Neutral Citation Number: [2014] EWCOP 45

Case No: 12488518

COURT OF PROTECTION

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 18/11/2014

Before :

MR JUSTICE MOSTYN

- -

Between :

Rochdale Metropolitan Borough Council **Applicant**

- and -

(1) KW (by her litigation friend Celia Walsh)
(2) PK
(3) MW **Respondents**

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- -

Mr Simon Burrows (instructed by **Rochdale MBC Legal Services**) for the **Applicant**
Mr Adam Fullwood (instructed by **Peter Edwards Law LLP**) for the **First Respondent**
The **Second** and **Third Respondents** were neither present nor represented

Hearing date: 7 November 2014

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Approved Judgment

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

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court. For the avoidance of doubt in any report of this judgment the First Respondent may be referred to as "Katherine".

Mr Justice Mostyn:

1. The question I have to determine is whether the arrangement made for the care of the First Respondent, KW ("Katherine"), in her own home, by the Applicant, Rochdale Metropolitan Borough Council ("Rochdale"), amounts to a deprivation of liberty within the terms of Article 5 of the European Convention on Human Rights 1950, which is incorporated domestically by the Human Rights Act 1998. That arrangement is approved by me pursuant to section 15 Mental Capacity Act 2005 ("MCA"). If it does amount to a deprivation of liberty then my order will have to provide for periodic reviews by this court. Such reviews plainly have significant resource implications for this hard pressed local authority. Every pound spent on such reviews is a pound less for other vitally necessary projects.

2. My answer to the question will primarily be made on an objective, factual, basis.

3. The Second and Third Respondents are Katherine's sister and brother. They have not played any part in the proceedings.

4. Katherine is aged 52. She is severely mentally incapacitated, to use the new language of the MCA; she is of "unsound mind" to use the old language of Article 5. She suffered brain damage while undergoing surgery to correct arteriovenous malformation in 1996[1], when aged only 34. This resulted in a subarachnoid haemorrhage and long term brain damage. She was left with cognitive and mental health problems, epilepsy and physical disability. She was discharged from hospital into a rehabilitation unit and thence to her own home, a bungalow in Middleton, with 24/7 support.

5. In April 2013 Katherine was admitted to hospital. Her mental health had declined. In May 2013 she was transferred to a psychiatric ward, and later to another hospital. On 28 June 2013 she was discharged and transferred to a care home where she stayed until 14 April 2014, when she returned home. For appreciable periods between 28 June 2013 and 14 April 2014 Katherine's confinement to the care home was not authorised under the terms of the MCA. On 26 June 2014 Katherine, acting by her litigation friend, made a claim for damages under Articles 5 and 8 of the Convention. On any view she had suffered an unlawful deprivation of liberty during those periods when her confinement was not authorised under the MCA. Her claim has been settled with modest compensation and a written apology. I approve the terms of the settlement.

6. Physically, Katherine is just ambulant with the use of a wheeled Zimmer frame. Mentally, she is trapped in the past. She believes it is 1996 and that she is living at her old home with her three small children (who are now all adult). Her delusions are very powerful and she has a tendency to try to wander off in order to find her small children. Her present home is held under a tenancy from a Housing Association. The arrangement entails the presence of carers 24/7. They attend to her every need in an effort to make her life as normal as possible. If she tries to wander off she will be brought back. The weekly cost of the arrangement is £1,468.04. Of this £932.52 is

[1] 1998 and 2000 have also been mentioned in the papers as the year for this unhappy event. The differences are immaterial.

paid by Rochdale and £535.52 by the local NHS Clinical Commissioning Group ("CCG").

7. Mr Adam Fullwood, representing Katherine, says that having regard to the majority decision of the Supreme Court in the combined appeals in the *Cheshire West* and *MIG and MEG* cases (reported sub nom *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19, [2014] 1 AC 896) this is a deprivation of liberty situation. Mr Simon Burrows, representing Rochdale, is constrained to concur. Notwithstanding their excellent arguments, and with great respect, I do not agree. I find it impossible to conceive that the best interests arrangement for Katherine, in her own home, provided by an independent contractor, but devised and paid for by Rochdale and CCG, amounts to a deprivation of liberty within Article 5. If her family had money and had devised and paid for the very same arrangement this could not be a situation of deprivation of liberty. But because they are devised and paid for by organs of the state they are said so to be, and the whole panoply of authorisation and review required by Article 5 (and its explications) is brought into play. In my opinion this is arbitrary, arguably irrational, and a league away from the intentions of the framers of the Convention.

8. It has been said that a consequence of the Supreme Court decision is that there will be tens, if not hundreds, of thousands of similar cases requiring Court of Protection authorisation and periodic reviews. This is not surprising as the facts of this case are unremarkable.

9. Before I examine the explicatory texts I look at Article 5 itself. This says, so far as is material:

> "RIGHT TO LIBERTY AND SECURITY
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

10. The right is to liberty and security. The framers contemplated the lawful detention of only five classes of persons under (e) namely:

    i) Persons with infectious diseases (in order to prevent their spread);

ii) persons of unsound mind;

iii) alcoholics;

iv) drug addicts; and

v) vagrants.

It seems reasonable to construe the lawful detention for these classes *ejusdem generis*. It seems obvious, at least to me, particularly having regard to the first class of case, that the framers plainly had in mind detention of such persons in a state institution such as a secure hospital, asylum or prison. It is noteworthy that in not one of the cases from the Strasbourg court since the advent of the Convention has it ever been suggested that lawful detention could happen in such a person's own home.

11. On this side of the Atlantic we are generally not troubled by the ideological dispute between loose constructionists and textual originalists, as besets our American cousins. It is surely relevant, however, to understand the historical and social context in which Article 5 came to be promulgated. Europe was still reeling from the bestial abuses perpetrated by Nazi Germany and its allies. With the onset of the Cold War the spectre of the gulags was very real. The Convention as a whole, and Article 5 in particular, was devised as a bulwark against the repetition of those lawless abuses. To my mind, Article 5, as originally devised and intended by its framers, has absolutely nothing to do with the best interests care regime which Katherine enjoys in her own home.

12. But, as has been said in a different context, the Convention is "not a foreign object imposed on us by the dead hand of the past, but an evolving reflection of our deepest commitments". It is a "living instrument" to be interpreted in accordance with standards and mores of the time. So the intentions of the framers are not determinative, but they surely remain relevant nonetheless.

13. It is now conclusively determined that for there to be a deprivation of liberty within the terms of Article 5 the following must be shown:

i) an objective element of "a person's confinement to a certain limited place for a not negligible length of time"; and

ii) a subjective element, namely that the person has not "validly consented to the confinement in question"; and that

iii) the deprivation of liberty must be one for which the State is responsible.

See *Storck v Germany* (2005) 43 EHRR 96 at paras [74] and [89]. Thus, there must be a confinement for an appreciable period, which is non-consensual, at the behest of the State. In numerous Strasbourg authorities emphasis has been placed on the key twin features of (1) "continuous supervision and control" and (2) lack of "freedom to leave". This is what has come to be known as the acid test (see paras 48, 54, and 105 of the Supreme Court decision).

14. I consider that the first question I have to answer is what is "liberty" for Katherine? This is obviously a big question. Counsel are agreed that in the Supreme Court only

Lord Kerr grapples with it. Before I turn to his opinion I would, as an aside, observe that for John Stuart Mill the answer was plain. In his essay "*On Liberty*", published in 1859, he stated:

> "…the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."

But he went on to say:

> "…this doctrine is meant to apply only to human beings in the maturity of their faculties … Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury."

For Mill the idea that Katherine's care in her own home involved an encroachment on her liberty would have been utterly impossible. His view would have been the same for each of the cases before the Supreme Court. For Mill, human liberty has three essential strands or components. First, liberty of conscience. Secondly, liberty of tastes and pursuits. And thirdly, liberty of combination among individuals. Each of these components requires a positive and reasoned intellectual function which is hard to ascribe to a person of unsound mind, which is why Mill qualified his doctrine as applying only to those human beings in the "maturity of their faculties."

15. At paras 11 - 14 Lady Hale explains the position of MIG and MEG at the time of the first instance hearing. I need only refer to the condition of MIG. At the time of the trial she was aged 18. She had a moderate to severe learning disability. She also had problems with her sight and her hearing. She communicated with difficulty and had limited understanding, spending much of her time listening to music on her iPod. She needed help crossing the road because she was unaware of danger. She was living with a foster mother with whom she had been placed when she was removed from home. She was devoted to her foster mother (whom she regarded as her "mummy"). Her foster mother provided her with intensive support in most aspects of daily living. She had never attempted to leave the home by herself and showed no wish to do so, but if she did, the foster mother would restrain her. She attended a further education unit daily during term time and was taken on trips and holidays by her foster mother. She was not on any medication.

16. Lord Kerr said this:

> "76. While there is a subjective element in the exercise of ascertaining whether one's liberty has been restricted, this is to be determined primarily on an objective basis. Restriction or deprivation of liberty is not solely dependent on the reaction or acquiescence of the person whose liberty has been curtailed. Her or his contentment with the conditions in which she finds herself does not determine whether she is restricted in her liberty. **Liberty means the state or condition of being free from external constraint**. It is predominantly an objective state. It does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity.

> 77. **The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited**. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.
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> 78. All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are – and have to be – applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is – and must remain – a constant feature of their lives, the restriction amounts to a deprivation of liberty.
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> 79. Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable – curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. **It is because they can – and must – now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty**."
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> (Emphasis added by me).

17. It is clear that the driving theme of the majority opinions is a denunciation of any form of discrimination against the disabled. With that sentiment I naturally wholeheartedly agree. Discrimination is found where like cases are not treated alike. However, when making Lord Kerr's comparison you do not have two like cases. You are comparing, on the one hand, a case where an 18 year old does not need protection and, on the other, a case where the 18 year old does. They are fundamentally dissimilar. The dissimilarity justifies differential treatment in the nature of protective measures. For me, it is simply impossible to see how such protective measures can linguistically be characterised as a "deprivation of liberty". The protected person is, as Mill says, merely "in a state to require being taken care of by others, [and] must be protected against their own actions as well as against external injury". And nothing more than that. In fact it seems to me to be an implementation of the right to security found in Article 5.

18. Let me focus on MIG. She was living in a normal family home albeit under a formal foster placement. She had never attempted to leave the home by herself and showed no wish to do so, but if she did, the foster mother would restrain her. So this was a proleptic rather than an actual constraint. The only actual constraint imposed on her

was assistance in crossing the road. But for Lord Kerr "liberty means the state or condition of being free from external constraint". Because a "normal" 18 year old could cross the road unaided, and because a "normal" 18 year old was free to leave her family home whenever she wanted, MIG was not free from external constraint and was therefore in a situation of deprivation of liberty within the terms of Article 5.

19. The opinions of the majority are binding on me and I must loyally follow them even if I personally agree with the view of Parker J and the Court of Appeal in *MIG and MEG*; with the Court of Appeal in *Cheshire West*; and with the minority in the Supreme Court[2]. There is a similarity between this case and that of MIG inasmuch as both involve so called constraints on an incapacitated person living at home. In determining the factual question I cannot take into account the benign motives of Rochdale in providing the care arrangement or of Katherine's contentment with it. Nor can I take into account the designed normality of the arrangement in Katherine's own home.

20. As I have shown, a key element of the objective test of confinement is whether the person is "free to leave". This is part of the acid test. "Free to leave" does not just mean wandering out of the front door. It means "leaving in the sense of removing [herself] permanently in order to live where and with whom [she] chooses" (see *JE v DE and Surrey County Council* [2006] EWHC 3459 (Fam) [2007] 2 FLR 1150 per Munby J at para 115, implicitly approved in the Supreme Court at para 40). This is the required sense of the second part of the acid test.

21. I do not find the test of the Strasbourg court in *HL v United Kingdom* 40 EHRR 761, at para 91, where it refers to the "concrete situation" of the protected person, as being of much assistance. The adjective "concrete" means that that I should look for an actual substance or thing rather than for an abstract quality. That is to state the obvious. Plainly, I will be looking only at Katherine's actual personal circumstances and not at any abstractions.

22. Katherine's ambulatory functions are very poor and are deteriorating. Soon she may not have the motor skills to walk even with her frame. If she becomes house-bound or bed-ridden it must follow that her deprivation of liberty just dissolves. It is often said that one stress-tests a proposition with some more extreme facts. Imagine a man in hospital in a coma. Imagine that such a man has no relations demanding to take him away. Literally, he is not "free to leave". Literally, he is under continuous supervision. Is he in a situation of deprivation of liberty? Surely not. So if Katherine cannot realistically leave in the sense described above then it must follow that the second part of the acid test is not satisfied.

23. By contrast MIG was a young woman with full motor functions, notwithstanding her problems with her sight and hearing. She had the physical capacity to leave in the sense described. She had sufficient mental capacity to make the decision to leave, in the sense described. If she tried she would be stopped. Therefore, it can be seen that in her case both parts of the acid test was satisfied.

[2] The minority would have allowed the appeal in the Cheshire West case but this was because they considered that the primacy of the fact finding function of the trial judge should not be impugned.

24. In my judgment there is a very great difference between the underlying facts of MIG's case and of this case notwithstanding that in both cases the protected person lives at home.

25. It is my primary factual finding that in Katherine's case the second part of the acid test is not satisfied. She is 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.

26. I am not suggesting, of course, that it is impossible for a person ever to be deprived of his liberty by confinement in his or her own home. In the field of criminal law this happens all the time. Bail conditions, or the terms of a release from prison on licence, routinely provide for this. However, I am of the view that for the plenitude of cases such as this, where a person, often elderly, who is both physically and mentally disabled to a severe extent, is being looked after in her own home, and where the arrangements happen to be made, and paid for, by a local authority, rather than by the person's own family and paid for from her own funds, or from funds provided by members of her family[3], Article 5 is simply not engaged.

27. I am of the view that the matter should be reconsidered by the Supreme Court. It is not completely clear that I can grant a leapfrog certificate under section 12 Administration of Justice Act 1969. Under that section a leapfrog appeal can only be made from a decision of the High Court or the Divisional Court. It has not been specifically amended to include a decision made by a High Court judge sitting in the Court of Protection, notwithstanding that before the enactment of the MCA these decisions were made by the High Court exercising its inherent jurisdiction. On the other hand section 47(1) of the MCA provides that "the [Court of Protection] has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court." This would suggest that notwithstanding the absence of any specific reference to the Court of Protection in section 12 a leapfrog appeal is possible.

28. On balance I conclude that the power to grant a leapfrog certificate exists here. If the Court of Protection has the same rights as the High Court then that must include the right to have a decision made by it reviewed directly by the Supreme Court, provided that all the other conditions are met. Mr Fullwood has indicated that he will apply for a certificate under section 12(4) immediately after the handing down of this judgment. If Mr Burrows (and PK and MW) agree I will grant the certificate.

29. If I am wrong and there is in fact no power to mount a leapfrog appeal from the Court of Protection to the Supreme Court it will not be possible to transfer these proceedings to the High Court to enable the leapfrog to happen. The only power mentioned in the MCA to transfer the proceedings to another court is in section 21. This allows secondary legislation to be made to permit a transfer to be made of proceedings relating to people under 18 to a court having jurisdiction under the Children Act 1989. Pursuant to section 21 (and section 65(5)) of the MCA the Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 (SI 2007 No. 1899) was made by the then President Sir Mark Potter on 25 June 2007. This allows a transfer to be made where the court "considers that in all the circumstances, it is just and convenient to transfer

[3] There is also the problematic question of whether the State is involved in a private arrangement if benefits, such as attendance allowance, are paid to help with the care of the protected person.

the proceedings." It is very odd that there appears to be no equivalent power to permit proceedings relating to adults to be transferred from the Court of Protection to the High Court, where, for example, the High Court is already exercising inherent or statutory powers in relation to the protected person. I do not think that section 47(1) gives the Court of Protection power to transfer proceedings concerning adults to the High Court for any purpose.

30. Accordingly, to cover the eventuality that the Supreme Court decides that a leapfrog appeal here is technically impossible, I will extend the time for seeking permission to appeal to the Court of Appeal until 14 days after the date on which the Supreme Court determines the competence of the leapfrog certificate.

LATER

31. Since handing down this judgment earlier today I have been informed that Rochdale does not consent to a leapfrog certificate.

32. In such circumstances Mr Fullwood seeks permission to appeal to the Court of Appeal. I grant Katherine that permission. I would like to think that the Court of Appeal will very speedily and shortly dispose of the appeal and grant permission to appeal to the Supreme Court. But that will be for them.
