Hilary Term
[2014] UKSC 19
On appeal from: [2011] EWCA Civ 1257; [2011] EWCA Civ 190

JUDGMENT

P (by his litigation friend the Official Solicitor) (Appellant) *v* Cheshire West and Chester Council and another (Respondents)

P and Q (by their litigation friend, the Official Solicitor) (Appellants) *v* Surrey County Council (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

19 March 2014

Heard on 21, 22 and 23 October 2013

Appellant
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Respondent
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Elizabeth-Anne Gumbel QC
Henry Witcomb
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LADY HALE (with whom Lord Sumption agrees)

1. This case is about the criteria for judging whether the living arrangements made for a mentally incapacitated person amount to a deprivation of liberty. If they do, then the deprivation has to be authorised, either by a court or by the procedures known as the deprivation of liberty safeguards, set out in the Mental Capacity Act 2005 ("the Mental Capacity Act"). If they do not, no independent check is made on whether those arrangements are in the best interests of the mentally incapacitated person, although of course the health or social care bodies who make the arrangements do so in the hope and belief that they are the best which can practicably be devised. It is no criticism of them if the safeguards are required. It is merely a recognition that human rights are for everyone, including the most disabled members of our community, and that those rights include the same right to liberty as has everyone else.

The statutory background

2. The deprivation of liberty safeguards were introduced into the Mental Capacity Act by the Mental Health Act 2007. In a sense the wheel has turned full circle. Throughout the 19th century it was assumed that persons of unsound mind (then known as either "lunatics" or "idiots") should be kept in some form of confinement and reformers concentrated upon providing more and better institutions where they could live. But it was also recognised that there was a risk of unjustified confinement and assumed that some form of judicial certification was the best protection against this. This was therefore the approach adopted under the Mental Deficiency Acts of 1913 and 1927, under which publicly funded institutions were established for people whose mental handicaps ranged from the severe (known as "idiots"), through the moderate (known as "imbeciles"), to the mild (known as "feeble-minded"). Those Acts did not provide for a "voluntary" status for patients who were able to consent to their admission to hospital, nor did they provide for an "informal" status for those who lacked the capacity to consent but raised no objection to their admission. However, unlike the institutions providing for people with mental illnesses, the institutions in question were not prohibited from admitting patients without formal certification. During the 1950s, therefore, this was first encouraged for patients admitted for a short time; and the Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954-1957 (chaired by Lord Percy), recommended that this could and should become the general practice without waiting for legislative reform (1957, Cmnd 169). Certification was seen, not only as bringing with it some stigma, but also as inconsistent with the goal of "normalising" the care and treatment of these patients

and bringing it into line with the care and treatment of people with physical disorders and disabilities.

3. A legislative basis for such "informal" admissions to hospital was provided by section 5(1) of the Mental Health Act 1959, now contained in section 131(1) of the Mental Health Act 1983 ("the 1983 Act"):

> "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 . . ."

But that, of course, begged the question of the underlying law: on what legal basis could a person who lacked the capacity to decide to go into hospital – or indeed anywhere else – be admitted and treated there, whether for mental or physical disorder?

4. The answer came in the case of *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1. The House of Lords confirmed that there was no-one authorised by law to consent to treatment on behalf of an adult who lacked the capacity to consent for himself, nor was there any jurisdiction in the courts to give such consent. It was, however, lawful for him to be given such treatment and care as was necessary in his own best interests. In cases of doubt or dispute, moreover, the High Court could declare whether or not proposed treatment would be lawful. That principle has now been given statutory backing in section 5 of the Mental Capacity Act; as originally enacted, however, section 6(5) of the Act was designed to make it clear that this did not permit hospitals or other carers to deprive a person of his liberty. This was prompted by the litigation concerning HL.

5. Quite how far the necessity principle might extend at common law was tested in the case of *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458. HL was autistic and profoundly mentally disabled. He had lived in a hospital for many years before being discharged to live with paid foster carers, Mr and Mrs E. One day he became agitated at his day centre and, as the foster carers could not be contacted, a social worker and doctor were called, he was sedated and taken to A & E, where he was examined by a psychiatrist. The psychiatrist assessed that he needed in-patient treatment, but by then he appeared fully compliant, and so he was admitted informally. Although the plan was to return him to Mr and Mrs E as soon as the hospital staff thought it possible, their contact with him was restricted and he would have been prevented from leaving had he tried to do so. Habeas corpus and judicial review proceedings were brought on his behalf. These succeeded in the

Court of Appeal (whereupon HL was promptly "sectioned" under the Mental Health Act), but failed in the House of Lords. The majority held that the hospital had not detained him. Lord Nolan and Lord Steyn held that it had. Lord Steyn expressed himself with some force, at p 495:

> "Counsel for the trust and the Secretary of State argued that L was in truth always free not to go to the hospital and subsequently to leave the hospital. This argument stretches credulity to breaking point. The truth is that for entirely bona fide reasons, conceived in the best interests of L, any possible resistance by him was overcome by sedation, by taking him to hospital and by close supervision of him in hospital and, if L had shown any sign of wanting to leave, he would have been firmly discouraged by staff and, if necessary, physically prevented from doing so. The suggestion that L was free to go was a fairy tale."

Nevertheless, both he and Lord Nolan agreed with the majority that what had been done was justified by the necessity principle and that section 131(1) covered, not only a patient who was able to and did give a valid consent, but also a patient who was unable to do so.

6. The case then went to the European Court of Human Rights as *HL v United Kingdom* (2004) 40 EHRR 761. The court agreed with Lord Steyn that HL had been deprived of his liberty. It found violations, both of the right to liberty, in article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, and of the right of a detained person to speedy access to a court which can order his release if his detention is not lawful, in article 5(4). 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.

7. Key passages from the judgment are these:

> "89. It is not disputed that in order to determine whether there has been a deprivation of liberty, the starting point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The

> distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.
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> 90. . . . . The majority of the House of Lords specifically distinguished actual restraint of a person (which would amount to false imprisonment) and restraint which was conditional upon his seeking to leave (which would not constitute false imprisonment). The court does not consider such a distinction to be of central importance under the Convention. Nor, for the same reason, can the court accept as determinative the fact . . . that the regime applied to the applicant (as a compliant incapacitated patient) did not materially differ from that applied to a person who had the capacity to consent to hospital treatment, neither objecting to their admission to hospital. The court recalls that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.
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> 91. . . . the court considers the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems on 22 July 1997 to the date he was compulsorily detained on 29 October, 1997. . . .
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> Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as 'stretching credulity to breaking point' and as a 'fairy tale'."

8. It therefore became necessary for this country to introduce some such machinery for the many thousands of mentally incapacitated people who are regularly deprived of their liberty in hospitals, care homes and elsewhere. The Mental Health Act 2007 amended the Mental Capacity Act accordingly. Section 6(5) was repealed and replaced with sections 4A and 4B. Deprivation of liberty is not permitted under the Act save in three circumstances: (i) it is authorised by the Court of Protection by an order under section 16(2)(a); (ii) it is authorised under the procedures provided for in Schedule A1, which relates only to deprivations in hospitals and in care homes falling within the meaning of the Care Standards Act 2000 (see Schedule A1, para 178); (iii) it falls within section 4B, which allows deprivation if it is necessary in order to give life sustaining treatment or to prevent

a serious deterioration in the person's condition while a case is pending before the court.

9. The safeguards have the appearance of bewildering complexity, much greater than that in the comparable provisions for detaining mental patients in hospital under the Mental Health Act; but their essence is to secure professional assessment, by people independent of the hospital or care home in question, of (a) whether the person concerned lacks the capacity to make his own decision about whether to be accommodated in the hospital or care home for the purpose of care or treatment (Schedule A1, para 15), and (b) whether it is in his best interests to be detained (para 16). The procedures are administrative, but the authorisation can be challenged in the Court of Protection under section 21A.

10. There have been far fewer authorisations under Schedule A1 than was predicted before the amendments came into force, although the numbers are rising (from 7157 applications in 2009-2010 to 11,887 in 2012-13). There have also been very few cases coming before the Court of Protection seeking authority to deprive someone of his liberty in a setting other than a hospital or care home (it is not known how many of the 88 applications made in 2012 were challenges under section 21A or for orders under section 16). It would not be at all surprising if those arranging for the care of people with severe learning disabilities were reluctant to see those arrangements, made in what they think are the best interests of the people concerned, as also depriving them of their liberty. As with detention under the Mental Health Act, they may worry that it carries a stigma. They may also baulk at the bureaucracy of the procedures and the time they take. They may even see the procedures as a return to the bad old days before the Mental Health Act 1959, when all mental patients were seen as prisoners rather than patients or residents like any others. Legal formalities may be seen as the antithesis of the normalisation which it is the object of both the Mental Health and the Mental Capacity Acts to achieve. The facts of the two cases before us are a good illustration of the sort of benevolent living arrangements which many might find difficult to characterise as a deprivation of liberty. What follows are the facts as they were when the cases were heard in the Court of Protection, which is now a long time ago.

The facts: P (otherwise known as MIG) and Q (otherwise known as MEG) v Surrey County Council

11. MIG and MEG are sisters who first became the subject of care proceedings under the Children Act 1989 in 2007, when they were aged respectively 16 and 15. MIG has a learning disability at the lower end of the moderate range or the upper end of the severe range. She also has problems with her sight and her hearing. She communicates with difficulty and has limited understanding, spending much of her time listening to music on her iPod. She needs help crossing the road because she is

unaware of danger. MEG has a learning disability at the upper end of the moderate range, bordering on the mild. Her communication skills are better than her sister's and her emotional understanding is quite sophisticated. Nevertheless, she may have autistic traits and she exhibits challenging behaviour.

12. Until 2007 they lived with their mother and from 1997 also with their step-father. They were ill-treated and neglected there. They were removed from home after siblings made allegations of sexual abuse against their step-father's father, and then against their step-father and their mother. Their step-father was later convicted of raping their half-sister and their mother of indecently assaulting her.

13. At the time of the final hearing before Parker J in 2010, MIG (then aged 18) was living with a foster mother with whom she had been placed when she was removed from home. She was devoted to her foster mother (whom she regarded as her "mummy"). Her foster mother provided her with intensive support in most aspects of daily living. She had never attempted to leave the home by herself and showed no wish to do so, but if she did, the foster mother would restrain her. She attended a further education unit daily during term time and was taken on trips and holidays by her foster mother. She was not on any medication.

14. MEG (then aged 17) had originally been placed with a foster carer, who was unable to manage her severe aggressive outbursts, and so she was moved to a residential home. She mourned the loss of that relationship and wished she was still living with her foster carer. The home was an NHS facility, not a care home, for learning disabled adolescents with complex needs. She had occasional outbursts of challenging behaviour towards the other three residents and sometimes required physical restraint. She was also receiving tranquillising medication. Her care needs were met only as a result of continuous supervision and control. She showed no wish to go out on her own and so did not need to be prevented from doing so. She was accompanied by staff whenever she left. She attended the same further education unit as MIG and had a much fuller social life than her sister.

15. In 2008, when the sisters were aged 17 and 16, the care proceedings were transferred to the Court of Protection, the interim care orders expired, and Court of Protection proceedings were issued instead. (The Court of Protection has jurisdiction over people aged 16 or more, whereas a family court cannot make a care order once a child has reached 17: Children Act 1989, s 31(3).) On 15 April 2010, Parker J decided that the sisters' living arrangements were in their best interests and concluded that they did *not* amount to a deprivation of liberty: [2010] EWHC 785 (Fam), [2011] Fam Law 29 (sub nom *In re MIG and MEG*). The Court of Appeal agreed: [2011] EWCA Civ 190 [2012] Fam 170. Wilson LJ, who gave the leading judgment, laid stress on the "relative normality" of the sisters' lives, compared with the lives they might have at home with their family (paras 28, 29), together with the

absence of any objection to their present accommodation (para 26). Mummery LJ was also impressed with the "greater fulfilment in an environment more free than they had previously had" (para 52). Smith LJ, on the other hand, thought their previous arrangements were not relevant, but stressed that "what may be a deprivation of liberty for one person may not be for another" (para 40).

The facts: Cheshire West and Chester Council v P

16. P was aged 38 at the time of the Court of Protection hearing. He was born with cerebral palsy and Down's syndrome and required 24 hour care to meet his personal care needs. Until he was 37 he lived with his mother, who was his principal carer, but her health began to deteriorate and the local social services authority concluded that she was no longer able to look after P. In 2009 they obtained orders from the Court of Protection that it was in P's best interests to live in accommodation arranged by the local authority.

17. Since November 2009, he had been living in Z house. This was not a care home. It was a spacious bungalow, described by an independent social worker as cosy and with a pleasant atmosphere, and close to P's family home. At the time of the final hearing, he shared it with two other residents. There were normally two staff on duty during the day and one "waking" member of staff overnight. P received 98 hours additional one to one support each week, to help him to leave the house whenever he chose. He went to a day centre four days a week and a hydrotherapy pool on the fifth. He also went out to a club, the pub and the shops, and saw his mother regularly at the house, the day centre and her home. He could walk short distances but needed a wheel chair to go further. He also required prompting and help with all the activities of daily living, getting about, eating, personal hygiene and continence. He wore continence pads. Because of his history of pulling at these and putting pieces in his mouth, he wore a "body suit" of all-in-one underwear which prevented him getting at the pads. Intervention was also needed to cope with other challenging behaviours which he could exhibit. But he was not on any tranquillising medication.

18. By the time of the final hearing before Baker J in April 2011, the principal issue was whether these arrangements amounted to a deprivation of liberty. Baker J held that P was completely under the control of the staff at Z House, that he could not "go anywhere, or do anything, without their support and assistance" (para 59). Further, "the steps required to deal with his challenging behaviour lead to a clear conclusion that, looked at overall, P is being deprived of his liberty" (para 60). Nevertheless it was in his best interests for those arrangements to continue: [2011] EWHC 1330 (Fam). The Court of Appeal substituted a declaration that the arrangements did *not* involve a deprivation of liberty: [2011] EWCA Civ 1257, [2012] PTSR 1447. Munby LJ, who delivered the leading judgment with which

Lloyd and Pill LJJ agreed, developed the concept of "relative normality" adopted in *P and Q*, and considered it appropriate to compare P's life, not with that which he had enjoyed before when living with his mother, but with that which other people like him, with his disabilities and difficulties, might normally expect to lead. As Lloyd LJ put it, "It is meaningless to look at the circumstances of P in the present case and to compare them with those of a man of the same age but of unimpaired health and capacity. . . . the right comparison is with another person of the same age and characteristics as P" (para 120).

What is a deprivation of liberty?

19. In cases under the Human Rights Act 1998, the courts have frequently to consider how far their duty, in section 2(1), to "take into account" the jurisprudence of the European Commission and Court of Human Rights goes. That problem does not trouble us in this case. Section 64(5) of the Mental Capacity Act states that: "In this Act, references to a deprivation of a person's liberty have the same meaning as in article 5(1) of the Human Rights Convention". As the object was to avoid the violation identified in *HL* 40 EHRR 761, it seems clear that we are expected to turn to the jurisprudence of the Strasbourg Court to find out what is meant by a deprivation of liberty in this context.

20. There is no case in Strasbourg which concerns the type of placements with which we are here concerned. However, there have been several relevant decisions in Strasbourg since the judgments in the courts below. The most important is probably the decision of the Grand Chamber in *Stanev v Bulgaria* (2012) 55 EHRR 696, because this concerned the placement of a mentally disabled man in a care home rather than a hospital. The Court summarised the general principles in the context of people with mental disorders or disabilities. It is therefore convenient to repeat each of those principles, together with an explanation of the previous case law from which it is taken. First,

> "115. The Court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement, the latter being governed by article 2 of Protocol No 4, is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of article 5 depends. In order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation 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."

This is a reference back to the well-known cases of *Guzzardi v Italy* (1980) 3 EHRR 333, paras 92-93, where the same points were made, derived from *Engel v Netherlands* (1976) 1 EHRR 647, paras 58 and 59, and to *Storck v Germany* (2005) 43 EHRR 6, para 71, where they were repeated. *Guzzardi* was a case of internal exile, where a suspected Mafioso was confined to a small area on an island with various other restrictions designed to prevent his engaging in Mafia activities. This was held to deprive him of his liberty.

21. Secondly,

> "116. In the context of deprivation of liberty on mental health grounds, the court has held that a person could be regarded as having been "detained" even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital."

This is a reference to *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para 42. *Ashingdane* was concerned with the rather different question of whether article 5 could protect a patient from being detained in a secure hospital such as Broadmoor when he did not need to be there. But the court accepted that a compulsory patient is deprived of his liberty in the hospital where he is detained, irrespective of the openness or otherwise of the conditions there.

22. Thirdly,

> "117. Furthermore, in relation to the placement of mentally disordered persons in an institution, the Court has held that the notion of deprivation of liberty does not only comprise *the objective element* of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as *an additional subjective element*, he has not validly consented to the confinement in question." (Emphasis supplied)

This is again a reference to *Storck v Germany* 43 EHRR 6, para 74. That case concerned a young woman who had twice been admitted to a private clinic for psychiatric treatment. The first time she had gone there with her father, had been placed in a locked ward and forcibly medicated, had tried to escape and been returned to the clinic by the police. The court held that she could not be taken to have consented to her confinement. The second time she had presented herself to

the clinic and had not tried to escape, so the court accepted the factual finding of the national court that she had not been confined against her will.

23. Fourthly,

> "118. The court has found that there was a deprivation of liberty in circumstances such as the following: (a) where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital; (b) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape; and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave."

(a) is a reference to *Shtukatarov v Russia* (2008) 54 EHRR 962, para 108; (b) is another reference to *Storck*, at para 76; and (c) is a reference to *HL v United Kingdom* 40 EHRR 761, at para 90 (see para 7 above).

24. Fifthly,

> "119. The court has also held that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when it is not disputed that person is legally incapable of consenting to, or disagreeing with, the proposed action."

The first reference is to *De Wilde, ooms and Versyp v Belgium (No 1)* (1971) 1 EHRR 373, paras 64-65, and the second is again to *HL v United Kingdom* 40 EHRR 761, para 90 (see para 7 above).

25. Finally, and for completeness,

> "120. In addition, the court has had occasion to observe that the first sentence of article 5(1) must be construed as laying down a positive obligation on the state to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The state is

> therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge. Thus, having regard to the particular circumstances of the cases before it, the court has held that the national authorities' responsibility was engaged as a result of detention in a psychiatric hospital at the request of the applicant's guardian and detention in a private clinic."

The references are once again to *Storck* and to *Shtukaturov*. On occasions, therefore, the state may be accountable even for arrangements which it has not itself made.

26. The applicant in *Stanev* had spent many years in a social care home where conditions were so bad that the court also found they amounted to inhuman and degrading treatment for the purpose of article 3. But the court also considered that (i) the objective requirement of deprivation of liberty was met because he had been kept at the home, in a mountain region far from his home town, needing permission to go out to the nearest village and leave of absence to visit his home, entirely at the discretion of the home's management which kept his identity papers and managed his finances, and accordingly "he was under constant supervision and was not free to leave the home without permission" (para 128); and (ii) the subjective element was met because he could understand his situation and had expressed his wish to leave, thus setting the case apart from the decision in *HM v Switzerland* (2002) 38 EHRR 314, where the court found that there was no deprivation of liberty "as the applicant had been placed in a nursing home purely in her own interests and after her arrival there had agreed to stay" (para 131).

27. *HM v Switzerland* concerned an old lady who was placed, by order of the authorities confirmed by the courts, in a care home because of severe neglect in her own home. It is a difficult case, not least because the Swiss legislation in question referred to the deprivation of liberty. In deciding that she had not been deprived of her liberty, the Strasbourg court referred to the fact that she had freedom of movement and was able to entertain social contacts with the outside world (para 45), that she "hardly felt the effects of her stay" and was "undecided as to which solution she in fact preferred" (para 46), that after she had moved there she agreed to stay (para 47), but "in particular the fact that the Cantonal Appeals Commission placed the applicant in the foster home in her own interests in order to provide her with the necessary medical care, as well as satisfactory living conditions and hygiene, and also taking into consideration the comparable circumstances in the case of *Nielsen v Denmark*" (para 48). There was a powerful dissent from Judge Jorundsson, who pointed out that it was "clear that she was not permitted to leave the institution and go home; and that if she did, she would have been brought back" (para O-16).

28. This reference to the benevolent purpose of the placement is inconsistent with the later Grand Chamber decisions of *Creanga v Romania* (2012) 56 EHRR 361, para 93, and *Austin v United Kingdom* (2012) 55 EHRR 14, para 58. There it was stated that an underlying public interest motive "has no bearing on the question whether that person has been deprived of his liberty . . . The same is true where the object is to protect, treat or care in some way for the person taken into confinement, unless that person has validly consented to what would otherwise be a deprivation of liberty" (para 58).

29. In *HL v United Kingdom*, the Court distinguished *HM v Switzerland* principally on the basis that "she had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay", although it also referred to "a regime entirely different to that applied to the present applicant" (para 93). However, the court has also distinguished it in four later cases concerning placements in social care homes rather than in hospitals. In *Stanev v Bulgaria* 55 EHRR 696, the court distinguished it on the basis that she had agreed to stay whereas the applicant in that case had at no time consented to the placement or accepted it tacitly. In *DD v Lithuania* (Application no 13469/06), 14 February 2012, the Court distinguished it on the same basis, coupled with the procedural safeguards, including judicial scrutiny, which were in place to protect HM (para 147). In *Kedzior v Poland* (Application no 45026/07), 16 October 2012, the government relied upon *HM v Switzerland*, but the court did not refer to it in its assessment. Finally, in *Mihailovs v Latvia* (Application no 35939/10), 22 January 2013, the court referred to it, not during its assessment of the "objective element" of confinement but only during its assessment of the "subjective element" of consent (see para 135).

30. The Court did not refer in its assessment in any of these later cases to *Nielsen v Denmark* (1988) 11 EHRR 175, which concerned a 12 year old boy placed in a children's psychiatric unit by his mother (who alone had parental responsibility for him). The court held, by a majority of nine to seven, that he had not been deprived of his liberty. The restrictions to which he was subject were "no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions . . . did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated" (para 72). Hence his hospitalisation "did not amount to a deprivation of liberty within the meaning of article 5, but was a responsible exercise by his mother of her custodial rights in the interest of the child" (para 73). The seven dissenting judges considered that placing a 12 year old boy who was not mentally ill in a psychiatric ward for several months against his will was indeed a deprivation of liberty. It would appear, therefore, that the case turns on the proper limits of parental authority in relation to a child. As already mentioned (para 4 above) there is no equivalent in English law to parental authority over a mentally incapacitated adult. In any event, the Strasbourg court was not deterred from finding a deprivation of liberty in the cases of *Stanov*, *DD*, *Kedzior*

and *Mihailovs* by the fact that the placements were arranged by the person who had been appointed legal guardian of the applicant.

31. In all these cases, the applicant lacked the legal capacity to consent to the placement. In *Shtukaturov v Russia* 54 EHRR 962, decided in 2008, the applicant had been placed in a psychiatric hospital at the request of his legal guardian, which in Russian law was regarded as a "voluntary" admission. Although he lacked the *de jure* legal capacity to decide for himself, this did not necessarily mean that he was *de facto* unable to understand his situation (para 108). Indeed, he had evinced his objections. The subjective element of lack of consent was made out (para 109). The court took the same view in *DD* (para 150) and in *Kedzior* (para 58). Thus it appeared to give some weight to the objections of a person who lacked legal capacity when deciding that the subjective element was made out despite the consent of the person's legal guardian. But in *Mihailovs*, the court seems to have gone further. In relation to one of the care home placements, the court held that there was a deprivation of liberty, because although the applicant lacked legal capacity he subjectively perceived his compulsory admission there as such a deprivation (para 134). In relation to a later placement, however, he did not raise any objections or attempt to leave and the court concluded that he had "tacitly agreed" to stay there and thus had not been deprived of his liberty (paras 139, 140). In contrast, of course, in *HL v United Kingdom*, the patient was deprived of his liberty in the hospital despite his apparent compliance.

32. The Strasbourg case law, therefore, is clear in some respects but not in others. The court has not so far dealt with a case combining the following features of the cases before us: (a) a person who lacks both legal and factual capacity to decide upon his or her own placement but who has not evinced dissatisfaction with or objection to it; (b) a placement, not in a hospital or social care home, but in a small group or domestic setting which is as close as possible to "normal" home life; and (c) the initial authorisation of that placement by a court as being in the best interests of the person concerned. The issue, of course, is whether that authorisation can continue indefinitely or whether there must be some periodic independent check upon whether the placements made are in the best interests of the people concerned.

The arguments

33. The first and most fundamental question is whether the concept of physical liberty protected by article 5 is the same for everyone, regardless of whether or not they are mentally or physically disabled. Munby LJ in P's case appears to have thought that it is not, for he criticised the trial judge for failing to grapple with the

> "question whether the limitations and restrictions on P's life at Z house are anything more than the inevitable corollary of his various disabilities. The truth, surely, is they are not. Because of his disabilities, P is inherently restricted in the kind of life he can lead. P's life, wherever he may be living, whether at home with his family or in the home of a friend or in somewhere like Z House is, to use Parker J's phrase…, dictated by his disabilities and difficulties" (para 110).

In the same way, both Lloyd LJ in that case, and Smith LJ in *P and Q*, thought that a person's life had to be compared with that of another person with his same characteristics. What was a deprivation of liberty for some people might not be a deprivation for others.

34. The answer given by Mr Richard Gordon QC, who appears instructed by the Official Solicitor on behalf of all three appellants, is that this confuses the concept of deprivation of liberty with the justification for imposing such a deprivation. People who lack the capacity to make (or implement) their own decisions about where to live may justifiably be deprived of their liberty in their own best interests. They may well be a good deal happier and better looked after if they are. But that does not mean that they have not been deprived of their liberty. We should not confuse the question of the quality of the arrangements which have been made with the question of whether these arrangements constitute a deprivation of liberty.

35. Allied to the "inevitable corollary" argument it might once have been suggested that a person cannot be deprived of his liberty if he lacks the capacity to understand and object to his situation. But that suggestion was rejected in *HL v United Kingdom*. In any event, it is quite clear that a person may be deprived of his liberty without knowing it. An unconscious or sleeping person may not know that he has been locked in a cell, but he has still been deprived of his liberty. A mentally disordered person who has been kept in a cupboard under the stairs (a not uncommon occurrence in days gone by) may not appreciate that there is any alternative way to live, but he has still been deprived of his liberty. We do not have any difficulty in recognising these situations as a deprivation of liberty. We should not let the comparative benevolence of the living arrangements with which we are concerned blind us to their essential character if indeed that constitutes a deprivation of liberty.

36. The whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to "everyone" (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws. The same philosophy underpins the United Nations Convention on the Rights of Persons with Disabilities (CRPD), ratified by the United Kingdom in 2009. Although not directly incorporated into our domestic law, the CRPD is recognised by the Strasbourg court as part of the international law context within which the

guarantees of the European Convention are to be interpreted. Thus, for example, in *Glor v Switzerland*, Application No 13444/04, 30 April 2009, at para 53, the Court reiterated that the Convention must be interpreted in the light of present-day conditions and continued:

> "It also considers that there is a European and Worldwide consensus on the need to protect people with disabilities from discriminatory treatment (see, for example, Recommendation 1592 (2003) towards full inclusion of people with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29 January 2003, or the United Nations Convention on the Rights of Persons with Disabilities, which entered into force on 3 May 2008)."

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. Components (b) and (c) are not in issue here, but component (a) is.

38. Ms Jenni Richards QC, who appears for both the local authorities involved, relies heavily on the statement in *Guzzardi v Italy*, which is repeated in *all* the later cases, that 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.

39. She contrasts the concrete situations of those who were held to have been deprived of their liberty in hospitals or care homes with others who were not: in particular in this context, *Nielsen v Denmark* and *HM v Switzerland*. She also refers to *Haidn v Germany* (Application no 6587/04), 13 January 2011, para 82, where the court expressed "serious doubts" whether instructing the applicant to live in an old people's home which he was not to leave without his custodian's permission amounted to a deprivation rather than a restriction of liberty. However, the court did not have to decide the question, as the applicant was complaining about his preventive detention in prison after the expiry of his sentence for serious sexual offences.

40. Mr Gordon argues that, in this context, the answer is clear: it is, as expressed in *HL v United Kingdom* 40 EHRR 761, para 91, whether the "concrete situation" of the person concerned is that he "[is] under continuous supervision and control and [is] not free to leave" the accommodation where he has been placed. By "free to leave" he means what Munby J meant in *JE v DE* [2007] 2 FLR 1150, para 115:

> "The fundamental issue in this case . . . is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution: I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses . . . "

41. Freedom to leave in this sense was the crucial factor, not only in *HL v United Kingdom*, where the complainant was placed in a hospital, but also in *Stanev v Bulgaria*, where the complainant was placed in a care home, as were the complainants in *DD v Lithuania*, *Kedzior v Poland*, and *Mihailovs v Latvia.* In each of these, the court's focus when considering the confinement question was on whether the complainant was "under the complete supervision and control of the staff and not free to leave". The fact that these were social care settings with relatively open conditions was no more determinative than had been the open hospital conditions in *Ashingdane.* In these more recent cases, *HM v Switzerland*, another care home placement, has consistently been distinguished because of the complainant's willingness to be in the home, rather than because of the conditions within the home. Although *Nielsen* has not been departed from, it is to be regarded as a case of substituted consent, and thus not fulfilling component (b).

42. In none of the more recent cases was the purpose of the confinement – which may well have been for the benefit of the person confined – considered relevant to whether or not there had been a deprivation of liberty. If the fact that the placement was designed to serve the best interests of the person concerned meant that there could be no deprivation of liberty, then the deprivation of liberty safeguards contained in the Mental Capacity Act would scarcely, if ever, be necessary. As Munby J himself put it in *JE v DE* [2007] 2 FLR 1150, para 46:

> "I have great difficulty in seeing how the question of whether a particular measure amounts to a deprivation of liberty can depend upon whether it is intended to serve or actually serves the interests of the person concerned. For surely this is to confuse . . . two quite separate and distinct questions: Has there been a deprivation of liberty? And, if so, can it be justified?"

This view has been confirmed by the rejection in *Austin v United Kingdom* 55 EHRR 359, para 58, with specific reference to the care and treatment of mentally incapacitated people, of any suggestion by the House of Lords in *Austin v Comr of Police of the Metropolis* [2009] AC 564 that a beneficial purpose might be relevant (and see also *MA v Cyprus* (Application No 41872/10), 23 July 2013 and *Creanga v Romania* 56 EHRR 361).

43. Nevertheless, while a benevolent or beneficial purpose may be irrelevant, the context of the measures may not. Mr Paul Bowen QC, for the Equality and Human Rights Commission, has analysed the deprivation of liberty cases into two types. Type 1 consists of those situations which are catered for in article 5(1), including the detention of convicted criminals and of "persons of unsound mind". In such cases, the Strasbourg Court has not had to concern itself with questions of degree, because the confinement is always potentially justifiable. Hence a person can be deprived of his liberty in an open prison, in an unlocked hospital ward, or in the ordinary conditions of a care home. The problem lies with type 2 cases, where deprivation of liberty is not catered for in the exhaustive list of permissible deprivations in article 5(1)(a) to (f) and thus what has happened, if it is a deprivation, cannot be justified. This was the position in *Guzzardi v Italy*, which concerned preventive measures against a suspected Mafioso, and for that matter in the English control order cases (such as *Secretary of State for the Home Department v JJ* [2008] AC 385), which concerned preventive measures against suspected terrorists. It was also the position in *Austin v United Kingdom*, which concerned "kettling" to maintain public order at a demonstration.

44. Ms Richards rejects any such distinction. Indeed it cannot be found in the Strasbourg case law, which, as we have seen, repeats all the principles irrespective of the context. Nevertheless, we may find it helpful in understanding some of its decisions: for example, why it was not a deprivation of liberty to "kettle" people at Oxford Circus for some seven hours (*Austin*) while it was a deprivation to confine a person for several hours in a police station (*Creanga)* or in a sobering up centre (*Litwa v Poland* (2001) 33 EHRR 1267). We may therefore find it most helpful to consider how the question has been approached in the particular context, in this case the placement of mentally incapacitated people, whose lawful detention in any setting designed for their care is always potentially justifiable under article 5(1)(e).

Discussion

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.

47. For that reason, I would reject the "relative normality" approach of the Court of Appeal in the case of P [2012] PTSR 1447, where the life which P was leading was compared with the life which another person with his disabilities might be leading. To some extent this approach was premised on the relevance of the reason for and purpose of the placement (para 76), derived from the House of Lords decision in *Austin*, and later disapproved by the Grand Chamber. It is in any event inconsistent with the view that people with disabilities have the same rights as everyone else. I have much more sympathy with the "relative normality" approach in *P and Q*, where the lives which MIG and MEG were living were compared (by the majority) with the ordinary lives which young people of their ages might live at home with their families. This seems both sensible and humane. But the fact remains that the lives which MIG and MEG were leading were not the same as those which would be led by other teenagers of their age. Their comparative normality in the sense of their "home-like" quality does not answer the question of whether in other respects they involved a deprivation of liberty for which the state was responsible.

48. So is there an acid test for the deprivation of liberty in these cases? I entirely sympathise with the desire of Munby LJ to produce such a test and thus to avoid the minute examination of the living arrangements of each mentally incapacitated person for whom the state makes arrangements which might otherwise be required. Ms Richards is right to say that the *Guzzardi* test is repeated in all the cases, irrespective of context. If any of these cases went to Strasbourg, we could confidently predict that it would be repeated once more. But these cases are not about the distinction between a restriction on freedom of movement and the deprivation of liberty. 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?

49. The answer, as it seems to me, lies in those features which have consistently been regarded as "key" in the jurisprudence which started with *HL v United Kingdom* 40 EHRR 761: that the person concerned "was under continuous supervision and control and was not free to leave" (para 91). I would not go so far as Mr Gordon, who argues that the supervision and control is relevant only insofar as it demonstrates that the person is not free to leave. A person might be under constant supervision and control but still be free to leave should he express the desire so to do. Conversely, it is possible to imagine situations in which a person is not free to leave but is not under such continuous supervision and control as to lead to the conclusion that he was deprived of his liberty. Indeed, that could be the explanation for the doubts expressed in *Haidn v Germany*.

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.

Application in the case of P

51. In the case of *P*, the Court of Appeal should not have set aside the decision of the judge for the reasons they gave. Does it follow that the decision of the judge should be restored? In my view it does. In paragraph 46 of his judgment, he correctly directed himself as to the three components of a deprivation of liberty derived from *Storck*; he reminded himself that the distinction between a deprivation of and a restriction of liberty is one of degree or intensity rather than nature or substance; and he held that "a 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 patient exercise complete and effective control of the person's care and movements" (para 46(5)). It is true that, in paragraph 48, he summarised the further guidance given by the Court of Appeal in *P and Q*, including the relevance of an absence of objection and the relative normality of the person's life, which in my view are not relevant factors. But when he considered the circumstances of P's life at the Z house, he remarked (para 58) upon the very great care taken by the local authority and the staff of Z House to ensure that P's life was as normal as possible, but continued (para 59):

> "On the other hand, his life is completely under the control of members of staff at Z House. He cannot go anywhere or do anything without their support and assistance. More specifically, his occasionally aggressive behaviour, and his worrying habit of touching and eating his continence pads, require a range of measures, including at time physical restraint, and, when necessary, the intrusive procedure of inserting fingers into his mouth whilst he is being restrained."

In my view, in substance the judge was applying the right test, derived from *HL v United Kingdom*, and his conclusion that "looked at overall, P is being deprived of his liberty" (para 60) should be restored.

Application in the case of P (MIG) and Q (MEG)

52. Wilson LJ found MEG's case difficult and only reached the conclusion that she had not been deprived of her liberty after "protracted thought": [2012] Fam 170, para 34. He relied upon the small size of the adolescent home, her lack of objection to life there, her attendance at the educational unit; her good family contact; and her fairly active social life. It is, however, very difficult to see how her case can be distinguished from that of P, who also enjoyed all of those features. She did not require the sort of restraint which P required because of his incontinence pads, but she did sometimes require physical restraint and she received medication to control her anxiety. Above all, the staff did exercise control over every aspect of her life. She would not be allowed out without supervision, or to see people whom they did not wish her to see, or to do things which they did not wish her to do.

53. MIG's case was different in one important respect. She was living in an ordinary family home, and also going out to attend an educational unit, and enjoying good family contact. Both Parker J and Wilson LJ were concerned that if these arrangements constituted a deprivation of liberty for which the state was responsible, then so too would HL's placement with his foster carers: but no-one had suggested this – indeed, the restriction on contact with them was one of the features relied upon in concluding that the hospital had deprived HL of his liberty. But the court was not called upon to confront that issue. The reality is that MIG's situation is otherwise the same as her sister's, in that her foster mother and others responsible for her care exercised complete control over every aspect of her life. She too would not be allowed out without supervision, or to see anyone whom they did not wish her to see, or to do things which they did not wish her to do.

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.

55. Several objections may be raised to the conclusion that both MIG and MEG are being deprived of their liberty. One is that neither could survive without this level of supervision and control: but that is to resurrect the comparison with other people sharing their disabilities and to deny them the same concept of liberty as everyone else. Another is that they are both content with their placements and have shown no desire to leave. If the "tacit acceptance" of the applicant was relevant in *Mihailovs*, why should the same tacit acceptance of MIG and MEG not be relevant too? I have found this the most difficult aspect of the case. But *Mihailovs* was different because he had a level of *de facto* understanding which had enabled him to express his objections to his first placement. The Strasbourg court accepts that there are some people who are not capable of expressing a view either way and this is probably the case with both MIG and MEG. As *HL* 40 EHRR 761 shows, compliance is not enough. Another possible distinction is that, if either of them indicated that they wanted to leave, the evidence was that the local authority would look for another placement: in other words, they were at least free to express a desire to leave.

56. In the end, none of these suggested distinctions is satisfactory. Nor, in my view, should they be. It is very easy to focus upon the positive features of these placements for all three of the appellants. The local authorities who are responsible for them have no doubt done the best they could to make their lives as happy and fulfilled, as well as safe, as they possibly could be. But the purpose of article 5 is to ensure that people are not deprived of their liberty without proper safeguards, safeguards which will secure that the legal justifications for the constraints which they are under are made out: in these cases, the law requires that they do indeed lack the capacity to decide for themselves where they should live and that the arrangements made for them are in their best interests. It is to set the cart before the horse to decide that because they do indeed lack capacity and the best possible arrangements have been made, they are not in need of those safeguards. If P, MIG and MEG were under the same constraints in the sort of institution in which Mr Stanev was confined, we would have no difficulty in deciding that they had been deprived of their liberty. In the end, it is the constraints that matter.

Policy

57. Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a

deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.

Conclusion

58. I would therefore allow both appeals. In the case of P I would restore the declaration of the judge. In the case of MIG and MEG I would make a declaration that their living arrangements at the relevant time constituted a deprivation of liberty within the meaning of section 64(5) of the Mental Capacity Act 2005.

LORD NEUBERGER

59. Having read the judgment of Lady Hale, with which Lord Kerr and Lord Sumption agree, and the judgment of Lord Carnwath and Lord Hodge, with which Lord Clarke agrees, I have come to the conclusion that I agree with Lady Hale. The issues raised by these appeals are both difficult and important, and the reasons which Lord Carnwath and Lord Hodge advance for differing from Lady Hale plainly merit serious consideration. Accordingly, I propose to explain the reasons for my conclusion, while avoiding retreading the ground covered by Lady Hale so far as I can.

60. I start with the proposition that, particularly in the field of mental health, it would be highly desirable to have as much authoritative guidance, or, as Lord Carnwath and Lord Hodge put it, as focussed a test, as possible in order to decide whether the circumstances of a particular case involve a deprivation of liberty falling within article 5.4 or a restriction on liberty falling outside article 5. Psychiatrists, social workers, local authorities, charities, and no doubt many others responsible for the health and welfare of those suffering from mental and physical impairment, as well as those people whose liberty is being interfered with, need, and are entitled to, as much in the way of clear guidance as it is possible for the courts to give. Of course, the issue of whether a particular case involves deprivation or restriction must depend on the specific facts of that case, but that does not mean that there can be no focussed guidance. It is also true that, however clear the guidance, there will be cases where it will be difficult to decide which side of the line the facts fall, but that is not a reason for the courts not seeking to minimise the uncertainty. On the contrary.

61. Accordingly, at least in principle, the approach proposed by Lady Hale appears to me to be attractive, and should be adopted unless there is good reason not to do so. Lord Carnwath and Lord Hodge suggest that there are two reasons for not adopting that approach, both of which reasons merit serious consideration. The first reason is that the Strasbourg jurisprudence has not gone as far as Lady Hale's analysis, and this is a case where we cannot properly go beyond Strasbourg in the light of section 64(5) of the Mental Capacity Act 2005. The second reason is that Lady Hale's analysis produces an undesirable or inappropriate outcome in cases such as those of P and Q in the appeal involving Surrey County Council.

62. So far as the first reason is concerned, it is true that there has been no decision of the Strasbourg court involving the combination of factors which arise in the present cases. It is also true that, in almost every decision to which we were referred, the Strasbourg court has been at pains to emphasise that the question whether article 5.4 is engaged is highly fact-sensitive, and that the distinction between deprivation and restriction is matter of "degree or intensity". However, it is self-evident that this does not mean that this court cannot seek to extract specific principles from those decisions, and then apply them to the facts of the cases before us.

63. In agreement with Lady Hale, I consider that the Strasbourg court decisions do indicate that the twin features of continuous supervision and control and lack of freedom to leave are the essential ingredients of deprivation of liberty (in addition to the area and period of confinement). In that connection, see *Guzzardi* v *Italy* (1980) 3 EHRR 333, para 95 ("supervision … carried out strictly and on an almost constant basis … [and] not able to leave his dwelling between 10 pm and 7 am"), *HL v United Kingdom* (2004) 40 EHRR 761, para 91 ("under continuous supervision and control and … not free to leave"), *Storck v Germany* (2005) 43 EHRR 96, para 73 ("continuous supervision and control … and … not … free to leave"), *Kedzior v Poland* (Application No 45026/07) 16 October 2012, para 57 ("constant supervision and … not free to leave"), *Stanev v Bulgaria* (2012) 55 EHRR 696, para 128 ("constant supervision and … not free to leave"), and *Mihailovs v Latvia* [2013] ECHR 65, para 132 ("under constant supervision and … not free to leave").

64. The factors which are relied on by Lord Carnwath and Lord Hodge to support the point that these cases differ from those decided by the Strasbourg court are as follows:

a) the person concerned lacks capacity to decide upon her placement but has not evinced dissatisfaction with or objection to it;

b) the placement is in a small group or domestic setting which is as close as possible to "normal" home life;

c) a court authorised that placement for the best interests of the person concerned; and

d) the regime is no more intrusive or confining than is required for the protection and well-being of the person concerned.

65. It is convenient to take factor (d) first, followed by factor (a), and then factor (c), and finally factor (b).

66. As to factor (d), the Grand Chamber made it clear in *Austin v United Kingdom* (2012) 55 EHRR 359, para 58 that the fact that "the object is to protect treat or care in some way for the person taken into confinement" has "no bearing on the question whether that person has been deprived of his liberty, although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified …". To the same effect, the Grand Chamber said in *Creanga v Romania* (2012) 56 EHRR 361, para 93 that "the purpose of measures by the authorities depriving applicants of their liberty no longer appears decisive for the court's assessment of whether there has in fact been a deprivation of liberty", on the basis that the purpose is to be taken "into account only at a later stage of its analysis, when examining the compatibility of the measure with article 5.1".

67. So far as factor (a) is concerned, I consider that it would be inappropriate to hold that, if certain conditions amounted to a deprivation of liberty in the case of a person who had the capacity to object and did object, they may, or – even worse – would, not do so in the cases of a person who lacked the capacity to object. On one view, such a conclusion would mean that, however confining the circumstances, they could not amount to a deprivation of liberty if the person concerned lacked the capacity to object. That cannot possibly be right. Alternatively, there would be a different test for those who were unable to object and those who could do so. That would be a recipe for uncertainty.

68. In addition, the notion that the absence of objection can justify what would otherwise amount to deprivation of liberty is contrary to principle. It is true, and indeed sensible, that a person's consent (provided that it is freely and properly given) may serve to defeat a contention that she has been deprived of her liberty. However, it involves turning that principle on its head to say that the absence of objection will justify what would otherwise be a deprivation of liberty – save in those rare circumstances where the absence of objection can be said to amount to consent, as in *Mihailovs v Latvia*, paras 138-139.

69. Further, if factor (a) had validity, it would tend to undermine the universality of human rights to which Lady Hale rightly refers. Over and above this, it seems to me that the principle referred to by the Grand Chamber in the decisions in para 66 would be infringed. I also draw support from the closing comments of the Strasbourg court in *HL v United Kingdom* 40 EHRR 761, para 90, where, after stating that a person should not "lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention", the court added "especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action".

70. I am unimpressed with factor (c). The court's involvement in cases such as those to which these appeals relate is not equivalent to that of a court sentencing a criminal to a specific term of imprisonment. It is deciding that the circumstances of an innocent and vulnerable person, suffering from disability, are such that there must be an interference with his liberty. If that interference would otherwise amount to a deprivation of liberty, I find it hard to understand why it should be otherwise simply because the court has approved it. The court's approval will almost always justify the deprivation from its inception, but, again, it is hard to see why it should continue to justify it for a potentially unlimited future. The only reason which can be advanced to justify such a conclusion is, as I see it, based on the purpose of the interference with liberty which brings one back to the observations in the Grand Chamber referred to in para 8 above.

71. Factor (b) forms the basis upon which Lord Carnwath and Lord Hodge rest their view that P and Q have not been deprived of their liberty. It is a fair point that the Strasbourg court has never had to consider a case where a person was confined to what may be described as an ordinary home. However, I cannot see any good reason why the fact that a person is confined to a domestic home, as opposed to a hospital or other institution, should prevent her from contending that she has been deprived of her liberty. In that connection, however, I note that article 5.4 was held to be infringed in *Guzzardi v Italy* 3 EHRR 333, where, as mentioned above, the Grand Chamber referred to the applicant not being "able to leave his dwelling between 10 pm and 7 am". I agree with Lord Carnwath and Lord Hodge that many people might react with surprise at simply being told that a person living in a domestic setting could complain of deprivation of liberty, but that is a point of little weight, particularly as such people may well retract the surprise when the consequences either way under article 5 are explained.

72. In the case of children living at home, what might otherwise be a deprivation of liberty would normally not give rise to an infringement of article 5 because it will have been imposed not by the state, but by virtue of what the Strasbourg court has called "the rights of the holder of parental authority", which are extensive albeit that they "cannot be unlimited" (see *Nielsen v Denmark* (1988) 11 EHRR 175, para 72, a decision which, at least on its facts, is controversial, as evidenced by the strength

of the dissenting opinions). However, it is fair to say that, while this point would apply to adoptive parents, I doubt that it would include foster parents (unless, perhaps, they had the benefit of a residence order). But in the great majority of cases of people other than young children living in ordinary domestic circumstances, the degree of supervision and control and the freedom to leave would take the situation out of article 5.4. And, where article 5.4 did apply, no doubt the benignly intimate circumstances of a domestic home would frequently help to render any deprivation of liberty easier to justify.

73. I do not accept that the cases cited by Lord Carnwath and Lord Hodge cast doubt on the notion that such confinement can fall within article 5.4. The comparison of the restrictions in the hospital in *Nielsen v Denmark* 11 EHRR 175, para 70 with "a real home" was made in connection with consideration of the contention that the "treatment given at the hospital and the conditions under which it was administered were inappropriate in the circumstances". The case involved a child, and was decided on the basis that his mother was exercising her article 8 rights responsibly, in good faith and on the basis of medical advice – see para 71. Indeed, the strength of the minority view to the contrary in that decision is a measure of the importance which the Strasbourg court attaches to the protection afforded by article 5.4. *HM v Switzerland* (2002) 38 EHRR 314 does not assist on the issue, not least because it turned on the consent given by the applicant, as explained in *HL v United Kingdom* 40 EHRR 761 para 93. *HL* itself seems to assist Lady Hale's conclusion to the extent that, as explained by the Grand Chamber in *Stanev v Bulgaria* 55 EHRR 696, para 118, the court there held that there was a deprivation of liberty "where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave". The "serious doubts" expressed in *Haidn v Germany* [2011] ECHR 39, para 82 take matters no further, not least because the factual circumstances are unclear.

74. Accordingly, I agree with Lady Hale that the appeal of P and Q against Surrey County Council, as well as the appeal of P against Cheshire West and Chester Council, should be allowed.

LORD KERR

75. For the reasons given by Lady Hale and Lord Neuberger, with which I agree, I would allow these appeals.

76. While there is a subjective element in the exercise of ascertaining whether one's liberty has been restricted, this is to be determined primarily on an objective basis. Restriction or deprivation of liberty is not solely dependent on the reaction or

acquiescence of the person whose liberty has been curtailed. Her or his contentment with the conditions in which she finds herself does not determine whether she is restricted in her liberty. Liberty means the state or condition of being free from external constraint. It is predominantly an objective state. It does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity.

77. The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is *in fact* circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.

78. All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are – and have to be – applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is – and must remain – a constant feature of their lives, the restriction amounts to a deprivation of liberty.

79. Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable – curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because they can – and must – now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.

80. Lord Clarke has commended the judgment of Parker J in the case of *P and Q* as setting out the factors relevant to an assessment of whether they are deprived of their liberty. The judgment is indeed a model of clarity but it is because it proceeds on the premise that liberty is to be judged subjectively that I cannot agree with it. Although the Strasbourg court has not had to confront precisely the situation in which the parties in these cases find themselves, it is clear, in my view, that the approach adopted by that court to the question of a deprivation of liberty is primarily rooted in an objective assessment of the conditions which are said to amount to that

state. Thus in *Stanev v Bulgaria* (2012) 55 EHRR 696 and the cases which preceded it, the European Court of Human Rights was careful to point out that the starting point was the concrete situation of the person concerned. The rubric employed to describe the criteria to be taken into account, "the type, duration, effects and manner of implementation of the measures" confirms the paramount importance of an objective assessment.

81. The subjective element in deprivation of liberty is the absence of valid consent to the confinement in question – see para 117 of *Stanev*. This must be distinguished from passive acquiescence to the deprivation, particularly where that stems from an inability to appreciate the fact that one's liberty is being curtailed. In para 118 (c) the court said that deprivation of liberty occurs when an adult is incapable of giving his consent to admission to a psychiatric institution, even though he had never attempted to leave it. And, as Lady Hale has pointed out (in para 24 of her judgment) the court also said in para 119 that the right to liberty was too important to be lost simply because a person had given himself up to detention, especially where he is legally incapable of consenting to or disagreeing with it.

82. Benevolence underpinning a regime which restricts liberty is irrelevant to an assessment of whether it in fact amounts to deprivation. Lord Carnwath and Lord Hodge suggest (in para 90 of their judgment) that the fact that a regime is no more intrusive or confining than is required for the protection and welfare of the person concerned, while principally relevant to justification of restriction of liberty, may also be taken into account in deciding whether the restriction amounts to deprivation of liberty. I cannot agree. The suggestion has echoes of some oblique observations in *HM v Switzerland* (2004) 38 EHRR 314 where it was found that the applicant had been placed in a nursing home in her own interests. But, as Lady Hale has pointed out (in para 28) this is inconsistent with later Grand Chamber decisions in *Creanga v Romania* (2012) 56 EHRR 361, and *Austin v United Kingdom* (2012) 55 EHRR 359.

83. In *Creanga* the court said (at para 93) that the purpose of the measures which deprived applicants of their liberty was no longer "decisive for the court's assessment of whether there has in fact been a deprivation of liberty". This factor was to be taken into account "only at a later stage of [the court's] analysis, when examining the compatibility of the measure with article 5.1 of the Convention", in other words, whether the deprivation was justified. And in *Austin* at para 58 the point is made even more directly. There it was said that the court's jurisprudence made it clear that "an underlying public interest motive … has no bearing on the question whether [the] person has been deprived of his liberty, although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of article 5.1."

84. These statements are consistent with the analysis of whether liberty has been deprived as involving principally an objective assessment. Placing restrictions on someone's liberty for their own good or even to make available to them a range of activities that they might not otherwise be capable of does not transform the restrictions into something less than constraints. To suggest that the purpose of the restriction is relevant to whether it amounts to a deprivation of liberty is to conflate the object of the restraints with their true character.

85. If, as Lord Carnwath and Lord Hodge have suggested, section 64(5) of the Mental Capacity Act 2005 ties us yet closer to the jurisprudence of Strasburg than does section 2 of the Human Rights Act 1998, this does not alter the requirement that we meet and deal with the claim that the restrictions on P's and MIG's and MEG's liberty amount to a deprivation under article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, even if there is no clear and constant line of authority from the European Court of Human Rights on similar facts to those which arise in the present appeals. Reference has been made to Lord Dyson's judgment in *Ambrose v Harris* [2011] 1 WLR 2435 para 88, where he said that it may be possible to find a "sufficiently clear indication in the Strasbourg jurisprudence of how the European court would resolve the question". But Lord Carnwath and Lord Hodge state that, in the absence of such a clear indication, this court should be "cautious about extending a concept as sensitive as 'deprivation of liberty' beyond the meaning which it would be regarded as having in ordinary usage" – para 93 of their judgment.

86. With respect, I do not agree that caution is the appropriate reaction to an absence of authoritative guidance from Strasbourg. This court, in common with all public authorities, has the duty under section 6 of the Human Rights Act not to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it. This court must therefore resolve the question of whether a claim to a Convention right is viable or not, even where the jurisprudence of the Strasbourg court does not disclose a clear current view.

87. In any event for the reasons given by Lady Hale, it is apparent that two central features of the current Strasbourg jurisprudence point clearly to the conclusion that there is a deprivation of liberty in these cases. These are that the question of whether there has been a deprivation is to be answered primarily by reference to an objective standard and that the subjective element of the test is confined to the issue of whether there has been a valid and effective consent to the restriction of liberty. I do not accept that this clear guidance can be substituted with an "ordinary usage" approach to the meaning of deprivation of liberty. If deprivation of liberty is to be judged principally as an objective condition, then MIG, MEG and P are unquestionably

subject to such deprivation, no matter how their situation might be regarded by those "using ordinary language".

LORD CARNWATH AND LORD HODGE

88. We gratefully adopt the bulk of Lady Hale's judgment, including her exposition of the legislative history, the relevant jurisprudence, and the facts of the cases before us. There is much common ground. We agree that the comparator should in principle be a person with unimpaired health and capacity for the reasons which the judgment advances. We also see real value in the clarity of a focused test as it would greatly assist the psychiatrists and other professionals who have to administer the Mental Capacity Act 2005 ("the 2005 Act").

89. We also recognise the arguments in favour of a policy of periodic supervision of arrangements made under that Act to safeguard those who have an incapacity in order to ensure that those arrangements are in their best interests. That is consistent with a commitment to give effective protection to vulnerable persons. On the other hand, as she recognises, there are legitimate concerns about the potential bureaucracy of the statutory procedures, and about including within the test "the sort of benevolent living arrangements which many might find difficult to characterise as a deprivation of liberty" (para 10).

90. There is also common ground that the approach proposed by Lady Hale goes further than any existing Strasbourg case law. As she says, Strasbourg has not yet ruled on a case which combines the following features of the cases before us:

(a) a person who lacks both legal and factual capacity to decide upon his or her own placement but who has not evinced dissatisfaction with or objection to it;

(b) a placement, not in a hospital or social care home, but in a small group or domestic setting which is as close as possible to "normal" home life; and

(c) the initial authorisation of that placement by a court as being in the best interests of the person concerned.

To those we would add a fourth: (d) that the regime is no more intrusive or confining than is required for the protection and well-being of the person concerned. We recognise that this fourth point, like the purpose of a regime, is principally relevant

to the justification of that regime rather than the analysis of its nature: see *Austin v United Kingdom* (2012) 55 EHRR 359, para 58. But in our view the degree of intrusion is nonetheless relevant to the latter.

91. The Strasbourg jurisprudence seems to us of added significance where, as Lady Hale notes (para 19), section 64(5) of the 2005 Act ties the concept of "deprivation of … liberty" into article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms by providing that it will have the same meaning. As the Strasbourg court is the authoritative interpreter of the Convention, it appears to us that under the 2005 Act we are more closely tied to its interpretation of the Convention than we are under section 2(1) of the Human Rights Act 1998. In effect Parliament has decided that it is to the Strasbourg jurisprudence that we must turn to find out what is meant by deprivation of liberty.

92. Even if we are wrong in suggesting that section 64(5) constrains us more than section 2 of the 1998 Act, we have clear and recent authority from a nine Justice Bench that we should follow a clear and constant line of decisions, especially those of the Grand Chamber (*Manchester City Council v Pinnock (Secretary of State for Communities and Local Government Intervening)* [2011] 2 AC 104, per Lord Neuberger (giving the judgment of the court) at para 48). See also *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2013] 3 WLR 1076 per Lord Sumption at para 121.

93. We accept that the mere fact that Strasbourg has not yet had occasion to consider a case with this combination of factors does not of itself preclude us from forming our own view of how it would decide the matter if cases such as the present were to come before it. As Lord Dyson said, in *Ambrose v Harris (Procurator Fiscal, Oban)* [2011] 1 WLR 2435, para 88, it may be possible to find a "sufficiently clear indication in the Strasbourg jurisprudence of how the European court would resolve [the] question". However, short of such a clear indication, we should be cautious about extending a concept as sensitive as "deprivation of liberty" beyond the meaning which it would be regarded as having in ordinary usage.

94. We can see the attractions of a universal test, applicable to all regardless of any physical or mental disabilities, as Lady Hale proposes (para 46). But it is not a concept which we can find reflected in the Strasbourg cases. The court has remained wedded to a case-specific test. It has consistently reaffirmed the need for an examination of the "concrete situation" taking into account "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question"; and that the difference between deprivation of liberty and restrictions on liberty was "merely one of degree or intensity, and not one of nature or substance".

95. Turning to the individual cases discussed by Lady Hale, we would attach particular importance to *Stanev v Bulgaria* (2012) 55 EHRR 696, as a recent Grand Chamber decision in which the court also took the opportunity to review the early cases. It is important however to keep in mind that the focus of the judgment was on state run social care institutions, such as the one in issue in that case, rather than the more domestic environments with which we are concerned. The relevant facts have been sufficiently summarised by Lady Hale (para 26).

96. We would highlight the following points in the judgment:

(a) The test is not hard edged. The court repeated its standard *Engel* formula:

> "In order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question" (para 115)

(b) The court summarised the effect of previous decisions in comparable cases:

> "The court has found that there was a deprivation of liberty in circumstances such as the following: (a) where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital (see *Shtukaturov v Russia* (2008) 54 EHRR 962, para 108); (b) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape (see *Storck v Germany* (2005) 43 EHRR 96, para 76); and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave (see *HL v United Kingdom* (2004) 40 EHRR 761, paras 89-94)".

(c) It is true that the court attached weight to the fact that he was "under constant supervision and was not free to leave the home without permission whenever he wished" (para 128), but this was not treated

as conclusive in itself; it was only one of a number of factors leading to the overall assessment.

(d) The court noted (at para 130) its previous holding that –

> "the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation (see *Shtukaturov*, at para 108)"

In *Stanev* itself, the subject was well aware of his situation, and had expressed his desire to leave the social care home. Unlike HM (see below) it could not be said that he had consented to or "tacitly accepted" his placement there (para 130-131).

97. It is notable that all the cases cited in the court's review related to people living in institutions of some kind, not in ordinary homes. Conversely, we have been referred to no Strasbourg case in which detention has been found in comparable circumstances to the present. A number of cases, in which no deprivation of liberty was found, contain pointers in the other direction:

i) In *Nielsen v Denmark* (1988) 11 EHRR 175 it was significant that restrictions on the child applicant's freedom of movement and contacts were no different from restrictions which might be imposed on a child "in an ordinary hospital", the conditions being "as similar as possible to a real home" (para 70).

ii) In *HM v Switzerland* (2002) 38 EHRR 314 it was relevant that, though "not able to go home" (para 32), she had freedom of movement, was able to maintain social contact with the outside world and hardly felt the effects of her stay (paras 45-46). The case was regarded as comparable to *Nielsen v Denmark* (para 48).

iii) In *HL v United Kingdom* (2004) 40 EHRR 761, para 93 the court distinguished *HM* on the grounds that the nursing home in that case was an "open institution which allowed freedom of movement and encouraged contacts with the outside world" and offered a regime "entirely different" from that in *HL*. (It is true that in *Stanev* 55 EHRR 696, *HM* was distinguished in part on the basis that HM, unlike Stanev, had "agreed to stay" (para 131). However, that is not the ground on which HM was actually decided, and the fuller discussion in *HL* shows that such assumed agreement was only part of the story.)

iv) In *Haidn v Germany* (Application No 6587/04) 13 January 2011, the subject, following release from detention on probation, was required by the court to live in an old people's home, which he could not leave without his custodian's permission (para 82). The court expressed "serious doubts" whether there was a deprivation of liberty, although did not need to decide the point.

98. None of these cases is conclusive. As Lady Hale has shown, different interpretations are possible. However, if we are to look, in Lord Dyson's words, for a "clear indication" of how Strasbourg would decide the matter, we are not persuaded that they provide sufficient support for the general test proposed by Lady Hale.

99. We are concerned that nobody using ordinary language would describe people living happily in a domestic setting as being deprived of their liberty. We recognise that the concept in the Convention may be given an autonomous meaning by the Strasbourg court. But we are struck by how the judges in the courts below, with far more experience than we ourselves can claim, have laboured to keep the concept of deprivation of liberty in touch with the ordinary meaning of those words. Although we agree with some of the criticisms made of the Court of Appeal's relevant comparator approach, we understand what the judges were striving to achieve.

100. We also share the concern of some of the judges below as to how such a test would have applied to HL, once returned from hospital to the placement with his foster parents, as required by the court's decision in that case. It is true as Lady Hale says (para 53) that no-one suggested in that case that his position there would involve a deprivation of liberty. But that, surely, was because it had not occurred to anyone (including the court) that such a placement in an ordinary home environment could constitute a deprivation of liberty for the purpose of article 5, even though the degree of control for practical purposes would be the same as before.

The present cases

101. No doubt P and Q can be said to have had their liberty restricted, by comparison with a person with unimpaired health and capacity. But that is not the same as a deprivation of liberty. Parker J summarised their position in this way:

> "228 In neither placement in my judgment is there 'confinement in a restricted space for a not negligible length of time'. [P] is living in a foster home and goes to college during the day; [Q] is living in a

> residential home and goes to college during the day. In the evenings they return to their respective homes …
>
> 229 The 'concrete situation' is that each lives exactly the kind of life that she would be capable of living in the home of her own family or a relative: their respective lives being dictated by their own cognitive limitations."

In our view that is entirely consistent with the Strasbourg jurisprudence and we would uphold her decision.

102. In *P v Cheshire West and Chester Council* Baker J took a different view, on the facts of that case. Lady Hale has summarised the judge's reasoning. He concluded:

> "59. On the other hand, his life is completely under the control of members of staff at Z House. He cannot go anywhere or do anything without their support and assistance. More specifically, his occasional aggressive behaviour, and his worrying habit of touching and eating his continence pads, require a range of measures, including at times physical restraint, and, when necessary, the intrusive procedure of inserting fingers into his mouth whilst he is being restrained."

103. The Court of Appeal took a different view. While we agree with Lady Hale's criticisms of parts of their reasoning, we see some force in their point that occasional restraint for purely therapeutic purposes should not be enough in itself to tip "restriction" over the edge into "deprivation". As Munby LJ said:

> "The measures described by the judge as applied from time to time to P are far removed from the physical or chemical restraints which one sometimes finds, for example, in mental hospitals. They are, in truth, the kinds of occasional restraint that anyone caring for P in whatever setting – for example, his own mother if he was still living at home – would from time to time have to adopt." ([2012] PTSR 1447, para 113)

However, we think that this is too narrow a reading of the judge's assessment overall and was not enough in itself to justify the court interfering with his decision in what in our view was a marginal case. Although we might not have reached the same decision, we are satisfied that he directed himself correctly on the legal principles,

and that his conclusion was one which was reasonably open to him on the particular facts of the case.

104. For these reasons, we would dismiss the appeal in *P & Q* but, in agreement with the majority, allow the appeal in *P v Cheshire West*.

LORD CLARKE

Introduction

105. I agree with the conclusions and reasoning of Lord Carnwath and Lord Hodge. As I see it, the question in these appeals is whether, on the facts found, the appellants were deprived of their liberty or whether their liberty was interfered with. This is a question of fact which, as so often, depends upon all the circumstances of the case. The jurisprudence of the European Court of Human Rights ("ECtHR"), which is discussed in detail by others, shows to my mind that, in order to answer the question, it is necessary to conduct a multi-factorial exercise which involves a balancing of a number of considerations. The ECtHR has not held that there is only one question (or acid test), namely whether the individual concerned is free to leave. Its approach is more nuanced than that.

106. As Smith LJ put it in *P and Q* [2012] Fam 170, para 40, whether in each case MIG and MEG was deprived of her liberty or whether her liberty was merely interfered with is a question of fact and degree. It is essentially a jury question and thus a question for the trial judge. Given that it involves a balancing of many different considerations, the decision of the judge should not be interfered with by an appellate court unless it concludes that the judge has erred in principle or that the judge was wrong. An appellate court should not simply substitute its own view for that of the judge. In these cases the judges of first instance, Parker J in *P and* Q and Baker J in *P,* were very experienced in this field so that their opinions deserve great respect.

107. In *P and Q* Parker J conducted a careful analysis of the facts relevant to each case: see paras 207 to 237. In para 224 she concluded (in my opinion correctly) that mere lack of capacity to consent cannot in itself create a deprivation of liberty. If it did, everyone placed by a local authority would be considered to be deprived of their liberty. She then said this:

> "225. Freedom to leave has to be assessed against the background that neither wants to leave their respective homes, there is no

alternative home save that of their mother where neither wishes to live, and neither appears to have the capacity to conceptualise any alternative unfamiliar environment. I have been told and I accept that if the local authority felt that either was actively unhappy where they were placed, then other arrangements would be made.

226. In my view it is necessary to analyse what specific measures or restraints are in fact required. …"

The judge then referred to *Salford City Council v GJ* [2008] EWHC 1097 (Fam), [2008] 2 FLR 1295 a case in which declaration had been made as to the lawfulness of certain measures and continued in this way.

"227. No such declarations or authorisations were sought here. Specifically no authorisation was sought to prevent either from leaving the placement. No declaration was sought that it was lawful to administer Risperidone to MEG. In the draft order submitted at the hearing the relevant declarations sought in the event that I concluded that there was a deprivation of liberty were that each should live in their respective homes, attend C College, and have contact with family members as set out in the schedule to the draft order. There was no reference to medication. No more specific measures were referred to in the draft order, or in the care plans which were sought to be authorised. On the basis, as I have found, that placement in itself and lack of consent in itself is not sufficient to create a deprivation of liberty in the circumstances of this case, then there must in my judgment be some other specific course of action adopted or measure taken whereby restraints or restrictions are placed upon an individual of sufficient degree and intensity to constitute a deprivation of liberty. The guidance in the Deprivation of Liberty Safeguards Code supports this analysis.

228. In neither placement in my judgment is there 'confinement in a restricted space for a not negligible length of time.' MIG is living in a foster home and goes to college during the day; MEG is living in a residential home and goes to college during the day. In the evenings they return to their respective homes. In their circumstances, and by comparison with the considerations in the control order cases, neither is subject to any form of house arrest or curfew.

229. The 'concrete situation' is that each lives exactly the kind of life that she would be capable of living in the home of her own family

or a relative: their respective lives being dictated by their own cognitive limitations. Each is subject to limitations on her own autonomy and freedom of movement and ability to enjoy activities by being guided or accompanied in order to provide for her own immediate protection.

…

233. With specific regard to the measures said to amount to deprivation of liberty here, and to the Deprivation of Liberty Safeguards Code set out above, it is relevant that:

i) Each was under the age of majority when admitted under the powers conferred by the Care Orders to their respective homes. Neither was admitted using restraint or medication.

ii) The question of where each is to live is for the court, and no decision has been taken by MIG's foster mother (who is not 'staff') or the staff of B Home that either cannot leave;

iii) Each lacks freedom and autonomy dictated by their own disability, rather than because it is imposed on them by their carers. Each is under the continuous supervision and control of her carers (and in the case of MIG, of her foster family rather than 'staff') so as to meet her care needs rather than to restrain her in any way.

iv) MEG is accommodated as a child in need.

v) Neither is restrained save for immediate purpose of ensuring safety, and, in the case of MEG, for her immediate protection and that of others when she has an outburst. In my view the case of neither does this cross the line so as to constitute deprivation of liberty.

vi) Medication is not administered to MEG so as to restrain her from leaving or to restrain her activities generally. In my view this does not cross the line either.

vii) Neither is in a locked environment.

viii) If either wished to leave in the immediate sense each would be restrained or brought back for their safety. If either were unhappy in their residential settings other arrangements would be sought.

ix) Neither is deprived of social contacts, and in the school environment they can associate with whom they will, subject to the teachers or other support staff in that environment. Specific controls are placed on their contact with their mother and stepfather, but these controls are imposed not by their carers, but by court order. The arrangements in relation to contact with HG and SG are dictated by practicalities.

x) Neither is in their respective homes all the time. They go to college for significant periods of time, where it is not suggested that either is deprived of her liberty, notwithstanding their respective lack of capacity to consent to attending college or to restraints on leaving that environment during the school day.

xi) Some relatives support their placements and some do not. None actively objects to the placement. No relative objects to the care regime. No request by any interested person for either to be released into their care has been refused.

xii) The fact that MEG is living in a residential home does not mean that she is deprived of her liberty. It is, to quote McFarlane J in *LLBC v TG, JG and KR*[1], an 'ordinary care home where only ordinary restrictions on liberty applied';

xiii) As in *LLBC v TG, JG and KR*, the subjects of these proceedings have at all times been the subject of either care orders or Court of Protection orders, under whose auspices they have been placed originally, and each person with an interest in the care and other arrangements for MIG and MEG has and has had the ability to apply to the court;

xiv) No challenge to their placements has been made and the case has proceeded without any active attempt to invite the court to authorise deprivation of liberty until the final hearing;

xv) No other arrangements less restrictive or invasive could be devised that would meet their care needs.

234. I have not met MIG or MEG but I have read much about them and heard much too. Their wishes and feelings are manifest and clearly expressed. They plainly have no subjective sense of confinement. In a non legal sense they have the capacity to consent to

[1] [2007] EWHC 2640, [2009] 1 FLR 414, per McFarlane J at [105(i)]

> their placements. I cannot imagine that any person visiting MIG at the home of JW, or MEG at B Home would gain any sense of confinement or detention.
>
> 235. Those circumstances are in my judgment very far from the 'paradigm' example of imprisonment."

108. I have set out that part of Parker J's judgment in detail because it seems to me to set out the many relevant factors with clarity and to demonstrate why she was entitled to hold that MIG and MEG were not deprived of their liberty. For my part, I see no reason to hold that the judge reached a wrong conclusion. In particular I agree with the conclusions of Lord Carnwath and Lord Hodge that nobody using ordinary language would describe people living happily in a domestic setting as being deprived of their liberty. I am not persuaded that the ECtHR would so hold. A more measured conclusion would be that MIG's liberty was interfered with and not that she had been deprived of her liberty. The same is true of MEG.

109. In conclusion, I would stress that, contrary to the view expressed by Lord Kerr in para 80, I do not read Parker J as adopting a subjective approach. As I see it she is essentially carrying out an objective assessment of the various factors in arriving at her conclusion. I have tried to do the same. This is not a comparative exercise with other people in different circumstances but an assessment of the position of MIG and MEG on the facts of their particular cases.

110. For these reasons, in agreement with Lord Carnwath and Lord Hodge, I would dismiss the appeals in *P and Q v Surrey County Council*. Applying the same approach in *P v Cheshire West and Chester Council*, I would again decline to interfere with the conclusions of the judge at first instance, Baker J, and would allow the appeal.