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Case No: COP 11760866

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2010

Before :

THE HONOURABLE MR JUSTICE MOSTYN

- -

Between :

YB **Applicant**

- and -

(1)BCC

- and -

(2) AK

- and -

(3) RK
(By her litigation friend the Official Solicitor) **Respondents**

- -

Mr David Lock (instructed by **Anthony Collins LLP**) for the **Applicant**
Mr Jonathan Cowen (instructed by **Birmingham Legal**) for the **Respondent (1)**
Mr Joseph O'Brien (instructed by **Irwin Mitchell LLP**) for the **Respondent (3)**

Hearing dates: 15-16 December 2010

- -

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.

.....

THE HONOURABLE MR JUSTICE MOSTYN

This judgment is being handed down in private on Tuesday 21 December 2010. It consists of 46 paragraphs and has been signed and dated by the judge

The Judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by name or location. In particular the anonymity of the children and the adult members of their family must be strictly preserved. If reported, it shall be the duty of the Law Reporters to anonymise this judgment

Mr Justice Mostyn:

1. The proceedings before me concern RK who was born on 11 May 1993 and is thus 17½ years old. The applicant, YB, is RK's mother. She is represented by Mr Lock. The local authority, BCC, is the first respondent, and is represented by Mr Cowen. RK's father, AK, is the second respondent. He is unrepresented. RK is the third respondent. She acts by her next friend, the Official Solicitor, and is represented by Mr O'Brien.

2. RK suffers from autism, ADHD and severe learning disabilities, which manifest themselves in severe behavioural problems, including aggressive and self-harming behaviour. She also has epilepsy and suffers from generalised tonic clonic seizures. RK has no ability to communicate verbally, and a very limited ability to communicate non-verbally.

3. In March or April 2009, RK's parents came to realise that, without greater support from the local authority at their home, RK required much greater care than they could provide. Thus RK moved from her parents' home under a s20 Children Act 1989 agreement made with BCC. She was first accommodated at C H Care Home, where concerns were raised and a s47 investigation commenced after she sustained bruising. On 3 July 2009 she was moved to O House, a private care home. On 10 September 2009, following concerns about the care provision there, RK was transferred to K Care Home ("KCH") under a s20 agreement between BCC and her parents.

The purpose of this hearing

4. The purpose of the hearing before me was to determine whether or not RK's current placement arrangements at KCH constitute a deprivation of her liberty. The position of the Official Solicitor and YK is that they do. The primary position of BCC is that they do not.

5. BCC's secondary position is that if a deprivation of liberty does arise in this and similar cases, then given the safeguards in place it is neither necessary nor proportionate for there to be applications to the court in order to authorise these deprivations of liberty. Mr Cowen acknowledges that this is a difficult argument to advance.

BCC's concerns

6. It is said by BCC that this case gives rise to an urgent need for judicial guidance, for the following reasons.

7. BCC, in common with other local authorities, accommodates a considerable number of children under s20 agreements made with parents or other persons having parental responsibility. Some are accommodated in care homes and some in foster care. Such children include vulnerable 16 and 17 year olds with disabilities who are lacking capacity in relation to certain material matters. BCC suggest that the practice of local authorities generally is to regard such an agreement under s20 as <u>not</u> creating a deprivation of liberty. Moreover, even if such an agreement does result in a deprivation of liberty, local authorities do not consider that it is necessary or proportionate to have to apply to court to authorise the deprivation of liberty.

8. If these agreements under s20 for accommodating 16 and 17 year old children lacking capacity amount to, or may amount to, a deprivation of their liberty, then, being under 18 years of age a standard authorisation under Schedule A1 of the Mental Capacity Act 2005 (MCA) cannot be obtained by the local authority. Therefore, say BCC, unless I give guidance which renders such steps unnecessary then in each case these local authorities will have to apply to the Court of Protection for a decision as to whether or not there is a deprivation of liberty and to seek a declaration that any deprivation of liberty is lawful.

9. The consequence of this will be that in every such case where the court authorises a deprivation of liberty, regular internal reviews by the local authority and reviews by the court will be required, as has been held in *Re BJ (Incapacitated Adult)* [2010] 1 FLR 1373.

10. A further consequence, or potential consequence, is that if, in principle, accommodating 16 or 17 year olds who lack capacity under a s20 agreement is or may constitute a deprivation of liberty, then the number of assessments of capacity required will also increase.

11. If the Official Solicitor and the Applicant are right, suggest BCC, the implications will be formidable as a large number of cases will require applications to the Court of Protection by local authorities and further regular consideration in time consuming reviews by both local authorities and the Court of Protection.

12. It is also understood by BCC that the Official Solicitor may consider claiming damages on behalf of children who have wrongly been deprived of their liberty. There are therefore out there numerous potential damages claims against a large number of local authorities.

13. BCC therefore argue that this case has considerable implications for local authorities and may have a direct impact on the use of their limited resources available for meeting their responsibilities in respect of vulnerable children.

Procedural History

14. On 17 September 2009, YB made an urgent application to the Court of Protection seeking declarations in respect of RK's capacity and best interests regarding her residence and the arrangements for her health and social care needs. It is accepted by Mr Lock (who did not act for the Applicant at that point) that although the point was not taken by any other party at that stage, this application was completely misconceived because there was no "decision" that the court could make on RK's behalf that she could have made for herself. On 24 September 2009, District Judge Alex Ralton granted permission to make the application and directed that a report under s49 MCA 2005 be obtained on the issue of RK's capacity to make decisions regarding her contact and residence.

15. The s.49 assessment was completed by Dr Rajaratnam Thavasothy, Consultant Psychiatrist, on 24 November 2009. Dr Thavasothy reported that even with assistance from staff, it was not possible for RK to understand the purpose of the visit or for her views to be elicited. Dr Thavasothy's opinion, taking into account the severity of RK's learning disabilities, her inability to communicate verbally, and her limited

ability to communicate non-verbally, and the severity of her autism, was that she lacked the capacity to decide where to live; where to have contact; to weigh issues and aspects of a cultural nature; to decide to care for herself; to keep herself from harm; or to decide to seek and obtain assistance when necessary.

16. It is agreed that RK has the mental age of a very young child.

17. On 2 June 2010, the matter came before Judge Cardinal (the COP nominated Judge at the regional hearing centre at Birmingham). At that hearing, the Official Solicitor raised the concern that the current care plan for RK's placement may amount to a deprivation of liberty. On 28 July 2010 the matter came before me and I made various orders including listing this hearing.

Issues to be decided in the present hearing

18. The issues in the present proceedings are:

    i) Whether the care régime for RK as currently practised amounts to a deprivation of liberty.

    ii) If, and to the extent that, the care plan for RK amounts to a deprivation of liberty, what is the legal basis therefor and what are the consequential obligations of BCC. In particular, whether BCC was obliged to seek a declaration of lawfulness from the Court of Protection.

    iii) If a deprivation of liberty can only be authorised by the Court of Protection under section 16(2)(a) MCA 2005, whether it would be appropriate to make such a declaration immediately or whether and to what extent less restrictive options must be explored.

What is a deprivation of liberty?

19. One might have thought that the answer to this question was obvious. However, there is a deal of case law on the subject including a number of ECtHR decisions. The law was recently summarised by Munby LJ in *A Local Authority v A (A Child) & Anor* [2010] EWHC 978 (Fam) at para 48:

> It was correctly common ground before me that in determining whether there is a 'deprivation of liberty' within the meaning of and engaging the protection of Article 5(1) three conditions must be satisfied (see *Storck v Germany* (2005) 43 EHRR 96 at paras [74] and [89] and *JE v DE (By his Litigation Friend the Official Solicitor), Surrey County Council and EW* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150, at para [77]; see also now *G v E and others* [2010] EWHC 621 (Fam) at para [77] and *Re MIG and MEG* [2010] EWHC 785 (Fam) at para [151]):
>
> i) an objective element of "a person's confinement to a certain limited place for a not negligible length of time";

> ii) a subjective element, namely that the person has not "validly consented to the confinement in question"; and
>
> iii) the deprivation of liberty must be one for which the State is responsible.

Thus there must be a confinement for an appreciable period, which is non-consensual, at the behest of the state.

20. As to the first (objective) element, the starting point is to examine the actual position of the individual in question taking account of a whole range of factors such as the type, the duration, the effects, and the manner of implementation of the "measure in question". The distinction between a deprivation of and a restriction upon liberty is said to be merely one of degree or intensity and not one of nature or substance: see *Guzzardi v Italy*, (1980) 3 EHRR 333, para 92, *Nielsen v Denmark*, para 67, *HM v Switzerland*, (2002) 38 EHRR 314 para 42, *HL v United Kingdom*, para 89, and *Storck v Germany*, para 42.

21. The key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the person exercise complete and effective control over the person's care and movements (*HL v United Kingdom*, para 91). This may not, however, be determinative in itself: other factors must always be considered. The duration of the measure is relevant, but not of itself determinative. The analysis is peculiarly fact-specific.

22. As to the second (subjective) element there is no deprivation of liberty if a person gives a valid consent to his confinement. A person may give a valid consent to his confinement only if he has the capacity to do so (*Storck v Germany*, at paras 76 and 77). Express refusal of consent by a person who has capacity will be determinative of this aspect of 'deprivation of liberty' (*Storck v Germany,* at para 77). Where a person has capacity, consent to their confinement may be inferred from the fact that the person does not object (*HL v United Kingdom,* para 93 and *Storck v Germany*, at para 77 explaining *HM v Switzerland* at para 46), but no such conclusion may be drawn in the case of a patient lacking capacity to consent (*HL v United Kingdom* at para 90).

23. The decision of the ECtHR in *Nielsen v Denmark* [1988] ECHR 10929/84 confirms that a parent may give a valid consent on behalf of a child. This decision has attracted some criticism. See, for example, Lord Walker of Gestingthorpe in *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5 at para 45 and Munby LJ in *Re A, Re C* [2010] EWHC 978 (Fam) at para 161. In the latter case Munby LJ instances the absurdity of a parent being able to consent on behalf of a child aged 17¾ but not for one aged 18¼. That is a fair point, but what of cases at the other end of the chronological scale? A parent must surely be able to consent on behalf of a one week old infant. Or a two year old. Or, as here, a 17 year old with the mental functionality of a two year old. At all events, there has been no decision of the ECtHR overturning *Nielsen* and it remains good law. I have noted that in *Re K (Secure Accommodation Order: Right To Liberty)* [2001] 1 FLR 526, CA Thorpe LJ in his powerful minority judgment held that a secure accommodation order under s25 of the 1989 Act was not an impermissible deprivation of liberty under Art 5 as it was no more than a necessary consequence of an exercise of parental responsibility for the protection and promotion of the 15 year old child's welfare. He stated:

> **[58]** From these European cases Mr Garnham develops his submission that in consequence of the interim care order of 1 January 1999 the local authority share parental responsibility with K's parents. The local authority is therefore in law doing no more in meeting K's needs by arranging for him to be cared for at the secure unit (necessarily under the terms of a s 25 order) than does the parent of a less disabled 15 year old who sends his child to a boarding school. I see considerable attraction in that argument but it does not seem to me to depend for successful foundation on the existence of an interim care order in this case. In a sense that is a fortuitous factor which results from the development that at one stage, although not now, the father seemed to contemplate exercising his parental right to remove K from secure accommodation.
>
> ….
>
> **[61]** For these reasons I accept Mr Garnham's first and bold submission that the order of 30 June 2000 did not breach K's s 5 rights since the deprivation of liberty was a necessary consequence of an exercise of parental responsibility for the protection and promotion of his welfare. …

24. Regardless of whether the deprivation of liberty is effected by a private individual or institution, it is necessary to show that it is imputable to the State that is to say that the State is responsible. This may happen in a number of ways:

    i) By the direct involvement of public authorities in the person's detention. The most obvious way in which the State will become directly involved is if the detention takes place in a hospital or care home that is run by a public authority. Where the place of detention is privately owned, the State may be, or become, directly involved in the detention.

    ii) By means of an order of the court.

    (*Storck v Germany*, para 89)

25. In making the assessment the motive of the detainer is generally irrelevant. That the detention is effected benignly with the detainee's best interests at heart does not generally help to answer the question.

26. As stated above the essential judicial function is the analysis of "the measure in question". Not one case has been cited to me, apart from the Bournewood case (*HL v United Kingdom*) itself, where the measure did not include formal coercive powers vested in the detainer. These range from internment on remand on a small island (*Guzzardi v Italy*), to being sectioned under the Mental Health Act or its equivalent abroad (*Ashingdane v UK* (1985) 7 EHRR 528, *HM v Switzerland* (2002) 38 EHRR 314), to interim care orders over a 17 year old (*Re MIG and MEG* [2010] EWHC

785). In *HL* the detainee was informally admitted to a psychiatric hospital. There was however a finding that had he tried to leave he would have been prevented from doing so.

27. It therefore seems to me that a very obvious facet or attribute of an alleged deprivation of liberty is the existence of a formal empowerment to do it. It seems to me counter-intuitive for it to be argued that the state is depriving a person of his liberty where it has no formal powers to do so in the situation in hand.

The present case

28. RK is being accommodated under s20 Children Act 1989. This provides:

> **20 Provision of accommodation for children: general**
>
> (1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.
>
> (2) Where a local authority provide accommodation under subsection (1) for a child who is ordinarily resident in the area of another local authority, that other local authority may take over the provision of accommodation for the child within—
>
> (a) three months of being notified in writing that the child is being provided with accommodation; or
>
> (b) such other longer period as may be prescribed.
>
> (3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.
>
> (4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.
>
> (5) A local authority may provide accommodation for any person who has reached the age of sixteen but is under twenty-

one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.

(6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes [and feelings] regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes [and feelings] of the child as they have been able to ascertain.

(7) A local authority may not provide accommodation under this section for any child if any person who—

(a) has parental responsibility for him; and

(b) is willing and able to—

(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him,

objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.

(9) Subsections (7) and (8) do not apply while any person—

(a) in whose favour a residence order is in force with respect to the child; . . .

[(aa) who is a special guardian of the child; or]

(b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children,

agrees to the child being looked after in accommodation provided by or on behalf of the local authority.

(10) Where there is more than one such person as is mentioned in subsection (9), all of them must agree.

> (11) Subsections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section.
>
> (emphasis added)

29. Section 17(10) of the Children Act 1989 ("CA") defines a "child in need" as follows:

> For the purposes of this Part a child shall be taken to be in need if—
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled,
>
> and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

30. It is not clear in this case whether RK is being accommodated under subsection (1), (3), (4) or (5) of section 20.

31. Obviously, a local authority discharging its duty under s20 has to keep its charges safe. It owes them a clear and important duty of care. Were it not to do so it would be liable to be sued for negligence. But as a matter of principle the discharge of that duty of care is not going to give rise to a deprivation of liberty if the child's parents can remove the child from the accommodation at any time under s20(8). If the child's parents decide not to remove him and the safeguarding of the child involves an actual confinement then it would be hard to say that the third element is satisfied, namely imputation to the state. Rather, the confinement will have been at the behest of the parents.

32. Both Mr Lock and Mr O'Brien argue that the question is not to be decided by reference to what they call "legal niceties". They say that the matter is to be examined de facto rather than de jure. I disagree. I consider that examination of the "measure in question" involves asking first and foremost what is the legal basis for the confinement. If the legal basis is truly voluntary then it is very hard, indeed impossible, to see, that there has been an actual confinement at the behest of the state.

33. That said, I will find later in this judgment that even on the footing argued by Mr Lock and Mr O'Brien, there has been no deprivation of liberty here. But my primary decision is that, given the terms of s20(8), the provision of accommodation to a child, whether aged 17 or 7, under s20(1), (3), (4) or (5) will not ever give rise to a deprivation of liberty within the terms of Art 5 of the European Convention on

Human Rights. If the child is being accommodated under the auspices of a care order, interim or full, or if the child has been placed in secure accommodation under s25, then the position might be different, but that is not the case here.

34. It is said by Mr Lock that s20(8) is an empty right for RK's parents because they are unable to exercise it because they cannot afford the costs of an expensive care package at home to provide care for their daughter and, at that stage, this was not something that the local authority were prepared to provide. He says they simply cannot practically manage RK full time on their own and they do not have the means to pay for a care package that would enable her to come home. His position on behalf of the parents is that whilst they have considerable reservations about the care regime for their daughter at KCH, in the absence of any practical alternative they accept that KCH is the most suitable place for RK at the present time It is the parents' belief that the home care plan proposed by BCC is not good enough. It was in order to challenge it that they launched these proceedings. It has even been suggested that the parents may launch proceedings for judicial review of the currently proposed plan. So it can be seen that the supposed impracticality relied on by the parents derives from a dispute with the local authority as to whether it should fund care package that the parents believe is necessary in order to bring RK home.

35. I do not believe that the means of the parents can as a matter of logic or principle inform the answer to the question of whether RK's liberty is being deprived. The whole point of Article 5 is to prevent arbitrariness, not to foster it.

36. At present RK's régime is as follows:

i) From Friday evening to Sunday evening she is at home with her parents. When at home she compliantly takes her prescribed medicines.

ii) During the week in term time she is at school. At school she is of course supervised to ensure that she neither harms herself or others. This is the same school that she attended before the s20 agreement. So nothing has changed in that regard.

iii) When not at school or at home she is at KCH. RK's parents can visit her at any time. At KCH she is closely supervised to prevent her harming herself or others. She compliantly takes her prescribed medicines. She has not been forced to do so, nor has she been restrained, other than on a few occasions for the purposes of preventing her from attacking others. If she behaves badly then minor sanctions have been imposed on a few occasions such as not allowing her to eat a takeaway meal or stopping her listening to music when in a car. The front door of KCH is not locked. Were RK to run out of it she would be brought back. It is said that this régime amounts to confinement in the sense that she has no autonomy. I am not sure that the notion of autonomy is meaningful for a person in RK's position.

37. All of the measures taken by the staff are lawful as being authorised by Regulation 17 of the Children's Homes Regulations 2001 (SI 2001 No. 3967). This provides:

Behaviour management, discipline and restraint

17(1) No measure of control, restraint or discipline which is excessive, unreasonable or contrary to paragraph (5) shall be used at any time on children accommodated in a children's home.

(2) The registered person shall prepare and implement a written policy (in this regulation referred to as "the behaviour management policy") which sets out—

(a) the measures of control, restraint and discipline which may be used in the children's home; and

(b) the means whereby appropriate behaviour is to be promoted in the home.

(3) The registered person shall—

(a) keep under review and where appropriate revise the behaviour management policy; and

(b) notify the Commission of any such revision within 28 days.

(4) The registered person shall ensure that within 24 hours of the use of any measure of control, restraint or discipline in a children's home, a written record is made in a volume kept for the purpose which shall include—

(a) the name of the child concerned;

(b) details of the child's behaviour leading to the use of the measure;

(c) a description of the measure used;

(d) the date, time and location of, the use of the measure, and in the case of any form of restraint, the duration of the restraint;

(e) the name of the person using the measure, and of any other person present;

(f) the effectiveness and any consequences of the use of the measure; and

(g) the signature of a person authorised by the registered provider to make the record.

(5) Subject to paragraphs (6) and (7) of this regulation, the following shall not be used as disciplinary measures on children accommodated in a children's home—

(a) any form of corporal punishment;

(b) any punishment relating to the consumption or deprivation of food or drink;

(c) any restriction, other than one imposed by a court or in accordance with regulation 15, on—

(i) a child's contact with his parents, relatives or friends;

(ii) visits to him by his parents, relatives or friends;

(iii) a child's communications with any of the persons listed in regulation 15(2); or

(iv) his access to any telephone helpline providing counselling for children;

(d) any requirement that a child wear distinctive or inappropriate clothes;

(e) the use or withholding of medication or medical or dental treatment;

(f) the intentional deprivation of sleep;

(g) the imposition of any financial penalty, other than a requirement for the payment of a reasonable sum (which may be by instalments) by way of reparation;

(h) any intimate physical examination of the child;

(i) the withholding of any aids or equipment needed by a disabled child;

(j) any measure which involves—

(i) any child in the imposition of any measure against any other child; or

(ii) the punishment of a group of children for the behaviour of an individual child.

(6) Nothing in this regulation shall prohibit—

(a) the taking of any action by, or in accordance with the instructions of, a registered medical practitioner or a registered dental practitioner which is necessary to protect the health of a child;

(b) the taking of any action immediately necessary to prevent injury to any person or serious damage to property; or

> (c) the imposition of a requirement that a child wear distinctive clothing for sporting purposes, or for purposes connected with his education or with any organisation whose members customarily wear uniform in connection with its activities.

38. By s3 of the Human Rights Act 1998 I must interpret these Regulations conformably with the Convention Rights. What this means is that acts of restraint control and discipline when done cumulatively must not infringe Art 5.

39. I find it impossible to say, quite apart from s20(8) Children Act 1989, that these factual circumstances amount to a "deprivation of liberty". Indeed it is an abuse of language to suggest it. To suggest that taking steps to prevent RK attacking others amounts to "restraint" signifying confinement is untenable. Equally, to suggest that the petty sanctions I have identified signifies confinement is untenable. The supervision that is supplied is understandably necessary to keep RK safe and to discharge the duty of care. The same is true of the need to ensure that RK takes her medicine. None of these things whether taken individually or collectively comes remotely close to crossing the line marked "deprivation of liberty".

40. The facts of this case are similar to those obtaining in *Nielsen v Denmark* and *HM v Switzerland*. In the former case the 12 year old boy was placed by his mother in a psychiatric ward where he was made to stay for 5 months despite having no need for therapeutic treatment. In the latter case an 80 year old female was placed against her will in an old persons' foster home. In neither of those cases did the court find that there had been a deprivation of liberty. In both cases the regime of care and confinement was similar to that obtaining here.

41. Although the originalist theory of statutory interpretation is generally eschewed on this side of the Atlantic it is worth remembering the historical context that informed the framing of the Convention in 1950. Art 5 was an important bulwark against totalitarian tyranny. As Parker J recently reminded us in *Re MIG & MEG* at para 222 its purpose is to prevent "arbitrary or unjustified deprivations of liberty". I find it impossible to conclude that the framers of the convention would even in their wildest dreams have contemplated that Art 5 might be engaged by the facts presented here. Even allowing for the accepted concept that the convention is a living instrument there has to be a line drawn somewhere where the court will say "thus far and no farther" (to echo Lord Steyn, writing in a different context, in *White (orse Frost) v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, HL at page 500).

42. I therefore conclude that the first (objective) element of the test is not satisfied in this case. I further conclude that the second (subjective) element is not satisfied. RK was placed at KCH by her parents pursuant to a s20 agreement. They consented on her behalf in circumstances where with a mental age of about two years she is obviously incapable of giving her own consent and where her parents have parental responsibility for her. By s3(1) of the Children Act 1989 parental responsibility is defined as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". In my opinion that extends to giving the necessary consent under the second element. In this regard I specifically follow and agree with the decision of the ECtHR in *Nielsen v Denmark* and the minority judgment of Thorpe LJ in *Re K*.

43. I further conclude that the third element is not satisfied. RK's placement at KCH is at the behest of her parents. It cannot be imputed to the state.

44. If I am wrong and the circumstances here do indeed amount to a deprivation of liberty then there is no alternative but for BCC to apply for authorisation under s16 MCA and/or a declaration of lawfulness under s15. There is absolutely no way round that. *Re BJ (Incapacitated Adult)* [2010] 1 FLR 1373 stipulates that the consequence will be expensive periodic court and internal reviews. I have some misgivings as to why expensive periodic court reviews are needed for 16 and 17 year olds residing in care homes where only internal LACC reviews would be needed for a 15 year old kept identically under a care order or for an 18 year old kept under a standard Schedule A1 authorisation. That said I am not prepared to carry myself to a position of dissent from that decision.

45. Equally, I cannot allow my concern at the charge on resources that will eventuate as a consequence of such a finding to inform my decision. If these facts do indeed amount to a deprivation of liberty then what flows must flow, whatever the expense.

46. My decision is, however, that there is no deprivation of liberty here. I therefore dismiss the proceedings.