Neutral Citation Number: [2016] EWCOP 33

Case No: 11877311

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF R

First Avenue House
42-49 High Holborn
London WC1V 6NP

Date: 23 June 2016

Before:

SENIOR JUDGE LUSH

- -

Between:

LONDON BOROUGH OF HARINGEY	**Applicant**
- and -	
(1) R (by his litigation friend, the Official Solicitor)	**Respondents**
(2) P	
(3) F	
(4) A	

- -

Sarah Okafor for the Applicant
Angela Hodes and Parishil Patel, instructed by Irwin Mitchell for the First Respondent
The Second and Third Respondents in person and unrepresented

Hearing date: 23 March 2016

- -

JUDGMENT

Senior Judge Lush:

1. These proceedings relate to a young man named Robert and I am required to decide:
   (a) whether he is free to leave his current supported living placement; and, if not,
   (b) whether he is objectively being deprived of his liberty; and, if he is,
   (c) whether the deprivation of his liberty is imputable to the State, so as to bring it within Article 5 of the European Convention on Human Rights.

2. The applicant is the London Borough of Haringey ('Haringey'). It claims that:
   (a) Robert is not being deprived of his liberty and is free to leave his current placement whenever he wishes; and
   (b) in the event that there is any deprivation of his liberty, it is his family's responsibility, as his court-appointed deputies, because they chose his current placement.

3. Robert's litigation friend, the Official Solicitor, disagrees and says that:
   (a) Robert is not free to leave his supported living accommodation; and
   (b) the deprivation of his liberty is clearly imputable to Haringey.

<u>The background</u>

4. Robert was born in November 1992 and is now 23. He has intellectual disabilities, epilepsy and autism. He is non-verbal and frequently self-harms, and requires a high level of support from others to manage his activities of daily living.

5. Until about a year ago he attended a residential college in Hertfordshire, which runs a three year course in independent living skills for young people with learning disabilities.

6. On 1 September 2015 he moved into supported living accommodation in the London Borough of Haringey, which he occupies with two men of a similar age to him. The three of them were carefully matched to ensure that they would be compatible with one another. They share communal facilities, such as the lounge, kitchen, bathroom and garden. Robert attends a day centre in Enfield five days a week.

7. His family live in the same borough. His father works in the insurance industry. His mother works in IT and his brother is a research student.

8. On 30 November 2010 I made an order appointing Robert's father, mother and brother jointly and severally to be his deputies for property and affairs, and on 4 April 2011 District Judge Alexander Ralton appointed the three of them jointly and severally to be Robert's personal welfare deputies.

9. Their appointment as personal welfare deputies was for a limited duration of five years, expiring on 3 April 2016.

Chronology of events in 2015

10. On 23 January 2015, at a meeting convened by his social worker and attended by his family and members of the staff from his college, it was agreed that the best option for Robert, when he left college, would be a supported living placement.

11. His social worker sent the family a list of organisations that provide packages of support to enable people with complex needs to live in the community.

12. His family met several providers and decided that M & Co.'s proposals were 'definitely more suitable' for Robert.

13. On 1 May M & Co. submitted their assessment of Robert to Haringey together with an estimate of the likely cost of the placement.

14. The social worker informed the family that she intended to propose the placement to Haringey's funding panel. The application was successful, and at the end of May she told the family that the placement was 'supported', subject to the completion of a weekly activity plan, and that she would liaise with M & Co. to complete this.

15. Similar arrangements were made in respect of the day centre and on 6 July Haringey Council informed the family that it had agreed to fund the day care placement as well as the supported living placement.

16. On 18 August the social worker took a further proposal to the panel to approve the cost of transporting Robert between the supported living accommodation and the day centre in Enfield. They are about six miles apart.

17. On 1 September Robert moved into the supported living placement and on 19 October his social worker visited him there to review his progress and to make sure that the risk assessments and support plan were up to date.

18. On 6 November his social worker carried out a review of his care plan with the manager of the day centre and staff from M & Co. The report stated that:

> "Haringey provided the financial support and specialist knowledge and commissioning ability to enable Robert to access the choice of providers and services that his parents have decided jointly with professional input are in his best interests."

19. A further review was arranged to take place in twelve months' time on 9 November 2016,

The application

20. On 20 December 2015 Haringey Legal Services applied to the Court of Protection for an order confirming whether Robert is being deprived of his liberty and, if so, whether it is lawful and in his best interests.

21. On 30 December 2015 I made an order:
    (a) joining Robert as a party to the proceedings;
    (b) inviting the Official Solicitor to act as his litigation friend; and
    (c) listing the matter for an attended hearing on Wednesday 23 March 2016.

22. The Official Solicitor accepted the invitation and instructed Irwin Mitchell Solicitors to act on his behalf.

23. On 6 March Robert's father, mother and brother filed witness statements and on 22 March counsel for Haringey and counsel for the Official Solicitor filed position statements.

24. The hearing took place on 23 March 2016 and was attended by:
    (a) Sarah Okafor of counsel, accompanied by a member of Haringey's legal services team and Robert's social worker;
    (b) Robert and his parents; and
    (c) Angela Hodes of counsel, accompanied by Catriona McGregor of Irwin Mitchell.

25. As I have said in paragraphs 2 and 3 above, Haringey contended that Robert is not being deprived of his liberty and that, in any event, no element of his care arrangements is attributable to the State, whereas the Official Solicitor submitted that:
    (a) Robert is being deprived of his liberty;
    (b) Haringey is responsible; and
    (c) it fell to the court to authorise the deprivation of liberty.

26. At the hearing I made an order:
    (a) authorising any deprivation of Robert's liberty;
    (b) renewing the family's appointment as personal welfare deputies until further order; and
    (c) granting the parties permission to file and serve written submissions by 27 April on the issues raised by this matter, including the extent to which any deprivation of liberty authorised by the order is imputable to the state.

27. The written submissions for the Official Solicitor were drafted by Parishil Patel of counsel on 26 April and Haringey's were drafted by Sarah Okafor on 29 April. With the court's permission, Mr Patel filed some further submissions on 6 May.

28. Everyone agrees that Robert's current placement and care arrangements are in his best interests, and are the least restrictive option in terms of his rights and freedom of action, and nobody disputes that Robert lacks capacity to make decisions about his care arrangements and, therefore, lacks capacity to consent to any deprivation of his liberty arising from those arrangements.

The law relating to deprivation of liberty

29. Section 4A of the Mental Capacity Act 2005, which was inserted by the Mental Health Act 2007, is headed "Restriction on deprivation of liberty" and provides that:

> (1) This Act does not authorise any person ('D') to deprive any other person ('P') of their liberty.
>
> (2) But that is subject to –
>
> (a) the following provisions of this section, and
>
> (b) section 4B (concerning life-sustaining treatment).
>
> (3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.
>
> (4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.
>
> (5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (Hospital and care home residents: deprivation of liberty).

30. "Deprivation of liberty" is defined in section 64(5) of the Mental Capacity Act as having the same meaning as in Article 5(1) of the European Convention on Human Rights 1950.

31. Article 5(1) says that:

> "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."

32. There follows a list of various grounds on which a deprivation of liberty may be justified, one of which, Article 5(1)(e), relates to the lawful detention of persons of unsound mind.

33. In *Storck v Germany* (2006) 43 EHRR 6, the European Court of Human Rights identified three components to a deprivation of liberty under Article 5:
    (a) the objective component of confinement in a particular restricted place for a not negligible length of time;
    (b) a subjective component of a lack of valid consent; and
    (c) the attribution of responsibility to the state.

34. At paragraph 89 of its judgment in *Storck*, the European Court of Human Rights held that the State can be responsible for a deprivation of liberty in three ways:

> "Firstly, her deprivation of liberty could be imputable to the State owing to the direct involvement of public authorities in the applicant's detention. Secondly, the State

could be found to have violated Article 5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of Article 5. Thirdly, the State could have breached its positive obligation to protect the applicant against interferences with her liberty by private persons."

35. The first type of deprivation of liberty is referred to as "direct State responsibility", and the third type is referred to as "indirect State responsibility".

The objective element of deprivation of liberty

36. The objective element of deprivation of liberty consists of "confinement in a particular restricted place for a not negligible length of time."

37. In English law the acid test was described by Lady Hale in *P v Cheshire West and Cheshire Council & another* [2014] UKSC 19 ('*Cheshire West'*). At paragraphs 48 and 49 she asked herself rhetorically:

> "So is there an acid test for deprivation of liberty in these cases? ... P, MIG and MEG are, for perfectly understandable reasons, not free to go *anywhere* without permission and close supervision. So what are the particular features of their 'concrete situation' on which we need to focus?
>
> The answer, it seems to me, lies in these features which have consistently been regarded as 'key' in the jurisprudence which started with *HL v United Kingdom*: that the person concerned "was under continuous supervision and control and was not free to leave"."

38. This objective element was considered by Mr Justice Bodey in *W City Council v Mrs L (by Her Litigation Friend PC) (Deprivation of Liberty: Own Home)* [2015] COPLR 337, who held that whether a person is free to leave or under continuous supervision and control is a matter of assessment in each case. The facts of that case were as follows.

39. Mrs L was 93 and had severe dementia, but she still lived on her own in a flat on the upper floor of a two-storey building. Care and safety arrangements had been set up by her daughters and the local authority, which included:

    (a) enclosing the garden with a gate and a fence, which had been erected and paid for by her family; and
    (b) door sensors, which switched themselves on in the evening and off in the morning, and had also been installed and paid for by her family.

40. The local authority applied to the court to determine:

    (a) whether the care arrangements constituted a deprivation of her liberty.
    (b) if so, then whether the State was responsible for such deprivation of liberty; and

(c) if so, whether such deprivation of liberty should be authorised by the court and what the arrangements for continuing the authorisation should be.

41. Mr Justice Bodey acknowledged that the case was finely balanced, but held that, although the arrangements clearly constituted restrictions on Mrs L's liberty, they did not quite cross the threshold to being a deprivation of it. If, contrary to the finding of the court, Mrs L was deprived of her liberty, this was not to be imputed to the State. This was a shared arrangement set up by agreement with a caring and pro-active family and the responsibility of the State was diluted by the strong role which the family had played and continued to play.

Counsel's submissions

42. In her written submissions on behalf of Haringey, Miss Okafor produced some guidance issued on 22 October 2015 - *Department of Health Guidance: Response to the Supreme Court Judgment/Deprivation of Liberty Safeguards* - which states that:

> "31. Where an individual lacks capacity and there is no valid consent, it must be remembered that there will be no deprivation of liberty unless the Supreme Court judgment "acid test" is met.
>
> 32. For this purpose it may be useful to bear in mind that, just because an individual is physically unable to leave their place of care/treatment, this does not necessarily mean the individual is "not free to leave" under the acid test. Rather, the question is, would they be allowed to leave if they were assisted to do so e.g. by family/friends? If the provider would facilitate the person leaving, then the individual is not deprived of their liberty."

43. Miss Okafor also referred to the decision of Mr Justice Mostyn in *Bournemouth Borough Council v PS and DS* [2015] EWCOP 39, the facts of which were, very briefly, as follows.

44. Ben was 28 and had autistic spectrum disorder and mild learning disabilities. He had lived in various institutions before being placed on his own in a two-bedroom bungalow with a garden in 2011.There were no locks on the doors but there were sensors which would alert a staff member, if he were to attempt to leave the premises, though he had never tried to do so. If he did attempt to leave, he would be persuaded to return and, if that failed, consideration would be given as to whether a Mental Health Act assessment was necessary, failing which the police would be called in as a last resort. He needed 1-1 staff support in the community as he lacked road and traffic awareness. If he were to step out into the road, staff would step in as an act of humanity to prevent him from significant harm.

45. At paragraphs 33 and 35 of his judgment, Mostyn J said:

> "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 constant 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. … 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."

46. In his submissions on behalf of the Official Solicitor, Mr Patel remarked that the sections of the Department of Health Guidance, to which Miss Okafor had referred, related to "end-of-life and palliative care", and that Robert is neither at the end of his life, nor in receipt of palliative care. There are, in fact, subsequent paragraphs in that guidance that expressly relate to deprivation of liberty in 'community settings'.

47. Responding to Miss Okafor's reference to Mostyn J's judgment in Ben's case, Mr Patel said that "in the Official Solicitor's respectful submission, Mostyn J had conflated the issue of whether the arrangements amount to an objective deprivation of liberty with whether they are in P's best interests."

48. With regard to indirect State responsibility, both counsel referred at length to the decision of Mr Justice Munby, as he then was, in *Re A and C* [2010] EWHC 978 (Fam), [2010] COPLR Con Vol 10, the facts of which can be summarised as follows.

49. A and C were females. A was born in 2001 and C was born in 1987. Both suffer from a rare genetic disorder called Smith Magenis Syndrome, which is characterised by "self-injurious behaviour, physical and verbal aggression, temper tantrums, destructive behaviour, hyperactivity, restlessness, excitability, distractibility and severe sleep disturbances, which include frequent and prolonged night waking and early morning waking." Both live in their own homes "in the exemplary and devoted care of their parents" in the same area for local government purposes. The only way that their parents can keep them safe at night is by locking their bedroom doors. The question arose whether this involves a deprivation of liberty, engaging Article 5 of the ECHR and, if so, what (if any) role does the local authority have in such cases.

50. At paragraph 95 Mr Justice Munby held that:

> "For present purposes I can summarise my conclusion as follows. Where the State – here a local authority – knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguable give rise to a deprivation of liberty, then its positive obligations under Article 5 will be triggered.
>
> (i) these will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty. In this context the local authority will need to

consider all the factors relevant to the objective and subjective elements …;

(ii) if, having carried out its investigation, the local authority is satisfied that the objective element is not present, so there is no deprivation of liberty, the local authority will have discharged its immediate obligations. However, its positive obligations may in an appropriate case require the local authority to continue to monitor the situation in the event that circumstances should change;

(iii) if, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation, both under Article 5 alone and taken together with Article 14, to take reasonable and proportionate measures to bring that state of affairs to an end. What is reasonable and proportionate in the circumstances will, of course, depend upon the context, but it might for example require the local authority to exercise its statutory powers and duties so as to provide support services fir the carers that will enable inappropriate restrictions to be ended, or at least minimised;

(iv) if, however, there are no reasonable measures that the local authority can take to bring the deprivation of liberty to an end, or if the measures it proposes are objected to by the individual or his family, then it is necessary for the local authority to seek the assistance of the court in determining whether there is, in fact, a deprivation of liberty, and, if there is, obtaining authorisation for its continuance."

51. At paragraph 96 Munby J concluded that:

> "What emerges from this is that, whatever the extent of a local authority's positive obligations under Article 5, its duties, and more important its powers, are limited. In essence, its duties are threefold: a duty in appropriate circumstances to investigate; a duty in appropriate circumstances to provide supporting services; and a duty in appropriate circumstances to refer the matter to the court."

52. On behalf of Haringey Council, Miss Okafor said:

> "There is nothing in the actions taken by (the social worker) in her role as the allocated social worker to assist the transition that suggests she sought to impose her will upon (Robert's parents) so as to defeat their own purpose or disempower them. It is a massive leap pf faith to take the actions of a helpful and assistive social worker exercising the functions of a public nature required to meet the Care Act well-being objectives, to say her actions in themselves created "state imputability" for the deprivation of Robert's liberty."

<u>Decision on the objective element of deprivation of liberty</u>

53. At paragraph 46 of the Supreme Court's judgment in *P v Cheshire West*, Lady Hale stated that:

> "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."

54. Applying this approach, in my judgment, Robert's care arrangements do satisfy the acid test for deprivation of liberty because:
    (a) he is obliged to live in a particular place;
    (b) he is subject to constant monitoring and control;
    (c) he has 1:1 support during the day and 1:2 support at night;
    (d) all aspects of his care arrangements are controlled and supervised by the care staff;
    (e) he is only allowed to leave the building with close supervision;
    (f) he is not free to leave the building without permission;
    (g) if he did attempt to leave without permission, he would be restrained by the care provider's staff, naturally as an act of humanity; and
    (h) the fact that his living arrangements are as comfortable as they possibly can be makes no difference.

55. It is irrelevant that Robert is content and acquiesces with these arrangements. As Lord Kerr observed, at paragraph 76 of *Cheshire West*:

> "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."

56. Robert's circumstances are different from Mrs L's. She was living in her own home and had no supervision and control for large parts of the day. For broadly the same reasons, Robert's circumstances are also different from Ben's, who had appreciable privacy and was free to leave.

<u>Decision on imputability to the State</u>

57. In my judgment, Haringey has at all times been directly responsible for Robert's care arrangements and, thereby, the deprivation of liberty caused by them.

58. This is because:

(a) Haringey was actively involved in every stage of the care planning process. It actually admitted that, "Haringey provided the financial support and specialist knowledge and commissioning ability to enable Robert to access the choice of providers and services that his parents have decided jointly with professional input are in his best interests."

(b) Haringey convened the meeting on 23 January 2015, at which it was decided that the best option for Robert would be supported living.

(c) It provided specialist knowledge by drawing up a list of the organisations that support people with autism to live in the community.

(d) It supplied a copy of that list to Robert's deputies and invited them to decide which package of support they thought would be most suitable for him.

(e) Whatever choice Robert's deputies had made would have been subject to further approval by Haringey.

(f) Haringey carefully matched Robert with his two housemates to ensure that the three of them would be compatible with one another.

(g) Haringey funds Robert's supported living placement and his day care and the transport costs between the two locations.

(h) The providers of the placement and the day care service are accountable to Haringey.

(i) The supported living placement and the day care service are subject to review by Haringey.

59. For the purposes of section 4 of the Mental Capacity Act 2005 Haringey was ultimately "the person making the determination" as to what was in Robert's best interests and, because it was practicable and appropriate to consult them, pursuant to subsection 4(7), Haringey took into account the views of "any deputy appointed for the person by the court."

60. The deputies' views, however, did not automatically determine the outcome and were merely a factor that Haringey was required to take into account as part of the overall decision-making process.

61. As I have found that the deprivation of Robert's liberty is directly imputable to the State, there is no need for me to address the issue of indirect State responsibility.