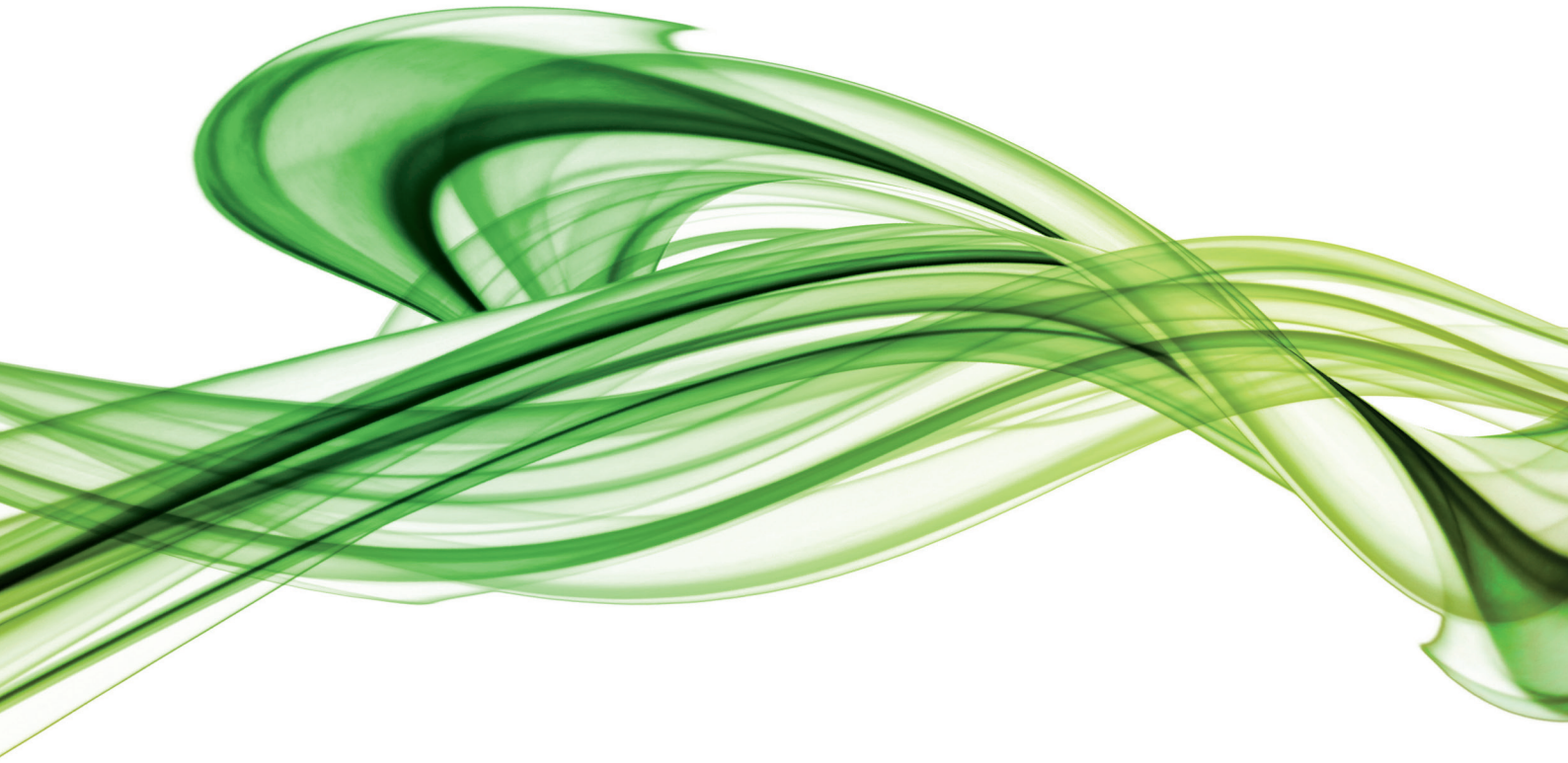
The Law Society

Identifying a deprivation of liberty: a practical guide

Summaries of key cases



Introduction

The cases summarised here represent the key English cases relating to deprivation of liberty since 2009,[1] together with (at the end) a list of cases that we consider should not be followed in light of the decision of the Supreme Court in Cheshire West. We attach what we call "health warnings" to those cases.

The chapter includes not just the cases relating to what constitutes a deprivation of liberty but also the most important cases relating to how deprivations of liberty in this context can be authorised.

Not all the issues in each case are summarised; rather, the focus is on questions relating to deprivation of liberty.

The cases are set out in chronological order. There are hyperlinks to publicly available transcripts. In the majority of cases, more detailed discussions can be found on the (free) 39 Essex Chambers case summaries database, available at www.copcasesonline.com.

References to paragraphs are to paragraphs in the main body of the guidance unless the context makes clear.

1. A Primary Care Trust v P and Ors [2009] EW Misc 10 (EWCOP) (Hedley J)

Facts: P was 24 years old at the time of the hearing. P had lived with his adoptive mother AH for a period of 18½ years. He suffered from a severe form of uncontrolled epilepsy and a mild learning disability. There was also a dispute as to whether P suffered from ME. The PCT and the local authority were concerned that both P and his adoptive mother AH were not complying with the medication regime set out by the doctors. P had been admitted as an emergency to hospital with life-threatening epileptic seizures in circumstances where AH had without medical advice withdrawn anti-epileptic medication a few days before. The matter had been before the court on a number of occasions and at the time of the hearing P was accommodated on a hospital ward.

Issues to be decided: 1) issues relating to his capacity to make decisions in respect of his medical treatment, residence, care and contact and ability to conduct litigation and, in the event that he lacked capacity; 2) his best interests in particular in relation to where he should live and the extent and frequency of contact with AH. In considering best interests, there were two conflicting proposals before the court. The PCT supported by the local authority concerned wished to provide P with independent living accommodation with limited contact with his mother. AH wished to resume the care of P on a full time basis. P wished to return to live with AH.

Decision: Hedley J found that P lacked capacity in all regards. He concluded that it was in P's best interests to live in independent living accommodation and for his contact with his mother to be restricted and that these arrangements amounted to a deprivation of P's liberty within the meaning of Article 5(1) of the ECHR. In reaching the conclusion that the arrangements in this case amounted to a deprivation of liberty Hedley J took the following 5 factors into account:

1) The degree of control to be exercised by the staff.

2) The constraint on P leaving if it was his intention to go back to AH.

3) The power of the staff to refuse a request from AH for the discharge of P to her care.

1 A date that we have picked since the 'DOLS regime' came into force in April 2009.

4) Necessary restraints on contact between P and AH.

5) It involved a fairly high degree of supervision and control within the placement.

Hedley J made orders under s.16 (2)(a) MCA 2005 accordingly.

2. *Re P (Scope of Schedule A1)* (30 June 2010) (Unreported) (Mostyn J)

This case concerns the scope of the powers that are granted by a standard authorisation under Schedule A1 to the MCA 2005. In it, Mostyn J was considering the extent of the powers granted to a local authority and a care home under existing (and any renewed) standard authorisations. He noted that it was common cause that these powers extended to a power to restrain P if he tried to leave the care home. The question for him was whether within those powers there was a power to coerce P to return if he refused to return to the care home from a period of leave. Mostyn J noted that it was understandably in P's interests that he should have access to society in the community and 'escape' the confines of the care home, and that the relevant PCT had agreed to fund 'befrienders' to encourage access to the community.

Mostyn J therefore asked himself whether the powers under the existing standard authorisation extend to coercing P back to the nursing home if P refused to return. He noted that it would be little short of absurd if the local authority and care home had powers to restrain P from leaving but not to compel him to return, and that the greater power must include the lesser. Mostyn J therefore declared that the power was implicit in the current and any future standard authorisation.

Note: this case does not, we suggest, provide authority for the proposition that a standard authorisation can be used to authorise a deprivation of liberty in relation to the transfer in or the transfer out of a placement (for instance the initial move into a hospital, or the permanent transfer from one hospital to another). See further in this regard the discussion at paragraph 4.15.

3. *BB v AM* [2010] EWHC 1916 (COP) (Baker J)

Facts: P was a 31 year old Bangladeshi woman, known as BB. She was said to have complex needs, being profoundly deaf with a diagnosis of schizoaffective disorder and probable learning difficulties. She lacked capacity to decide where she should live. In April 2010 BB was removed from home by support workers employed by the Community Mental Health Team, following reports that her parents had assaulted her. After a series of moves she was finally transferred to a hospital managed by a Mental Health NHS Trust in May 2010. BB's deprivation of liberty was authorised by that Trust under an urgent authorisation under the MCA 2005 in June 2010. The authorisation lapsed. The medical evidence was that BB was not detainable under the MHA 1983 because she was happy to stay in hospital and take medication. She had made no attempts to leave and she reported being happy. She changed the subject when asked about her home and family but she did so without showing any negative emotion or particular interest. It was contended by the Official Solicitor on behalf of BB that the arrangements amounted to a deprivation of her liberty and that there was no longer any lawful authorisation for BB's deprivation of liberty.

Issues to be decided: Issues relating to residence and contact were resolved by consent. However, the issue of whether or not BB was (1) ineligible to be deprived of her liberty within the meaning of the eligibility requirements in Schedule 1A MCA 2005 and (2) deprived of her liberty, were unresolved. A declaration was sought by the Official Solicitor acting for BB that the circumstances amounted to a deprivation of liberty.

Decision: Baker J found that BB was not ineligible to be deprived of her liberty within the meaning of the eligibility requirements in Schedule 1A. Accordingly the court was empowered to make an order in relation to her deprivation of liberty under s.16(2)(a) MCA 2005. In the circumstances of the case he found that BB was deprived of her liberty. In reaching this conclusion he took the following 'cumulative' factors into account: (1) BB was away from her family; (2) she was in an institution under sedation; (3) she was in circumstances where her contact with the outside world was strictly controlled; (4) her capacity to have free access to her family was limited by court order; and (5) her movements were under strict control and supervision of hospital staff. Baker J made the declaration sought and made an order authorising her deprivation of liberty under s.16 (2)(a) MCA 2005.

4. *A County Council v MB, JB and a Residential Home* [2010] EWHC 2508 (COP) (Charles J)

Facts: Mrs B had been admitted to a care home following concerns about her being physically assaulted by her husband. An urgent authorisation was granted and then a standard authorisation lasting for one month. Prior to the expiry of the standard authorisation, a further standard authorisation was sought, but the best interests assessor concluded that the best interests requirement was no longer met. This was because Mrs B had displayed emotional and physical signs of distress at having been removed from her home. The local authority supervisory body sought advice as to what they should do, and following some confusion due to difficulty in contacting the Court of Protection urgently, they requested the care home to issue a second urgent authorisation.

Issues to be decided: The question of her best interests in respect of where she should live was no longer an issue at the time of the hearing. The issue before the court was whether the issuing of the second urgent authorisation was lawful.

Decision: Charles J found that the second urgent authorisation could not lawfully be issued. Once an urgent authorisation has been given, detention can only lawfully be extended by a standard authorisation or by court order. The court granted a declaration that Mrs. B had been unlawfully deprived of her liberty from the expiry of the standard authorisation until the court declared the deprivation of liberty lawful at a subsequent hearing. Charles J did not, however, make any award of damages under the Human Rights Act 1998, noting that – in his view correctly – no such award had been sought. See further in this regard the discussion at paragraphs 2.44-2.48.

Charles J went on to give useful guidance about the duties of managing and supervisory authorities; a full discussion can be found at: http://www.39essex.com/court_of_protection/search.php?id=2825.

5. *R (C) v A Local Authority and others* [2011] EWHC 1539 (Admin) (Ryder J)

Facts: C was an 18 year old boy who had been resident in a school for some years. He had autism and severe learning disability with extremely challenging behaviour. His behaviour was managed in large part by the use of a padded blue room in which he was secluded when he exhibited challenging behaviour. He had developed a number of behaviours that were particularly prevalent when in the 'blue room' including defecating, smearing and eating his own urine and faeces, and stripping naked. He was prevented from leaving the blue room for reasons of aggression and nakedness. The blue room was also used as a room to which C had been encouraged to withdraw

as a safe place and was said to have a calming influence on him. C had brought judicial review proceedings against the local authority, through his mother as his litigation friend. The local authority made an application to the Court of Protection and the two cases were heard together. The Official Solicitor replaced C's mother as his litigation friend.

In the judicial review proceedings the Official Solicitor sought declarations that C's rights under Articles 3, 5 and 8 ECHR had been violated, and damages for C as a result. The Official Solicitor sought orders compelling the local authority to provide an appropriate care plan, and make appropriate transitional arrangements.

It was accepted that C had been deprived of his liberty when he was secluded in the blue room. The DOLS procedure could not be used as the school was not a care home or hospital.

Issues to be decided: Whether C's rights under Articles 3, 5 and 8 ECHR had been violated; whether the Code of Practice to the MHA 1983 should apply to C when the provisions of the MHA 1983 were not being used and he was not in hospital.

Decision: Ryder J made the following findings: (1) since at least C's 16th birthday the approach of the MCA 2005 was more relevant to his situation than the Children Act 1989, but this approach was not applied to C; (2) as the DOLS Code of Practice and Schedule A1 of the MCA did not apply to C, an application should have been made to the COP before any deprivation of liberty occurred. In this case the application should have been made on C's 16th birthday; (3) since at least C's 16th birthday there had been no lawful authority to deprive C of his liberty; (4) the court could not make even interim declarations as to whether the conditions in which C was being deprived of his liberty were in his best interests until it had heard oral evidence from a number of those caring for C and from instructed experts; (5) the application of good practice in the COP in any determination of best interests must have regard to the same material as that contained in the DOLS Code of Practice; (6) the MHA 1983 Code of Practice reflects best practice in relation to seclusion. It applies to the care, treatment, and in particular seclusion and restraint of those with mental disorder, whether they are being treated in hospital or in the community, and whether the MHA is being used. As such, the provisions applied to C whose condition fell within the definition of mental disorder in the MHA. Moreover the Code should be applied as a matter of good practice to the seclusion of children and young people in children's homes whose disability does not fall within the definition of a mental disorder.

The court considered the limited number of situations in which secluding C could be lawful and in his best interests. Ryder J considered that seclusion could be used to control aggressive behaviour, but only so long as it was necessary and proportionate and it had to be the least restrictive option. It had to be exercised in accordance with an intervention and prevention plan designed to safeguard C's psychological and physical health. However, Ryder J held that it would be not lawful to seclude C used solely for nakedness, such seclusion being little more than "an amateur attempt at behaviour modification which is not proportionate to any risk or the least restrictive option." Nor would it be lawful to seclude C as a punishment as part of a behaviour management plan, or solely for reasons of him self-harming.

6. London Borough of Hillingdon v Neary [2011] EWHC 1377 (COP) (Peter Jackson J)

Facts: Steven Neary had autism and a severe learning disability and could become very anxious at unexpected changes. Sometimes this would be manifested through lashing out at others. Steven had grown up with his parents Mark and Julie Neary and had lived with his father Mark after his parents separated, remaining in regular contact with Julie. Between January and May 2008 Steven had lived in a support Unit but then returned home. In December 2009 Mr Neary was unwell and agreed to Steven being placed in respite in a Unit. Staff found his behaviour difficult to manage and it was accepted that Steven wanted to go home. Mr Neary sought Steven's return home. Hillingdon had decided that Steven should not return home but did not tell Mr Neary its position until April 2010. Following an incident in April 2010 when Steven wandered off, an urgent authorisation was granted under DOLS, followed by a series of standard authorisations. Mr Neary was appointed as Steven's representative ("relevant person's representative" or RPR. He made it clear that he wanted to challenge the authorisation insofar as it was being used to enforce Steven's stay at the Unit. He had great difficulty in obtaining legal advice. In October 2010 the local authority applied to the Court of Protection seeking declarations which would allow it to make decisions as to Steven's residence and care. In November 2010 an IMCA's report raised serious questions about Hillingdon's refusal to allow Steven to return home and suggested a trial return home. In December 2010 Mr Neary appealed against the current authorisation to the Court of Protection. The Official Solicitor was appointed to represent Steven. On 23 December 2010 Mr Justice Mostyn terminated the standard authorisation and Steven returned home. An independent psychiatrist and social worker were instructed and both concluded it was in Steven's best interests to remain at home with a package of care. This was agreed between the parties. In the meantime the Official Solicitor sought findings that Steven's human rights had been violated in a number of ways.

Relevant issues to be decided: the nature of, and the extent of, the breaches of Steven's rights under Articles 5(1) and (4) and 8 ECHR.

Decision: Peter Jackson held that Article 8 was the "nub" of the matter in the case before the court, and fell to be considered first. He held that Steven's Article 8 ECHR rights had been breached throughout the relevant period. He emphasised that the fact that a court disagrees with a local authority's beliefs as to an individual's best interests does not necessarily imply a breach of Article 8. However, in this case the following factors led the judge to conclude the local authority had not respected Steven's Article 8 rights: the lack of any attempt to weigh up the advantages and disadvantages of care at home or in the Unit; the local authority's unwillingness to listen to Mr Neary or accept the validity of his concerns which persisted to the final hearing; its pursuit of a double agenda and its delay in applying to the Court of Protection.

As regards Article 5, Peter Jackson J held that there had been no lawful authority to deprive Steven of his liberty between January and April 2010 (as no DOLS authorisation had been place). Although a DOLS authorisation was in place between April and December 2010, the deprivation of his liberty was unlawful because the best interests assessments were flawed. Peter Jackson J emphasised that, where best interests assessments are inadequate and the supervisory body knows or ought to know this, the supervisory body is not bound to follow the recommendations. Peter Jackson J also found that Steven's rights under Article 5(4) ECHR were also breached by the failure to appoint an IMCA under s.39D MCA 2005; the failure to hold an effective review; and the delay in applying to the court. It was not enough, he found, to suggest that Mr Neary should have taken the case to

court. The fact that he did not do so did not excuse the local authority of the obligation to act – it redoubled it.

In a subsequent settlement approved by the High Court, Steven Neary was awarded £35,000 in damages (together with costs).

7. A Local Authority v PB and P [2011] EWHC 2675 (COP) (Charles J)

Facts: P was a 49 year old man, who had a life-long learning disability. He had been cared for by his mother for the majority of his life, but had been removed from his mother's care in 2008 to be cared for by the local authority. P suffered from glaucoma and at the time of the hearing was effectively blind, with little chance of regaining his eyesight. P had also had significant difficulties with his teeth and all his upper teeth had been removed, as had a number of his lower teeth. On the first occasion that the matter had been before the court, Charles J had found that P lacked capacity to make decisions about where he should live and arrangements with regards to contact. P's mother wished P to return to her care. The evidence showed that P's current placement was 'exceptional' and that he required one to one support throughout the day and support that was quickly available during the night because of his multiple needs.

Issues to be decided: **(1)** where it was in P's best interests to live. The local authority was not prepared to offer a supported placement at home that would provide one to one support during the day. The choice was therefore between the present placement and regime and a return home on the basis that his mother would shoulder the day-to-day care of P with some respite care provided by the local authority; **(2)** whether the proposed care regime amounted to a deprivation of P's liberty.

Decision: It was in P's short, medium and long-term best interests to continue at his present placement, and not to return to live at his mother's home. In the circumstances, Charles J chose not to come to a concluded view as to whether P was deprived of his liberty. He was satisfied that the proposed care plan and regime for P promoted his best interests and that such aspects of it, if any, that meant that he was being deprived of his liberty by its implementation should be authorised by the court. He made orders under s.16(2)(a) MCA 2005 accordingly.

In the course of his judgment Charles J commented that:

(1) In the exercise by the court of the welfare jurisdiction and the approach under the MCA 2005 more generally the most important issue is whether consent or authorisation should be given to a care regime on behalf of a person who does not have the capacity to give consent himself. That question is not determined by whether or not the person is being deprived of his liberty but by an assessment of whether the care regime is in his best interests. This will include a determination of whether a less restrictive regime would promote P's best interests and when reviews should take place.

(2) In borderline cases where there is a question whether a person is being deprived of his liberty, and cases in which there will be a deprivation of liberty if identified contingency planning is implemented (involving say restraint), care providers should ensure that there is no breach of Article 5 ECHR and review the regime to ensure it remains in P's best interests. This may involve applying the DOLS regime, or, at the very least considering the qualifying requirements identified in Schedule A1 to the MCA 2005;

(3) If the DOLs regime under Schedule A1 applies, it should be used in preference to authorisation and review by the court.

Note: this judgment pre-dates that of the Supreme Court in Cheshire West but we suggest that the approach outlined above remains equally applicable.

8. *RK v (1) BCC(2) YB (3) AK* [2011] EWCA Civ 1305 (Court of Appeal (Thorpe LJJ and Gross LJJ and Baron J))

Facts: This was an appeal by RK against a decision by Mostyn J, who had decided that: (1) the provision of accommodation to a child (of any age) under s. 20 Children Act 1989 was not capable – in principle – of ever giving rise to a deprivation of liberty within the terms of Article 5 ECHR; and (2) the factual circumstances of the case did not amount to a deprivation of RK's liberty. The parents had consented to the arrangements by which their child was placed in accommodation under s.20 Children Act 1989.

Issues to be decided: (1) Whether the provision of accommodation to a child (of any age) under s.20 Children Act 1989 is ever capable – in principle - of giving rise to a deprivation of liberty within the terms of Article 5 ECHR; (2) whether the restrictions authorised by the parent(s) individually or cumulatively amount to detention.

Decision: An adult in the exercise of parental responsibility may impose, or authorise others to impose, restrictions upon the liberty of a child but such restrictions may not in their totality amount to a deprivation of liberty. Detention engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the detention of a child. The provision of accommodation to a child under arrangements made between a local authority and the child's parent(s) may therefore give rise to a deprivation of liberty within the terms of Article 5(1) ECHR.

RK's appeal was therefore dismissed.

Note: the Court of Appeal agreed with Mostyn J's conclusion that RK was, on the facts, not deprived of her liberty. Key to the Court of Appeal's decision appears to have been the purpose of the restrictions imposed. We therefore suggest that this aspect of their decision needs to be approached with caution in light of the decision of the Supreme Court in Cheshire West.

9. *J Council v GU (1), J Partnership NHS Foundation Trust (2), CQC (3) and X Limited (4)* [2012] EWHC 3531 COP (Mostyn J)

Facts: This case concerned a man known as "George." Mostyn J described him as "very seriously challenged," with a history which told a very sad story. George had childhood autism, OCD, personality disorder and paedophilia. He lived at Y Care Home, under the terms of a standard authorisation. As a result of George's paedophilia he would write letters about his fantasies and leave them in public places, and would try to leave messages for children. Therefore, George's placement regime involved rigorous restrictions on his contact with others including strip searching, monitoring correspondence and telephone calls to protect the public. It was common ground that George's placement constituted a deprivation of his liberty but also curtailed his rights to respect for private and family life under Article 8 ECHR.

Issues to be decided: The question was whether the restrictions impacting on George's private life – and therefore his rights under Article 8 ECHR - were lawful. This was a separate question to consideration of his rights under Article 5 ECHR and therefore had to be considered, even though a standard authorisation was in force.

Decision: Although the parties reached agreement in this case, and the judge approved of the order they all sought, Mostyn J gave a written judgment. He noted that the simple fact that George was lawfully deprived of his liberty did not itself authorise restrictions on his right to a private life. But his right to a private life could not be allowed to destroy the purpose of his detention. The example that the judge gave was that of prisoners whose Article 8 rights extend to allowing them to use payphones or write letters but not enjoy conjugal visits. For the restrictions to be "in accordance with the law" the measures had to (1) have a basis in national law (which could include statutory guidance such as the Code of Practice to the MHA 1983); (2) be accessible to the person concerned (i.e. to George); and (3) compatible with the rule of law. Mostyn J noted that, for a person in George's situation, and by contrast with those detained in high security under the MHA 1983, there were no nationally required procedures or safeguards. He endorsed as necessary to secure George's rights under Article 8 ECHR detailed written policies setting out when George's correspondence could be monitored, when his telephone calls could be monitored and when he could be searched. These included oversight by the CQC. Mostyn J stated that in many cases involving deprivation of liberty where there was also an interference with P's Article 8 rights, a one-off order of the Court would be sufficient. But where there is going to be a long-term restrictive regime accompanied by invasive monitoring of the kind to which George was subject, then Mostyn J indicated that policies overseen by the applicable NHS Trust and the CQC are likely to be necessary if serious doubts as to Article 8 compliance are to be avoided.

10. *DM v Doncaster MBC and Secretary of State for Health* [2011] EWHC 3652 (Admin) (Langstaff J)

Facts: Both husband (FM) and wife (DM) were in their 80s and had been married for 63 years. He had dementia and was being detained in a care home pursuant to a DOLS authorisation; she wanted him back home. The care home fees were being paid out of his limited income and their joint savings. His wife brought a claim to recover the fees.

Issues to be decided: Whether by virtue of the DOLS authorisation, the local authority was under a duty to accommodate FM under the MCA 2005 (no power to charge) rather than under s.21 of the National Assistance Act 1948 (duty to charge in s.22, subject to means testing).

Decision: The MCA 2005 did not impose a duty or power on local authorities to accommodate detained care home residents. As the DOLS supervisory body, they were obliged to ensure that the DOLS assessments were carried out, to check whether the six qualifying requirements were made out and, if they were, to grant the requested standard authorisation. They were not obliged to accommodate the person, to arrange for their accommodation, or to pay for it.

Note: this decision is also important for making clear that an authorisation under Schedule A1 does not **require** detention; rather its effect is to authorise a public body to deprive a person of their liberty if the relevant conditions are met.

11. Secretary of State for Justice v (1) RB (2) Lancashire Care NHS Foundation Trust [2011] EWCA Civ 1608 (Court of Appeal (Kay, Arden and Moses LJJ))

Facts: RB was 75. He had a persistent delusional disorder. He was detained under ss. 37/41 MHA 1983. RB wanted to be discharged from hospital. There was general agreement that he could be managed in the community, but that he would need to be subject to conditions for the protection of the public. These conditions included residence in a care home, and a condition that he was escorted at all times in the community. There was no dispute that this proposed care regime amounted to a deprivation of his liberty. Despite the diagnosis of mental illness RB had capacity to decide about residence and treatment, and the question of capacity did not arise in this case. The Upper Tribunal granted RB a conditional discharge, setting conditions which had the effect of depriving RB of his liberty in the care home. RB was content with this arrangement but the Secretary of State appealed to the Court of Appeal.

Issues to be decided: The question for the Court of Appeal was whether s.73 MHA 1983 allowed a Mental Health Tribunal to discharge a patient and set conditions which amounted to a deprivation of his or her liberty. The Upper Tribunal had concluded that such a power existed and that the word "discharge" in s73 does not automatically imply "release from detention to a state of liberty." The Secretary of State disagreed. His argument was that the effect of the Upper Tribunal's decision was to create a new category of patients detained under the MHA 1983, but where there was no obligation to provide treatment and where the patient had reduced rights to apply to the Tribunal.

Decision: The Court of Appeal noted that any deprivation of liberty must be "in accordance with a procedure prescribed by law" to comply with Article 5(1) ECHR. The original order made under ss.37/41 MHA 1983 authorised detention in hospital only, not detention in another setting. Furthermore a patient who was deprived of his liberty following a conditional discharge could apply to a Tribunal but would not know what test he had to satisfy. The detention would not be in accordance with a procedure prescribed by law. The Court of Appeal held that detention in a care home other than for the purpose of treatment and without appropriate medical treatment being available would be counter to the whole scheme of the MHA 1983. It held that a Tribunal could not rely on the best interests of the patient to order conditional discharge on terms that inevitably amount to deprivation of liberty.

(Note that DOLS could not be used in this case as RB had capacity to consent to being accommodated in the care home, and the restrictions proposed were to protect the public, not RB).

12. *Y County Council v ZZ (by his litigation friend the Official Solicitor)* [2012] EWCOP B34 (Moor J)

Facts: Mr ZZ was a man of young middle age who had a mild learning disability with some autistic traits. From his twenties onwards he had a history of sexualised behaviour towards children and appeared to be sexually aroused by creating emergency situations (for example fire-setting and criminal damage). In 1999 he was placed under a hospital order (s.37 MHA 1983) following charges of arson. After 18 months he moved into residential care and was placed under guardianship. During his period Mr ZZ met and married another service user at the home where he lived. Between 2006 and 2010 concerns about Mr ZZ's behaviour escalated. He carried out a serious assault against a member of staff and was moved to another placement in 2006. His wife remained at the

original home and subsequently the relationship between her and Mr ZZ broke down and she moved into independent living. At the new placement Mr ZZ continued to be involved in low level assaults. However, his sexualized behaviour towards children caused even greater concern. He began dropping notes for children with his phone number asking them to contact him, offering money for sexual activity. He would ask to be allowed to go to places where there were likely to be children, such as corner shops. He was noted to be masturbating over children's television programmes. He applied to adopt a child with his wife. At one point ZZ was confronted by the relative of a child who had received a note from ZZ. In September 2010 the situation deteriorated and Mr ZZ was given notice. He was moved to the J. Although it is clear that Mr ZZ was subject to a high level of supervision in his previous placements the J is a locked environment and Mr ZZ was not free to leave and was closely supervised and monitored inside and outside. In summer 2010 Mr ZZ underwent the first sexual offenders treatment plan. He engaged with this but there were concerns he was "going through the motions." The forensic psychologist considered ZZ still had a strong desire for deviant activity with children. After his move to the J home, Mr ZZ was placed under guardianship and a standard authorisation and the local authority made an application to the Court of Protection asking the court to determine whether the deprivation of Mr ZZ's liberty was lawful.

Issues to be decided: whether ZZ was deprived of his liberty and, if he was, whether this was in ZZ's best interests.

Decision: Moor J reminded himself that a standard authorisation under DOLS can run alongside a guardianship order. Whilst the guardianship order was in force, which specified that ZZ should reside at the J home, he did not, as a Court of Protection judge, have jurisdiction to make decisions about ZZ's place of residence. Moor J found that ZZ was deprived of his liberty at the J home. He found that complete and effective control was being exercised over ZZ. The restrictions included being checked hourly, not leaving the J unescorted, using his mobile phone for only one hour a day; and that ZZ was not allowed unsupervised access to the garden as there were children living next door.

Moor J held that he had no doubt that the restrictions upon ZZ were in his best interests. He said *"They are designed to keep him out of mischief, to keep him safe and healthy, to keep others safe, to prevent the sort of situation where the relative of a child wanted to do him serious harm, which I have no doubt was very frightening for him and they are there to prevent him getting into trouble with the police."*

13. *Commissioner of Police for the Metropolis v ZH* [2013] EWCA Civ 69 (Court of Appeal (Dyson MR, Richards LJ, Black LJ))

This was an appeal by the Metropolitan Police against the decision of Sir Robert Nelson awarding substantial damages to reflect their breaches of common law and the Disability Discrimination Act 1995. Sir Robert Nelson had found *[2012] EWHC 604 (Admin)* that the police had not only committed the torts of trespass and false imprisonment, but had also breached ZH's rights under Articles 3, 5 and 8 ECHR and also the DDA 1995

Facts: ZH was a severely autistic, epileptic sixteen year old young man who suffered from learning disabilities and could not communicate by speech. In September 2008 he was taken by the specialist school he attended to a swimming pool for a familiarisation visit. During the visit he became fixated by the water and could not be persuaded to move from the side of the pool. After

30 minutes a decision was taken by the manager of the pool to ring the police. The arrival of the police gave rise to an escalating series of events which culminated in ZH jumping into the pool, being forcibly removed from it, being handcuffed, put in leg restraints and placed in a cage in the back of a police van, while still wet, for a period of around 40 minutes. His carers were not permitted to get into the cage to comfort him. ZH suffered consequential psychological trauma and an exacerbation of his epileptic seizures.

Issues to be determined: Whether the circumstances amounted to a deprivation of liberty, as found by Sir Robert Nelson, or merely a restriction on movement.

Decision: The Court of Appeal upheld Sir Robert's decision that ZH had been deprived of his liberty. Lord Dyson noted that the restraint of ZH was "*closely analogous to the classic or paradigm case of detention in a prison or police cell. In particular, it is difficult to see any difference in kind between being detained in the caged area at the back of a police van and being detained in a police cell. In fact, ZH was deprived of movement throughout the entire period of the restraint. The restraint was intense in nature and lasted for approximately 40 minutes and its effects on ZH were serious.*"

Note: In light of the decision in *ZH* it is clear that a person can be subjected to a deprivation of liberty which may only last a relatively short period of time (the restraint whilst he was at the pool-side lasted about 15 minutes and the restraint in the police van lasted about 25 minutes). The decision also makes clear the extent to which the intensity of the restrictions is of significance in determining how long a period of time is 'non-negligible.' See further the discussion at paragraphs 3.29-3.32.

14. *A PCT v LDV, CC and B Healthcare Group* [2013] EWHC 272 (Fam) (Baker J)

Facts: LDV was a former Winterbourne View patient. She was 33 years old and suffered from a mild learning disability and emotionally unstable personality disorder. On 25 May 2012, a tribunal had ordered her discharge from detention under s.3 of the MHA 1983 ('MHA') to take effect on 28 September 2012. It decided that she needed a residential establishment in the community rather than the medium-secure unit. Identifying a suitable community placement was underway and, as a preliminary step, LDV was moved to a hospital closer to home ('WH') in early September 2012.

At around the same time, doctors from the medium-secure unit provided two medical recommendations that she be re-detained under s.3 MHA 1983. However, with no material change in circumstances since the tribunal's decision in May, the Approved Mental Health Professional ('AMHP') concluded that such re-detention would be unlawful and declined to make the s.3 application. As a result, the deferred discharge took effect on 28 September 2012. But LDV remained in WH; now on an informal basis.

During her assessment, the AMHP identified that the restrictions in LDV's care plan seemed to constitute a deprivation of liberty and advised the Primary Care Trust ('PCT') and the hospital trust that an authorisation should be sought through a court order.

LDV was subject to a significant number of restrictions, including as to her ability to leave unaccompanied and to move within the unit. She was also subject to continuous observation (the precise time-frame varying depending upon the level of risk), restraint, searches of her property and person, administration of sedative medication and control over contact with her mother.

On 12 October 2012 an urgent authorisation under Schedule A1 MCA 2005 was granted, and a request for a standard authorisation was made. The best interests assessor concluded that there was indeed a deprivation of liberty but LDV was ineligible to be deprived of her liberty because she was within the scope of the MHA. On 23 October 2012, the PCT therefore made an urgent application to the Court of Protection.

Issue to be determined: (1) Whether LDV's circumstances amounted to a deprivation of liberty; (2) what salient details are relevant to the decision whether to be accommodated in hospital for the purpose of being given relevant care or treatment (i.e. the details that the individual must be able to understand, retain and use/weigh).

Decision: (1) The restrictions included in the care plan objectively amounted to a deprivation of LDV's liberty; (2) On the facts of LDV's case, the salient details were that she was in hospital to receive care and treatment for a mental disorder, and the material liberty-restricting features of that care and treatment plan.

Note: this decision is important not only in the psychiatric context, because in determining the question of whether LDV had the material capacity, Baker J proceeded as if he were considering the capacity requirement in paragraph 15 of Schedule A1 (although he was not, strictly, bound to do so). See further in this regard the discussion at paragraphs 2.17-2.20.

15. *Re M (Best Interests: Deprivation of Liberty)* [2013] EWHC 3456 (COP) (Peter Jackson J)

Facts: This s. 21A MCA 2005 application was brought by M, a 67 year old woman, through her IMCA as her litigation friend, who had been resident in a care home since June 2012. M suffered from diabetes which was poorly controlled and lacked capacity to make decisions about her diabetes management due to her *"inflexible but mistaken belief that she [could] manage her own diabetes"* which resulted in her being unable to weigh up the serious risks to her health that would be posed by returning home, with an inevitable reduction in the level of supervision.

The two options for M's care were continued residence in the care home, or a return home with a *"standard care package"* which involved twice daily visits from district nurses to supervise M's insulin regime, and regular visits each day from carers. Since being at the care home, M's physical condition had improved, but her mental health had worsened. She was being treated for mild depression with antidepressants. She repeatedly and consistently said that she wanted to return home and had said that she would take her own life if that were not allowed to happen. She was still only partially compliant with her insulin regime and refused to eat any food provided by the home.

A psychiatrist commissioned to provide a report to the court under s.49 MCA 2005 took the view that it was in M's best interests to return home despite the risks to her health, and that all options to achieve this had not been fully explored.

The issue to be decided: M's best interests. A return home carried with it a real risk of death as a result of M's diabetes and her non-compliance. Remaining at the care home carried a real risk that M would self-harm because of her strongly held wish to return home.

Decision: it was in M's best interests for the standard authorisation to be terminated. The judge stated that considerable weight had to be attached to M's wishes, bearing in mind that her incapacity extended only to one area of her life – her diabetes management – and that she was otherwise very aware of her circumstances. He summed up the position as follows:

> *"38. In the end, if M remains confined in a home she is entitled to ask 'What for?' The only answer that could be provided at the moment is 'To keep you alive as long as possible.' In my view that is not a sufficient answer. The right to life and the state's obligation to protect it is not absolute and the court must surely have regard to the person's own assessment of her quality of life. In M's case there is little to be said for a solution that attempts, without any guarantee of success, to preserve for her a daily life without meaning or happiness and which she, with some justification, regards as insupportable."*

The judge emphasised that the Court of Protection is the place to make the difficult decisions about whether risks are justified.

> *"41.... my decision implies no criticism whatever of any of the witnesses from the local authority or by the CCG. I understand the position taken and the reasons for it; indeed it would be difficult for them to have taken a different view on the facts of the case. There are risks either way and it is perfectly appropriate that responsibility for the outcome should fall on the shoulders of the court and not on the shoulders of the parties."*

16. *AM v (1) South London and Maudsley NHS Foundation Trust (2) Secretary of State for Health* [2013] UKUT 0365 AAC (Charles J)

Facts: AM was detained under s.2 MHA 1983. She was 78 years old. She applied to the First Tier Tribunal to be discharged. She argued at the hearing that she would remain in hospital informally. The Tribunal did not discharge her from detention, considering that if it did AM's daughter would take her home and would not prevent AM's ongoing treatment, even though AM was content on the ward. AM appealed to the Upper Tribunal and argued that she should be discharged from detention under s.2 by a Tribunal and her treatment in hospital could be continued using the Deprivation of Liberty Safeguards.

Issues to be decided: What approach should be taken by decision-makers (either AMHPs or the First Tier Tribunal) when considering the admission for assessment and/or treatment of a mentally-disordered patient who lacked capacity to consent to admission to hospital.

Decision: Charles J said that, in introducing DOLS, Parliament must have intended to provide an alternative to the MHA 1983 to authorise the detention of an incapacitated person, and that this must have been intended to include occasions where such a person would be detained using DOLS in hospital for mental disorder. Decision-makers under the MHA 1983 (which would include AMHPs and also Tribunals) therefore needed to consider the availability of treatment when a patient's deprivation of liberty was authorised under the DOLS regime.

In such cases, Charles J held, decision-makers should go through the following questions and take into account the following considerations:

- Is admission to hospital required?
- Will P be a mental health patient and if so does he object to all or part of the relevant treatment? If so, he is ineligible for DOLs and the MHA 1983 must be used;
- Does the relevant person have capacity to consent to admission to hospital?
- Can the hospital rely on the provisions of the MCA 2005 to assess and treat the person lawfully? This requires consideration of the likelihood of the person remaining compliant with their treatment (and therefore remain eligible to be deprived of their liberty using DOLS); and also whether there is a risk that cannot sensibly be ignored that the treatment regime will amount to a deprivation of liberty;
- How should the existence of a choice between reliance on the MHA 1983 and the MCA 2005 be taken into account? This involves the FTT (or earlier decision-maker, for example, an AMHP) taking a fact-sensitive approach to try to identify the least restrictive way of best achieving the proposed assessment or treatment. DOLS will not always be less restrictive than detention under the MHA, but may carry less stigma in the eyes of some;
- An AMHP or a Tribunal cannot compel a managing authority to apply for an authorisation or a supervisory body to grant one, so the AMHP or Tribunal needs to know whether those who could implement the MCA/DOLS will do so.

Note: in his judgment, Charles J expressly made clear that his reference in *GJ v The Foundation Trust* [2009] EWHC 2972 (Fam) to the MHA 1983 having 'primacy' was not intended to be a general statement.

17. *An NHS Trust v Dr A* [2013] EWHC 2442 (COP) (Baker J)

Facts: Dr A was a fifty year old Iranian whose application for asylum in the UK had been refused. He was detained under s.3 MHA 1983, and was receiving treatment for delusional disorder. But he was also on hunger strike, as part of an attempt to compel the UK Border Agency to return his passport. He was being fed through a naso-gastric tube. Dr A's mental state improved and the section was rescinded and he remained in hospital informally. A few weeks after this, he removed the nasogastric tube. His physical health deteriorated and reached a life-threatening state. The Trust considered that Dr A lacked capacity to refuse nutrition and hydration and issued an application to the Court. Interim declarations were made allowing him to be fed via the tube. Dr A continued to resist this and was detained under s 3 MHA.

Issues to be decided: (1) Whether Dr A lacked capacity to make decisions about nutrition and hydration; (2) If he lacked capacity to make such decisions, where did his best interests lie; (3) What powers did the court have to direct provision of nutrition and hydration as this would mean depriving Dr A of his liberty?

Decision: Baker J found that Dr A lacked capacity to make decisions about hydration and nutrition and associated treatment, and that it was in his best interests for the Court to make an order permitting forcible feeding. Baker J concluded this treatment could not be carried out under s.63 MHA 1983, which permits treatment under the supervision of the patient's approved clinician for the mental disorder from which the patient is suffering, without the patient's consent This was because the judge was not satisfied that the force-feeding was treatment for the mental disorder from which Dr A was suffering. Instead it was for a physical disorder which resulted from his decision to refuse food.

Because he was detained under s.3 MHA 1983, Dr A was ineligible to be deprived of his liberty either through DOLS or through an order of the Court by operation of Schedule 1A to the MCA 2005. So, if in order to receive the force-feeding it was necessary to deprive Dr A of his liberty, this could not be lawfully authorised and a new "Bournewood Gap" appeared to be opening. Referring to the "ambiguity, obscurity and possible absurdity" of the legislation surrounding DOLS, the judge found himself able to use the inherent jurisdiction to make orders authorising Dr A to be deprived of his liberty in order to receive force-feeding, whilst remaining on s.3 MHA 1983.

Note: the effect of this judgment is to make clear that where a patient is detained under the MHA 1983, requires treatment for a physical disorder which cannot be administered under the provisions of s.63 MHA 1983, and that treatment itself will involve a deprivation of their liberty, an application to the High Court will be required because the fact of the detention under the MHA 1983 means the patient will be ineligible for an authorisation under Schedule A1 or an order of the Court of Protection under s.16(2)(a) MCA 2005.

18. *Re P* [2014] EWHC 1650 (Fam) (Baker J)

Facts: An NHS Trust made an extremely urgent application in the middle of the night for a declaration that it was lawful for its doctors to treat a seventeen-year-old girl following a drug overdose notwithstanding her refusal to consent to that treatment.

Issue to be decided: Whether P had the capacity to make decisions concerning her medical treatment, whether treatment should be administered against her consent, and whether the circumstances of that treatment would amount to a deprivation of her liberty.

Decision: The Court was not satisfied that P lacked capacity to make decisions concerning her medical treatment, but was satisfied that – P being a minor – it could authorise treatment to be administered against her consent. Baker J accepted that it might be necessary in the course of administering life-sustaining treatment – which would have to be administered continuously over a 21 hour period – to sedate or restrain P. He declared that such steps would be lawful notwithstanding the fact that they amounted to a deprivation of liberty.

19. *Liverpool City Council v SG & Ors* [2014] EWCOP 10 (Holman J)

Facts: SG was aged 19, and, whilst arrangements were made to move her into supported living, she continued to be resident in the same children's home as she was in prior to the age of 18, subject to a regime that indisputably amounted to a deprivation of her liberty. She was the subject of very considerable staffing on a 3:1 basis. The staffing includes monitoring her while she was in the bathroom (ensuring her dignity was maintained at all times), locking the front door as a preventative measure, following, observing and monitoring her on visits into the community, and if she "attempted to leave the staff supporting her, they would follow several paces behind her and attempt to maintain conversation." Items which could be used for self-harm were removed, and she remained supported 3:1 during the day and 2:1 during the night. She lacked capacity to decide as to her residence and care arrangements.

Issue to be decided: Whether the Court of Protection in light of Guidance issued jointly by the President of the Court of Protection and OFSTED on 12 February 2014 entitled *"Deprivation of Liberty – Guidance for Providers of Children's Homes and Residential Special Schools,"* had power to make an order which authorised a deprivation of her liberty at the children's home.

Decision: The Court of Protection has the power to make an order which authorises that a person who is not a child (i.e. who has attained the age of 18) may be deprived of his liberty in premises which are a children's home as defined in section 1(2) of the Care Standards Act 2000 and are subject to the Children's Homes Regulations 2001 (as amended). Further, it is the duty of the person or body, in this case the local authority, who is or are depriving the patient of his liberty, to apply to the court for an authorisation; and, indeed, the duty of the court to make such authorisation as in its discretion and on the facts and in the circumstances of the case it considers appropriate.

Note: See also ***Barnsley MBC v GS & Ors*** *[2014] EWCOP 46*, in which Holman J held that the Guidance was wrong in suggesting that a non-secure children's home or a residential school was unable to deprive a child of their liberty; he further held that, in principle, the Court of Protection could authorise the deprivation of liberty of a 16 or 17 year old lacking the material capacity in such a place.

20. *The Mental Health Trust/The Acute Trust & the Council v DD (by her litigation friend the Official Solicitor), BC* (Number 1 and Number 2) [2014] EWCOP 11 and [2014] EWCOP 13 (Cobb J)

Facts: Both these cases concern DD, a 36 year old woman with a mild to borderline learning disability and autism spectrum disorder. At the time of the hearings she was at an advanced stage of pregnancy. She had what the judge described as "an extraordinary and complex obstetric history" and was expecting her sixth baby. DD and BC's wishes were for a home birth without social or health care assistance; DD's five children were all cared for by permanent substitute carers and four of the children had been adopted. DD and BC had completely failed to engage with the Authorities.

Issues to be decided: The Applicants sought declarations and orders in relation to DD's capacity; the care and health of DD during the final stage of her pregnancy, and in the safe delivery of the unborn baby; *authorisation for the deprivation of DD's liberty; the use of restraint (even for a short time) and permission to intrude, by force if necessary, into the privacy and sanctity of her home.*

Decision: (I) she lacked capacity to litigate the application in so far as it relates to the delivery of her baby; and that (ii) she lacked the capacity to make a decision about the mode of delivery of her unborn baby. (2) It was in DD's best interests to authorise the caesarean and associated actions (which included forced entry into her home, restraint and sedation).

The judge authorised the necessary steps to deprive DD of her liberty but set out in his judgment a number of restrictions:

> *"Any physical restraint or deprivation of liberty is a significant interference with DD's rights under Articles 5 and Article 8 of the ECHR and, in my judgment, as such should only be carried out:*
>
> i *by professionals who have received training in the relevant techniques and who have reviewed the individual plan for DD;*
>
> ii *as a last resort and where less restrictive alternatives, such as verbal de-escalation and distraction techniques, have failed and only when it is necessary to do so;*
>
> iii *in the least restrictive manner, proportionate to achieving the aim, for the shortest period possible;*
>
> iv *in accordance with any agreed Care Plans, Risk Assessments and Court Orders."*

21. *NHS Trust & Ors v FG* [2014] EWCOP 30 (Keehan J)

Facts: At the time of the application FG was 24 years old and she was in the late stages of her first pregnancy. She had been diagnosed with a schizoaffective disorder and was detained at Hospital under s 3 MHA 1983. FG suffered from persecutory delusions that included a belief that the mental health services were 'murderers' and would murder her and her unborn child. The plans for the delivery of the child included plans for FG's transfer from Trust 1 to the maternity unit in Trust 2, plans for her to receive obstetric, midwifery and anaesthetic care and for her to be returned to Trust 1.

Issues to be decided: Whether the proposed plan for FG's transfer and obstetric care was in her best interests. In the event that the court decided that the proposed plan for her transfer and care was in her best interests, the Trusts sought authorisation for the proposed transfer and orders that it was lawful for their staff to use reasonable and proportionate measures to carry out the plans including those which involved physical or medical restraint and a deprivation of liberty.

Decision: (1) Keehan J was satisfied that the orders sought by the Trusts in respect of her medical treatment were in her best interests and (2) he made orders accordingly, including orders in relation to physical or medical restraint and deprivation of FG's liberty. In the course of his judgment Keehan J gave detailed guidance, attached as an annex to the judgment, on the steps to be taken when a local authority and/or medical professionals are concerned about and dealing with a pregnant woman who has mental health problems and, potentially lacks capacity to litigate and to make decisions about her welfare or medical treatment.

Note: This judgment is important because Keehan J confirmed that the acid test applies in the acute setting. Keehan J observed at paragraph 96 that:

"It will commonly be the case that when at the acute hospital P:

i will have obstetric and midwifery staff constantly present throughout her labour and delivery;

ii will be under the continuous control of obstetric and midwifery staff who, because she lacks capacity to make decisions about her medical case, will take decisions on her behalf in her best interests;

iii will often not be permitted to leave the delivery suite.

Those factors may, when applying the acid test, lead to a conclusion that P is or will suffer a deprivation of her liberty when at the acute hospital. If the Trusts are to deprive P of her liberty, they have a duty not to do so unlawfully."

22. *Re AJ (Deprivation of Liberty Safeguards* [2015] EWCOP 5 (Baker J)

Facts: An elderly lady, AJ, had lived for a considerable period of time in an annexe of the home of her niece and her husband ('Mr and Mrs C'). She developed vascular dementia and became increasingly dependent on others, in particular Mrs C. In agreement with the relevant local authority, she was taken to a care home by Mr and Mrs C purportedly for respite but, in fact, on the basis that she was to be permanently cared for there if she settled. Mr C was appointed as her unpaid RPR, and a s.39D IMCA was appointed. AJ was objecting to her presence at the care home she was initially placed at, and then the care home she was moved to shortly thereafter, for several

months before her RPR ultimately brought proceedings on her behalf in the Court of Protection under s.21A MCA 2005.

Issues to be decided: Whether the local authority had breached AJ's rights under Articles 5(1), 5(4) and 8 ECHR in failing to take appropriate steps to ensure that the deprivation of her liberty had been suitably authorised in advance and she had been supported to bring a challenge to that authorisation.

Decision: In concluding that AJ's ECHR rights had been breached, Baker J gave wider guidance, which can be summarised thus. (1) In the vast majority of cases, it should be possible to plan in advance so that a standard authorisation can be obtained before the deprivation of liberty begins. It is only in exceptional cases, where the need for the deprivation of liberty is so urgent that it is in the best interests of the person for it to begin while the application is being considered, that a standard authorisation need not be sought before the deprivation begins. (2) Professionals need to be on their guard to look out for cases where vulnerable people are admitted to residential care ostensibly for respite when the underlying plan is for a permanent placement without proper consideration as to their Article 5 rights. (3) It is likely to be difficult for a close relative or friend who believes that it is in P's best interests to move into residential care, and has been actively involved in arranging such a move, into a placement that involves a deprivation of liberty, to fulfil the functions of RPR, which involve making a challenge to any authorisation of that deprivation. (4) The appointment of a RPR and IMCA does not absolve the local authority from responsibility for ensuring that P's Article 5 rights are respected. The local authority must monitor whether the RPR is representing and supporting P in accordance with his statutory duty. (5) The local authority must make sufficient resources available to assist an IMCA and keep in touch with the IMCA to ensure that all reasonable steps are being taken to pursue P's Article 5 rights. (6) In circumstances where a RPR and an IMCA have failed to take sufficient steps to challenge the authorisation, the local authority should consider bringing the matter before the court itself. This is likely, however, to be a last resort since in most cases P's Article 5 rights should be protected by the combined efforts of a properly selected and appointed RPR and an IMCA carrying out their duties with appropriate expedition.

Note also that Baker J emphasised the importance of properly recording of the use of physical restraint of incapacitated adults in their care plans and documenting such use in the assessment of whether an authorisation under Schedule A1 should be granted.

CASES WITH HEALTH WARNINGS

1. *DH NHS Foundation Trust v PS* [2010] EWHC 1217 (Fam) (Sir Nicholas Wall P)

Facts: PS was 55. Evidence was accepted that she lacked the capacity to make decisions about her healthcare and treatment. She also lacked the capacity to conduct or defend proceedings. PS had cancer of the uterus. The treating doctors were of the opinion that she required a hysterectomy and removal of the fallopian tube and ovaries. PS also suffered from needle phobia. The clinical team treating her came to the conclusion that special arrangements would need to be put in place both to ensure that she had the operation and that she remained in hospital for her post-operative recovery. Such arrangements included sedation if necessary in order to convey her to hospital, the administration of anaesthetic during the operation, and post operatively analgesic with a sedative effect, close supervision and the use of force (as a last resort) to stop her absconding.

Issues to be decided: (1) whether it was in her best interests to undergo the proposed operation; and (2) whether it was in her best interests to sedate PS and if necessary for force to be used in order to convey her to hospital, to administer the anaesthetic (because of her needle phobia) and to detain PS in hospital during the period of post-operative recovery.

Decision: (1) It was in PS's best interest to undergo a hysterectomy and removal of the fallopian tubes and ovaries. (2) it was necessary and in PS's best interests to use sedation and force, if required, to convey PS to hospital, during the operation and to detain her in hospital post operatively.

Health Warning: Sir Nicholas Wall P appeared on the face of the judgment to have come to the view that it was not necessary to invoke the provisions of Schedule A1 to the MCA 2005 because it was necessary for P to have the operation and therefore there was no deprivation of liberty. It is our view following on from the decision in Cheshire West that the planned sedation and restraint during the transfer to hospital, and during the administration of the anaesthetic for the operation itself, and the arrangements post operatively, would now be likely to be held to meet the acid test and to be a deprivation of PS's liberty requiring authorisation.

2. *Re A and Re C* [2010] EWHC 978 (Fam) (Munby J)

Facts: A and C were both female. A was born in 2001 (and therefore a child), and C was born in 1987 (and was an adult). Both suffered from a rare genetic disorder called Smith Magenis Syndrome, characterised by "self-injurious behaviour, physical and verbal aggression, temper tantrums, destructive behaviour, hyperactivity, restlessness, excitability, distractibility and severe sleep disturbances, which include frequent and prolonged night waking and early morning waking." Both lived at home "in the exemplary and devoted care of their parents" in the area of the same local authority. The only way that their parents could keep them safe at night was by locking their bedroom doors.

Issues to be decided: Whether the circumstances amounted to a deprivation of liberty, engaging Article 5 of the ECHR and, if so, what (if any) role the local authority had in such cases.

Decision: (1) The State was not directly involved in either of the cases. The local authority was providing support services only. It was not directly involved in what happened in the home of

either person. It was not the decision-maker. Mere knowledge was not enough, although this might trigger a duty to investigate and seek judicial assistance. Accordingly, the local authority could not be in breach of Article 5 ECHR in these cases even if a deprivation of liberty had occurred. (2) Neither A nor C were deprived of their liberty. Following the reasoning of Parker J at first instance in *MIG and MEG,* Munby J decided that a loving, caring, proportionate and appropriate regime by devoted parents in a loving family relationship whose objective was solely "*the welfare, happiness and best interests of A and C respectively – fell significantly short of anything that would engage Art 5*." He decided that the restrictions imposed were not to restrict their liberty but to maximise their opportunities and help them to lead their lives to the full. This amounted to an appropriate and proportionate restriction upon liberty, not a deprivation of liberty.

Accordingly as there was no deprivation of liberty, there was no need to decide whether it could be justified as an Article 5 compliant exercise of parental responsibility in respect of A.

Health Warning: We consider that it is unlikely that the approach adopted to the question of whether A and C were deprived of their liberty would be the same now, post Cheshire West. However, the outcome could well be the same since it seems unlikely on the facts that any such deprivation of liberty would be imputable to the State (or, if it was, that the State could have been required to do anything more than it did by way of bringing the matter to court).

3. *R (Sessay) v South London and the Maudsley NHS Foundation Trust* [2011] EWHC 2617 (QB) (Divisional Court (Pitchford LJ and Supperstone J))

Facts: Ms Sessay was removed from her home by the police following concerns about her welfare and ability to care for her child. She was taken to the s.136 MHA 1983 suite at SLAM's hospital where she was held for thirteen hours before a decision was made to admit her under s.2 MHA 1983. At least some of the Trust staff at the s.136 suite were under the impression that she had been brought to the suite under s. 136 but this was incorrect. The Trust policy was that the maximum time any patient should be held in the s136 suite should not exceed 8 hours and the aim was for the patient to remain there not more than four hours. Had the Trust been aware that Ms Sessay was not detained under s135 or s136 her admission might have been progressed more quickly.

Issues to be decided: (1) whether Ms Sessay was deprived of her liberty pending the decision to admit her under s.2 MHA 1983; (2) whether there was any authority for detention during this period; (3) whether the Trust could rely on the common law doctrine of necessity.

Decision: Ms Sessay had been detained under the common law, without lawful authority during the thirteen hour period. The court held that not all cases of false imprisonment would also involve a deprivation of liberty for the purpose of Article 5 because of the requirement that the detention had been for "a not negligible length of time": but in the circumstances of this case the cumulative effect of the Trust's actions had been to deprive Ms Sessay of her liberty under Article 5 ECHR as well. The MHA 1983 provided a complete statutory framework for the detention of incapacitated people in hospital for care and treatment and its powers could have been used in this case. The Trust could not rely on the common law doctrine of necessity to detain her.

The court observed that in the normal course of events Article 5 would not have been engaged (nor would she have been imprisoned for purposes of the common law) had Ms Sessay's admission been dealt with within the four to eight hours specified by the Trust's policy.

Health warning: Whilst we are of the view (see paragraph 3.27) that regard will be had to the context in which measures are imposed when determining whether the length over which they are imposed will be considered 'non-negligible,' the observation made by the Divisional Court in relation to the Trust's policy was made on the basis of authority from the European Court of Human rights relating to purpose that the ECtHR has now said should not be followed. It may very well be that a court considering the question now would still reach the same conclusion, but may do on the basis of slightly different reasoning.

4. C v Blackburn with Darwen Borough Council and others [2011] EWHC 3321 (COP) (Peter Jackson J)

Facts: C was 45 at the time of the judgment. He had a learning disability and lacked capacity to make decisions about where to live. He had a history of aggression, self-harm, and impulsive behaviour such as running into traffic. After a period of time detained under the MHA he went abroad and on return he was admitted to a care home. He was then received into guardianship and, following an incident when he kicked down a door, a standard authorisation under DOLS was granted. C appealed against the authorisation to the Court of Protection. The First Tier Tribunal refused his application to be discharged from guardianship. During the hearing in the Court of Protection, C told the judge that he wanted to go somewhere else and that being in the care home caused him a lot of stress.

Issues to be decided: (1) whether C was ineligible for DOLS; (2) whether C was deprived of his liberty; (3) whether the regime at the care home was necessary; (4) the relationship between the guardianship order and DOLS.

Decision: C was not ineligible for the use of DOLS; however, the judge found that he was not deprived of his liberty and the standard authorisation was set aside. In coming to this conclusion the judge relied on the decision of the Court of Appeal in *Cheshire West*. A particular feature in this case was that although C was unhappy at the care home and wanted to live somewhere else, there was no alternative available. The restrictions on his liberty were necessary for his safety and that of others.

Peter Jackson J held that the Court of Protection does not have the power to determine C's place of residence while the guardianship order was in effect. However, he held, genuinely disputed issues about the residence of an incapacitated adult should be determined by the Court of Protection. In this case there was a question about whether the use of guardianship was the right vehicle to determine where C should live. The judge invited the local authority, who was the guardian, to consider renouncing its role so the court could make decisions about C's welfare.

Health warning: We consider that a court considering these facts now would most probably conclude that C was deprived of his liberty following the decision of the Supreme Court in Cheshire West. Importantly, that C had nowhere else to go is not relevant (see paragraph 3.21.3). However the judge's comments about the use of guardianship hold good and should be followed (they are also consistent with the approach taken by the Upper Tribunal in *NL v Hampshire County Council* ([2014] UKUT 475 (AAC)), a decision expressly considering the effect of the Supreme Court decision on guardianship, in which Upper Tribunal Judge Jacobs held that the operation of guardianship does not, itself give rise to ad deprivation of liberty).

5. *CC v KK* [2012] EWHC 2136 (COP) (Baker J)

Facts: KK was an 82-year old woman with Parkinson's Disease, vascular dementia, and paralysis down her left side. Following the death of her husband, she moved and settled in a rented bungalow. However, incapacity and best interests determinations had resulted in her being placed in a nursing home between July and October 2010 and from July 2011. Her deprivation of liberty was authorised under Schedule A1 of the MCA from 12 August 2011 which she challenged under s.21 MCA on 2 September 2011. Trial home visits commenced in November 2011 and subsequent requests for DOLS authorisations under Schedule A1 were refused on the basis that there was no deprivation of liberty. The s.21A challenge was dismissed and interim declarations granted as to her incapacity and best interests. By the time of the final hearing in May 2012, she was having daily home visits.

Issues to be decided: (1) whether KK had capacity to make decisions about her residence and care, and (2) whether she had been, and or was being, deprived of her liberty.

Decision: (1) KK had capacity to make decisions about her residence; and (2) she had not been, and was not being, deprived of her liberty because despite the staff exercising a large measure of control over KK's care and movements and KK objecting strongly to her residence, the arrangements for her care could not be described as one of "continuous control."

Health Warning: This decision was arrived at while the Supreme Court's decision in Cheshire West was awaited. Baker J was therefore bound by the decision of the Court of Appeal, but we consider it clear from the facts that KK was under complete/continuous supervision control and was not free to leave, such that she would be found (applying the approach in *Cheshire West*) objectively to be deprived of her liberty.

6. *Rochdale MBC v KW* [2014] EWCOP 45 (Mostyn J)

Facts: A 52 year old woman, KW, was cared for in own home. As a result of a subarachnoid haemorrhage sustained during a medical operation many years previously, she had cognitive and mental health problems, epilepsy and physical disability. She was cared for in her own home with a package of 24/7 care funded jointly by Rochdale MBC and the local CCG.

Issue to be decided: Whether KW was deprived of her liberty.

Decision: Mostyn J held that she was not deprived of her liberty because she was *"not in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom."* Mostyn J made it very clear that he considered that the Supreme Court had adopted the wrong approach in *Cheshire West* and that the issue of deprivation of liberty should be revisited by that Court.

Health warning: KW's appeal against the decision was allowed by consent by the Court of Appeal in February 2015 (without any judgment). As discussed in Chapter 3, the conclusions reached by Mostyn J in this judgment are not compatible with the reasoning of the majority in *Cheshire West* and should not be followed.

7. The decisions of the lower courts in the Cheshire West cases (apart from the decision of Baker J in Mr P's case)

The judgment of Baker J in Mr P's case (*[2011] EWHC 1330 (COP)*) was held by the Supreme Court to have been correct on the law and on the facts.[2] However, the decision of the Court of Appeal (*[2011] EWCA Civ 1257*) was overturned by the Supreme Court and should not be followed. The facts of Mr P's case are given at paragraphs 2.24-2.25.

The decisions of Parker J in P and Q (*[2010] EWHC 785 (COP)*) and of the Court of Appeal in the same case (known as MIG and MEG) (*[2011] EWCA Civ 190*) should not be followed as they were overturned by the Supreme Court. The facts of P and Q are given at paragraphs 2.26-2.28.

2 Although the minority made clear that they might have reached a different conclusion if they had been considering his situation for themselves.