Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol
clerks@albionchambers.co.uk
www.albionchambers.co.uk

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Albion Chambers COURT OF PROTECTION

Freedom is the right of all

How the Supreme Court transformed the deprivation of liberty landscape

Facts

1. The deprivation of liberty safeguards were introduced following the European Court of Human Rights Case of *HL v United Kingdom* [2004] 40 EHRR 761. That case concerned a man who was autistic and profoundly mentally-disabled. He had been prevented from leaving hospital after being admitted for treatment and was subsequently held to have been deprived of his liberty. The issue had arisen because HL had been unable to consent to his care.

2. Put simply, the safeguards exist to ascertain, through independent assessment, whether the person lacks the capacity to make his own decision about whether to be accommodated in care for treatment and whether it is in his best interests to be detained. However, it is widely recognised that the safeguards are considerably more complex than the comparable provisions under the Mental Health Act 2007.

3. The two decided cases turned on the question of whether or not the care provided by the local authorities in each case amounted to a deprivation of liberty, the facts of each case are as follows:

4. P and Q: The first case concerned two sisters, P (Referred to as MIG) and Q, (MEG). MIG has a learning disability as well as problems with her sight and hearing. MEG has a learning disability, possible autistic traits and exhibited challenging behaviour.

5. Until 1997 MIG and MEG had lived with their mother and step-father, however, complaints from their other siblings led to their step-father being convicted of sexual offences, MIG and MEG were subsequently made the subject of care proceedings under the Children Act 1989. At the time of the final hearing in 2010 MIG, (18 at the time) was living with a foster mother with whom she had lived throughout the proceedings. She was provided with intensive support in most aspects of her daily life, was not on medication; attended a further education unit daily in term time and was taken on trips and holidays by her foster mother. It was found that she had never attempted to leave the placement, nor had she ever expressed a wish to do so. However, it was the case that if she did, her foster mother would restrain her.

6. MEG (aged 17 at the time) had initially been placed with a foster carer, however, the carer was unable to manage her aggressive outbursts and so MEG was moved to a residential home. The home was an NHS facility for learning-disabled adolescents with complex needs. She had occasional challenging outbursts towards the other three residents and sometimes required physical restraint in addition to tranquilising medication. MEG received constant supervision and control. She showed no wish to go out on her own and so did not need to be prevented from doing so. She attended the same education unit as MIG and had a much fuller social life than MIG.

7. P: The second case concerned P. He was born with cerebral palsy and Down's syndrome. He required 24-hour care to meet his needs. Until the age of 37, P lived with his mother until such point that her own health made it impossible for her to continue, therefore, in 2009, the Local Authority obtained an order from the Court of Protection that it was in P's best interests to live in the care of the Local Authority. P lived in Z house, a residential bungalow close to his home, living with two other residents and two staff during the day and one staff member at night. P received 98 hours one-to-one support each week in order to help him leave the house whenever he chose. P participated in many activities outside the home, however, he required a wheelchair to travel all but short distances, P also required help with daily living including eating, personal hygiene and continence.

Case history

8. The case history is relatively well known. In each case proceedings were brought to ascertain whether or not the conditions in which each of the applicants lived amounted to a deprivation of liberty.

9. In the first case, Parker J held that MIG and MEG's liberty was being restricted, but not deprived and were in their best interests. The Court of Appeal agreed with that finding.

10. In P's case, Baker J held that he had suffered a deprivation of liberty, but that it was in P's best interests for the arrangements to continue. The Court of Appeal substituted a declaration that the arrangements did not amount to a deprivation of liberty when compared to the circumstances of someone of the same age and disabilities as P.

11. His lordship then proceeds to analyse the four 'unique' factors given by the minority to justify this case being one that treads into territory not yet covered by the line of authorities. He argues that d) is irrelevant because the purpose for the detention is irrelevant to the question of whether a person's liberty has in fact been deprived. His Lordship also states that he is 'unimpressed' with factor c) the original justification being judicial may be a relevant factor, but that approval should

not amount to a potentially unlimited future justification.

The judgement

12. Lady Hale gives the leading judgment in this case. The overall decision is in fact remarkably straightforward with the majority providing a single 'acid test' for ascertaining whether or not arrangements amount to a deprivation of liberty.

13. The judges were unanimous in finding that in the case of P there was a deprivation of his liberty and the safeguards would apply. However, in the case of P and Q there was a split of 4:3 in favour of holding that they too, had been deprived of their liberty.

14. In my opinion, an effective way to read this case is to read Lady Hale's judgment first, (with whom Lord Sumption agreed) then to read the dissenting judgments of Lords Carnwath, Hodge and Clarke before finally reading the remaining majority judgments of Lords Neuberger and Kerr. This is because the dissenting judgments build mainly upon Lady Hale's reasoning, whereas the majority opinions of Lords Neuberger and Kerr dissect both lines of argument in their reasoning.

Lady Hale

15. First, Lady Hale undertook a full analysis of the existing Strasbourg jurisprudence on this issue. This is of particular relevance to this matter as unlike cases under the HRA 1998, where section 2 merely requires courts to 'take into account' the ECtHR's jurisprudence; section 64(5) of the MCA 2007 states that references to a deprivation of a person's liberty have the same meaning as in article 5(1) of the Convention, essentially directly importing the Strasbourg jurisprudence into the act.

16. From the authorities she derives six general principles in the context of people with mental disabilities:

a) The difference between deprivation of liberty and restrictions on liberty is one of degree or intensity, not one of nature or substance. The starting point for determining whether a deprivation has taken place is the subject's 'concrete situation', taking into account a wide range of criteria.

b) A person can be detained despite having a regular opportunity to leave the place where he was being detained for periods without an escort.

c) Whether there has been a deprivation of liberty is not a purely objective question, there must also be a lack of subjective valid consent.

d) Deprivations of liberty have been found in circumstances where people had attempted to leave their confinement; had initially consented but later attempted to leave and where the confinee lacked capacity to consent but had never attempted to leave.

e) The right to liberty is too important in a democratic society for a person to lose the benefit of the protection where the person willingly gave himself up to be taken into confinement, especially where it is not disputed that he is legally incapable of consenting to such an action.

f) Article 5(1) lays down a positive obligation on states to protect the liberty of those within its jurisdiction.

17. Lady Hale then dealt with the first fundamental question that the appeals raised. Namely whether the concept of physical liberty protected by article 5 is a universal concept, or differs depending on whether or not the person was physically or mentally disabled. This was of particular issue in the Court of Appeal where Munby LJ clearly thought that it was not the same standard for all, and that what constitutes liberty for an individual had to be compared to someone with the same characteristics.

18. Lady Hale dismissed this concept and re-affirmed the universal character of human rights. They are guaranteed to "everyone" and "premised on the inherent dignity of all human beings whatever their frailty or flaws. She accepted that: "it may be the case that those rights have to be limited or restricted because of their disabilities but the starting point should be the same as that for everyone else."

19. This must be correct. Even at first glance there is a worrying circularity to Munby LJ's reasoning. The idea that what must be acceptable conditions for one disabled person is premised on how other disabled people are treated is at best a recipe for stagnation, at worst a recipe for disaster. It is only by comparing the living standards for disabled people to how those by which everyone wishes to be treated that those standards can improve.

20. Lady Hale then analysed the second question, namely what is the essential character of a deprivation of liberty? Her ladyship first stated that the case of *Storck v Germany* 43 EHRR 6 lays down three components:

(a) the objective component of confinement in a particular restricted place for a not negligible length of time;

(b) the subjective component of lack of valid consent; and

(c) the attribution of responsibility to the state.

21. As mentioned above, the Strasbourg cases have made repeated reference to the 'concrete situation,' Lady Hale proposes that the answer lies in those features which have been regarded as key. Namely, whether the person concerned "was under continuous supervision and control and was not free to leave." Furthermore, acceding to the intervener representations made by the National Autistic Society and Mind, her Ladyship, rather than attempting to craft one all-encompassing test for deprivation of liberty specified what was not relevant, holding that "considerations of a person's compliance or objection, the relative normality of the placement and the purposes behind it are all irrelevant to this objective question." (Paras [49] and [50]).

22. "Free to leave" in this context would appear to mean the same as in *JE v DE* [2007] 2 FLR 1150 where Munby LJ said that free to leave means: "leaving in the sense of removing himself permanently in order to live where and whom he chooses." However, whether this is what her Ladyship intended it to mean is unclear, as it could be that her reference to this case was merely clarifying the arguments of Mr Richard Gordon QC in paragraph 40. Another factor which Lady Hale takes from the HL case is that mere compliance is not enough. However, in that vein it was suggested that a possible distinction in P and Q's case was that: "if either of them indicated that they wanted to leave, the evidence was that the local authority would look for another placement: in other words, they were at least free to express a desire to leave." But it is important to note, that despite this, it was still held that even being able to express this much was not enough to meet the test.

23. It was also argued, that the context of the deprivation may be relevant. However, this distinction was also rejected by the Supreme Court. However, her Ladyship did accept that context may be relevant in ascertaining why the European Court has found deprivations in some circumstances and not others. She therefore decided to approach the present question by looking primarily at cases which were of a similar context to the present matters. Nevertheless, she came to the conclusion that what it means to be deprived of one's liberty is an objective standard which must be the same for all people, with no differing standards on the basis of physical or mental disabilities. She argued that: *"If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close*

supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."

24. Applying the test she posits to both appeals Lady Hale held that all of the applicants had been deprived of their liberty.

Lords Carnwath, Hodge and Clarke (The Minority)

25. Their Lordships gave a joint dissenting judgment in which they expressed some disquiet in relation to P and Q and a universal test in general. After agreeing with Lady Hale's position as regards the development of the European cases and her rejection of the Court of Appeal's reasoning, they explain that Strasbourg has put more store in a case-specific test taking into account "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question." Re-emphasising that the difference between restrictions and deprivations of liberty was "merely one of degree or intensity and not one of nature or substance."

26. Their Lordships' reason for deciding that the present cases go further than the Strasbourg jurisprudence had clearly been shown to go was based on the fact that the present cases differ from the previous cases in four key respects, of which the first three were also remarked upon by Lady Hale, the fourth is added by their Lordships:

a. the person concerned lacks both legal and factual capacity to decide upon his or her own placement but who has not evinced dissatisfaction with or objection to it;

b. the placement is not in a hospital or social care home, but in a small group or domestic setting which is as close as possible to "normal" home life; and

c. the initial authorisation of that placement was authorised by a court as being in the best interests of the person concerned.

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

27. In particular, their Lordships were concerned that in this situation, where there was no clear authority, they would be cautious about extending a concept as sensitive as a deprivation of liberty beyond a meaning which it could be regarded as having in ordinary usage.

28. Their Lordships, having analysed the existing authorities, held that there was nothing in the test formulated by Parker J in P and Q's case which was inconsistent with those authorities and therefore should be upheld. They were also particularly concerned in that case that:

"Nobody using ordinary language would describe people living happily in a domestic setting as being deprived of their liberty. We recognise that the concept in the Convention may be given an autonomous meaning by the Strasbourg court. But we are struck by how the judges in the courts below, with far more experience than we ourselves can claim, have laboured to keep the concept of deprivation of liberty in touch with the ordinary meaning of those words."

29. This overall approach was also supported by Lord Clarke, he argued that the ECtHR's approach has been much more nuanced than one single acid test. He considered, therefore, that there was nothing inherently wrong in principle with Parker J's approach, and therefore the decision should not be interfered with.

Lord Neuberger

30. Lord Neuberger's approach is to support Lady Hale's judgment and indicate clearly why he disagrees with the minority's reasoning. This is an effective approach in that it answers the questions the dissenting judgments raise.

31. He begins his speech with the proposition that authoritative guidance is highly desirable in the context of mental health. He supports as focussed a test as possible in order to minimise uncertainty.

32. He then makes an odd comment in paragraph 61. "The approach proposed by Lady Hale appears to me attractive, and should be adopted *unless there is a good reason not to do so*."(emphasis added). He states that the minority suggest two such reasons, namely that it is a proposition beyond where Strasbourg has yet gone and that it produces an undesirable result. It is odd that he prefaces the test by providing what almost amounts to an escape clause. Or, as one commentator has called it: "a chink in the armour." [1]

33. With regard to factor b) He argues that the nature of the placement or confinement being in a domestic setting should have no bearing on the question of whether or not the placement amounts to a deprivation of liberty, as Lady Hale puts it, a gilded cage is still a cage. He goes on to compare the situation to that of a child. A child's liberty is normally not deprived by its parents for the purposes of Article 5 because it is not imposed by the state but by its parents. Parents have rights of parental authority which his Lordship argues would not extend to foster carers, (which does beg the question of how such deprivations are to be squared with Article 5, more on this below).

34. Finally, with regard to a) his Lordship is clear that it would be inappropriate to essentially have two tests of what is a deprivation depending on whether or not the person confined has or lacks capacity to object. This relates back to Lady Hale's dismissal of the Court of Appeal's reasoning and holding that the standard of liberty is a universal concept, not one which depends on the characteristics of the person in question. His Lordship then goes on to say that lack of objection is not equal to consent.

35. Again this must be the case in a system that imposes an objective standard of liberty (as I would argue Lady Hale's test does). If liberty were to be judged subjectively then someone who had no notion that they were in fact being deprived of their liberty would have no cause or reason to object. In such circumstances it would be impossible for someone to validly consent to their confinement because a valid consent depends on full knowledge.

Lord Kerr

36. The child point raised by Lord Neuberger is explored more fully by Lord Kerr. He is the only one of the judges to explore the comparator reasoning which the Court of Appeal approved. However, he is very clear that the comparator in each case is someone of the same age and station whose liberty has not been curtailed. Thus he argues, the correct comparator for P and Q would be a teenager of the same age and background. In comparison to that person their liberty would clearly in fact be circumscribed.

37. He further explores the question which Lord Neuberger raises in regard to the liberty of children. He argues that all children 'are (or should be)' subject to some level of restraint. However, as children age and mature that level of restraint is relaxed. Therefore he argues, because that state of affairs would not amount to a constant feature of their lives,

1. www.no5.com/news-and-publications/news/766-laura-davidson-summarises-and-comments-on-the-supreme-court-s-decision-in-i-cheshire-west-and-p-and-q-i-/ accessed 26/03/2014

Team Clerks
Michael Harding
Julie Hathway
Ken Duthie

Claire Wills-Goldingham QC
Call 1988 QC 2012
Mental Health Review Tribunal (legal member)

Claire Rowsell
Call 1991
Former Solicitor

Charlotte Pitts
Call 1999

Benjamin Jenkins
Call 2004

Monisha Khandker
Call 2005

Stuart Fuller
Call 2007

Emily Brazenall
Call 2009

Kevin Farquharson
Call 2011

Pupils

Alexander West
Call 2011

Alexander Small
Call 2012

as it is with P and Q, it amounts only to a restriction, not a deprivation.

Comment

38. Overall, I think the reasoning of the majority is a sound. In particular the judgments of Lord Neuberger and Lord Kerr act as an effective counter to the arguments of the minority through dissecting their arguments in turn.

39. The decisiveness of the decision leads to a firm conclusion which leaves very little room for manoeuvre in future decisions, particularly when one considers the list of what features will not be relevant to the question.

40. In terms of its effects this will clearly be a very wide reaching decision. The new test as formulated by Lady Hale is very likely to lead to a clear increase in the amount of applicants who will be declared to have been deprived of their liberty. This has to be a welcome conclusion, the guarantee of liberty is a fundamental part of our legal system and has been for centuries. As Lord Neuberger rightly points out, uncertainty in this area needs to be minimised.

41. It would appear very likely therefore that local authorities will be faced with a great deal more work from ensuring that the Deprivation of Liberty Safeguards are in place. This decision, combined with the recent report by the House of Lords Select Committee on the need to reform the safeguards, should surely put the government on notice to completely overhaul the existing system of protection.

42. Lady Hale herself admitted that the safeguards are overly complex, she argues at paragraph 57 that "such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty Safeguards." However, she gives no guidance as to what form such safeguards should take.

Alexander Small