extent) DE's freedom or liberty was or is curtailed within the institutional setting. The fundamental issue in this case, in my judgment, is whether DE was deprived of his liberty to leave the X home and whether DE had been and is

being deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses, specifically removing himself to live at home with JE". And at [117] he said that "the crucial issue here…just as it was in *HL v United Kingdom [2004] 40 EHRR 761,* (was) whether DE was or was not, is or is not, "free to leave"…and was…completely under the control of (the Local Authority) because…it was and is (the Local Authority) who decides the essential matters of where DE can live, whether he can leave and whether he can be with JE". He concluded by referring to and agreeing with the conclusion of the Strasbourg court in *HL v United Kingdom* [2004] 40 EHRR 761 that whether a patient is kept in "locked" or "open" conditions is not determinative.

155. At [124] he said that "the fact is that DE has repeatedly expressed his wish to be living at home with JE and has made it clear that he is in the Y home, as previously the X home, 'against his will'." And, at [126] he said that DE was in the equivalent position to HL because he would only be released from the hospital to the care of another when the professionals considered it appropriate.

156. I have been referred to the recent decision of *Austin (FC) & another v Commissioner of Police of the Metropolis* [2009] UKHL 5. The facts of *Austin* were far removed from the incapacity cases. At a demonstration in central London in 2001, a police cordon had been put around demonstrators. The appellant had been a participant in the demonstration. She was found to have been well aware that the aim of many of the demonstrators was to cause violence, and though there was no suggestion that she was engaged in anything other than peaceful protest or had any wish to cause violence, she had taken the risk of violence, and she had joined in with others to obstruct the highway. She brought an action for false imprisonment. The judge at first instance found that the sole purpose of the cordon was to maintain public order, that it was proportionate to that need, and that those within the cordon were not deprived of their freedom of movement arbitrarily. The Court of Appeal dismissed her appeal.

157. On appeal to the House of Lords, Lord Hope of Craighead, who gave the first Opinion, posed the question: "is it relevant, when considering whether a case falls within the ambit of Article 5(1) to have regard to the purpose for which a person's freedom of movement has been restricted? If so, in what kind of cases can this be relevant? And, if the purpose of the restriction is relevant, what conditions must it satisfy to avoid being prescribed by the Article?" The House of Lords identified that the question of crowd control did not previously appear to have been brought to the Strasbourg court. Although the decision of the committee members was unanimous that there was no deprivation of liberty their reasons are subtly different.

158. Lord Hope stated that detention in the paradigm sense was not in the minds of anyone. "If purpose is relevant, it must be to enable a balance to be struck between what the restriction seeks to achieve and the interest of the individual". He concluded that the question of balance is inherent in the concepts enshrined in the Convention, and that "there is room, even in the case of fundamental rights, for a pragmatic approach to be taken which takes full account of all the circumstances, in a case

where the interests of public safety have to be balanced against the rights of the individual."

159. Lord Scott of Foscote stated that "when deciding whether a confinement or a restriction imposed by some public authority constitutes a deprivement of liberty for the purposes of article 5(1) of the European Convention, the purpose of the persons responsible for imposing it rank very high in the circumstances to be taken into account in reaching the decision. The imposition of the cordon on the appellant, and many others, was done for the purposes of protecting the physical safety of the demonstrators….and of protecting the neighbourhood properties…"

160. Lord Walker of Gestingthorpe described Lord Hope's opinion as to purpose as "guarded", referring to *HL v United Kingdom* and *Storck v Germany*, and stating that "if confinement amounting to deprivation of liberty and personal security is established, good intentions cannot make up for any deficiencies in justification of the confinement under one of the exceptions listed in Article 5(1) (a) to (f), which are to be strictly construed."

161. Lord Carswell did not express a separate opinion.

162. Lord Neuberger of Abbotsbury stated that it is important to keep in mind that in *McKay* [2007] 44 EHRR the court said that the "key purpose" of article 5 is to prevent arbitrary or unjustified deprivations of liberty. "This suggests that it is necessary to examine the circumstances of a particular case, particularly when it is not a paradigm case" (which is "in prison, in the custody of a gaoler" - per Lord Hoffman in *JJ*.) "In *Saadi v United Kingdom* (Application no 13229/03) 29 January 2008, the Grand Chamber said that the 'notion of arbitrariness in the context of Article 5 varies depending on the type of detention involved …to make clear that…the state of mind of the person responsible for the alleged detention can be a relevant factor when deciding whether article 5 has been infringed …' Given the fact sensitive nature of the enquiry and the significance of arbitrariness, this seems to me to be entirely consistent with the more general approach of the court to Article 5 cases [54]." He then stated that this simply emphasised that as in all Convention cases the circumstances of the case needed to be considered, together with a fair balance between the general rights of the community and the requirement of the individual's fundamental rights. He concluded that bearing in mind the duties of the police and their need to protect against disorder and violence "it seems to me to be unrealistic to contend that Article 5 comes into play at all, providing that the actions of the police are proportionate and reasonable; and any confinement is restricted to a reasonable minimum..." [60].

163. In my judgment the decision in *Austin* cannot be divorced from its context. The question of purpose or intention in *Austin* was intimately bound up in the evaluation of all the circumstances, namely that the police had a duty to maintain public order and where the interests of the public had to be considered. It was pre-eminently a "balance" case. It also seems to me that although the words "purpose" and "intention" are used synonymously in certain passages in *Austin*, the word "intention" is not used in the same sense as in *HL v United Kingdom* and *JE v DE*. In *HL v United Kingdom* and in *DE v JE* the word "intention" is used in the sense of the mental attitude with which a person acts, whereas "purpose" in the sense that it is used in Austin is more akin to motive, the motive of the police being to exercise

crowd control, rather than to confine the demonstrators. Lord Scott however in stating at [39] that "the intention of the police was to maintain the cordon so long as was reasonably thought necessary" uses the word "intention" in the sense of mental attitude, whilst Lord Hope in saying at [24] "detention in the paradigm sense was not in the minds of anyone", seems to be referring to "motive". The heart of the case lies in the passage in the speech of Lord Walker "what were the police doing…? What were they about? The answer is …that they were engaged in an unusually difficult exercise in crowd control…" [47]. The question of purpose posed at the outset is in the end answered only in the qualified ways set out above.

164. I accept that the question of intention in the sense of mental attitude is irrelevant to the question of whether a person is deprived of their liberty. A person's belief that they are not depriving another of their liberty is likely to be irrelevant and may be inaccurate. In *HL v United Kingdom* the hospital representatives denied that it was in their minds to confine HL because he was free to leave at any time, a concept which Lord Steyn in the House of Lords in *Bournewood* described as a "fairytale". So I treat with extreme caution the suggestion that purpose is relevant in this type of case, save that it does seem to me to be realistic to put into the equation when trying to discern the factual matrix and whether these girls are objectively deprived of their liberty, that both girls were placed in their respective placements as children in need, because they need homes, rather than because they require restraint, or treatment. It is also relevant in my view to consider the reasons why they are under continuous supervision and control.

165. I take from *Austin* the statement that in a search for a decision as to which side of the line a particular case falls, the paradigm example of the confined prisoner must be held up for comparison, whilst recognising that deprivation of liberty can take many other forms.

166. I note that in *JJ* Baroness Hale of Richmond stated at para [58] "It also appears that restrictions designed for the benefit of the person concerned are less likely to be considered a deprivation of liberty than those designed for the benefit of society", referring to *Nielsen v Denmark*, *HM v Switzerland*, *HL v United Kingdom*, and *Secretary of State for the Home Department v Mental Health Review Tribunal and PH*, but this comment was made in the context of a control order and precedes *Storck v Germany*.

The amendments to the Mental Capacity Act 2005 introduced by Section 50 of the Mental Health Act 2007 on 1 April 2009

167. Section 4A of the Mental Capacity Act 2005 is headed **Restrictions on deprivation of liberty** and provides that:

> "(1) This Act does not authorise any person ('D') to deprive any other person ('P') of their liberty;
> (2) But that is subject to:–
> (a) The following conditions of this section; and
> (b) Section 4B (this relates to deprivation of liberty necessary for life sustaining treatment etc).
> (3) 'D' may deprive 'P' of his liberty if, by doing so, 'D' is giving effect to a relevant decision of the court;

(4) A relevant decision of the court is a decision made by an order under Section 16(2) (a) in relation to a matter concerning 'P''s personal welfare;
(5) 'D' may deprive 'P' of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents) deprivation of liberty."

168. Schedule A1 to the Act provides for standard authorisations to be given in relation to the placement of adults in a hospital or care home for care and treatment in circumstances which amount to a deprivation of liberty. It is common ground that the provisions of Schedule A1 do not apply to either girl. MIG is not detained in a hospital or care home for the purpose of being given care or treatment. MEG is ineligible to be made the subject of a standard authorisation because Schedule A1 provides by paragraph 13 that the age requirement is that the person has reached the age of 18. B Home is not itself registered for the purposes of Schedule A1 of the Act.

169. However it is submitted that there is power within the provisions of the Mental Capacity Act 2005 to authorise deprivations of liberty, pursuant to Sections 15 and 16 MCA 2005.

170. Section 15 (1) (c) of the MCA 1925 gives the Court of Protection power to make declarations as to the lawfulness or otherwise of any act (including an omission and a course of conduct).

171. Section 16 (2) (a) of the Act provides that where a person ('P') lacks capacity in relation to a matter or matters concerning 'P''s personal welfare…the court may, by making an order, make the decision or decisions on 'P''s behalf in relation to the matter or matters. The scope of welfare powers are specifically but not exclusively defined by s 17.

172. Section 16A of the Mental Capacity Act 2005, provides that:
"(1) If a person is ineligible to be deprived of liberty by the Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.
……
(4) For the purposes of this section:-
(a) Schedule 1A applies for determining whether or not 'P' is ineligible to be deprived of liberty by this Act;
(b) Welfare order means an order under section 16(2) (a)."

173. Paragraph 2 of Schedule 1A sets out the classes of person ineligible to be deprived of liberty by the Mental Capacity Act 2005. They are persons who are the subject of hospital or treatment regimes, the guardianship regime, or who are within the scope of the Mental Health Act. There is no specific age requirement.

174. Paragraph 13 of Schedule 1A to the Act provides that:
"In a case where this Schedule applies for the purposes of Section 16 A –
'authorised course of action' means any course of action amounting to a deprivation of liberty which the order under 16 (2) (a) authorises; …".

175. The Mental Capacity Act 2005: Deprivation of Liberty Safeguards Code states at Paragraph 1.20 that "It will only be lawful to deprive somebody of their liberty

elsewhere (for example, in their own home, in supported living arrangements other than in a care home, or in a day centre) when following an order of the Court of Protection on personal welfare matters. In such a case the Court of Protection order itself provides a legal basis for the deprivation of liberty. This means that a separate deprivation of liberty authorisation under the processes set out in the Code of Practice is not required."

176. Paragraph 1.2 of the Code of Practice could be interpreted as advising that a declaration or authorisation in respect of the arrangements made for personal welfare is sufficient and that no separate authorisation of deprivation of liberty pursuant to the Mental Capacity Act 2005 is required. But I conclude, having regard to Section 16 A of the Act, that in addition to authorising the arrangements by way of personal welfare order as to where 'P' is to live and as to contact the Court should specifically and separately authorise the course(s) of action which amount to deprivation of liberty, and declare such to be in the best interests of 'P' and lawful. This is of course providing that 'P' is not 'ineligible' to be deprived of liberty pursuant to Schedule 1A to the Act, and that Schedule A1 does not apply.

177. MEG does not come within the class of ineligible persons pursuant to Schedule 1A. Section 2 (5) of the Act provides that orders under the Act can be made in relation to a person over 16. I initially took the view that the Local Authority could only proceed pursuant to s 25 of the Children Act 1989 or the inherent jurisdiction in respect of a minor.

178. In relation to MEG the Local Authority still exercises a statutory duty to her as a person under the age of 18 because she is accommodated under s 20 Children Act 1989 and she is thus a "looked after child". She is probably accommodated under s 20 (3) as child in need who has reached the age of 16 and whose welfare the authority considers will be seriously prejudiced if they do not provide her with accommodation, or under s20 (4) where, although a person who has parental authority for her is able to provide her with accommodation the Local Authority considers that to provide her with accommodation would safeguard or promote her welfare. She is probably not being accommodated pursuant to section 20 (5) as a person who has reached the age of 16 but is under 21 in any community home which takes children who have reached the age of 16.

179. There would almost certainly have been power to seek a Section 25 order since it is only when a child is being accommodated pursuant to Section 20(5) and has reached the age of 16 that a secure accommodation cannot be made in relation to a person under the age of 18 (see *Re G (Secure Accommodation)* [2000] 2 FLR 259).

180. S 25 of the Children Act 1989 provides that in the absence of a Secure Accommodation Order a child looked after by a Local Authority may not be placed, and if placed may not be kept, in "accommodation provided for the purpose of restricting liberty". The grounds on which such an order may be made are that:

a. A child or young person has a history of absconding and is likely to abscond from any other description of accommodation; and

b. If he absconds is likely to suffer significant harm; or

c. If he is kept in any other description of accommodation he is likely to injure himself or other persons.

181. It would also have been open to the local authority to apply for an order restricting liberty pursuant to Section 100 Children Act 1989. In appropriate cases recourse may be had to the inherent jurisdiction: see *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180 where Wall J was in no doubt that he could and should exercise the inherent jurisdiction so as to authorise an anorexic girl's detention in a clinic, where the clinic was not "accommodation provided for the purposes of restricting liberty", as neither is B Home.

182. I am now persuaded, having heard further argument, that there is power in the Court of Protection to make an order authorising the deprivation of liberty of a person aged between 16 and 18, and that where a Secure Accommodation order is not required, and where the young person is not 'Gillick competent', the Mental Capacity Act 2005 route is appropriate. Nevertheless, the fact that no s 25 order has been sought or contemplated, and that B Home is not "accommodation provided for the purpose of restricting liberty", is relevant in this case when considering whether or not MEG is in fact deprived of her liberty.

Review

183. The Code of Practice, quoted above, refers to the Court using its own procedures in order to review deprivation of liberty where a welfare order has been made but where Schedule A1 does not apply.

184. In *Re PS (Incapacitated or Vulnerable adult)* [2007] EWHC 623 (Fam); [2007] 2 FLR 1083, Munby J, as he then was, held that:

1. The detention must be authorised by the court on an application made by the Local Authority and before the detention commences;

2. There must be evidence establishing at least a *prima facie* case that the individual lacks capacity and that confinement of that nature is appropriate;

3. An order for detention must contain provision for adequate review at reasonable intervals.

185. He also stated that the court should specify, in appropriate cases, if reasonable restraint were needed.

186. In *GJ v NJ and BJ (Incapacitated Adults)* [2008] EWHC 1097 (Fam); [2008] 2 FLR 1295 (a case decided in the run up to the new provisions but before they were in their final form), Munby J , as he then was, [1] said that:

i. The Local Authority should hold regular internal reviews;

ii. There should be court reviews in which the Official Solicitor should be involved;

iii. There should be liberty to apply.

[1] And see also Salford City Council v BJ [2009] EWHC 3310 (Fam) per Munby LJ.

187. Counsel submit that that discipline remains appropriate in respect of Section 16 orders in relation to deprivation of liberty. I agree. In this case, if I am to find that either girl is being deprived of their liberty, Miss Morris suggests that I should order court reviews at six monthly intervals. Mr O'Brien says that the circumstances of this are such that I should simply declare the deprivation of liberty to be lawful, and not order reviews, because the placement will be regularly reviewed by the Local Authority pursuant to its statutory duties and the circumstances of this case are such that it is unnecessary for there to be a court review.

188. I accept that where deprivation of liberty is authorised by the court, but where standard authorisation is not available, the court must review. Tempted though I am to say that there may be cases where the case is so barely over the line that it does not require review, I consider that once the line is crossed the court has to provide a reviewing process. Either a person is deprived of liberty or not.[2] The review, I should say, is directed not towards the placement in itself, but as to the courses of action which amount to deprivation of liberty.

The background to the current placements

189. The Interim Care Orders were first made on 2 May 2007 when MIG had just attained the age of 16 and MEG had just attained the age of 17. Although Section 31 (3) of the Children Act 1989 provides that no Care Order may be made in respect of a child who has attained the age of 17, each for the purposes of the Children Act 1989 was and in the case of MEG still is a "child" until attaining the age of 18, and the Local Authority has duties to each until each attains their majority, pursuant to Part III Children Act 1989 as I have set out above. In my view as the subject of statutory Care Orders neither MIG nor MEG can be said to have been deprived of their liberty simply by their placement in foster homes (and then in the case of MEG in a residential home) when the Local Authority had parental responsibility under the Care Order and was exercising its statutory duties, and in the absence any more specific measures to deprive either of their liberty. In MEG's case she was still subject to an Interim Care Order when she moved to B Home in the summer of 2008.

190. There is some confusion given the history set out in paragraphs 12 and 13 above as to exactly when it was that the care order expired. By chapter 10 of the Code of Practice, Paragraph 10.12, it is provided that "application to the Court of Protection should be made before deprivation of liberty begins. A Court of Protection order will then itself provide a legal basis for deprivation of liberty." The same point was made by Munby J in Re *GJ, NJ and BJ (Incapacitated Adults)*. There is no statutory requirement for such an application to be made prior to deprivation of liberty taking place, and the guidance quoted above uses the word "should" rather than "must". There must be power, in my judgment, to make a welfare order authorising deprivation of liberty when the deprivation of liberty has commenced under a care order, and that care order is no longer in existence.

191. If Miss Morris is right then the orders which I have successively made authorising the accommodation of MIG and MEG may in themselves have deprived MIG and MEG of their liberty which has not been specifically authorised (by way of declaration prior to 1 April 2009), and have thus created an unlawful state of affairs.

[2] Munby LJ takes the same view. In Salford City Council v BJ [2009] EWHC 3310 (Fam) he said "regular reviews by the court are not merely desirable, not merely a matter of good practice; they go, as both the Strasbourg jurisprudence and the domestic case law make clear, to the very legality of what is being done."

The arguments

192. I now turn to the question of whether either MIG or MEG is in fact deprived of liberty in their current circumstances.

193. Miss Morris submitted that on fine balance MIG is deprived of her liberty, because in the sense in which the ECHR in *HL v United Kingdom*, and Munby J in *DE v JE* analysed the concept, she is unable to decide where she is able to live, is not free to leave, is subject to continuous supervision and control, and is deprived of social contacts by the declaration which I make in relation to her family and others. In relation to MEG she relies on the same factors, plus the fact that MEG is in a residential home and receives medication. Mr O' Brien for the Local Authority says that the fact that:

    a. MEG is in a residential home;

    b. she receives medication.

    potentially tips the case over the line.

194. Before coming to consider these arguments in greater detail, I will deal with other preliminary points.

Is it relevant that MIG is living with a foster mother who is a self employed independent contractor rather than an employee of the Local Authority?

195. Mr O'Brien for the Local Authority submits that since JW is an independent contractor, any deprivation of liberty is not imputable to the Local Authority. I have been referred to a number of public law authorities which I do not regard as necessary to analyse. In order for there to be an Article 5 breach, deprivation of liberty must be imputable to the state.

196. I do not agree with him that JW's employment status is relevant. Firstly the Mental Capacity Act 2005 states that "no person" may deprive 'P' of his or her liberty. Secondly, whatever JW's contractual status, she is undoubtedly the Local Authority's agent. MIG was placed first of all by the Local Authority pursuant to a court order. The court has authorised her placement in the home. The only sense in which it is said that JW may be depriving MIG of her liberty is by providing continuous supervision and control whilst MIG is in her household. It is the Local Authority and the court who have restricted her contacts (so it is said) and who have the responsibility for deciding on her placement.

197. That is not to say that the fact that MIG is living in a domestic setting is irrelevant to the factual background.

Can a person be deprived of their liberty in a domestic setting?

198. In *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867 Munby J said at [54] "although one tends to think of habeas corpus as a remedy against state action, the unlawful detention need not be at the hands of the state or public authority. Even a domestic house may for this purpose be a prison: see R v Jackson [1891] 1 QB 671, especially per Lord Esher MR, at 682…"

199. In my view it is possible for a person to be deprived of their liberty in a domestic setting. The passage cited above from the Code of Practice paragraph 1.20 ("it will

only be lawful to deprive someone of their liberty elsewhere (for example in supported living arrangements in their own home, or in a day centre) when following an order of the Court of Protection") supports that proposition. Control orders, pursuant to the Prevention of Terrorism Act 2005, and house arrest generally, are obvious examples.

200. But conversely, even a degree of confinement in particular premises may not constitute deprivation of liberty. In my view there must be a significant element of confinement, of restriction, which crosses the line between restrictions on liberty and confinement. In *JJ*, the House of Lords held by a majority that 18 hours a day confinement in a small flat with other restrictions on movement constituted deprivation of liberty. Lord Brown of Eaton under Heywood (one of the majority) was the only member of the committee who gave consideration to what would cross the line. He said "18 hour curfews are simply too long to be consistent with the retention of physical liberty. In my opinion they breach Article 5. I am equally clear however that 12 or 14 hour curfews…are consistent with physical liberty….for my part I would regard the acceptable limit to be 16 hours leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day. Such a regime…can and should properly be characterised as one which restricts the subject's liberty of movement rather than one which actually deprives him of his liberty. Permanent confinement beyond 16 hours a day on a long term basis necessarily to my mind involved the deprivation of physical liberty."

201. In *Secretary of State for the Home Department v GG* [2009] EWHC 142, Collins J held, at [52], that "the curfew period cannot be considered in isolation. Whether there is deprivation of liberty and so a breach of Article 5 will depend on the effect of the restrictions. Thus a 16 hours curfew coupled with restrictions on visits for one removed from his home area and so living where he knows no one and so effectively subjected to isolation may well mean that 16 hours can be regarded as excessive. Having said that, it is clear from the speeches in *JJ* that what must be the principal focus is the extent to which the controlled person is actually confined."

Is it sufficient to create a deprivation of liberty, in the case of an incapacitated adult, that he or she is not capable of consenting to living in a particular place, which may be a domestic home?

202. In *HL v United Kingdom* the ECHR held that the fact that the patient was unable to consent was irrelevant. He did not positively object to being placed in the hospital. He was still deprived of his liberty. However in my judgment that cannot be the determinative factor. No single factor is likely to be enough, save in the paradigm case. The Deprivation of Liberty safeguards contain a detailed checklist, and if the question of lack of capacity to consent were determinative that checklist would simply be unnecessary. In my judgment the question of whether 'P' is in an institutional setting also cannot be left out of the evaluation. It is notable that in *HL v United Kingdom* it was not suggested that HL would be deprived of his liberty in the domestic setting of the home of the foster carers, a placement to which he also lacked capacity to consent or dissent, and which he was not free to leave. The foster carers are described as "paid carers" and they must, I assume, have been employed by the Local Authority with social work responsibility for HL. In *HM v Switzerland*, although I accept that the principles were not there so clearly defined as in subsequent cases, the setting in which HM was living seems to have been one of the

factors which was taken into account. A valid point is made by Munby J that in *Storck v Germany* the Strasbourg court stated that HM had the capacity to consent. But in *HL v United Kingdom*, at paragraph 93, the Court remarked that the fact that the regime in the foster home in *HM v Switzerland* was "entirely different to that applied to the present applicant (the foster home was an open institution which allowed freedom of movement and encouraged contacts with the outside world) allows a conclusion that the facts of the HM case were not of a degree or intensity sufficiently serious to justify the conclusion that she was detained". In *Storck v Germany* the factors outlined by the court plainly constituted objective confinement and deprivation of liberty. They are in marked contrast to the circumstances in which either MIG or MEG finds herself.

203. There is a valid distinction in my judgment between a confinement within the home: equivalent to house arrest, as in the control orders cases, and the mere fact of being placed in a foster home. As Collins J said in *GG*, it is the effect of the restrictions and the extent of the confinement which matters. And Lord Bingham in *JJ* stressed the need to examine what the person's life would have been like had they not been placed in the location where they are said to be confined. I do not accept that mere placement in a residential or domestic setting can be construed as creating confinement of itself just because the person cannot legally decide whether to remain there or not. In my judgment, if a person is living what is for them a normal life in a family home, and would not be living any different life in any other setting including in their own family home, then it is very difficult to see how they can objectively be confined, simply because they lack the capacity to consent to that placement.

204. A person who lacks capacity and who cannot therefore give or withhold consent may nonetheless express a wish not to be in a particular setting. In *JE v DE* Munby J placed very considerable weight on the fact that although incapable of taking a decision as to his residence, JE consistently stated his wish to leave. The applicant in *Storck v Germany* wished to leave the hospital and attempted to run away. Notwithstanding that MIG and MEG cannot consent to their placements, the fact of happiness in their respective environments, each regarding the place where they live as home, and their wish to stay there, must be relevant to the question of both the objective and the subjective element.

The Code of Practice and the Deprivation of Liberty Safeguards Code

205. The Mental Capacity Act 2005 Code of Practice comments that

> "In HL v United Kingdom the Court held that the difference between restriction and deprivation of liberty was one of 'degree and intensity, not nature or substance'. There must therefore be particular factors in the specific situation of the person concerned which provide the 'degree' or 'intensity' to result in a deprivation of liberty. In practice, this can relate to
>
> - The type of care being provided
> - How long the situation lasts
> - Its effects, or
> - The way the particular situation came about."

206. The Deprivation of Liberty Safeguards Code was issued together with the amendments to the Mental Capacity Act 2005 effected by the Mental Health Act 2007 which introduced the scheme of standard authorisation of deprivation of liberty.

Notwithstanding that this is not a standard authorisation case; I agree that it is provides a helpful check list:

"2.5 ... the following factors can be relevant to identifying whether steps taken involve more than restraint and amount to a deprivation of liberty. It is important to remember that this list is not exclusive; other factors may arise in future in particular cases.

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
- Staff exercise complete and effective control over the care and movement of a person for a significant period.
- Staff exercise control over assessments, contacts and residence.
- A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.
- A request by carers for a person to be discharged to their care is refused.
- The person is unable to maintain social contacts because of restrictions placed on their access to other people.
- The person loses autonomy because they are under continuous supervision and control.

"2.6 In determining whether deprivation of liberty has occurred, or is likely to occur, decision-makers need to consider all the facts in a particular case. There is unlikely to be any simple definition that can be applied in every case, and it is probable that no single factor will, in itself, determine whether the overall set of steps being taken in relation to the relevant person amount to a deprivation of liberty. In general, the decision-maker should always consider the following:

- All the circumstances of each and every case.
- What measures are being taken in relation to the individual? When are they required? For what period do they endure? What are the effects of any restraints or restrictions on the individual? Why are they necessary? What aim do they seek to meet? What are the views of the relevant person, their family or carers? Do any of them object to the measures?
- How are any restraints or restrictions implemented? Do any of the constraints on the individual's personal freedom go beyond "restraint" or "restriction" to the extent that they constitute a deprivation of liberty? Are there any less restrictive options for delivering care or treatment that avoid deprivation of liberty altogether?
- Does the cumulative effect of all the restrictions imposed on the person amount to a deprivation of liberty, even if individually they would not?

...

> "2.8 ... Preventing a person from leaving a care home or hospital unaccompanied because there is a risk that they would try to cross a road in a dangerous way, for example, is likely to be seen as a proportionate restriction or restraint to prevent the person from coming to harm. That would be unlikely, in itself, to constitute a deprivation of liberty. Similarly, looking a door to guard against immediate harm is unlikely, in itself, to amount to a deprivation of liberty.
>
> …
>
> "2.9 However, where the restriction or restraint is frequent, cumulative and ongoing, or if there are other factors present, then care providers should consider whether this has gone beyond permissible restraint, as defined in the Act."

All the circumstances: MIG

207. I start with the description of MIG's placement from the Triangle report, which I accept is an accurate assessment of her circumstances. MIG is living in a "very secure stable foster home and in our work she demonstrated a strong attachment to her foster carer J. She has her own room, exceptionally good support with basic life skills and personal care with clear boundaries and routines. Additionally J gives her educational input, exciting holidays and trips…In our view this secure and consistent placement has helped MIG immensely. She is part of a loving and committed foster family with whom she has formed healthy relationships and learnt to develop her independence. …she is significantly dependent on (JW) for her emotional well being. If for any reason this placement were to suddenly end, we predict that MIG would collapse…Some of the parenting that (JW) provides for MIG is in line with the parenting usually provided to a much younger child. She requires high levels of support in all aspects of her life."

208. MIG is a young woman of 18 who has probably experienced a traumatic upbringing, but certainly one characterised by violence, sexual abuse of a sibling, neglect, chaos, and where her mother put her own needs and wants before her children. MIG has probably suffered some emotional damage. She has a severe learning disability with the cognitive ability of a 2-3 year old and has hearing, visual and speech impediments. She is incapable of independent living. She is largely dependent on others. She needs to be looked after save for basic care needs. She lacks capacity to make decisions as to her care, education, social and family contacts and health care. She cannot go out on her own. She shows no wish to go out on her own. She can communicate her wants and wishes in a limited manner.

209. MIG is living in an ordinary domestic environment which she regards as home. She is not restrained in any way. She is not locked in in any way, (although she does refuse to keep her bedroom door open, causing some concern to her foster parents). She does not wish to leave. She wants to stay with JW. She loves JW and regards JW as her "Mummy".

210. Continuous supervision and control is exercised so as to meet her care needs. Limitations on movement are generally dictated by limitations in MIG's ability, or her lack of awareness of danger. She has never sought to leave the home. If she were to try to leave she would be restrained for her own immediate safety. MIG has no sense of safety and in particular no awareness of road safety. She needs to be guided and accompanied. She needs guidance in crossing roads. This is because of her disability. Such restraints do not amount in my judgment to deprivation of liberty. She is not medicated.

211. There are no restrictions on her social contacts save by way of court declaration. She has as many social contacts within and outside the home as she is able in accordance with her own capacity to interact with others. She goes to college. She is transported to and from college. Whilst there she is not under the control of JW or the Applicant.

212. Although her mother would like to care for her she reluctantly accepts that she should remain where she is. her mother has no objections to the care provided for MIG by JW. her mother does not regard her as being confined or retained. MIG's sisters HG and SG support the placement.

All the circumstances: MEG

213. MEG is well and appropriately placed at B Home. She was placed there because of the breakdown of her foster placement. The Triangle assessment, which I accept, is that "a breakdown of MEG's placement at B Home, especially if sudden, is likely to trigger a further and sustained deterioration in MEG's emotional state and behaviour, potentially requiring a secure placement." It seems therefore that Triangle did not regard B Home as a "secure placement".

214. MEG is a young woman of 17 who has probably experienced a traumatic upbringing, but certainly one characterised by violence, sexual abuse of a sibling, neglect, chaos, and where her mother put her own needs and wants before her children. MEG has suffered some emotional damage, probably considerable emotional damage. She has a learning disability with the cognitive ability of a 4-5 year old and visual impediments. Her speech is more advanced than her other functioning. She can communicate her wishes and feelings clearly.

215. B Home is a small group home where MEG is one of four residents. She has one to one and sometimes two to one support. Her behaviour is stabilising with behavioural management techniques. MEG presents challenging behaviour in which she has outbursts. Those outbursts are principally directed at other residents and young persons whom she perceives as less able than herself. She has to be restrained from time to time when she has an outburst. She is not otherwise restrained. Continuous supervision and control is exercised so as to meet her care needs. She is not in a locked environment.

216. MEG receives medication 'Risperidone' for the purpose of controlling her anxiety, which is a pervasive feature of her emotional state. I have re-read my note carefully. No oral evidence was given about this medication and it uses at the hearing. Miss Morris has since pointed out to me that Mr O'Meara reported that the staff at B Home told him that MEG receives medication to "stabilise her mood and calm her". She also drew my attention to Dr Xenitidis' report where he records that LG told him that the gradual but significant improvement in MEG's behaviour was caused in his view by the "implementation of strategies in place both reactive and in terms of rewarding positive behaviour as well as identifying early warning signs of her behaviour. It is possible that tranquilising medication prescribed for her 'Risperidone 1mg at night' may have helped as well." In addition he felt that the fact that MEG has a structured day programme has helped a lot". The effect of the medication on MEG was not explored in any way in the hearing before me and Dr Xenitidis in particular was not asked about it in the letter of instruction or in evidence. Miss Morris tells me that the Official Solicitor takes the view that the fact that MEG is medicated means that the arrangements go beyond "ordinary restrictions" in a children's home for

adolescents when taken together with the restraints which have to be exercised temporarily and from time to time when she has a tantrum.

217. In my judgment the fact of administration of medication in itself cannot create deprivation of liberty. On the material before me I do not conclude that medication plays a part in restraining MEG so as to create a deprivation of her liberty. She was not medicated in order to secure her admission and is not medicated to prevent her from leaving. My reading of the evidence was that she would require this medication in any setting. There were no specific references to measures of restraint in the evidence save that in the final care plan it was stated that MEG had sometimes to be guided away from an activity which could trigger unpredictable behaviour using "MAYBO" (physical intervention programme) techniques in a way which did not involve physical restraint, although I understood from the descriptions of seriously aggressive incidents (now rare) that there might have had to be appropriate physical intervention. This physical restraint in my judgment does not amount to a deprivation of liberty.

218. MEG is incapable of independent living. She is largely dependent on others. She needs to be looked after save for basic care needs. She lacks capacity to make decisions as to her care, education, social and family contacts and health care. She cannot go out on her own. She shows no wish to go out on her own. She can communicate her wants and wishes in a limited manner. There are no restrictions on her social contacts save by way of court declaration. She goes to college. She is transported to and from college. Whilst there she is not under the control of JW or the Applicant and there are no restraints on her social contacts. She has a lively social life both in the home and at college and outside the home accompanied by staff and other residents.

219. Although her mother would like to care for her she reluctantly accepts that she should remain where she is. Her mother has no objections to the care provided for MEG by B home. Her mother does not regard her as being confined or restrained. MEG's sisters support the placement.

220. Although, as Lord Bingham said in *JJ*, it is dangerous to transpose the effects of decisions from other decided cases on different facts, I note that in *LLBC v (1) TG by his litigation friend the Official Solicitor) (2) JG and (3) KR* [2007] EWHC 2640 (Fam) Mr Justice McFarlane, in the context of an application pursuant to the inherent jurisdiction prior to the implementation of the DOL amendments to the 2005 Act, in relation to an elderly man ('T') placed in a care home, held that although the case was close to the borderline, the man had at no time been deprived of his liberty, because:

i. The care home where the man had been living was an "ordinary care home where only ordinary restrictions on liberty applied";

ii. The family were able to visit him on an unrestricted basis;

iii. T was personally compliant and expressed himself as happy there. He had lived in the Local Authority care home for three years and was objectively content with the situation there;

iv. His placement there was authorised by the court, in the context that TG lacked capacity to determine the issue of his own residence, and under initial orders that gave the family the ability to apply to the court to vary or discharge the order; and which had been continued at the first on notice hearing by consent, at a time when JG and KR were represented by solicitors and counsel;

v. Some family members supported the placement and others did not. (In this case HG and SG support the placement, and the mother reluctantly accepts);

vi. There were no occasions when he was objectively deprived of his liberty.

221. In law MEG does not have complete autonomy as she has not yet attained her majority, and even though the Local Authority has no parental responsibility for her since the discharge of the care order, it still has statutory powers and duties to her. In my view it is not irrelevant in MEG's case that she is under 18. I accept that the fact that she is under 18 does not mean that she can be arbitrarily detained or confined even on the authority of those with parental responsibility for her. In *Storck v Germany*, in contrast to *Nielsen v Denmark*, the Strasbourg Court held that the fact that 'P' (aged 15) had been detained and confined in hospital with the intention that she be detained and confined there by her parents who had parental responsibility for her did not prevent her from being deprived of her liberty. Nevertheless the fact that there are specific duties on the Local Authority to accommodate MEG is relevant to examining the reasons why she has been accommodated.

Conclusion

222. I remind myself that the purpose of Article 5 is to prevent "arbitrary or unjustified deprivations of liberty". The placements of MIG and MEG in their respective homes were not arbitrary. In *HL v United Kingdom* HL was removed arbitrarily from his home when the authorities had no legal authority so to do to a hospital setting, in *Storck v Germany* the girl was physically detained and medicated to restrain her in a hospital having been placed and confined there in purported exercise of parental responsibility and where there was no court order, in *JE v DE* the husband was taken to an institution where there were restraints on his liberty where the Local Authority did not seek a declaration under the inherent jurisdiction. There are immediate contrasts with this case, where both girls have been placed under the lawful authority of a care order, MEG is still the subject of specific statutory duties, and the courts have been involved throughout. In my view the fact of their removal from their homes and placement in public care under the care order and subsequently pursuant to an order in the Court of Protection is in my view not enough to cause a deprivation of liberty in itself.

223. It is said that that MIG and MEG are each deprived of their liberty because they lack the capacity to consent or to object to their placement, and that they lack the freedom to leave where they are living. In my view this casts the net too wide.

224. I have set out above at paragraphs 202-204 my analysis, which I shall not repeat, as to whether mere lack of capacity to consent to living arrangements can in itself create a deprivation of liberty. I add that if mere lack of capacity to consent were enough

then all such persons placed by a Local Authority would be considered to be deprived of their liberty. The provisions of the Mental Capacity Act 2005 and the Code of Practice and the Deprivation of Liberty Safeguards Code plainly do not support that analysis. Although neither is able to consent to their living arrangements, the fact of their wishes is an important part of the factual context: each wants to remain living in her present environment.

225. Freedom to leave has to be assessed against the background that neither wants to leave their respective homes, there is no alternative home save that of their mother where neither wishes to live, and neither appears to have the capacity to conceptualise any alternative unfamiliar environment. I have been told and I accept that if the Local Authority felt that either was actively unhappy where they were placed, then other arrangements would be made.

226. In my view it is necessary to analyse what specific measures or restraints are in fact required. In *Re GJ, NJ, BJ (Incapacitated Adults)*, a case where relief was sought pursuant to the inherent jurisdiction, but which is nonetheless of relevance, the Local Authority sought and obtained declarations (*inter alia*) :-

    a. That it was lawful and in BJ's best interests that reasonable and proportionate measures as set out in the care plan …(including those measures which amount to a deprivation of liberty) be in place to prevent harm to himself or others;

    b. That it was lawful to prevent BJ leaving his placement.

227. No such declarations or authorisations were sought here. Specifically no authorisation was sought to prevent either from leaving the placement. No declaration was sought that it was lawful to administer Risperidone to MEG. In the draft order submitted at the hearing the relevant declarations sought in the event that I concluded that there was a deprivation of liberty were that each should live in their respective homes, attend C College, and have contact with family members as set out in the schedule to the draft order. There was no reference to medication. No more specific measures were referred to in the draft order, or in the care plans which were sought to be authorised. On the basis, as I have found, that placement in itself and lack of consent in itself is not sufficient to create a deprivation of liberty in the circumstances of this case, then there must in my judgment be some other specific course of action adopted or measure taken whereby restraints or restrictions are placed upon an individual of sufficient degree and intensity to constitute a deprivation of liberty. The guidance in the Deprivation of Liberty Safeguards Code supports this analysis.

228. In neither placement in my judgment is there "confinement in a restricted space for a not negligible length of time." MIG is living in a foster home and goes to college during the day; MEG is living in a residential home and goes to college during the day. In the evenings they return to their respective homes. In their circumstances, and by comparison with the considerations in the control order cases, neither is subject to any form of house arrest or curfew.

229. The "concrete situation" is that each lives exactly the kind of life that she would be capable of living in the home of her own family or a relative: their respective lives being dictated by their own cognitive limitations. Each is subject to limitations on her

own autonomy and freedom of movement and ability to enjoy activities by being guided or accompanied in order to provide for her own immediate protection.

230. I agree that it is impermissible for me to consider whether, if either is objectively detained or confined, this is with good or benign intentions or in their best interests. But notwithstanding that, as was observed by Lord Walker in *Austin*, "purpose" does not figure in the list of factors to be evaluated in determining the concrete situation of the person concerned, I am of the view that in this case it is permissible to look at the "reasons" why they are each living where they are. In the case of each there are overwhelming welfare grounds for them not to live in their family of origin. In relation to both girls, the primary intention is to provide them each with a home. Within those homes, they are not objectively deprived of their liberty. In neither of those homes are they there principally for the purpose of being "treated and managed". They are there to receive care.

231. I accept, as Miss Morris argues, that a Secure Accommodation order or an order pursuant to the inherent jurisdiction would be sought in order to impose, and would impose, a deprivation of liberty closer to the "paradigm" example than the circumstances of either girl here, and that the question of what circumstances create a deprivation of liberty in any individual case may involve more subtle considerations. But were MEG's behaviour such that she needed to be prevented from running away she would have been placed in a secure unit, probably by way of Secure Accommodation order. As I have said above, it is of some significance here that the Local Authority saw no need to seek any order pursuant to s 25 Children Act or the inherent jurisdiction.

232. Neither was it felt necessary to make any application to the Court to authorise deprivation of liberty before the final hearing. I appreciate that the Official Solicitor had highlighted, through Miss Morris's position statements, (although not in his in his final report dated 24 April 2009) the issue of deprivation of liberty as one that needed to be considered once the amendments to the Mental Capacity Act 2005 came into force and rightly perceived it to need careful consideration, and considered that MIG's case was near the borderline. Nonetheless no pressing need was felt to regularise a situation which was, if there were a deprivation of either girl's liberty, unlawful. Of course I accept, particularly bearing in mind the comment of Lord Steyn in *Bournewood*, that the perception or intention of the detainer cannot prevent there being a deprivation of liberty, but I cannot ignore this history in my assessment of the proposition that either of these girls is objectively deprived of their liberty, particularly since the authorities establish that authorisation must be sought before the deprivation of liberty commences.

233. With specific regard to the measures said to amount to deprivation of liberty here, and to the Deprivation of Liberty Safeguards Code set out above, it is relevant that:

    a. Each was under the age of majority when admitted under the powers conferred by the Care Orders to their respective homes. Neither was admitted using restraint or medication;

    b. The question of where each is to live is for the court, and no decision has been taken by MIG's foster mother (who is not "staff") or the staff of B Home that either cannot leave;

c. Each lacks freedom and autonomy dictated by their own disability, rather than because it is imposed on them by their carers. Each is under the continuous supervision and control of her carers (and in the case of MIG, of her foster family rather than "staff") so as to meet her care needs rather than to restrain her in any way;

d. MEG is accommodated as a child in need;

e. Neither is restrained save for immediate purpose of ensuring safety, and, in the case of MEG, for her immediate protection and that of others when she has an outburst. In my view the case of neither does this cross the line so as to constitute deprivation of liberty;

f. Medication is not administered to MEG so as to restrain her from leaving or to restrain her activities generally. In my view this does not cross the line either;

g. Neither is in a locked environment;

h. If either wished to leave in the immediate sense each would be restrained or brought back for their safety. If either were unhappy in their residential settings other arrangements would be sought;

i. Neither is deprived of social contacts, and in the school environment they can associate with whom they will, subject to the teachers or other support staff in that environment. Specific controls are placed on their contact with their mother and stepfather, but these controls are imposed not by their carers, but by court order. The arrangements in relation to contact with HG and SG are dictated by practicalities;

j. Neither is in their respective homes all the time. They go to college for significant periods of time, where it is not suggested that either is deprived of her liberty, notwithstanding their respective lack of capacity to consent to attending college or to restraints on leaving that environment during the school day;

k. Some relatives support their placements and some do not. None actively objects to the placement. No relative objects to the care regime. No request by any interested person for either to be released into their care has been refused;

l. The fact that MEG is living in a residential home does not mean that she is deprived of her liberty. It is, to quote Mr Justice McFarlane in *LLBC v TG, JG and KR*, an "ordinary care home where only ordinary restrictions on liberty apply";

m. As in *LLBC v TG, JG and KR*, the subjects of these proceedings have at all times been the subject of either care orders or Court of Protection orders, under whose auspices they have been placed originally, and each person with an interest in the care and other arrangements for MIG and MEG has and has had the ability to apply to the court;

n. No challenge to their placements has been made and the case has proceeded without any active attempt to invite the court to authorise deprivation of liberty until the final hearing;

o. No other arrangements less restrictive or invasive could be devised that would meet their care needs.

234. I have not met MIG or MEG but I have read much about them and heard much too. Their wishes and feelings are manifest and clearly expressed. They plainly have no subjective sense of confinement. In a non legal sense they have the capacity to consent to their placements. I cannot imagine that any person visiting MIG at the home of JW, or MEG at B Home would gain any sense of confinement or detention.

235. Those circumstances are in my judgment very far from the "paradigm" example of imprisonment.

236. Miss Morris submitted to me that the purpose of the legislation is to protect vulnerable persons who are subject to more than minimal intervention. She says that MEG will be subject to intervention and physical restraint because she is in a residential home and is medicated and that it would be "sad if she didn't get the benefit of the legislation". But that is not the test. The question is, are the restrictions of such a degree and intensity that she is objectively deprived of her liberty. In my view they are not.

237. In my view neither is deprived of her liberty within Article 5(b) nor is there any breach of the right of either to respect to private or family life pursuant to Article 8.