Neutral Citation Number: [2015] EWCOP 39

Case No: 11537855

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2015

Before :

MR JUSTICE MOSTYN

- -

Between :

BOURNEMOUTH BOROUGH COUNCIL	**Applicant**
- and -	
PS	**1st Respondent**
- and -	
DS	**2nd Respondent**

- -

Sian Davies (instructed by **Bournemouth Borough Legal**) for the **applicant**
Mark Mullins (instructed by **Conroys**) for the **first respondent**
The second respondent was not represented

Hearing date: 3 June 2015

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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.

Mr Justice Mostyn:

1. In this case I have to decide (i) whether the package of care provided to BS ("Ben") is in his best interests; (ii) whether that package amounts to a deprivation of liberty within the terms of Article 5 of the European Convention on Human Rights 1950; and (iii) what contact Ben should have to his mother, the first respondent.

2. The application was made by the applicant local authority on 13 February 2015.

3. I heard full argument from counsel for the applicant and for the first respondent. The second respondent, Ben's brother, did not participate in the final hearing.

4. At the commencement of the hearing I determined the question of the participation of Ben in these proceedings. On 16 February 2015 District Judge Susan Jackson joined Ben as a party to the proceedings and invited the Official Solicitor to act as his litigation friend. The Official Solicitor declined to do so.

5. By virtue of COP Rule 2007 rule 141(1), as presently in force, Ben, as a party lacking capacity, is required to have a litigation friend. By virtue of great frugality Ben has accumulated appreciable savings from his benefits. It was foreseeable that were Ben to have a litigation friend who instructed solicitors and counsel, his savings would soon be consumed in legal costs. In my own order of 17 March 2015 I caused a recital to be inserted recording my concern that his means should not be eroded by legal costs. That same order recorded that Ben would be referred to the IMCA service for the appointment of an IMCA. That has duly happened and I have had the benefit of a helpful report from the IMCA, Katie Turner, where Ben's wishes and feelings are clearly set out.

6. In *Re X (Deprivation of Liberty) No. 2* [2014] EWCOP 37 [2015] 2 FCR 28 Sir James Munby P at paras 12 – 15 and 19 explained that Article 6 of the 1950 Convention required that a protected person should be able to participate in the proceedings properly and satisfactorily with the opportunity of access to the court and of being heard, directly or indirectly, in the proceedings. However, these standards did not necessarily require that the protected person should be a party to the proceedings. There was no obstacle to the protected person participating in the proceedings without being a party.

7. This ruling has been put on a statutory footing by a new rule 3A to the COP rules. This permits the protected person's participation to be secured by the appointment of a non-legal representative. However this new rule does not take effect until 1 July 2015, some three weeks hence.

8. In the circumstances, in what I suppose will be one of the last orders of its kind to be made, I directed that Ben be discharged as a party. I was wholly satisfied that his voice has been fully heard through the IMCA Katie Turner. Further, in relation to the question of deprivation of liberty, all relevant submissions have been fully put on both sides of the argument by counsel for the applicant and the first respondent.

9. There was no dispute between the applicant and the first respondent concerning issues (i) and (iii). The argument was centrally about the question of deprivation of liberty.

10. Ben was born on 12 February 1987 and is now aged 28. He is diagnosed as suffering from autistic spectrum disorder and mild learning disability. The first statement from the social worker, Mr Morrison records how he needs continuous care, in the following terms:

> "Ben has a diagnosis of autism with associated severely challenging and dangerous behaviour including damage to property, physical injury to others, self harm and inappropriate sexualised behaviour. He also has significant impairments of social interaction and communication with others. He is at risk of self neglect because he lacks insight into his care needs and the need to maintain his medication. Ben would not be able to care for his physical and mental health needs without support as staff need to prompt him to undertake all personal care, to get out of bed at an appropriate time in the morning, wash his hair and help in maintaining his personal and dental hygiene."

11. A report from Dr Hannah Kiddle, a Highly Specialist Clinical Psychologist, dated 24 February 2012 determined that Ben did not have the capacity to make an informed choice about where he lives. There is no doubt that for the purposes of the Mental Capacity Act 2005, sections 2 and 3, Ben lacks capacity in all relevant respects.

12. In 2000 Ben moved with his family to Bournemouth from Wales. In 2002 care proceedings were commenced by the local authority, and in 2003 a final care order was made. Ben was placed in a number of institutional placements culminating in a placement in 2006 at the Finigan Unit Hospital (which has since closed). In February 2006 in proceedings under the inherent jurisdiction Macur J made an order declaring that Ben lacked capacity to determine where he lived; that it was lawful and in his best interests that the applicant should arrange accommodation for him; and that contact to his mother should be as prescribed therein. Further, orders were made against Ben's mother prohibiting her from disturbing Ben's placement.

13. In 2011 Ben moved to his current accommodation in Bournemouth. This home is described, and the regime that Ben experiences in it, by Mr Morrison as follows:

> "This is a 2-bedroom bungalow with a garden. He lives there on his own and has staff with him in his home for 365 days a year with 24 hour waking night staff attendance provided by Dorset Healthcare University NHS Foundation Trust Domiciliary Care Agency. Ben is subject to constant observation and monitoring and is provided with minimal personal care when he is in his home.
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> He is encouraged to engage with a timetable devised by staff to ensure all daily tasks are completed within the appropriate times of the day. Ben has difficulties in engaging with the agreed tasks as he invariably declines, and reverts to wanting to go back to the arrangements of previous institutional settings where everything was done for him.

> With support, he uses local transport and is involved in doing his own shopping for food and other consumables. Ben needs staff support to encourage him to get out of bed in the morning as he is likely to stay in bed till 12 noon if left. This is managed on a one to one step by step basis. Ben also needs encouragement from the staff to complete his personal care tasks. He has difficulties effectively cleaning himself when in the bath and includes washing his hair. He also needs hands on support to clean his teeth. Without this personal support Ben would neglect his personal care needs putting his health at significant risk of harm.
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> Ben does not have access to the kitchen when cooking is being undertaken by the staff as there have been some incidents of him putting himself and others at risk. The incidents have included the inappropriate use of the microwave, putting hot water on an electric kettle base, and all kitchen utensils are in a locked cupboard due to a past incident of him using a pair of scissors as a weapon; he has demonstrated little understanding of the risks associated in the kitchen. The kitchen is therefore locked by a staff member during cooking. Ben is able and does access the kitchen at other times and the care and risk management plan has determined Ben needs staff attendance at all times in the kitchen. Ben has minimal evening or night needs and generally sleeps through the night but on occasions requests staff support if he is unable to sleep. It has been assessed as Ben requiring a waking staff member to support and respond when the need arises to maintain his safety.
>
> Ben's medication is managed and administered by support staff which he accepts and is compliant with the arrangements. The medication is in a locked cupboard managed by staff as Ben has no understanding of the need for his medication and why he is required to take it to maintain good health."

14. In his oral evidence Mr Morrison elaborated a little on this and explained that Ben certainly does have some privacy. If a staff member is locked in the kitchen he has free unsupervised access to all parts of the bungalow and to the garden. Ben has sexual needs and he is given complete privacy to masturbate in his bedroom when he wishes to do so.

15. There are no locks on the doors but there are sensors which would alert a staff member were he to seek to leave, although he has never tried to do so. Mr Morrison explained the situation as follows:

> "The property is such he is in theory able to leave his home on his own volition. Since he has lived at his bungalow he has never left of his own accord or verbally requested to leave without staff. However a door alarm is in place which would alert staff should Ben attempt to leave without staff attendance. If Ben were to leave the property without this having been

> arranged by staff they would quickly follow him, attempt to engage with him, and monitor him in the community. Ben requires one to one staff support at all times in the community. If he decided he didn't want to return to his home, staff would firstly verbally encourage him to return, if this proved unsuccessful the Manager of Ben's care agency would be contacted and they or another staff member would arrive and assist. If this proved unsuccessful further advice, support and attendance by Crisis Team and Social Services for crisis management would be sought and to consider whether a Mental Health Act assessment would be required. If this proved unsuccessful then consideration would be given to the attendance of the Police. Police attendance would be determined by the circumstances and if it is deemed his health and safety and that of others are at risk of harm. At all times staff would remain with Ben."

16. In his oral evidence Mr Morrison explained that if all attempts to persuade Ben to return home failed they would ask the police to exercise the powers under section 136 of the Mental Health Act 1983 to remove Ben to a place of safety. He also explained that consistently with a duty of common humanity if staff were out with Ben and he appeared to be about to step in front of a car they would prevent him from doing so. He stated in his witness statement:

> "Ben needs 1-1 staff support in the community as he lacks road and traffic awareness. Without staff support Ben would not take into account the traffic or road conditions at any given time. If Ben was unescorted in the community it is highly likely he would walk out into the road presenting a high risk of serious harm to him and potentially others. When Ben is escorted in the community he would be guided either verbally or physically and supported to cross a road and staff would intervene should he put himself at risk of significant harm."

17. He accepted under cross-examination that such an act of humanity could not amount to a deprivation of liberty, and I emphatically agree.

18. In his witness statement Mr Morrison dwelt on one particular aspect of necessary supervision. He stated:

> "There is particular risk associated with Ben accessing public toilets in the community as the result of past incidents of Ben engaging in inappropriate sexual activity in public places including toilets. Ben has no understanding of the rights of other members of the public having access to public toilets safely and that any sexual activity in a toilet is illegal. Ben is supported by staff to access public toilets should he need to do so. … He is encouraged to use the locked cubicle of the disabled toilet and staff have a key to access should this be required. When Ben uses a male communal toilet the worker either remains outside the building or goes inside to support

> Ben. If Ben does not want to leave the toilet a male worker would enter the toilet and encourage him to leave. If a female worker was in attendance they would remain on site and the manager of the care agency would be called for assistance and attendance. A male worker or the intensive support team worker will arrive to support Ben. If this proved unsuccessful the Intensive support team would be called for specialist support and if unsuccessful then Police would be called."

19. There is no dispute between the applicant and the first respondent but that the current arrangements are in Ben's interests and should continue. Ben's wishes as expressed to the IMCA Katie Turner fluctuate. Sometimes he wishes to return to the Finigan Unit Hospital where everything is done for him; sometimes he wishes to live with his mother. Each of these choices is impossible. The Finigan has closed and his mother has neither the space nor the facilities to accommodate and support him.

20. Since the decision of the Supreme Court in *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19, [2014] 1 AC 896 there have been a number of decisions of High Court Judges sitting in the Court of Protection seeking to unravel and apply the acid test for what constitutes a deprivation of liberty. These include two of my own (*Rochdale Metropolitan Borough Council v KW & Ors* [2014] EWCOP 45 and *London Borough of Tower Hamlets v TB & Anor* [2014] EWCOP 53) and the recent judgment of Mr Justice Bodey in *W City Council v Mrs L* [2015] EWCOP 20.

21. In the *Rochdale* case I decided that the protected person, a lady aged 52 who was severely mentally incapacitated, cared for round the clock in her own home, was not in a position of being detained by the state either legally, literally or philosophically. I decided on the facts at para 25 that "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." In that regard I followed the definition of what constitutes freedom to leave as spelt out in *JE v DE and Surrey County Council* [2006] EWHC 3459 (Fam) [2007] 2 FLR 1150 by Munby J at para 115, which to my mind had been implicitly approved in the Supreme Court at para 40. That definition is: "leaving in the sense of removing [herself] permanently in order to live where and with whom [she] chooses".

22. My adoption of that definition has provoked a certain amount of criticism. In his blog[1] Alex Ruck Keene wrote:

> "Further, it seems to us that Mostyn J was on thin ice in holding that the Supreme Court had held that “freedom to leave” defined solely in the “macro” terms said to have been identified by Munby J in *JE v DE*. In the same speech given by Lady Hale noted above[2] and in the course of discussing the situations of P, MIG and MEG, she noted that:

[1] http://www.39essex.com/cop_cases/rochdale-mbc-v-kw/
[2] Psychiatry and the Law: An enduring interest for Lord Rodger, The Lord Rodger Memorial Lecture 2014, 31 October 2014.

> "they were under the complete control of the people looking after them and were certainly not free to go, either for a short time or to go and live somewhere else" (emphasis added).
>
> Whilst, of course, Lady Hale was not speaking in a judicial capacity, at the very least it suggests that she does not consider that the majority held that freedom to leave was only relevant in the 'macro' sense.
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> Taking a step back, and even applying Mostyn J's analysis of the 'ordinary' person able to take advantage of their liberty, we would suggest that an 'ordinary' person who was unable to come and go from the place that they live as they see fit would undoubtedly consider themselves to be deprived of an important right. We note in this regard that the Grand Chamber of the European Court of Human Rights placed very considerable emphasis in *Stanev* on the fact that Mr Stanev was not able to leave the care home for such purposes as visiting the nearby village "*whenever he wished*" (i.e. not merely for purposes of permanently relocation) in finding that he was deprived of his liberty (see in particular paragraphs 124-128). This is also entirely consistent with the approach adopted in *KC v Poland* ."

23. I do not retreat from my view one inch. I do not think that reliance can be placed on the case of *Stanev* to undermine the definition given by Munby J. As I will explain, Mr Stanev was unquestionably being incarcerated for myriad reasons, and to pluck out one aspect of his detention and then to elevate it into a stand-alone litmus test for the issue does not seem to me to be an example of objective reasoning. Equally, the reliance on one remark, an aside almost, made by Lady Hale in her lecture seems to me to be a very fragile peg on which to hang the rebuttal.

24. I explained in my second decision in the *Rochdale* case ([2015] EWCOP 13) that my order in that case had been overturned by the Court of Appeal on the merits in strange circumstances without a hearing or a judgment explaining why or how I had erred. I further explained that at the present time it is unknown whether the protected person in that case is or is not in a condition of state detention.

25. In *London Borough of Tower Hamlets v TB & Anor* [2014] EWCOP 53 I focussed on an aspect which had not been considered by the Supreme Court. While everyone would agree that there should be no discrimination against the disabled the fact is that discrimination only occurs when like cases are not treated alike, and as must be obvious, the case of a disabled person is not the same as the case of an able-bodied person. Therefore as Judge Greve pointed out in *Price v. The United Kingdom* [2001] ECHR 458 "the applicant's disabilities are not hidden or easily overlooked. It requires no special qualification, *only a minimum of ordinary human empathy*, to appreciate her situation and to understand that to avoid unnecessary hardship – that is, hardship not implicit in the imprisonment of an able-bodied person – she has to be treated differently from other people because her situation is significantly different." In my decision at para 57 I held that the state is obliged to secure the human dignity of the disabled by recognising that their situation is significantly different from that of the

able-bodied. Thus measures should be taken to ameliorate and compensate for those disabilities. I said that to characterise those necessary measures as state detention is unreal.

26. In his comment on this decision Alex Ruck Keene wrote[3] "the judge's further comments on the vexed issue of deprivation of liberty explain in more detail the difficulty many people have in seeing how the intensive support and care that a person requires to meet their needs could engage Article 5 ECHR". I think he is probably right and I would go further and would suggest that almost all people would share my difficulty.

27. In *W City Council v Mrs L* a 93 year old lady living at home, suffering from dementia, supported by a package where she was visited three times a day, was said by the local authority to be in a condition of deprivation of liberty. Bodey J decided that she was not. He held:

> "22. It is clear from *Cheshire West* that there may be situations where a person is not free to leave a place, but is not under *such* continuous supervision and control as to mean that the arrangements put in place constitute a deprivation of liberty (per Lady Hale, cited at paragraph 11 above). It is well established that the difference between a deprivation of liberty and a restriction of liberty is one of degree or intensity, not one of nature or substance. The bulk of the jurisprudence can be seen to concern individuals in State-run social care institutions or hospitals, and not individuals in their own homes. This *per se* cannot of course be decisive in a given case for saying that a deprivation of liberty does not exist (for it is easy to envisage arrangements in a person's own home which would constitute just such a deprivation of liberty); but, in my judgment, the 'own home' consideration must be a relevant factor in the mix.
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> 23. There are also references in the authorities suggesting that it has been relevant that the individual concerned, or someone acting on his behalf, was the complainant; in other words, was oppositional concerning the arrangements. For example at paragraph 71 of *Cheshire West* Lord Neuberger said:
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> "…It is a fair point that the Strasbourg court has never had to consider a case where a person was confined to what may be described as an ordinary home. However, I cannot see any good reason why the fact that a person is confined to a domestic home, as opposed to a hospital or other institution, *should prevent her from contending that she has been deprived of her liberty*." [Emphasis added]
>
> Again, in paragraph 41 of *Cheshire West*, Lady Hale spoke about the *complainant* being under the complete supervision

[3] http://www.39essex.com/cop_cases/lb-tower-hamlets-v-tb-ors/

and control of *the staff* and not free to leave [emphasis added]. Such considerations do not apply here, although they are clearly not pre-requisite to a deprivation of liberty: see paragraph 12(a) above. But it is overwhelmingly clear that Mrs L is where she always wanted to be when she was capacitous: and where not only has she not shown or expressed any dissatisfaction with the arrangements, but has demonstrated positively a continuing satisfaction with being in her own home. Further, her home is clearly not a 'placement' in the sense of a person being taken or taking herself to some institution or hospital.

24. The fact of Mrs L referring to, and demonstrating by her demeanour, this continuing contentment in her home is not in issue. It is right that she is of course not capacitated. Otherwise, this case would not be happening. But I do find that she is capable of expressing her wishes and feelings, as is referred to in the documents and shown in such things as for example her choice of clothes, the choice of what she does around the property, and in her going in and out of the garden at will. Although I accept the general need for the caution which Miss Hirst urges me to exercise, this consideration must be relevant in the evaluation of whether Mrs L is being 'deprived' of her 'liberty' within Article 5.

25. This case is thus different from one involving institutional accommodation with arrangements designed to confine the person for his or her safety, and where that person, or someone on his or her behalf, is challenging the need for such confinement. At paragraph 38 of Cheshire West Lady Hale spoke about 'the presence or absence of coercion' being a relevant consideration. As I have said, the range of criteria to be taken into account includes the type, duration, effects and manner of implementation of the arrangements put in place. The fact that those criteria are prefaced by the words 'such as' demonstrates that they are not intended to be exhaustive. It is a question of an overall review of all the particular circumstances of the case.

26. I observe too that Article 5 refers to everyone having a right to 'liberty *and security* of person' [emphasis added]. Mrs L's 'security' is being achieved by the arrangements put into place as being in her best interests, even though involving restrictions. Such restrictions are not continuous or complete. Mrs L has ample time to spend as she wishes, and the carer's visits are the minimum necessary for her safety and wellbeing, being largely concerned to ensure that she is eating, taking liquids and coping generally in other respects.

27. This is a finely balanced case; but on the totality of everything that I have read in the files, I have come to the

> conclusion and find that whilst the arrangements (clearly) constitute restrictions on Mrs L's liberty, they do not quite cross the line to being a deprivation of it. If I were wrong about that, and if there is a deprivation of Mrs L's liberty, is it to be imputed to the State? On the facts, I find not. This is a shared arrangement set up by agreement with a caring and pro-active family: and the responsibility of the State is, it seems to me, diluted by the strong role which the family has played and continues to play. I do not consider in such circumstances that the mischief of State interference at which Article 5 was and is directed, sufficiently exists.
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> 28. In these circumstances, my decision is simply that there is no deprivation of Mrs L's liberty. This is not per se because Mrs L is in her own home; nor because she wishes to be there. Those features alone would not necessarily stop particular arrangements amounting to a deprivation of liberty. Rather it is a finely balanced decision taken on all the facts of the particular case. The question of the court's authorising the arrangements concerned does not in the circumstances arise, although I would have authorised them if it did. The question of Mrs L's up to date best interests is better considered back in Birmingham by the District Judge, and I anticipate that it should be capable of being dealt with by consent."

28. I whole-heartedly agree with this decision and the reasoning underpinning it. I particularly associate myself with para 26. The intensive support and care that a person requires to meet their needs plainly *does* engage Article 5 ECHR, but not necessarily in the way suggested by the advocates of the term-of-art definition promulgated by the Supreme Court. Rather, it engages and gives effect to the right to security mentioned in that Article.

29. The continuing legal controversy shows how difficult it is to pin down a definition of what is a deprivation of liberty (i.e. detention by the state) as opposed to a restriction on movement or nothing beyond humane and empathetic care. It has been said on a number of occasions by the Strasbourg Court that the difference is merely one of degree or intensity, and not one of nature or substance (see, for example, *Stanev v Bulgaria* (2012) 55 EHRR 22 at para 115). Ultimately I think that whether a factual situation does or does not satisfy the acid test is likely to be determined by the "I know it when I see it" legal technique. That received its most famous expression from Justice Potter Stewart in the US Supreme Court in *Jacobellis v Ohio* (1964) 378 U.S. 184, an obscenity case, where he stated "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." The technique has been expressed in zoological metaphor. In *Cadogan Estates Ltd v Morris* [1998] EWCA Civ 1671, a case about a claim for a new lease, Stuart-Smith LJ stated at para 17 "this seems to me to be an application of the well known elephant test. It is difficult to describe, but you know it when you see it". Another expression is the well known aphorism attributed to the American poet James Whitcomb Riley who

wrote "when I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck". The case of *Stanev* was perfectly obviously one of rigorous state detention. In describing Mr Stanev's circumstances the court referred to the "severity of the regime". The complainant was held in dire conditions in a remote compound enclosed by a high metal fence. Apart from the administration of medication, no therapeutic activities were organised for residents, who led passive, monotonous lives. The complainant needed prior permission to leave the compound, even to visit the nearby village. He had been denied permission to travel on many occasions by the management. In accordance with a practice with no legal basis, residents who left the premises for longer than the authorised period were treated as fugitives and were searched for by the police. The complainant had in fact been arrested by the police on one occasion.

30. One does not need to reach for many legal tomes to realise that this was unquestionably a case of deprivation of liberty. The Strasbourg court knew it when it saw it.

31. In *KC v Poland* [2014] ECHR 1322 a 72 year old widow, under the apparent care of a social guardian, who had previously been declared to be partially incapacitated, was placed by a court, against her wishes, in a care home on account of chronic schizophrenia and a disorder of the central nervous system. She could ask for permission to leave the care home on her own during the day. When she asked for the court order to be varied to allow her to leave for one hour a day to go to the shops and to allow her to stay in her room all day, this request was declined by the court on the basis that it was provided for by the internal regulations of the care home. The Polish government's position was that she had never requested permission to leave on her own even for a short period of time. However, and unsurprisingly, the government did not contest that she had been deprived of her liberty under Article 5. It knew it when it saw it. The court, inevitably, agreed. At para 51 it stated:

> "In the present case, although the applicant has been declared only partially incapacitated and although the Government submitted that she could ask to leave the social care home on her own during the day, they did not contest that she had been deprived of her liberty. She was compulsory placed in the social care home, against her will, on the basis of a court decision. Therefore, the responsibility of the authorities for the situation complained of is engaged."

32. In my opinion that was a very obvious case of state detention.

33. I cannot say that I know that Ben is being detained by the state when I look at his position. Far from it. I agree with Mr Mullins that he is not. First, he is not under continuous supervision. He is afforded appreciable privacy. Second, he is free to leave. Were he to do so his carers would seek to persuade him to return but such persuasion would not cross the line into coercion. The deprivation of liberty line would only be crossed if and when the police exercised powers under the Mental Health Act. Were that to happen then a range of reviews and safeguards would become operative. But up to that point Ben is a free man. In my judgment, on the specific facts in play here, the acid test is not met. Ben is not living in a cage, gilded or otherwise.

34. In making this decision I am doing no more than interpreting and applying the law, as I understand it to have been stated and promulgated by the majority of the Supreme Court, to the specific facts of this case. In reaching my decision I have reminded myself that, as Bacon wrote, a judge's office is "*jus dicere,* and not *jus dare;* to interpret law, and not to make law, or give law"[4].

35. I therefore declare that Ben is not being deprived of his liberty by virtue of the care package which I approve as being in his best interests.

36. So far as contact is concerned the proposal is that the present monthly supervised contact will be increased to happen much more frequently and that after the passage of a reasonable period under the new routine a review should take place to see if contact can resume on an unsupervised basis. The first respondent is agreeable to this plan. I leave the details to be agreed between her and the applicant and they will be incorporated in my order.

37. I agree that the order of Macur J of February 2006, which contains various prohibitions against the first respondent, should be discharged. There is no evidence that the first respondent has ever breached the order or that were the prohibitions to be removed that she would act inappropriately in the future. A new order should be made under the 2005 Act incorporating the decisions I have made in this judgment.

38. In her lecture Lady Hale frankly stated that the decision of the Supreme Court of 19 March 2014 has had "alarming practical consequences". I was told by Miss Davies that in the immediate aftermath of the decision the rate of suspected DOLs cases in this local authority rose by 1000% (it has recently reduced to 800%). This local authority is one of three in Dorset. Statistics from the Department of Health state that in the six month period immediately following the decision 55,000 DOLs applications were made, an eightfold increase on 2013-14 figures.

39. The resource implications in terms of time and money are staggering. In the *Tower Hamlets* case I stated at para 60:

> "Notwithstanding the arrival of the streamlined procedure recently promulgated by the Court of Protection Practice Direction 10AA there will still be tens if not hundreds of thousands of such cases and hundreds of thousands if not millions of documents to be processed. The streamlined procedure itself requires the deployment of much man and womanpower in order to identify, monitor and process the cases. Plainly all this will cost huge sums, sums which I would respectfully suggest are better spent on the front line rather than on lawyers."

40. I do not criticise this local authority in the slightest for bringing this case. In the light of the decision of the Supreme Court local authorities have to err on the side of caution and bring every case, however borderline, before the court. For if they do not, and a case is later found to be one of deprivation of liberty, there may be heavy

[4] Essayes or Counsels, Civill and Morall: Of Judicature (LVI) (1625)

damages claims (and lawyers' costs) to pay. I remain of the view that the matter needs to be urgently reconsidered by the Supreme Court.
