Neutral Citation Number: [2015] EWHC 922 (Fam)

Case No: FD14P01079

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/03/2015

Before :

THE HONOURABLE MR JUSTICE KEEHAN

- -

Between :

TRUST A **Applicant**

- and –

(1) X (By the Child's Guardian) **Respondents**
(2) A LOCAL AUTHORTITY
(3) Y
(4) Z

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- -

Mr John McKendrick (instructed by **Mills and Reeve LLP**) for the **Applicant**
Mr Jeremy Ford (instructed by **CAFCASS Legal**) for the **First Respondent (By the Child's Guardian)**
Mr Jonathan Cowen and Mr Edward Bennett (instructed by **A Local Authority Solicitors**) for the **Second Respondent**
Third Respondent Y in person
Fourth Respondent did not appear nor was represented

Hearing dates: 9 and 10 March 2015

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Judgment

THE HONOURABLE MR JUSTICE KEEHAN

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 children 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 Keehan :

Introduction

1. D was born on 23 April 1999 and is 15 years of age. He was diagnosed with Attention Deficit Hyperactivity Disorder at the age of 4, with Asperser's Syndrome at the age of 7 and with Tourette's syndrome at the age of 8.

2. In March 2012 a referral was made to the Child and Adolescent Mental Health services because of his challenging behaviours at home. His treating community psychiatrist made a referral to Hospital B. On 15 October 2013 he was informally admitted for a multidisciplinary assessment and treatment. D remains at Hospital B to date. In the opinion of his treating psychiatrist, Dr K, D is now fit to be discharged from the hospital. The local authority is in the process of identifying a suitable residential placement and it is hoped that D will be placed by the end of this month.

3. On 11 December 2014, and in light of the decision of the Supreme Court in *Surrey County Council v P, Cheshire West and Chester Council v P [2014] UKSC 19 [2014] AC 896 ('Cheshire West')*, the hospital Trust issued an application under the inherent jurisdiction of the High Court seeking a declaration that the deprivation of D's liberty by the Trust was lawful and in his best interests. On 17 December 2014 Holman J made an interim declaration that the deprivation of liberty was lawful. He further gave directions for the hearing of this application.

The issues

4. I am asked to determine the following principal issues:

    a) does the placement of D at Hospital B satisfy the first limb of the test propounded by Baroness Hale in *Cheshire West;*

    b) if so, does the parents' consent to his placement come within the exercise of parental responsibility in respect of a 15 year old young person. In other words are the parents able to consent to what would otherwise amount to a deprivation of liberty; and

    c) if not, should the court exercise its powers under the inherent jurisdiction to consider declaring that the deprivation of liberty of D at Hospital B is lawful and in his best interests.

5. On 9 March I heard the parties' submissions on each of these issues.

6. The Applicant Trust submits that the circumstances in which D lives at Hospital B satisfy the first limb of the *Cheshire West* test namely:

> "the objective component of the confinement in a particular restricted place for a not negligible length of time."

7. Further the Trust submits that D's parents cannot consent to his placement at Hospital B because such a decision, to consent to what would otherwise amount to a deprivation of liberty, falls outside the 'zone of parental responsibility'.

8. Accordingly, the Trust submits the appropriate course is to seek the court's approval of D's placement under the inherent jurisdiction of the High Court.

9. The local authority adopts a diametrically opposed stance. It submits that the circumstances of D's placement do not amount to a deprivation of liberty. Further, it submits that the decision of D's parents to consent to his placement at Hospital B falls within the proper exercise of parental responsibility. Accordingly what might otherwise constitute a deprivation of liberty does not do so because the second and third limbs of the test in *Cheshire West* are not satisfied namely:

> " (b) the subjective component of lack of valid consent; and
>
> (c) the attribution of responsibility to the state".

10. The children's guardian confined her submissions to observations that D was well placed at Hospital B and was progressing.

11. D's mother, W, acted in person. She did not seek to make any submissions. D's father, M, was unable to appear at this hearing but did not seek an adjournment nor to make any submissions on the principal issues.

Background

12. D was diagnosed with Attention Deficit Hyperactivity Disorder, Asperger's Syndrome and Tourette's Syndrome from a very early age. On admission to Hospital B in October 2013 he was further diagnosed as suffering from a mild learning disability.

13. His parents struggled for many years to care for D in the family home. He had significant difficulties with social interactions. His behaviour was challenging; he was observed to be physically and verbally aggressive. D would urinate and defecate in inappropriate places. He presented with anxiety and paranoid behaviours. All of this had a marked adverse effect on D's younger brother R. Medication had limited effects.

14. In March 2012 D was referred to his local Child and Adolescent Mental Health team. His treating psychiatrist made a referral to Hospital B who agreed to admit D informally for multi disciplinary assessment and treatment.

15. Hospital B provides mental health services to children and young people aged between 12 and 18. D lives within the grounds of the hospital. He attends an on site school on a full time basis.

16. His parents and brother visit him at the unit on a regular basis. D frequently speaks to his parents on the telephone. He enjoys home visits usually at a weekend for up to six hours but he is supervised at all times.

17. Dr K describes D's life at Hospital B as follows:

> "D is residing on X one of the two buildings which make up the adolescent service. Each building is a six-bedded unit. Each young person has their own bedroom, and shares bathroom and living areas with the other patients. There is a school room attached to each building, and all the students receive full time education provided from a special school outreach service."

> "D's unit is staffed 24 hours a day.
>
> It has a locked front door. D does not leave the ward without a staff member or his family accompanying him. He has been offered opportunity to undertake small tasks by himself, such as emptying the bins, but he says he is scared. Unescorted leave would be considered as part of his treatment package to see how he fares.
>
> D has his own bedroom, which he can access whilst he is on the unit at his leisure. He shares a bathroom and residential areas within the building.
>
> D is on general observations. This means that he is checked on every half an hour or so. However, D seeks out contact with staff more regularly within that time and this means that he is under direct observation on a much more regular basis. I am of the view that he is under constant supervision and control.
>
> His school is integral to the building. He goes off site for all relevant school activities such as, to music sessions on site, and to activities which take place in the community, such as shopping and cafes. He leaves the unit on a daily basis, accompanied by staff.
>
> He is independent in his self-care, and requires minimal support for this. He eats a varied diet independently, and is able to vocalise his preferences.
>
> Attempts to engage him in more serious conversation unnerves him, and he will try to deflect the subject, or directly challenge the person, by telling them that he is not happy. I am of the view that this is reflected in the anxiety he has shown around his discharge. My team will need to manage this carefully within the discharge process.
>
> When out in the community, D is supported one-to-one. He has stated that he would be anxious to go out on his own, and prefers to be accompanied by staff. On occasion he has to be reminded about his behaviour when out, as he might stare and pull faces at strangers. He has been encouraged to do some tasks independently, such as emptying the bins outside, but he has stated that he was too anxious to do it by himself and so he is accompanied when doing this."

18. In relation to the reviews of D's progress and the suitability of his continued placement, Dr K reported:

> "The Trust undertakes weekly Multidisciplinary Team reviews of D's care by way of a team review at Hospital B. These involve those involved in D's care, including myself, nursing staff, speech and language specialists, occupational therapists and representatives from his school (which is on site at Hospital B).
>
> In addition, on a five or six weekly basis, D's care is reviewed by members of the Trust and local services. This includes A Local Authority, whose representatives are invited to attend. This meeting gives an overview of

> progress over the last 6 weeks. Historically A Local Authority had not attended as there was no social worker allocated. Those present will discuss D's presentation in depth and any changes/proposed changes to his care plan and medication. Feedback and input from his family are obtained also and a key component of the meeting is to plan next steps in his care, including discharge planning."

19. D is assessed by Dr K as not being 'Gillick' competent to consent to his residence and care arrangement or to any deprivation of liberty.

20. Dr K considers it inappropriate to use the provisions of the Mental Health Act 1983 to place D under section. It is not necessary to detain D in order to treat him.

21. In August 2014 the clinical team led by Dr K agreed that D was now fit to be discharged from hospital to a residential placement. There has been considerable delay in identifying a suitable residential unit for D. I do not intend to dwell on the reasons for that delay. It is highly likely that D will be subject to a similar regime of supervision and control in that placement as he is at the hospital.

Law

22. In the case of *Cheshire West* the Supreme Court considered the issue of a deprivation of liberty in the context of the living arrangements of mentally incapacitated individuals. It was held by the majority that since the term, deprivation of liberty, was to be given the same meaning in domestic law as in Article 5 of the Convention it was to be construed by reference to the relevant jurisprudence of the European Court of Human Rights ('ECHR').

23. Having undertaken a review of decisions of the ECHR, Baroness Hale said:

> 37. The second question, therefore, is what is the essential character of a deprivation of liberty? It is common ground that three components can be derived from *Storck*, paras 74 and 89, confirmed in *Stanev*, paras 117 and 120, as follows: (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.
>
> 38. […] the difference between restriction and deprivation of liberty is one of fact and degree in which a number of factors may be relevant. Simply asking whether a person is "confined" is not enough except in obvious cases. The "starting point" is always upon the "concrete situation" of the particular person concerned and "account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question": 3 EHRR 333, para 92. The presence or absence of coercion is also relevant. Thus there is no single "touchstone" of what constitutes a deprivation of liberty in this or any other context.

and later said

> 45. In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.
>
> 46. Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focussed right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that 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.

and

> 50. The National Autistic Society and Mind, in their helpful intervention, list the factors which each of them has developed as indicators of when there is a deprivation of liberty. Each list is clearly directed towards the test indicated above. But the charities do not suggest that this court should lay down a prescriptive list of criteria. Rather, we should indicate the test and those factors which are *not* relevant. Thus, they suggest, the person's compliance or lack of objection is not relevant; the relative normality of the placement (whatever the comparison made) is not relevant; and the reason or purpose behind a particular placement is also not relevant. For the reasons given above, I agree with that approach.

24. Baroness Hale considered the decision of the ECHR in the case of *Neilsen v Denmark (1988) 11 EHRR 175*. There the court found that the hospitalisation of a 12 year old for 5 months was not a deprivation of liberty. It was rather the responsible exercise by his mother of her custodial rights in the interest of the child. Lord Neuberger referred to the decisions in *Neilsen* as ‘controversial’ [paragraph 72]. Baroness Hale observed

that the decision of the court in that case "would appear, therefore….to turn on the proper limits of parental authority in relation to the child" [paragraph 30].

25. Later in the judgment she said:

> 54. If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty. Furthermore, that deprivation is the responsibility of the state. Similar constraints would not necessarily amount to a deprivation of liberty for the purpose of article 5 if imposed by parents in the exercise of their ordinary parental responsibilities and outside the legal framework governing state intervention in the lives of children or people who lack the capacity to make their own decisions.

26. Mr McKendrick submits that other obiter comments made in *Cheshire West* suggest that parents can consent to the deprivation of liberty in respect of their children 'living at home' (per Lord Neuberger at paragraph 72) or 'in the normal family setting' (per Lord Kerr at paragraph 79).

27. I was referred to the case of *RK v BCC and othrs* [2011] EWCA Civ 1305 which was concerned with the question of whether the accommodation of a child or young person under s20 CA 1989 could give rise to a deprivation of liberty. The Court of Appeal agreed with the conclusion of Mostyn J that on the facts of the case the circumstances of the young person's accommodation amounted to a restriction of her liberty and not a deprivation of liberty.

28. In the course of giving the judgment of the court, Thorpe LJ said at paragraphs 14 and 15:

> 14. The consensus is to this effect: The decisions of the European Court of Human Rights in *Neilson v Denmark* [1988] 11EHRR 175 and of this court in *Re K* [2002] 2WLR 1141 demonstrate that an adult in the exercise of parental responsibility may impose, or may authorise others to impose, restrictions on the liberty of the child. However restrictions so imposed must not in their totality amount to deprivation of liberty. Deprivation of liberty engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the deprivation of liberty of a child.
>
> 15. This consensus was supported and accepted by the court. How does it apply to this case on its facts?

29. Mr Cowen, who appeared for the local authority in RK, submitted that, on further reflection, the concession was wrongly made and the consensus was erroneously achieved. I am told that no authorities were cited to the Court of Appeal in support of the concession. The observations of Thorpe LJ set out above and in particular the passage ' a parent may not lawfully detain or authorise the deprivation of liberty of a

child' were made obiter. With great respect to Thorpe LJ, I doubt the same correctly states the legal position. This bold statement is arguably inconsistent with the views expressed by two of the Supreme Court Justices in *Cheshire West*: see paragraph 26 above.

30. The Court of Appeal referred to the 'deprivation of liberty of a child' without any qualifications to the child's age or maturity. It is obvious that young children will be under the 'complete supervision and control' of the parents and 'will not be free to leave' the family home without supervision. Such a state of affairs would certainly not amount to a deprivation of liberty. In the premises I do not consider myself to be bound by the observations made in *RK*.

31. In *Re K (A child) (Secure Accommodation Order: Right to Liberty) [2001] Fam 377* the Court of Appeal considered whether s 25 CA 1989 was incompatible with Art 5 of the Convention. The court concluded it was not. In the course of giving judgment Butler-Sloss P said:

> 29. […] A child can be the subject of a secure accommodation order in circumstances in which the local authority does not share parental responsibility with the parents. It is a benign jurisdiction to protect the child as well as others: see *In re W (Secure Accommodation Order: Attendance at Court*) [1994] 2 FLR 1092, 1096 per Ewbank J, but it is none the less restrictive. If a parent exercised those powers by detaining a child in similar restrictive fashion and was challenged to justify such detonation, for my part I doubt whether the general rights and responsibilities of a parent would cover such an exercise of parental authority. It might be permissible for a few days but not for nearly two years.

32. In giving a concurring judgment Judge LJ (as he then was) said:

> 99 …There was some interesting discussion about the way in which parents restrict the movements of their children from time to time by, for example, putting young children into bed when they would rather be up, or "grounding" teenagers when they would prefer to be partying with their friends, or sending children to boarding schools, entrusting the schools with authority to restrict their movements. All this reflects the normal working of family life in which parents are responsible for bringing up, teaching, enlightening and disciplining their children as necessary and appropriate, and into which the law and local authorities should only intervene when the parents' behaviour can fairly be stigmatised as cruel or abusive.
>
> …
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> 101 … If the restrictions necessarily imposed on K for his own safety and that of others were imposed on an ordinary boy of 15, who did not pose the problems requiring a secure accommodation order, in my view, there would be a strong case that his parents were ill-treating him. As it is the local authority have been obliged, as a "last resort", to seek authorisation to impose restrictions on the boy's liberty which would otherwise be unacceptable, whether imposed by his parents or anyone else. That, as it seems to me, is the point of the unequivocal statutory language. The

> purpose is to restrict liberty, and there would be no point in such a restriction or the need for it to be authorised by the court, if it were not anticipated that much more was involved than ordinary parental control…
>
> 102 In short, although normal parental control over the movements of a child may be exercised by the local authority over a child in its care, the implementation of a secure accommodation order does not represent normal parental control.

33. The observations of both Butler-Sloss P and Judge LJ were made and must be read in the context of the provisions of a secure accommodation order which is recognised to be a draconian order. It must be granted sparingly and only where, of course, the statutory criteria of s25 (1) (a) and (b) 1989 are satisfied namely:

> … unless it appears—
>
> (a)that—
>
> (i)he has a history of absconding and is likely to abscond from any other description of accommodation; and
>
> (ii)if he absconds, he is likely to suffer significant harm; or
>
> (b)that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

34. In my judgment the decision in *Re K* is limited to the interpretation of s 25 CA 1989 and the compatibility of that statutory provision with article 5 of the Convention. The references to the ambit of parental responsibility were obiter. In any event I do not derive any assistance from the decision and observations made in *Re K* in deciding whether D's parents on the facts of this case were entitled to consent to his detention in Hospital B.

35. The point has been made in the course of submissions that D will be 16 very shortly on 23 April when a different approach and statutory regime applies. Thus once D is 16 years of age any deprivation of D's liberty would have to be sanctioned by the Court of Protection pursuant to the provisions of the Mental Capacity Act 2005.

36. I have been referred to the provisions of s131 MHA 1983 which states:

> 131 Informal admission of patients.
>
> (1)Nothing in this Act shall be construed as preventing a patient who requires treatment for mental disorder from being admitted to any hospital or **[**registered establishment**]** in pursuance of arrangements made in that behalf and without any application, order or direction rendering him liable to be detained under this Act, or from remaining in any hospital or **[**registered establishment**]** in pursuance of such arrangements after he has ceased to be so liable to be detained.

> **[** (2)Subsections (3) and (4) below apply in the case of a patient aged 16 or 17 years who has capacity to consent to the making of such arrangements as are mentioned in subsection (1) above.
>
> (3)If the patient consents to the making of the arrangements, they may be made, carried out and determined on the basis of that consent even though there are one or more persons who have parental responsibility for him.
>
> (4)If the patient does not consent to the making of the arrangements, they may not be made, carried out or determined on the basis of the consent of a person who has parental responsibility for him.
>
> (5)In this section—
>
> (a)the reference to a patient who has capacity is to be read in accordance with the Mental Capacity Act 2005; and
>
> (b)"parental responsibility" has the same meaning as in the Children Act 1989.**]**

37. Further s8 FLRA 1969 provides that:

> s8(1) The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.

38. These provisions are just two examples of where Parliament has chosen, in a number of areas, to draw a distinction between a child and a young person who has yet to achieve his/her majority but who has attained the age of 16 or 17. Thus the legal authority of a parent to consent to the detention or treatment of a 16 or 17 year old is severely curtailed, if not removed.

39. The threshold is attaining the age of 16. The fact that a young person is 16 minus 23 days is irrelevant as far as the effect of those provisions is concerned.

Discussion

40. In the ultimate analysis counsel for the Trust and counsel for the local authority accepted that the circumstances in which D was accommodated amounted to a deprivation of liberty subject to the issue of consent to the placement.

41. Mr Cowen, on behalf of the local authority sought to contend that:

    i) *Cheshire West* did not apply to those cases where the young person concerned was under the age of 16 years;

    ii) in such a case the decision in *Cheshire West,* that the disability or mental disorder of the young person concerned was irrelevant to the question of whether there was a deprivation of liberty, did not apply; and

iii) the court should prefer and apply the 'relative normality' test propounded by the Court of Appeal in *P and Q.*

42. I do not accept any of those propositions. The protection of Article 5 of the Convention and the fundamental right to liberty applies to the whole of the human race; young or old and to those with disabilities just as much to those without. It may be those rights have sometimes to be limited or restricted because of the young age or disabilities of the individual but 'the starting point should be the same as that for everyone else', per Baroness Hale: *Cheshire West* at paragraph 45.

43. The majority in *Cheshire West* decided that what it means to be deprived of liberty is the same for everyone, whether or not they have a physical or mental disability: per Baroness Hale in *Cheshire West* at paragraph 46.

44. I accept the essential ratio of *Cheshire West* does not apply to the circumstances of this case. Nevertheless, in my view, the acid test definitions of a deprivation of liberty apply as much to D as they did to the subjects of the appeals in *Cheshire West.*

45. In the premises I do not accept the local authority's third submission that I should reject the approach of the Supreme Court in *Cheshire West* and apply the Court of Appeal's test of 'relative normality'. I do not understand the logic of the submission that I should hold that the decision of the Supreme Court does not apply to the facts of this case but then resurrect and apply the test propounded by the Court of Appeal which was expressly rejected by the majority of the Supreme Court.

46. The essential issue in this case is whether D's parents can, in the proper exercise of parental responsibility, consent to his accommodation in Hospital B and thus render what would otherwise be a deprivation of liberty <u>not</u> a deprivation of liberty (ie the 2nd limb in *Cheshire West* is <u>not</u> satisfied).

47. Mr McKendrick draws a distinction between the circumstances of the child in *Neilsen* and those of D. I agree with those submissions. In any event, and for the avoidance of any doubt, I have not had regard to the 'controversial' majority judgment in *Neilsen* in coming to my decision in this case.

48. Mr McKendrick reminds me that Dr K does not consider D to be Gillick competent to consent to his residence, treatment or care. He referred me to the provision of the new MHA Code of Practice which comes into effect on 1 April 2015. Paragraphs 19.47 – 19.48 provide:

> 19.47 An additional and significant factor when considering whether the proposed intervention in relation to a child or young person is a restriction of liberty or amounts to a deprivation of liberty is the role of parental control and supervision. Practitioners will need to determine whether the care regime for, and restrictions placed on, the child or young person accord with the degree of parenting control and supervision that would be expected for a child or young person of that age. For example, whereas it is usual for a child of under 12 years not to be allowed out unaccompanied without their parent's permission, this would not usually be an acceptable restriction on a 17 year old. Account also needs to be taken of the particular experience of the child

> or young person. For example, a younger child who has been caring for their parent, including shopping for the household and/or accompanying their parent to medical appointments, might not be used to being prevented from going out unaccompanied.
>
> 19.48 Prior to the Supreme Court's judgment in Cheshire West, case law had established that persons with parental responsibility cannot authorise a deprivation of liberty. Cheshire West clarified the elements establishing a deprivation of liberty, but did not expressly decide whether a person with parental responsibility could, and if so in what circumstances, consent to restrictions that would, without their consent, amount to a deprivation of liberty. In determining whether a person with parental responsibility can consent to the arrangements which would, without their consent, amount to a deprivation of liberty, practitioners will need to consider and apply developments in case law following Cheshire West. In determining the limits of parental responsibility, decision-makers must carefully consider and balance: (i) the child's right to liberty under article 5, which should be informed by article 37 of the UNCRC, (ii) the parent's right to respect for the right to family life under article 8, which includes the concept of parental responsibility for the care and custody of minor children, and (iii) the child's right to autonomy which is also protected under article 8. Decision makers should seek their own legal advice in respect of cases before them. (Chapter 26 provides guidance on the use of restrictive interventions.)

49. The Trust submitted that D's parents cannot consent to a deprivation of his liberty in Hospital B for 11 reasons:

i) D has the same Article 5 ECHR rights as an adult and the same definition of deprivation of liberty applies to him as it does to adults;

ii) D has a mental disorder, he is deprived of his liberty pursuant to Article 5 (1) (e) – see Cheshire at paragraph 6, per Baroness Hale: "Article 5(1)(e) permits the lawful detention of persons of unsound mind, but that detention has to conform to the Convention standards of legality, and the doctrine of necessity did not provide HL with sufficient protection against arbitrary deprivation of his liberty. The court was struck by the difference between the careful machinery for authorising the detention and treatment of compulsory patients under the Mental Health Act and the complete lack of any such machinery for compliant incapacitated patients such as HL";

iii) D has been resident on a locked psychiatric ward for fifteen months;

iv) D can only leave that ward with adult 1:1 supervision;

v) whilst his parents consented to his placement, such consent much be seen in the context they could not accommodate him at their home;

vi) he does not lead a life of relative normalcy;

vii) D is fifteen and shortly will be afforded the protection of the MCA to authorise and review any deprivation of liberty occasioned by being deprived of his liberty at Hospital B (by way of application of s. 4A MCA, given Schedule A1 would not apply to him until he is 18);

viii) to rely (effectively solely) on parental consent, when D's parents cannot accommodate and care for him (and have no or other limited options for their son) is an insufficient safeguard to protect D's Article 5 ECHR rights;

ix) parental consent over a period of fifteen months, as means of review and safeguard, is not compliant with Article 5 (4);

x) it is out with the reasonable zone of parental control to authorise the deprivation of liberty for such a prolonged period of time and is inconsistent with a child's Article 5 ECHR right;

xi) hospital clinicians remain uneasy about caring for and depriving a child of his liberty, given the length of time and given his age, with only authority provided by way of parental consent.

50. The Trust concludes its submissions as follows:

> The applicant recognises there may be cases where parents can authorise the deprivation of liberty of a younger child for a shorter period of time, in a hospital setting. The applicants are not certain the concession approved by the court in RK is correct. Indeed it seems clear parents can authorise the first stage of the deprivation of liberty test (i.e. they can deprive, rather than just restrict, the liberty of their children, at home) but that such deprivation is not an Article 5 deprivation of liberty, because it is not attributable to the state. Each case ultimately must be considered on its facts (however unpalatable such an approach may be in respect of public resource considerations).
>
> Whilst the applicant (in many ways) would gratefully submit that D is not deprived of his liberty, it does not consider it is appropriate for a public body to interpret the law in a manner disadvantageous to the protection of a vulnerable child's rights. Whilst the applicant would readily adopt a "pragmatic approach" as identified by Gross LK in RK, the applicant submits the preferred conclusion, on the facts of these proceedings, is that D is deprived of his liberty, such deprivation is attributable to the state and his parents cannot provide valid consent.

Analysis

51. When D attains the age of 16 his future accommodation and any deprivation of liberty involved will be matters for the Court of Protection to consider. The fact that a different regime and different considerations will apply once D has become 16 should not, in my judgment, affect the approach I should take during any period when he is not 16.

52. On the facts of this case I am wholly satisfied that D lives in conditions which amount to a deprivation of his liberty. He is under constant supervision and control. The fact that D enjoys residing in the unit in Hospital B, that he is comfortable there and readily seeks out and engages with members of staff are irrelevant factors when considering whether there is a deprivation of liberty. So too are the facts that the arrangements have been made in his welfare best interests and have been, and are, to his benefit. A gilded cage is still a cage.

53. D was admitted to Hospital B on the recommendation of his treating clinicians because of his autism and his other conditions. The fact that his parents were (understandably) struggling to cope with caring for him at home was but one factor which culminated in the clinical decision to informally admit him to the hospital.

54. I wish to pay tribute to D's parents who have throughout acted in what they considered to be in the best interests of their elder son. They have, at all times, paid the closest interest in his care at the hospital and they have worked in co-operation with the clinicians, staff and carers at the unit. They have attended, or at least one of them has attended, the periodic reviews held at the hospital.

55. When considering the exercise of parental responsibility in this case and whether a decision falls within the zone of parental responsibility, it is inevitable and necessary that I take into account D's autism and his other diagnosed conditions. I do so because they are important and fundamental factors to take into account when considering his maturity and his ability to make decisions about his day to day life.

56. An appropriate exercise of parental responsibility in respect of a 5 year old child will differ very considerably from what is or is not an appropriate exercise of parental responsibility in respect of a 15 year old young person.

57. The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. The decision to keep an autistic 15 year old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility.

58. The parents of this young man are making decisions, of which he is incapable, in the welfare best interests of their son. It is necessary for them to do so to protect him and to provide him with the help and support he needs.

59. I acknowledge that D is not now cared for at home nor 'in a home setting'. His regime of care and treatment was advised by his treating clinicians and supported by his parents. They wanted to secure the best treatment support and help for their son. They have done so. It has proved extremely beneficial for D who is now ready to move to a new residential home out of a hospital setting. What other loving and caring parent would have done otherwise?

60. Those arrangements are and were made on the advice of the treating clinicians. All professionals involved in his life and in reviewing his care and treatment are agreed that these arrangements are overwhelmingly in D's best interests. On the facts of this case, why on public policy or human rights grounds should these parents be denied the ability to secure the best medical treatment and care for their son? Why should the state interfere in these parents' role to make informed decisions about their son's care and living arrangements?

61. I can see no reasons or justifications for denying the parents that role or permitting the state to interfere in D's life or that of his family.

62. I accept the position might well be very different if the parents were acting contrary to medical advice or having consented to his placement at Hospital B, they simply abandoned him or took no interest or involvement in his life thereafter.

63. The position could not be more different here. D's parents have regular phone calls with him. They regularly visit him at the unit. Every weekend D has supported visits to the family home. He greatly enjoys spending time at home with his parents and his younger brother.

64. In my judgment, on the facts of this case, it would be wholly disproportionate, and fly in the face of common sense, to rule that the decision of the parents to place D at Hospital B was not well within the zone of parental responsibility.

Conclusions

65. I am satisfied that the circumstances in which D is accommodated would amount to a deprivation of liberty but for his parents' consent to his placement there.

66. I am satisfied that, on the particular facts of this case, the consent of D's parents to his placement at Hospital B, with all of the restrictions placed upon his life there, falls within the 'zone of parental responsibility'. In the exercise of their parental responsibility for D, I am satisfied they have and are able to consent to his placement.

67. In the case of a young person under the age of 16, the court may, in the exercise of the inherent jurisdiction, authorise a deprivation of liberty.

68. I do not propose to give wider guidance in respect of the approach taken by hospital trusts or local authorities in the cases of young people under the age of 16 who are or may be subject to a deprivation of liberty. These cases are invariably fact specific and require a close examination of the 'concrete' situation on the ground.

69. For the same reason I do not consider it would be appropriate for me to comment on D's care in the new proposed residential unit. The local authority has not yet identified a suitable unit and I do not know what D's day to day life will consist of or of the restrictions that will be placed upon him. Accordingly I am unable to determine whether the regime at that unit could or would amount to a deprivation of his liberty.

70. I consider it well beyond the remit of this judgment to comment on the approach of the local authority, still less that of the Court of Protection, once D has attained the age of 16; it would not be appropriate for me to do so.