What is deprivation of liberty? The Supreme Court speaks.

The Supreme Court has this morning overturned the Court of Appeal in the cases of *P (by the Official Solicitor) v Cheshire West and Chester Council*, and *P & Q (or MIG & MEG)(by the official Solicitor) v Surrey County Council* [2014] UKSC 19. In what is the most far-reaching human rights case heard in the UK for a decade, the Supreme Court reversed the *Cheshire West* decision by 7 Justices to 0, and *Surrey* decision by 4 to 3.

The cases rested on what is the proper test to be applied to determine where there is a deprivation of liberty when mentally incapacitated people are required to live in a place when they could not (and therefore did not) consent? These places could be hospitals or care homes, but in the three appeals before the Supreme Court they were an independent supported living placement, a unit for learning disabled young people and a foster home. If they are deprived of their liberty, Article 5 of the European Convention is engaged and protections including periodic reviews of their detention are triggered. Their detention must be authorised and reviewed by the Court of Protection. Where the statutory scheme applies, in hospitals and care homes, detained residents fall within the so-called DOLS (deprivation of liberty safeguards), which is an administrative procedure whereby people may be detained without the authority of a Court (albeit with the right of appeal to one).

The Court had to decide whether the "test" to be applied should include factors such as "*the relative normality*" of the surroundings in which the person is placed (the more "normal" the less it was likely to involve deprivation of liberty); whether the person (or their relatives or carers) objects to the placement (if they do not it is less likely to involve deprivation of liberty); whether a person with comparable disabilities would be expected to live in a less restricted environment (if so, it is more likely to be a deprivation); whether the reason or purpose for the placement is a relevant factor (if the measure is an appropriate way of achieving the best for the person, the less it is likely to amount to a deprivation)? These were factors that the Court of Appeal had suggested were relevant.

The majority of the Supreme Court rejected these factors as part of the test. Lady Hale (with whom Lords Neuberger, Kerr and Sumption agreed) emphasised the universality of human rights:

> *In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorable from the universal character of human rights, founded*

> *on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights, rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.*
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> *Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that 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".*

Consequently, the "*relative normality*" of the placement, and the reason for the person being placed there were ***not*** relevant factors in determining whether the person was deprived of their liberty. The comparator survived, but not in the form envisaged by the Court of Appeal. The comparator was not another person with similar disabilities, but an ordinary person without mental incapacity. Furthermore, the person's compliance or lack of objection was also not relevant.

Lady Hale then went on to ask whether there is an ***acid test*** for deprivation of liberty in these cases? She reviewed the Strasbourg case law and agreed that the classic test *Guzzardi v Italy* (1980) 3 EHRR 333 is repeated in all the ECtHR cases: i.e. the starting point is the "*concrete situation of the individual*", and then one must always "*take account of a whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question*". Lady Hale was sure that these would confidently be repeated once again if these cases were to go to Strasbourg.

Then she goes on (at para [48]) (my emphasis)

> "*But **these cases** are not about the distinction between a restriction on freedom of movement and the deprivation of liberty. P, MIG and MEG are, for perfectly understandable reasons**, not free to go anywhere without permission and close supervision**. So what are the particular features of their 'concrete situation' on which we need to focus"*

At [49] she identifies the key factor as being whether the person is ***under continuous supervision and control and not free to leave***.

That is the test.

What is meant by "free to leave"? Lady Hale refers to Munby, J. in *JE v DE* [2007] 2 FLR 1150 where he had defined "freed to leave" as "*not just for the purpose of some trip or outing approved by [the local authority] 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.*."

The fact that a placement may have "relatively open conditions" was no more determinative of deprivation of liberty than (for example) open hospital conditions (in e.g. *Ashingdane v UK* (1985) 7 EHRR 528).

There were 5 judgments in the case. Lord Neuberger and Lord Kerr agreeing with Lady Hale (as did Lord Sumption, although without writing his own judgment). Lord Carnwath and Hodge jointly disagreed with Lady Hale that the test should go as far as she did. They considered that the Strasbourg cases fell short of a universal test of the sort Lady Hale put forward, and that there was insufficient certainty that Strasbourg would have gone as far as she did. They preferred a balancing of the numerous factors outlined in the cases (intensity or restriction, manner of implementation etc). Lord Clarke agreed with Lords Carnwath and Hodge.

Conclusions:

- This case should be seen as an affirmation of the principles of the *Mental Capacity Act*.

- It recognises those who lack capacity as being equal with those who do not. If the concepts of relative normality, Munby L.J.'s comparator, and the significance of an absence of objection had been determining factors in whether Article 5 applied the result would have been to remove those protections from those who need them the most.

- The test fits in with the ethos of the *United Nations Convention on the Rights of Persons with Disabilities*.

- During the hearing the Justices had been concerned that if the test put forward by the Official Solicitor were to be accepted it would lead to large numbers of people coming within the protection of Article 5 (including those who would fall under the DOLS), and this would create bureaucratic difficulties as well as considerable cost. This remains to be seen. But in the week that the House of Lords Select Committee was so scathing of the inadequacy of the protections afforded by the DOLS, it may be that this judgment will ensure that those who

have ***not*** fallen under the protection of the regime will now do so. It is suggested that this will be a good thing.

- Another concern was that if the test for deprivation of liberty was as sought by the Official Solicitor, it would mean that a number of people would, in fact, be detained who could not lawfully be so. These include patients subject to guardianship, community treatment orders or conditional discharges under the Mental Health Act. These orders do not without more authorise deprivation of liberty (although they are often used as if they do). In the case of guardianship, the patient is certainly not free to leave in the sense of living where he chooses- that is the prerogative of the guardian. However, he may not be deprived of his liberty if there is an absence of continuous supervision and control. For instance, many guardianship patients are free to spend their days doing what they like, where they like- but have to reside at a particular address. They are not free to leave so that they can live somewhere else, but they are not subject to continuous supervision. It remains to be seen whether the Supreme Court's test creates a conflict between the two regimes.

- Finally, the test will hopefully bring clarity to an area that had become almost impossibly difficult to predict. Lets hope the BIAS, clinicians, social workers, IMCAs, legal advisers and Judges, as well as the people concerned and their families will find it easier to identify a "DOL" after *Cheshire West*!

Simon Burrows was instructed by O'Donnells, Preston on behalf of the Official Solicitor for P in the Cheshire West case from first instance to the Supreme Court. He was led by Richard Gordon, Q.C. in the Court of Appeal and the Supreme Court, and was co-junior with Amy Street in the Supreme Court.