CAPACITY, CONSENT AND THE PROVISION OF CARE

AN ANALYSIS OF RECENT AND RELEVANT CASELAW

SCOTT BLAIR, ADVOCATE

INTRODUCTION

In this part of the seminar I want to look at recent and otherwise generally relevant caselaw and to reflect on how and when human right considerations have a material role to play, particularly as regards deprivation of liberty and Article 5 ECHR.

This paper seeks to take account of the discussion contained in the Scottish Law Commission ("SLC" or "the Commission") paper *"Adults with Incapacity"* (No 156) published in July 2012. It has much to say on human rights in this field.

As the SLC paper noted at paragraph 1.2 the main human rights issues identified by the Mental Welfare Commission related to possible deprivations of liberty in community settings such as care homes. The view was that the legislation set out in the Adults with Incapacity (Scotland) Act 2000 lacked clarity about the use of statutory interventions to authorise moving a person into residential care, in circumstances where the person appeared to be compliant but lacked the legal capacity to make that decision. The Commission noted that before the decision in *Bournewood* (otherwise *HL v United Kingdom* (2005) 40 EHRR 32) , it had been assumed that patients who were incapable of consent but compliant with their admission could be regarded as voluntary patients. The decision of the Strasbourg Court changed that as a lack of capacity to consent appeared to preclude voluntary or informal admission.

In England and Wales, the response to the *Bournewood* decision was to establish new provisions on the admission of persons over the age of 18 to facilities which could amount to a deprivation of liberty along with new for review and appeal provisions. This was done by Schedule 7 to the Mental Health Act 2007, which inserted a new Schedule A1 into the Mental Capacity Act 2005.

It was also suggested to the SLC that it should look at the compatibility with Article 5 of the ECHR of practices and procedures that were being followed in care homes. This could also have expanded into Article 3 and 8 issues.

However the Commission decided that the issue of most pressing concern was in relation to issues relating to welfare guardianship and deprivation of liberty. I will though attempt to provide an overview of some issues under the ECHR other than under Article 5.

CONCLUSIONS FOR SCOTLAND BY THE SLC

Before embarking on an examination of the cases I thought it would be helpful to set out some of the general conclusions of the SLC as regards the extent to which our current legal framework might need rethinking or reworking so as to ensure compliance with our international obligations.

This is as follows:-

"6.4 As outlined in Chapter 3, the statutory scheme in place in Scotland to provide for decision-making on behalf of people whose cognitive abilities are impaired is currently contained in the Adults with Incapacity (Scotland) Act 2000. The main provisions of the scheme were discussed in Chapter 3 above. Currently, if a measure which might involve a deprivation of liberty is contemplated for such a person, the only formal processes available for authorisation are the obtaining of an intervention order or the appointment of a guardian under the incapacity legislation or, if admission to hospital is sought, detention under the Mental Health (Care and Treatment) (Scotland) Act 2003. As far as the 2000 Act processes are concerned, the Scottish Government guidance to local authorities states that intervention orders appear more suited to one-off or time-limited actions or decisions, rather than a continuing regime.[1] It is also suggested that the welfare aspects of moving an adult to different accommodation are better dealt with through welfare guardianship. These observations would apply with greater force were that accommodation to involve a deprivation of liberty. Moreover, a process capable of resulting in authorised deprivation of liberty should, as a minimum, make explicit mention of deprivation of liberty. Reliance on an implication that intervention orders may be used in this way would not meet the requirement of precision: the Convention:

> *"…requires that all law be sufficiently precise to allow the citizen – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail….."*

This appears to have been recognised in practice, as there does not appear to be any example of use of an intervention order to authorise arrangements which involve deprivation of liberty."

"6.5 Some of the same observations apply to the use of guardianship. There is no specific reference in the guardianship provisions of the 2000 Act to deprivation of liberty. As Hilary Patrick comments:

> *"It seems generally accepted that the Adults with Incapacity Act guardianship can constitute the lawful procedure required by ECHR law if an adult is to be deprived of his or her liberty on the grounds of mental disorder."*[4]

Whether this acceptance is justified is open to question, as far as the current guardianship process is concerned."

6.6 As there is no reference to deprivation of liberty in the 2000 Act, it is not clear how as a matter of practicality such a power may be sought and obtained. In Muldoon the applicant sought welfare powers (a) to decide where the adult should live, (b) to have access to confidential documents, and (c) to consent to, or withhold consent to, medical treatment. The application was granted as sought, with the welfare powers apparently being "particular matters" specified under section 64(1)(a). The Sheriff took the view that deprivation of liberty was involved; it therefore appears that in the result, power to deprive the adult of her liberty was included, although not specified in the order granted. It would be possible in an application to seek power to deprive an adult of liberty as a specified power under section 64(1)(a). Alternatively, general powers under section 64(1)(b) to deal with all aspects of the personal welfare of the adult could be sought. Whether such an order without further specification would include sanctioning arrangements depriving that adult of liberty has not been judicially considered."

"6.7 In relation to these different statutory routes, the question arises as to whether depriving an adult of liberty is properly characterised as relating to, or an aspect of, the personal welfare of the adult. In comparing the very specific powers granted to guardians where the adult does not comply with his or her guardian's instructions, Hilary Patrick observes that that degree of specification in relation to other, more short-term powers, makes it more difficult to argue that the Scottish Parliament intended to confer powers to detain or authorise others to detain the adult in the general provisions in section 64. On the other hand, the 2000 Act provides that welfare attorneys, guardians and those authorised under intervention orders may not "place the adult in a hospital for the treatment of mental disorder against his will". That these are the only specified statutory exceptions to the powers which a decision-maker may exercise in relation to placing the adult in particular accommodation suggests that placement in other circumstances (in hospital where the adult is not manifesting objections, or elsewhere even if he is) is permitted by the legislation. It also suggests that general welfare powers are wide enough to cover deprivation of liberty in the adult's interests."

"6.8 There was no reference to Article 5 in this Commission's Report on Incapable Adults.[9] In summary, therefore, there are problems concerning the absence of mention of deprivation of liberty in the statute and the lack of clarity as to whether, such absence notwithstanding, a guardianship order can explicitly authorise or impliedly permit, deprivation of liberty of the person to whom it relates."

"6.9 The position regarding review is clearer. In terms of section 58(3) of the 2000 Act, the Sheriff who grants the application for guardianship "shall" appoint the guardian for a period of three years or, if cause is shown, any other period, including an indefinite period. There is no provision for review by the court, either automatically or on application. If the guardian then uses his or her powers to deprive the adult of their liberty, the absence of provisions entitling the adult to take proceedings to challenge their detention appears to us to raise issues under Article 5(4). Even if the guardian were to be appointed for three years, thus generating review after that time, that period could be seen as too long."

"6.10 The 2000 Act also provides for powers of attorney which deal with welfare matters. By section 16, a person may grant a power of attorney which relates to his or her personal welfare and which will become exercisable if that person becomes incapable of making decisions in relation to the matter covered by the power of attorney, or if the attorney reasonably believes that such incapacity exists. Could an attorney acting under such a power take a decision which caused the adult to be deprived of his or her liberty?"

"6.11 If the Power of Attorney document does not refer to the possibility of deprivation of liberty should the adult lose capacity, it is difficult to accept that entitlement to consent to arrangements amounting to detention should be implied. If the document were to refer explicitly to such entitlement, the position would be stronger. Insofar as review is concerned, observations similar to those we made in relation to guardianship would apply: the absence of provisions entitling the adult to take proceedings to challenge their detention appears to us to raise an issue under Article 5(4)."

THE HUMAN RIGHTS ACT-SCOPE

Let me set the statutory background.

The Human Rights Act 1998 applies to public authorities and the ECHR rights set out in Schedule 1 of the Act can be enforced against public authorities. Such bodies can include local authorities, central and devolved government as well as care regulators such as the former Care Commission and the present SCSWIS.

The important provision here is Section 6. It provides:-

"Acts of public authorities"
(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3)In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4). . . . . .

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

Human rights under the HRA do not apply directly to the private sector even where the care might be funded by the state. This was the finding of the House of Lords in *YL v Birmingham City Council* [2007] UKHL 27 the ruling

that the HRA does not cover those whose accommodation in private care homes is council funded was made in a case last year.

The 83-year-old Alzheimer's patient, YL, was threatened with eviction from a care home because of the alleged disruptive behaviour of her husband and daughter, and her lawyers argued the eviction violated her rights to privacy and a family life under Article 8 of the ECHR. Their argument was that, as her accommodation was council funded, the care home should take on the same responsibilities as the local authority, and the HRA should therefore apply. The law lords turned down the appeal after voting against it with a 3-2 majority because in providing care and accommodation for residents placed with it by a local authority, a privately-owned care home was not performing functions of a public nature within the meaning of the Human Rights Act 1998 Section 6(3)(b).

That case can be perhaps seen as more about contractual arrangements as between the care home and the care recipient and as such did not engage the Human Rights Act as it was about an entirely private matter between as it were "landlord" and "tenant".

However the ECHR recognises that public bodies which regulate the private sector and which can take action against private entities such as sole traders or partnerships or companies can come under a positive duty to prevent the abuse of human rights by such entities. This could be in the form of enforcement action or other appropriate intervention. These duties can convert what would otherwise be a power or discretion to act into a duty to act. We shall revisit this later.

DEPRIVATION OF LIBERTY AND ARTICLE 5

Article 5 ECHR provides:-

"Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

> *a. the lawful detention of a person after conviction by a competent court;*
> *b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

The European Court of Human Rights has described (*McKay v United Kingdom* (2006) 44 EHRR 41 at paragraph 30) the importance of Article 5 as being of the utmost importance as:-

"together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual"

I will come on to look at the Strasbourg cases shortly. In the SLC paper the Commission noted at paragraph 2.86 that a review of the Strasbourg caselaw showed that it was difficult to extract any clear principles. It noted that the Strasbourg Court looked at matters on a case by case basis. Against that background the SLC considered that the Member States would be better aimed at the development of their own systems.

Notwithstanding the difficulty in extracting principles the SLC was able to note (at paragraph 2.70 onwards) that one could extract from these cases the

view that one needed to consider range of factors before one could decide if there had been a deprivation of liberty.

The objective element To take the objective element first, there must be *"confinement in a particular restricted space for a not negligible length of time"*. The SLC noted that in several cases, the Court has confirmed that *"the difference between deprivation of and restriction upon liberty is...merely one of degree or intensity, and not one of nature or substance."* Even though the use of Article 2 of Protocol 4 (freedom of movement) to assist in identifying what is or is not a deprivation of liberty has been described as *"profoundly unconvincing"*; the SLC noted that it was well-established. The SLC noted that this Article featured prominently in the House of Lords decision in *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5; [2009] 1 AC 564 to which we will come. The SLC noted that in referring to the objective element, the Court has not identified any one feature which, when present, will always indicate a deprivation of liberty. It did note that despite the absence of a touchstone for the existence of deprivation of liberty, cases where the individual has been kept under lock and key have tended to result in a finding that there has been deprivation of liberty.

The SLC also noted that where the premises concerned are a hospital, particularly a psychiatric hospital, is also more likely to result in such a finding. Deprivation of liberty can, however, occur in settings other than incarceration in a closed prison or psychiatric hospital. As the degree of physical constraint lessens, factors such as social isolation and the other circumstances of the regime may come into play.

The subjective element The SLC noted that this element concerns the absence of consent. An individual can only be considered to have been deprived of his or her liberty if he or she has not validly consented to the confinement in question. The Court will scrutinise the facts of the case to determine whether or not there has been consent and may infer from the facts that consent was absent if, for example, the person concerned tried to escape from the premises. If the person does not have the capacity to consent, then consent cannot have been given. And in a situation where, legally or in fact, the person lacks capacity, the Court will still take into account an expression of hostility to the placement.

If there is a deprivation of liberty then for such a deprivation of liberty to be lawful it must meet the Article 5 criteria. Plainly mental health and criminal justice based detentions, should in general terms in Scotland comply with Article 5. What though about cases of alleged deprivation of liberty in other settings e.g. care homes? How do they fit the Article 5 template of

"prescribed by law", much less being done for a necessary purpose prescribed by Article 5? Let us unpack this a little more.

The European Court has drawn a distinction between 'deprivation of liberty' and 'restrictions on the liberty of movement'. When assessing if a restriction amounts to a deprivation, *'the starting point must be the specific situation of the individual concerned and account must be taken of a whole range of factors ... such as the type, duration, effects and manner of implementation of the measure in question'. The distinction is 'merely one of a degree or intensity and not one of nature or substance.'*

Although a deprivation of liberty is always unlawful unless authorised in accordance with Article. 5 of the ECHR, restrictions on liberty of movement can be imposed on someone without further statutory guarantees.

A restriction is likely to involve the use of force to make someone do something that they are resisting or the restriction of a person's freedom of movement, whether they are resisting or not..

The line between restraint and deprivation of liberty is not clear and fact specific. Recall though that a restraint might still engage Articles 3 or 8 even if it is not deprivation of liberty under Article 5.

In determining whether there is a 'deprivation of liberty' within the meaning of Article 5(1) three conditions must be satisfied. The caselaw is more complex than the following summary might suggest, but it is for present purposes a useful guide. This can be found in the English case of *JE v DE* [2007] 2 FLR 1150, para 77:-

(i) an objective element of a person's confinement in a particular restricted space for a not negligible length of time (*Storck v Germany*, (2005) 43 EHRR 96, para 74);

(ii) a subjective element, namely that the person has not validly consented to the confinement in question (*Storck v Germany*, at para 74);

(iii) the deprivation of liberty must be one for which the State is responsible (*Storck v Germany*, para 89).

The latter has particular resonance in a private care home setting. Absent state responsibility any wrong will not be based on Article 5. However this raises the issue of just where state responsibility arises.

In *Storck* a young woman was placed in a psychiatric institution and where:-

'She was kept in a locked ward and was under continuous supervision and control ... and was not free to leave the clinic during her entire stay of 20 months. When she attempted to flee, she was shackled. When she succeeded one time, she was brought back by the police. She was unable to maintain regular contact with the outside world.'

Mere acquiescence in the restrictions will not be sufficient, as the case of *HL v United Kingdom* demonstrates. The fact that the person may have given himself up to be taken into detention does not mean that he has consented to his detention, whether he has capacity (*Storck v Germany*, paragraph 75) or not (*HL v United Kingdom*, paragraph 90). The right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention.

Whether the restrictions are enforceable in law may convert what is otherwise a mere restriction on liberty into a deprivation of liberty.

Thus in *Ashingdane v United Kingdom* (1985) 7 EHRR 528, a person kept compulsorily in a mental hospital under a detention order was protected by article 5, even though he was in an 'open' (i.e. unlocked) ward and was permitted to leave the hospital unaccompanied during the day and over the weekend. '

Similarly in *Re MIG and MEG* (which we will look at later when we look at English cases) Parker J drew a distinction between a 'house arrest' and the mere placing of a person in a foster home:

"There is a valid distinction in my judgment between a confinement within the home: equivalent to house arrest, as in the control orders cases, and the mere fact of being placed in a foster home.

As regards the subjective element, there is no deprivation of liberty if a person gives a valid consent to their confinement. A person may give a valid consent to their confinement only if they have capacity to do so (Storck v Germany, at paras 76 and 77). Express refusal of consent by a person who has capacity will be determinative of this aspect of 'deprivation of liberty' (Storck v Germany, at para 77). The same cannot be said of a person who lacks capacity, although his objections to remaining where he is will be a factor that strongly indicates a deprivation of liberty, as in JE v DE. Where a person has capacity, consent to their confinement may be inferred from the fact that the person does not object (HL v United Kingdom, para 93 and Storck v

Germany, at para 77 explaining HM v Switzerland at para 46), but no such conclusion may be drawn in the case of a patient lacking capacity to consent (HL v United Kingdom at para 90).

As regards the third element, whether detention is imputable to the State, where the deprivation of liberty is effected by a private individual or institution, it is necessary to show that it is imputable to the State i.e. the State is responsible. This may happen in one of three ways (Storck v Germany, para 89).

First, by the direct involvement of public authorities in the person's detention. If the detention takes place in a hospital or care home that is run by a public authority then that is the most obvious way in which the State will become directly involved. However, even where the place of detention is privately owned the State may be, or become, directly involved in the detention. In Storck, for example, the applicant was detained in a private psychiatric hospital but on at least one occasion, after she had escaped, she had been captured by the police and returned to the hospital. That was considered to be sufficient to engage the State's responsibility for the detention.

Secondly, the State can violate Article 5(1) in that its courts, in domestic proceedings brought by a detainee, fails to interpret the provisions of civil law relating to a claim in the spirit of Article 5.

Thirdly, the State could violate its positive obligations to protect the detainee against interferences with his liberty carried out by private persons. In the context of Article 5, the Court in Storck v Germany ruled that the State owes a positive obligation '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' (para 102). In the context of deprivation of liberty in a private institution, the measures go beyond ensuring that an appropriate legal and administrative framework is in place, but extend to ensuring regular supervision and control to ensure that confinement and medical treatment is justified (ibid, para 103, 108)."

Bournewood

Substance not form is relevant to the determination of whether someone is detained. That came over very clearly in *HL v United Kingdom* (2005) 40 EHRR 32. This case is commonly known as "*Bournewood*".

HL, who suffered from severe autism and challenging behaviour, lacked capacity to decide where he wanted to live. After many years in a psychiatric hospital he lived with carers for three years. Then while at a day centre his

behaviour deteriorated and he was informally admitted to hospital. He was denied contact with his carers for three months and the intention was to keep him in hospital. Because he was "compliant" it was asserted that he was not deprived of his liberty.

In the House of Lords, *R (L) v Bournewood Community and Mental Health NHS Trust* (1998) UKHL 24, the House of Lords had considered the issue of unlawful detention under English common law whereas the ECHR were concerned with deprivation of liberty under Article 5. That is an important distinction. The common law did not carry the procedural rights which exist under Article 5. That was the crucial distinction. In reaching this view the House reversed the Court of Appeal who had held he had been detained.

The Court of Appeal decision caused much concern given the number of people caught in similar situation. It has been suggested that if correct it would require around another 35,000 formal admissions per annum. The view of the Court of Appeal was that the patient was detained; the view of the judge at first instance that the patient was "free to leave" was rejected. The line that detention could be justified by the common law doctrine of necessity was also rejected. The basis for any detention had to be found in the Mental Health Act 1983. As the hospital did not have his consent he was being detained unlawfully.

In the House of Lords, the unanimous view was that the appeal should be allowed. Three judges agreed that the patient had not been detained. Even so of the three judges who issued reasoned speeches, two concluded that the patient had been detained. Lord Goff emphasised that, for the tort of false imprisonment, "there must *in fact* be a complete deprivation of, or restraint upon, the plaintiff's liberty". In the present case, that had not occurred. For Lords Nolan and Steyn, the patient had been detained, with Lord Steyn affirming that this was a question of fact, but such detention was justified by the common law doctrine of necessity. The European Court held that he had been deprived of his liberty. The patient had no recourse to the protections offered by the Mental Health Act 1983. The absence of procedural safeguards and access to the court amounted to a breach of Article 5(1) and (4). Note by way of contrast at the stage of the House of Lords had considered the issue of unlawful detention under English common law whereas the ECHR were concerned with deprivation of liberty under Article 5. That is an important distinction. The common law did not carry the procedural rights which exist under Article 5. That was the crucial distinction.

The European Court said that (para. 89):- *" It is not disputed that in order to determine whether there has been a deprivation of liberty, the starting-point must be*

the concrete 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 a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance." The question of apparent compliance was of no moment as:- *"….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."* As a matter of fact it was clear to the Court:- *"that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from 22 July 1997, when he presented acute behavioural problems, to 29 October 1997, when he was compulsorily detained."*

The doctrine of necessity did not avail. This was because the Court considered it to be too vague and not subject to adequate procedural safeguards. The case also emphasises that it is substance and not form which determines if someone is detained. The SLC noted at paragraph 6.12 that:- *" Since Bournewood, there has been, as yet, no detailed discussion in any Scottish case of what sort of living arrangements for a person whose capacity is impaired will amount to deprivation of liberty. In Muldoon the Court appears to have taken the view that there was a deprivation of liberty simply because the adult lacked capacity and residential provision was being made on her behalf. This does not seem to accord with Strasbourg case-law, which clarifies that Article 5 is contemplating the physical liberty of the person. Assessment of whether that physical liberty has been removed requires that there be taken into account a range of criteria including the type, duration, effects and manner of implementation of the measure in question. Such an assessment does not appear to have been carried out in Muldoon nor in Docherty or RMcC, other cases in which Muldoon has been followed."*

Before we look at those cases it might be useful to provide a more detailed overview of the European cases. The approach of the European Court is to look at the circumstances of the individual in question. On this basis even someone held in an open ward and who could from time to time leave unaccompanied was still deprived of their liberty as was held in *Ashingdane v United Kingdom* decided 28.05.1985 at paragraph 42 and reported at (1985) 7 EHRR 528. In *Neilsen v Denmark* (1988) 11 EHRR 175 there was no deprivation of liberty where a 12 year old boy was admitted to a psychiatric ward against his will, but in accordance with the wishes of his mother who held sole parental rights. The purpose of the restrictions is particularly relevant in relation to a child, as the Court recognised in *Neilsen v Denmark* at para. 72:- *"It must be possible for a child like the applicant to be admitted to hospital at the*

request of the holder of parental rights, a case which is clearly not covered by paragraph (1) of article 5".

The decision was made by a narrow 9-7 majority, the dissenting minority and the Commission both concluded that there had been a deprivation of liberty. The Court also considered whether the factual circumstances of the case - locked doors, only supervised outings- disclosed a deprivation of liberty within Article 5.

The Court decided that the restrictions on the freedom of movement and contact with the outside were not really any different from the sort of limits that a child in an ordinary hospital might experience. One can see though that there could be an alternate line that being in a psychiatric ward for five months might be thought to be a deprivation of liberty. On one view there is no need to resort to parental rights to see how both a child and her parents' rights to respect for private and family life require that there be a certain sphere within which the State does not intrude. That would also apply to an incapacitated adult who has a relationship with her parents that is protected from arbitrary interference by the State.

This is subject in both cases to the State's positive protective obligations as the Court stated in *Neilsen*, para 72, '*the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the State to provide safeguards against abuse'.*

The role of purpose or context is controversial as we shall come to see when we look at more of the cases, but in domestic terms it would appear potentially relevant given the majority view of the House of Lords in *Austin v. Commissioner of Police of the Metropolis* [2009] UKHL 5 that the purpose of a measure is relevant in determining whether there is a deprivation of liberty.

Austin dealt with whether the police use of cordons at demonstrations amounted to a form of deprivation of liberty or a lesser, and lawful, restriction on movement. Lord Hope of Craighead said at para. 17:- *"If the difference between a restriction of liberty and a deprivation of liberty was to be measured merely by the duration of the restriction, it would be hard to regard what happened in this case as anything other than a deprivation of liberty. The interference with the appellant's freedom of movement was not merely transitory, as in R (Gillan) v Commissioner of the Police of the Metropolis [2006] UKHL 12; [2006] 2 AC 307 where detention in the exercise of stop and search powers would ordinarily be for a few minutes only. In this case the detention that resulted from the police cordon was measured in hours, not minutes. But it is very well established that, in order to determine whether the threshold has been crossed, a much wider examination of the*

facts and circumstances is appropriate. In Engel v The Netherlands (No 1) (1976) 1 EHRR 647, para 59, for example, the court said that a disciplinary measure which would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian might not possess that characteristic when applied to a serviceman. But it would not escape the terms of article 5 if it deviated from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this was so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question."

The purpose for which the restrictions are imposed may have some, though limited, relevance. A restriction that is taken in the best interests of an individual may be less likely to give rise to a deprivation than one that is imposed for punitive purposes or to reduce the risk that the individual would pose to other people. Support for this view may be found in the Strasbourg cases of Nielsen v Denmark (1988) 11 EHRR 175 and HM v Switzerland (2002) 38 EHRR 314, and the domestic decisions of the Court of Appeal in Secretary of State for the Home Department v Mental Health Review Tribunal (PH, interested party) [2002] EWCA Civ 1868 and, most recently, of the House of Lords in Austin and another v Commissioner of Police of the Metropolis [2009] 1 AC 564.

The question of purpose was considered in the Strasbourg Court when Austin went there. The case is at (2012) 55 EHRR 14. The Court emphasised that a public interest motive *"has no bearing on the question whether that person has been deprived of his liberty"*. Even so it pointed out that the examination of the *"type, duration, effects and manner of implementation of the measure in question allows regard to be paid to the specific context and circumstances of restrictions other than the paradigm case of confinement in a cell"*.

The key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the person exercise complete and effective control over the person's care and movements (*HL v United Kingdom*, paragraph 91). This may not, however, be sufficient in itself: other factors must always be considered.

The duration of the measure is relevant, but not of itself determinative. In *JJ v Secretary of State for the Home Department* [2007] UKHL 45, the House of Lords held that a control order under the Prevention of Terrorism Act 2005 imposing a curfew of 18 hours gave rise to a deprivation of liberty, but (according to Lord Brown) a curfew of 16 hours would not.

On the other hand, in *Austin* Lord Hope at paragraph 17 expressed the view that a restriction measured in 'hours, not minutes' could give rise to a

deprivation of liberty. In *X and Y v Sweden* (1976) 7 DR 123 detention for two hours to enforce deportation was covered by Article 5. In *X v Austria* (1979) 18 DR 154, restrain to take a blood test was a deprivation of liberty. In *Guzzardi v Italy* the Court said that:-*"92. The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 (P4-2) which has not been ratified by Italy. In order to determine whether someone has been"deprived of his liberty" within the meaning of Article 5 (art. 5), the starting point must be his concrete situation andaccount must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, par. 58-59).*

93. The difference between deprivation of and restriction upon liberty is nonetheless 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 (art. 5) depends."

HM v. Switzerland (2002) 38 EHRR 314 dealt with alleged detention in a nursing home. There the non-consensual emplacement of the elderly applicant in a nursing home was a measure in her own interests and did not infringe her right to liberty under Article 5. H.M, a Swiss national born in 1912, was a pensioner, who was living in a house belonging to her son, in Lyss in the Canton of Bern. She received help from the Lyss Association for House and Sick Visits as from 1987, as well as her son, although his ability to support her was limited due to the fact that he was an invalid himself with severe sight problems. From 29 February 1996 the house visits were stopped because certain conditions had not been respected, concerning access to the house, heating, washing and meals. From March 1996 the house doctor also stopped visiting. On 17 December Aarberg District Government Office ordered, against the applicants will, that she be placed for an unlimited time in a nursing home, on the ground of serious neglect. Both she and her son appealed, unsuccessfully. The Appeal Commission found that the placement was justified on the grounds both of neglect and that the applicant had senile dementia. On 14 January 1998 the placement order was lifted after she agreed to stay in the nursing home willingly.

The applicant complained about being placed in a home against her will, claiming that she could wash and dress herself, that her son could cook for

her and that she did not want him to be left alone. In the nursing home she was no longer free to decide where she lived, to take decisions concerning her everyday life, or to go home.

She complained she was unlawfully deprived of her liberty, in that Article 5 (1) (e) of the Convention only cites "vagrancy", and not neglect, as a ground of detention. She contended that she did not meet the conditions of vagrancy, as, at the time of her placement, she had a home and received a pension. She complained that, when the Association for House and Sick Visits stopped assisting her at home, her health deteriorated, thus providing the authorities with an opportunity to place her in a nursing home. Concerning the Appeals Commission view of her mental condition, she pointed out that she had been denied the right to reply before the Commission and that she had not been examined by a medical expert.

The Court noted that the applicant had had an opportunity to receive care in her own home, but that she and her son had refused to co-operate. Subsequently, her living conditions had deteriorated to such an extent that the authorities had decided to take action. The appeals commission carefully reviewed the circumstances of the case and decided that the nursing home in question, which was in an area familiar to the applicant, could provide her with the necessary care. The applicant was also able to maintain social contact with the outside world while in the home. The Court further noted that, after the applicant had moved to the nursing home, she had agreed to stay there.

As the SLC noted at paragraph 2.36 when looking at this case the :- *"Strasbourg court drew a distinction between Article 2 of Protocol 4, which relates to restrictions on freedom of movement, and Article 5, observing that the distinction is however one of degree or intensity, not one of nature or substance. The Court reiterated that in determining if a deprivation of liberty has occurred, account must be taken of the type, duration, effects and manner of implementation of the measure in question. In the present case, placement had occurred at a time when the applicant had been suffering from serious neglect and was in need of the care which the nursing home could provide. She had not been in the secure ward of the home, but had had freedom of movement and was able to maintain social contact with the outside world. At some points, she had been undecided as to her own preference about remaining in the home. The original placement was in her own interests in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene. Thus, there had not been deprivation of liberty but a responsible measure taken by the competent authorities in the applicant's interests".*

The Court concluded that the placement in the nursing home was a responsible measure taken by the competent authorities in the applicants own interests, in order to provide her with the necessary medical care and adequate living conditions. It did not, therefore, amount to a deprivation of liberty within the meaning of Article 5 (1). Finding that this Article was not applicable, the Court held, by six votes to one, that there had been no violation of Article 5(1). Note that she was not incapacitated as opposed to *HL*. Where a person has capacity, consent to their confinement may be inferred from the fact that the person does not object.

Per contra in *Storck v Germany*, at para 77 the ECHR stated that *HM v Switzerland* was better understood as a case in which the applicant, who had been legally capable of expressing a view, had been undecided as to whether or not she wanted to stay in the nursing home so that consent could be inferred from her lack of objection.

In *Stanev v Bulgaria*, Application no. 36760/06, 17 January 2012, the Grand Chamber dealt with a case involving a man in his fifties living in a social care home for people with mental disorders. He had been diagnosed with schizophrenia in 1975. In 2000, a Regional Court had declared him partially incapacitated. He had then been placed under the guardianship of an officer of the local Municipal Council, and his placement in the home effected by a contract between the guardian (who at that point had not met the applicant) and the home. Under Bulgarian law, partial incapacity resulted in the person requiring the consent of his or her guardian to legal transactions and, in turn, the guardian being unable to enter into a contract binding the incapacitated person without his or her consent. As a result of conditions in the home, the inability to leave and the absence of procedures to seek release from partial guardianship, the applicant complained to the European Court of breaches of Articles 3, 5, 6 and 8.

Of interest is that as noted at paragraph 2.43 by the SLC:- *" In its judgement, the Court referred first to the United Nations Convention on the Rights of Persons with Disabilities, to Recommendation No. R(99) 4 of the Committee of Ministers adopted on 23 February 1999 and to reports on visits to Bulgaria by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment as "relevant international instruments."*

In a passage with resonance for a range of care disposals the Court said:-*"The Court observes at the outset that it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a "deprivation of liberty" within the meaning of Article 5 § 1. In some cases, the placement is initiated by families who are also involved in the*

guardianship arrangements and is based on civil-law agreements signed with an appropriate social care institution. Accordingly, any restrictions on liberty in such cases are the result of actions by private individuals and the authorities' role is limited to supervision. The Court is not called upon in the present case to rule on the obligations that may arise under the Convention for the authorities in such situations."

On the facts of this case the objective element was met as was the subjective element. The patient had clearly expressed the wish to go home and he had been aware of his situation.

More recently in *DD v Lithuania* [2012] MHLR 209, the applicant (D), a Lithuanian national, complained that her admission to a home for people with learning difficulties, the refusal of her request to change her guardian, and her treatment within the home violated the ECHR. In 1980, at the age of 17, D had been diagnosed as suffering from schizophrenia. Between 1980 and 2000 she was regularly admitted for treatment to hospital. In 2000, D's adoptive father obtained a court order that she was legally incapacitated. In 2002, the court appointed D's treating psychiatrist as her legal guardian because of friction between D and her father. In 2003, for personal reasons, the psychiatrist was discharged and, in 2004, D's father was appointed as guardian. He had her admitted to hospital for treatment and a decision was made by the local authority to transfer her to the home, where her treatment was continued. She was under continuous supervision and control. Her requests for a change of guardian were refused. D applied for the guardianship proceedings to be reopened on the ground that she had not been consulted in the appointment of her guardian, which contravened domestic law. She asked to leave the home and stated that she was being kept and treated there by force. The court refused to reopen the guardianship proceedings on the ground that there was no cause to do so. In 2006, D's father removed her from institutional care to his flat. She left and was eventually returned to the home by the police. A year later she left the home without permission and was, again, returned by police. In 2007, the home was appointed her permanent guardian.

D complained that (1) the failure to involve her in the proceedings leading to the declaration of incapacity and in the guardianship proceedings amounted to denial of a right of access to the court and had been in breach of Article 6(1) of the Convention; (2) her involuntary admission to the home had been unlawful and its extreme degree of control over her life was in breach of Article 5(1); (3) her treatment in the home, such as being secured to a bed in an isolation room, and the overall standard of medical treatment and the censorship of her correspondence violated Article 3.

The complaints were upheld in part. In many cases, the fact that individuals had to be placed under guardianship because of a lack of ability to manage their own affairs did not mean that they were incapable of expressing a view on their situation. It was feasible that they might conflict with the guardian, and, where such conflict had a major impact on their legal situation, it was essential that they should have access to the court and the opportunity to be heard through some form of representation. Mental illness could not justify impairing the essence of that right except in very exceptional circumstances. The key principle governing Article 6 was fairness, including the appearance of fairness. In the instant case, D had not participated in the proceedings for her incapacitation; she had not even been notified. The decision had been made on the basis of a medical report without summoning its author for questioning. With regard to the guardianship proceedings, there was no indication that D was so incapacitated that her personal participation would have been meaningless. She had managed to express clear views in subsequent hearings. Given her history of psychiatric troubles and the complexity of the issues, the interests of fairness demanded that D should have been provided with a lawyer at the time when guardianship was being determined. While the domestic court might argue that she had been properly represented by her father, it was not the legality, but the fairness, of the decision that was under challenge. The authorities and the courts knew that that relationship had not always been positive. The refusal to reopen the guardianship proceedings had therefore been unfair and there had been a violation of Article 6(1) (see paras 118-127 of judgment).

D had been deprived of her liberty within the meaning of Article 5(1) and was still so deprived. The home had exercised complete and effective control by medication and supervision over D's assessment, treatment, care, residence and movement from 2004 onwards. Each case had to be decided on its own particular "range of factors", *HM v Switzerland* (2004) 38 EHRR 17 and *Nielsen v Denmark (1989)* 11 EHRR 175 considered. The specific situation in D's case was that she was under continuous supervision and control and not free to leave. She was not so incapacitated that she could not express consent or objection: she had unequivocally objected to her admission throughout the duration of her stay; she had requested discharge, twice attempted to escape and always been returned (paras 146-152). However the safeguards met the *Winterwerp* criteria so her detention was lawful.

In relation to this part of the judgment the SLC said at paragraph 2.55*:-" This part of the decision is not easy to follow. Although the Court reiterates the "broader meaning" of lawfulness in the context of Article 5(1)(e), to include the notion of "fair and proper procedure", said to mean that a measure depriving a person of liberty should "issue from and be executed by an appropriate authority", the conclusion that*

there was no breach of Article 5(1) must mean that the minimal procedural requirement of consent by the guardian was seen as adequate."

As for the Article 3 complaint, the Court noted that inferiority and powerlessness typical of patients compulsorily admitted to hospital called for increased vigilance in reviewing whether the Convention had been complied with. As a general rule, a measure which was a medical or therapeutic necessity could not be regarded as inhuman or degrading, but the court had to be satisfied that the medical necessity had been shown to exist. On the evidence, and according to the psychiatric principles generally accepted at the time, medical necessity had justified physically restraining D. Her other accusations fell short of inhuman or degrading treatment.

As noted by the SLC :- "*The cases of HM v Switzerland and Nielsen v Denmark, which had been relied on by the Government, were distinguished. HM was said to be distinct on the basis that it was not established that the applicant there was legally incapable of expressing a view, and she had often expressed her agreement to being in the home. In addition, there were safeguards in place to ensure that the placement was justified under domestic and international law. Nielsen was distinguished on the basis that the applicant was hospitalised for a strictly limited period of time of only five and a half months, on his mother's request and for therapeutic purposes. The therapy consisted of regular talks and environmental therapy, and did not involve medication. Lastly, the assistance rendered by the authorities in hospitalising the applicant was of a "limited and subsidiary nature".*

SCOTTISH CASES

We now look at the Scottish cases mentioned by the SLC. In *Muldoon, Applicant* 2009 SLT 57 an application for an order under the Adults with Incapacity (Scotland) Act 2000 Section 57 by two sons for their elderly mother who was suffering from dementia fell to be granted where the intervention was necessary and in keeping with the principles of the 2000 Act and was the least restrictive option in the circumstances of the case.

Two brothers (X) applied for an order under the Adults with Incapacity (Scotland) Act 2000 Section 57, appointing them as joint guardians with powers relating to the welfare of their mother (M), who suffered from dementia and now lived in a residential care home.

The application under the Adults with Incapacity (Scotland) Act 2000 Section 57 had been opposed by the local authority on the basis of a report from a mental health officer (S) who had opined that the welfare powers sought by X which included to decide her place of residence and to refuse or obtain

medical care, were not of benefit to M, although X were considered suitable to act as guardians.

S submitted that (1) M was compliant with her regime and was not deprived of her liberty in contravention of Article 5, where she was only restricted in her movements; (2) although there had been two issues of dispute in the past regarding M's accommodation and her attendance at a hospital, these had been resolved amicably and without recourse to the courts; (3) if M was found to be deprived of her liberty and decisions were required to be made, these could be taken under Part 5 and the Social Work (Scotland) Act 1968 section 13ZA; (4) it was not possible for the court to conclude that guardianship had a benefit to her future and the powers were not reasonably likely to be needed. Therefore no intervention was necessary and the application should be refused.

Sheriff Baird granted the Order for the following reasons. (1) M had been deprived of her liberty in contravention of Article 5 as she was legally incapable of consenting to or disagreeing with her regime albeit that she was compliant with it. Therefore the appropriate statutory intervention was a guardianship order which was the least restrictive option in the circumstances of the case and the earlier case of *Muldoon, Applicant* 2005 SLT (Sh Ct) 52 applied. (2) The intervention was necessary and in keeping with the principles of the 2000 Act. There had already been two disputes among the interested parties over M's welfare and Part 5 of the 2000 Act and section 13ZA of the 1968 Act could not be relied on to provide the appropriate safeguard for M. Further, the intervention in the form of the appointment of X as welfare guardians would be of benefit to M when considering her own past wishes where she had expressed the desire that X should deal with all her affairs in terms of section 1(4)(a) of the 2000 Act, and in taking account of X's views as nearest relatives under section 1(4)(b), whereby they had indicated that they wished to be appointed as M's welfare guardians.

In that case a safeguarder had instructed a report by an independent social worker. It suggested that the least restrictive option would be an informal care. This reflected what the adult enjoyed. Sheriff Baird noted that:-

> *"While noting her severely impaired capacity to make decisions, [the adult] was, [the safeguarder] said, "compliant" with the care provided and to remaining where she was. Although recognising the noble motivation of the applicant, he noted recent guidance from the Mental Welfare Commission for Scotland (Authorising Significant Interventions for Adults Who Lack Capacity August 2004), which suggests a selective approach towards incapable adults. He said he agreed with that in the case of the adult who was*

incapable and "compliant" (that word again — I will return to it) and believed that welfare guardianship was not necessary to ensure her health, care and welfare".[2]

Even so he did not accept that this was in fact correct approach. He took the view that *Bournewood meant that he had to* grant the guardianship application. He said:-

"In other words, where the adult is compliant with the regime, but is legally incapable of consenting to or disagreeing with it, then that person is deprived of his or her liberty in breach of art 5 of the Convention, and that step should not be taken without express statutory (presumably 'authority') governing it.

He went on to say that the appropriate statutory intervention was a guardianship order under Part 6 of the Act. It would benefit the adult and that such benefit could not reasonably be achieved without the intervention. He made the general point that :-

"that in every case where a court is dealing with an adult who is incapable but compliant, the least restrictive option will be the granting of a guardianship order under the Act (assuming of course that all the other statutory requirements are satisfied), for that way only will the necessary safeguards and statutory and regulatory framework to protect the adult (and the guardian), come into play".

In the case of *Docherty (*unreported, Glasgow Sheriff Court, 8 February 2005. http://www.scotcourts.gov.uk/opinions/aw56.html) Sheriff Baird required to determine an application by the Chief Social Work Officer for Glasgow City Council for the appointment of a welfare guardian to a lady aged 91. There was a dispute among her three sons.

The Sheriff said he was more convinced than ever that Muldoon was correct and that:-

"I believe that the position of the place of residence of all adults, (and I do mean all adults), who are incapable but compliant, and where that is currently managed on an informal basis, will have to be reviewed and guardianship orders contemplated (that being an explicit recognition of the potential outcome which was put forward (as a kind of "floodgates" argument) by Counsel for the UK Government in his presentation before the ECHR [sic] in HL."

Muldoon and *Docherty* were followed in the case of *RMcC, Applicant*, 26 February 2009 by Sheriff I S McDonald at Kilmarnock Sheriff Court (http://www.scotcourts.gov.uk/opinions/AW1608.html). The Sheriff said that:- *" the Adult in the instant case is legally incapable of consenting to or*

disagreeing with the regime and this therefore must result in the deprivation of her liberty. She cannot leave and this is a permanent situation."

In 2007, the Scottish Parliament of course passed the Adult Support and Protection (Scotland) Act. The related Scottish Executive guidance distances itself from *Muldoon*. It says that it did not consider that a guardian should be appointed in all cases where a move to residential accommodation was contemplated and the adult was incapax but compliant. It noted that there were no clearly y defined criteria as to what was a deprivation of liberty. The guidance did make it clear that section 13ZA did not authorise such deprivation, but also listed factors to help to identify when it might arise.

The Scottish Executive does not accept Sheriff Baird's interpretation of the Strasbourg jurisprudence. The guidance is now contained as Annex A within Annex 1 to the Adults with Incapacity (Scotland) Act 2000: Code of Practice for Local Authorities Exercising Functions under the 2000 Act (2008).

The SLC considered the relationship of section 13ZA to the AWI legislation. They raised concerns over the use of section 13ZA in cases where detention is contemplated. It is of course the case that in deciding to use the power under section 13ZA that local authorities first utilise the first four principles set out in section 1 of the Adults with Incapacity (Scotland) Act 2000.

A local authority cannot use section 13ZA if they are aware that (a) there is a guardian or welfare attorney with powers relating to the proposed steps or (b) an intervention order has been granted relating to the proposed steps or (c) an application has been made (but not yet determined) for an intervention order or guardianship order under Part 6 of the 2000 Act.

The background to section 13ZA was that it was aimed at meeting concerns whereby social work departments wanted to be clear on whether they needed more formal orders to move an adult from one residential home to another in the not uncommon situation where the adult could not consent (but did comply) and where not relevant person disagreed.

As the SLC caution though, section 13ZA is not a panacea. By implication some of the concerns raised by Sheriff Baird may underlie this. The SLC said:-
"3.63 There is at least a strong argument that section 13ZA could not be relied upon where the arrangements being provided for could be said to constitute a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights. The 1968 Act does not contain a procedure for detention or provide for rights of appeal. To secure ECHR compliance, more formal arrangements under the 2000 Act may be required. In more general terms, it has been suggested that where a local

authority's community care duties require it to make arrangements for an adult who lacks the capacity to agree, the local authority should consider whether there would be benefit to the adult in applying for an order under Part 6 of the 2000 Act."

Since the publication of the SLC paper we have an additional case-*AB v. Rosriguez, RMO and MHTS*, 26 September 2012, a decision of Sheriff Principal Lockhart at Airdrie Sheriff Court. This is not an AWI case but it does have some resonance for the themes in this paper.

There a patient (B) suffering from a mental disorder and resident in a locked facility in a care home appealed against the refusal by the MHTS of her application under the Mental Health (Care and Treatment) (Scotland) Act 2003 s.100 for revocation or variation of a compulsory treatment order to which she was subject. The Tribunal found that it could not revoke the order on the basis of a submission by the patient questioning the lawfulness of her placement in the locked facility, which was not the least restrictive in all the circumstances; such a submission fell outwith the ambit of the Tribunal's powers in ss.103(3) and 103(4) of the 2003 Act, particularly by reference to ss.64(5) and 66(1). The Tribunal further found that it was not necessary for her to be detained in hospital.

On appeal the patient sought to have the decision set aside and the case remitted to the Tribunal for reconsideration, and submitted that her continued detention in a locked facility while under a community based order went beyond the statutory intervention to which she was subject and it was not competent for such an order to require her to reside in a locked facility; the Tribunal had erred in law in acting unreasonably in the exercise of its discretion, which was inconsistent with the guiding principle of minimalist intervention, in particular s.1(3)(g) of the 2003 Act and also that the Tribunal had erred in failing to make a recorded matter that a welfare guardianship order should be considered.

The appeal was refused. The only cases mentioned in the decision were G*uzzardi v Italy* (1981) 3 EHRR 333 and *West and Chester Council* v *P* 2001 EWCA Civ 1257. In the latter case the Court of Appeal said:-

> *"23. Merely being required to live at a particular address...does not, without more, amount to a derivation of liberty. Similarly, restraint must be distinguished from deprivation of liberty. In extreme cases, no doubt, restraint may be so persuasive as to constitute a deprivation of liberty, but restraint by itself is not deprivation of liberty."*

The Sheriff Principal appears to have endorsed this approach as he accepted the submission which relied on it. *Muldoon* is not referred to which is not

surprising as the AB case was not a guardianship case. Even so the case is of interest beyond its own immediate legal context.

Although the case is about detention under the 2003 Act and the role of MHTS, it might be read as supporting the view that not all forms of restraint which might be regarded as being a form of detention are in fact legal detention for the purpose of Article 5. On a view the case might lend support for the view that the *Muldoon* approach which could, on one view, be read as saying that if something looks like detention where the patient is not capable of consenting even if compliant, then it must be treated as detention and so be subject to guardianship at least, might go too far.

In summary the decision was that B's detention in a locked facility was the minimum required for her safety; there was a history of her leaving hospital and her own home and placing herself at significant risk, she was known to be liable to exploitation, and the facility in fact facilitated supervised visits to her family and to the local area, and it was not appropriate to consider such an arrangement as amounting to legal detention.

The Tribunal was entitled to take the view that the care home provided the best arrangements possible for B's appropriate care and treatment and there was no evidence before it of any other facility which could better cater to her needs.

The Tribunal was entitled to find that guardianship could not be such medical treatment, community care services, relevant services, other treatment, care or service as a recorded matter was defined in terms of s.64(4)(a)(ii) of the 2003 Act, and was entitled to find that it was not open to it to require that that should be considered or applied for.

The Sheriff Principal said:-

"[25] This appeal falls to be refused. In my opinion the submissions on behalf of the Mental Health Tribunal for Scotland and the responsible medical officer, which I have set out in full, are well founded. In my opinion the overriding purpose of the Mental Health (Care and Treatment) (Scotland) Act 2003 is to provide appropriate care and treatment for persons having a mental disorder. In this case the medical evidence before the Tribunal was to the effect that a hospital based order was not necessary. On the other hand there were strong

reasons for the keypad locking system at Z Care Home. There was a need to monitor movement in and out of it. The appellant required to be prevented from leaving unexpectedly. She was a risk to road users and to herself if she left Z Care Home unaccompanied. She required to be prevented from leaving unexpectedly and alone. There was a history of leaving Stobhill Hospital and her own home and she had placed herself at significant risk. There was also a requirement to monitor visitors at Z Care Home. The patient was known to be liable to exploitation. It was the minimum required for her safety. Visits to her family were arranged fortnightly. Visits to the local area under supervision in a safe manner were facilitated. If she wanted to leave for a walk, she would request this but would require to be supervised for reasons of safety. There was no evidence that this did not work well in practice. She had free access to the Z Care Home gardens in the summertime. There was no evidence before the Tribunal of any concern about her requiring to wait for a supervised walk because staff members were not available. In any event, such matters must be considered proportionately.

[26] In my opinion it is not appropriate to consider such an arrangement as amounting to legal detention. The Tribunal were entitled to take the view, which they did, that these arrangements at Z Care Home provided the best arrangements possible for appropriate care and treatment for the appellant. There was no evidence before the Tribunal of any other facility which could cater better for the appellant's needs. In these circumstances the first ground of appeal fails.

[27] The other ground of appeal is that the Tribunal erred in not making a Recorded Matter that consideration should have been given to the making of a welfare guardianship order in respect of the appellant. In my opinion the Tribunal dealt with this submission on behalf of the appellant very adequately. I have set out their findings in para [10] hereof. In my opinion the Tribunal were entitled to state: "We do not find that Guardianship, which is applied for in

terms of the Adults with Incapacity (Scotland) Act 2000, could be 'such medical treatment, community care services, relevant services, other treatment, care or service' as a Recorded Matter is defined in terms of section 64(4)(a)(ii) of the 2003 Act." The Tribunal was correct to find that it was not open to them to require this should be considered or applied for. This ground of appeal also fails."

ENGLAND AND WALES

Compared with Scotland, England and Wales has seen a considerable amount of litigation on what amounts to a deprivation of liberty under Article 5.

The SLC had this to say:-

"6.17 A large volume of case-law has now built up in England concerning when an adult with incapacity can be said to be deprived of his or her liberty. What has emerged are differences between an approach focused mainly on the physical conditions in which the individual lives and an approach which takes into account more of the context in which care is delivered. On the latter approach, such matters as the life the person might lead without the care regime in question and the underlying purpose of that regime are also relevant to the question of whether a deprivation of liberty is occurring. But in the context of Article 5, the role of purpose has proved controversial."

The breadth of coverage in England has been wide and has raised issues of complexity. For example the Court of Appeal considered that one could be detained if in substance that was what was happening even where the medical authorities had purportedly released a patient on a conditional basis. As the legislation did not clearly cover the situation in which the patient found himself the substantive detention was unlawful-not "prescribed by law" under Article 5 ECHR. This was *SSJ v RB* (2011) EWCA Civ 1608.

In this case the Court of Appeal held that the Mental Health Tribunal may not grant a conditional discharge in circumstances where the conditions would inevitably lead to an Article 5 deprivation of liberty.

This was a long running case in which an elderly man had been detained for any years in a secure psychiatric Hospital under a Mental Health Act section, with restrictions on his discharge. Initially, the First Tier Tribunal granted him

a conditional discharge with considerable restrictions attached. That was then set-aside by the Regional Judge on the grounds that the decision was plainly wrong. The patient then sought judicial review of the Regional Judge's decision, which was granted by the Upper Tribunal (presided over by Lord Justice Carnwath, Senior President of Tribunals). Then, on the substantive appeal the Upper Tribunal rejected the Ministry of Justice's appeal. The Ministry of Justice then appealed to the Court of Appeal.

The Court of Appeal has decided that restricted patients could not lawfully be discharged from hospital under conditions that amount to deprivation of liberty. The previous decision of the Upper Tribunal had allowed such a move provided it was not to another hospital. The UT's position created a new and anomalous type of detention that could not have been envisaged by Parliament when it passed the Mental Health Act as it would provide less adequate safeguards for those so detained compared with other detained patients, which in turn would be discriminatory.

In a rather different context, Article 5 liberty issues were considered by the House of Lords in the *Austin case which we looked at earlier.* This was the "kettling case". The police had created a cordon around demonstrators. They had not been allowed to leave for some hours. Was this detention ? Lord Hope noted that the question of purpose of detention was to be considered. Was it relevant?

His Lordship then referred to *HM v Switzerland and Nielsen v Denmark*. He inferred from references in some of the cases to the purpose of the measure in question that purpose may be a circumstance to be taken into account when assessing whether Article 5 has been breached. Lord Scott of Foscote considered that purpose and intentions *"rank very high in the circumstances to be taken in to account in reaching the decision."* In contrast Lord Walker considered that *"If …deprivation of liberty is established, good intentions cannot make up for any deficiencies in justification of the confinement…"*However there was no deprivation of liberty as the substance of what the police did was about crowd control and protection of persons and property. Lord Neuberger of Abbotsbury also agreed with Lord Walker. As the decision in Strasbourg suggests, purpose is not directly relevant, but context can be.

Closer to the world of care homes, the question of purpose was considered in an earlier case by Munby J who pointed out in the case of *JE v DE* [2007] 2 FLR 1150, paragraph 70, the cases of *Neilsen* and *HM* preceded those in *HL* and *Storck*, and no support can be found in those later cases for the proposition that the purpose of the restriction is relevant in determining whether it gives rise to a deprivation.

In particular it is to be doubted whether the reasoning given for the decision in *HM v Switzerland* is correct, in which the Court assessed the applicant's 'detention' in a nursing home as 'a responsible measure taken by the competent authorities in the applicant's interests' (paragraph 48) and for that reason (among others) was not a deprivation of liberty. This is not a phrase that has been repeated in subsequent case-law. This decision is better understood as one that turns on the second, subjective element, namely that *HM* had capacity to consent and the fact she had been undecided as to whether or not she wanted to stay had entitled the clinic to infer that she did not object (see *Storck v Germany*, paragraph 77).

In the recent decision of *Re MIG and MEG, Surrey County Council v CA and LA* [2010] EWHC 785, [163]-[166] purpose was raised again. Parker J commented that she treated:

"...with extreme caution the suggestion that purpose is relevant in this type of case, save that it does seem to me to be realistic to put into the equation when trying to discern the factual matrix and whether these girls are objectively deprived of their liberty, that both girls were placed in their respective placements as children in need, because they need homes, rather than because they require restraint, or treatment. It is also relevant in my view to consider the reasons why they are under continuous supervision and control."

On which see *Re MIG and MEG* at para.164. *Re MIG and MEG* concerned two girls with learning disabilities who, while they were children, had been removed from their homes for protection reasons and placed elsewhere under care orders. MIG was placed with a foster family and MEG in a residential home. Their disabilities meant they needed a high degree of supervision in their respective environments and they had no safety awareness. In MIG's case it was argued that she was deprived of her liberty because she was unable to decide where to live, was not free to leave, was subject to continuous supervision and control and was deprived of social contacts. In MEG's case the same factors were relied on plus the fact that she lived in a residential home and received medication.

Parker J held that there was no deprivation either case. Although there was continuous supervision and control this was in place to meet care needs; the limitations on movement and any need for restraint were dictated by MIG and MEG's ability and lack of awareness of danger. Their lack of freedom and need for support and supervision were determined by their disabilities, rather than imposed by their carers: paragraphs 210, 215, 218, 233(iii). Restraint was only used for the immediate purpose of ensuring safety: paragraph 233.

Although MEG was medicated the medication was to control her anxiety and did not create a deprivation as she was not medicated to secure admission or to prevent her from leaving; she would have required the medication in any setting: para. 217. Furthermore the fact of MEG being in a residential, rather than a family, home did not equate to a deprivation it being an ordinary care home with ordinary restrictions on liberty: paragraph 233(xii).

It was emphasised that their placements were not arbitrary and were authorised by the care order or other orders: paragraph 233(xiii). In relation to the reasons for detention Parker J said (*Re MIG and MEG* at paragraph 230):

"I agree that it is impermissible for me to consider whether, if either is objectively detained or confined, this is with good or benign intentions or in their best interest. But notwithstanding that, as was observed by Lord Walker in Austin, "purpose" does not figure in the list of factors to be evaluated in determining the concrete situation of the person concerned, I am of the view that in this case it is permissible to look at the "reasons" why they are each living where they are. In the case of each there are overwhelming welfare grounds for them not to live in their family of origin. In relation to both girls, the primary intention is to provide them each with a home. Within those homes, they are not objectively deprived of their liberty. In neither of those homes are they there principally for the purpose of being "treated and managed". They are there to receive care."

So it is lawful to consider the reasons for the restrictions, if not the purpose.

The Court of Appeal upheld the decision made by Parker J although differing on one aspect, the question of whether or not the contentment of the person in question was relevant. This is reported at [2011] EWCA Civ 190 and included a discussion of *Austin*.

Wilson LJ thought that relevant factors were that neither girl objected to the arrangements for her care, the use or non-use of medication and the normality of their living arrangements. These were relevant to the examination of the objective element. This element was not present. Smith LJ and Mummery LJ could not agree on whether the objective element could include a comparison between the arrangements now applying to an individual's care and the arrangements under which they lived prior to any alleged deprivation.

The Court of Appeal also considered more generally that the European Court of Human Rights had made it clear that a deprivation of liberty had three elements: (a) the objective element of a person's confinement to a certain limited place for a not negligible length of time; (b) the additional subjective element that they had not validly consented to the confinement in question;

(c) the confinement had to be imputable to the state, *Storck v Germany* (2006) 43 EHRR 6 considered. The second and third elements were satisfied as X and Y could not give their consent to the care arrangements and those arrangements had been made by the State. The judge's enquiry was therefore into the existence of the first element in the respective circumstances of the girls.

A person's happiness, as such, was not relevant to whether she was deprived of her liberty. Its relevance, having regard to the Mental Capacity Act 2005 Section 4(6)(a), was whether any such deprivation was in her best interest. Such was a necessary condition of its being "lawful" and thus of its not infringing Article 5.

In assessing whether there had been a deprivation of liberty such as to engage Article 5 the criteria to be considered were: whether objections to the arrangements had been expressed; whether drugs which might suppress the expression of objections had been used; the normality of the living arrangements and the opportunities for leaving the place of residence for the purposes of recreation, education and social contact, *JE v DE* [2006] EWHC 3459 (Fam), [2007] 2 F.L.R. 1150, *HL v United Kingdom* (2005) 40 EHRR 32 and *Storck* considered.

Previous arrangements were not relevant to the question of whether the extant arrangements engaged Article 5 as it was not concerned with any changes in a person's situation but rather with the objective question of whether there was, under the arrangements imposed by the state, a deprivation of liberty. In the case of both girls it was apparent that certain factors were common: they were not free to leave their respective accommodation; they did not object to the arrangements for them; they did not seek to leave and therefore did not have to be restrained from leaving their accommodation; they were not under close confinement within their accommodation; they were taken out each day to the unit of further education; they were taken on other outings and they had good outside contact with family members.

The circumstances of one differed from the other in that she was not living in a family home; her outbursts sometimes precipitated the need for physical restraint and she required medication for control of her anxiety. Those particular differing factors meant that Y's case was closer to the border of deprivation of liberty but when regard was had to the small size of the residential home, her lack of objection to life there, her attendance at an educational unit, her good contact with such members of her family as were significant for her and her fairly active social life, her case was kept outside

Article 5. Accordingly, the arrangements made the local authority for the girls did not amount to a deprivation of liberty so as to engage Article 5, (see paragraphs 17-30, 34, 39 of judgment).

The degree, or closeness, of physical restraint is relevant. Thus, whether the person is in a ward which is 'locked' or 'lockable' is relevant but not determinative as the individual may still not be free to leave (*HL v United Kingdom*, paragraph 92): see also *Amuur v France* (1996) 22 EHRR 533.

The place of confinement is also relevant. Restrictions on liberty in a prison or police station, or a psychiatric institution, are more likely to be considered a deprivation of liberty than those occurring in a person's home. A curfew requiring the individual to stay at home overnight will not necessarily constitute a deprivation of liberty, although as *JJ* demonstrates a period of more than 18 hours a day will.

On that basis a distinction may also be drawn between restrictions imposed in a person's own home and those imposed by an institution, whether private or public.

The defining feature is perhaps whether the individual can maintain a relatively normal daily balance between work and home. If so, then there will be no deprivation of liberty. This provides one explanation for the decision in *Engel v Netherlands* (1976) 1 EHRR 706, where the soldiers' 'aggravated arrest' by which they continued with their normal duties but were confined during off duty hours to a specially designated building within army premises, but not locked up, did not amount to a deprivation of liberty. Given the constraints already consequent on military life, the restrictions imposed allowed them to maintain a relatively normal balance in their life.

It may also be relevant that the restrictions are imposed by a private individual rather than a public authority. While this is particularly relevant to the third element, whether the restrictions on liberty can be imputed to the State, it may also be relevant to the question whether the first element is satisfied. Thus, while a restriction imposed in a child or vulnerable adult's best interests in the context of a loving family relationship may not qualify, the same restrictions when imposed by a public authority may do so.

In *A Local Authority v A*, Munby J emphasised this distinction in this passage at paragraph 150: But for the fact that they are each locked in their bedrooms at night, Parker J's analysis and conclusions in relation to MIG would lead me, and for essentially the same reasons, unhesitatingly to the conclusion that

neither A nor C is being deprived of her liberty. Their happy family life, in the heart of a caring and loving family, can hardly be further removed from the paradigm case of the prisoner or, indeed the immensely different case of someone subject to control order and curfew.

The individual's subjective experience and opinion of the restrictions is also relevant to this aspect of the test. Thus, even in a case where the individual lacks capacity, the fact that he or she objects to the restrictions may distinguish the case from one where the individual is acquiescing or even content with the measures employed.

This was a defining feature of the decision in *JE v DE* and was a particular feature in *G v E (By his litigation friend the Official Solicitor), A Local Authority, F* [2010] EWHC 621. E was living in a residential home, was under constant supervision and control, had restrictions on his social contacts including family members, was not permitted to live elsewhere and was medicated to reduce agitation and challenging behaviour: *G v E*, at p. 20.

However E's case had significant defining features, in particular that he had been hastily moved from his long-term foster family into residential care following (unsubstantiated) safeguarding concerns and following the move restrictions were placed on his contact with his foster carer and her family. Despite his limited ability to communicate E appeared to express a desire to return to his foster home and demonstrated that he was missing his foster carer and other members of the family. E's foster carer objected to him being moved and the proceedings concerned whether he should be allowed to return to her care.

As emphasised in *Re MIG and MEG* (see para 222) there is a significant difference between moving someone arbitrarily from their home into circumstances amounting to a deprivation without any safeguards, and a move that is sanctioned by the courts.

Perhaps the deprivation in E's case arose because of the fact of his arbitrary removal from his foster carer's care, his subjective experience of the placement which he wanted to leave, and the restrictions placed on him to prevent his return and to force him to adjust to his new surroundings.

On the other hand where the individual is subjectively happy with their situation that will be a factor telling against a deprivation, as in *Re MIG and MEG*, where Parker J observed (paragraph 234):

'Their wishes and feelings are manifest and clearly expressed. They plainly have no subjective sense of confinement. In a non-legal sense they have capacity to consent to their placements'.

A different situation prevailed in *London Borough of Hillingdon v Steven Neary* [2011] EWHC 1377, a case where a young man, with childhood autism and severe learning disability was placed in a "behaviour support unit" by a local authority. Neither he nor his father wanted him to live there.

Although the deprivation of liberty procedures had been utilised after he had been there for about four months, the Court of Protection held that the situation prior to that had also amounted to deprivation of liberty essentially because of his objection to being at the support unit, the objection of his father and the total effective control of the young man in an environment that was not his home. Doors in the Unit were kept locked with normal locks, but this was not highlighted by the court as a material feature.

For the second period of his residence in local authority care, authorisation under the deprivation of liberty safeguards was in place. Even so the Court of Protection held that Article 5 had been breached. There had been flaws in the procedures followed to the deprivation was not "lawful". Of note is that the court considered that there was an argument that Article 8 had been breached as the patient should have been with his family. The court noted that there was a risk of conflating the secondary question of deprivation of liberty with the even more pressing question of where he should be living.

In *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257 an adult man with cerebral palsy and Down's Syndrome, was being cared for in a small group facility, The issue was whether he was being deprived of his liberty. There was no dispute that P lacked the capacity to make decisions as to his care and residence. He was subject to one-to-one supervision whilst in "Z house". He had to attend a day centre five days of each week. He was challenging. He needed assistance with all activities of daily living and had an increased risk of choking. P shredded incontinence pads and had eaten their contents. During the legal proceedings he had been given an "all-in one suit" to try to cope with these issues (shades of a straitjacket?) This was also used restraint in relation to his challenging behaviour.

Baker J set out relevant legal principles which were later approved by the Court of Appeal (although the Court departed from him on the application of these principles.

He said:-

"(1) Section 64(5) of the 2005 Act provides that references to "deprivation of liberty" in the Act have the same meaning as in Article 5(1) of ECHR. Any analysis of whether P has been in fact deprived of his liberty must therefore have close regard to the jurisprudence of both the English courts and the European Court on the interpretation of that Article.

(2) That jurisprudence makes clear that, when determining whether there is a "deprivation of liberty" within the meaning of Article 5, three conditions must be satisfied, namely (a) an objective element of a person's confinement in a particular restricted space for a not negligible time; (b) a subjective element, namely that the person has not validly consented to the confinement in question, and (c) the deprivation of liberty must be one for which the State is responsible: see Storck v Germany (2005) 43 EHRR 96 and JE v DE and Surrey CC, supra.

(3) When considering the objective element, the starting point is to examine the concrete situation of the individual concerned, 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.

(4) The distinction between a deprivation of, and a restriction of, liberty is merely one of degree or intensity and not one of nature or substance: Guzzardi v Italy (1980) 3 EHRR 333, Storck v Germany, supra.

(5) 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: HL v United Kingdom, supra.

(6) So far as the subjective element is concerned, whilst there is no deprivation of liberty if a person gives a valid consent to their confinement, such consent can only be valid if the person has capacity to give it: Storck v Germany supra.

(7) So far as the third element is concerned, regardless of whether the confinement is effected by a private individual or institution, it is necessary to show that it is imputable to the State. This may happen by the direct involvement of public authorities or by order of the court."

The local authority argued that there was at most a restriction on liberty and contended that the following were relevant:-

"(1) P's move to Z House was planned carefully and conscientiously. No force, threats, sedation or subterfuge were involved.

(2) Z House is a large and spacious bungalow.

(3) P has his own room, which has been personalised and is equipped with his possessions such as his own music system. Occupational therapy ensures that P's accommodation is as homely as possible.

(4) P has shared use of communal space and free access to the entire building. P and the three other residents often sit and eat together. There is a garden which P can use whenever he likes.

(5) Z House is situated close to P's family so they can visit regularly. Contact with his family is encouraged.

(6) P is sociable and has the opportunity to mix with staff and other residents.

(7) The external doors of the property are unlocked during the day but locked at night for security reasons.

(8) P has never attempted to leave the property.

(9) P needs prompting and assistance with all activities of daily living, including nutrition, mobility, personal hygiene and continence. He requires one-to-one close personal supervision with self-care and sometimes 2:1 care to help with his continence problems.

(10) The 98 hours of extra care and support provided to him promote his freedom of movement.

(11) He attends a day centre Monday to Friday, leaving Z House at about 9.30 and returning about 5 pm.

(12) He takes part in other activities such as pub lunches, visits to the park and garden centres. He enjoys going out into the community. On these occasions, 1:1 support is provided because P has no concept of danger.

(13) His behaviour is not controlled by medication."

For P, the Official Solicitor argued that P's circumstances did amount to a deprivation of liberty because:-

"(1) Every aspect of P's life is monitored and supervised by those working for the local authority. There is complete and effective control over his care and movements.

(2) P is obliged to live at Z House. He cannot return to M's care, nor move anywhere else.

(3) He is unable to leave the premises unescorted.

(4) He has little privacy within Z House. Every aspect of his personal care is supported by staff.

(5) Z House records show that his behaviour is challenging and requires management. A wide range of measures is used for that purpose.

(6) Some of his behaviour is extremely challenging and needs urgent intervention, including on occasions physical restraint.

(7) In particular, his tendency to self-harm may require physical intervention. On occasions he can assault others unless restrained. In the community, he is often restrained in a wheelchair by a strap.

(8) Furthermore, his tendency to tear off his incontinence pads and ingest bits of padding and the contents requires a range of measures, including the wearing of a bodysuit that restricts his freedom, and on occasions, in his own interests, intrusive physical interventions, which can include having his arms held by one member of staff whilst a second inserts a gloved finger into his mouth to forcibly remove any retained material.

(9) The use of restraint is part of his care package. The local authority has been prompted in the course of this case to introduce a new policy which clarifies and articulates the circumstances in which restraint may be used."

At first instance Baker J took into account that P was living in accommodation of a type not designed for compulsory detention; that he had regular contact with his family; that he attended a day centre and that he enjoyed a good social life, but that his life was completely under the control of members of staff, and a range of measures was employed to deal with his behaviour, some of which amounted to restraint. He had been deprived of his liberty.

The Court of Appeal reversed this decision. Purpose came up again. Munby LJ approved what he had said in *JE v DE and Surrey County Council*:

> *"And if beneficent purpose cannot deprive what is manifestly a deprivation of liberty of its character as such, why should a beneficent purpose be of assistance in determining whether some more marginal state of affairs does or does not amount to a deprivation of liberty?*[70]

He stressed that including "reason" and "purpose" were themselves to be seen as objective.

Normality was also invoked. He said one had to introduce a comparator who was:-

"an adult of similar age, with the same capabilities and affected by the same condition or suffering the same inherent mental and physical disabilities and limitations".

He drew matters together as follows:-

> *"102. At this point it may be helpful to draw some of the threads together. My purpose, I stress, is limited. It is merely to draw attention to some aspects of*

the jurisprudence which are likely to be of significance in the kind of cases that come before the Court of Protection.

i) The starting point is the "concrete situation", taking account of a whole range of criteria such as the "type, duration, effects and manner of implementation" of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, not nature or substance.

ii) Deprivation of liberty must be distinguished from restraint. Restraint by itself is not deprivation of liberty.

iii) Account must be taken of the individual's whole situation.

iv) The context is crucial.

v) Mere lack of capacity to consent to living arrangements cannot in itself create a deprivation of liberty.

vi) In determining whether or not there is a deprivation of liberty, it is legitimate to have regard both to the objective "reason" why someone is placed and treated as they are and also to the objective "purpose" (or "aim") of the placement.

vii) Subjective motives or intentions, on the other hand, have only limited relevance. An improper motive or intention may have the effect that what would otherwise not be a deprivation of liberty is in fact, and for that very reason, a deprivation. But a good motive or intention cannot render innocuous what would otherwise be a deprivation of liberty. Good intentions are essentially neutral. At most they merely negative the existence of any improper purpose or of any malign, base or improper motive that might, if present, turn what would otherwise be innocuous into a deprivation of liberty. Thus the test is essentially an objective one.

viii) In determining whether or not there is a deprivation of liberty, it is always relevant to evaluate and assess the 'relative normality' (or otherwise) of the concrete situation.

ix) But the assessment must take account of the particular capabilities of the person concerned. What may be a deprivation of liberty for one person may not be for another.

x) In most contexts (as, for example, in the control order cases) the relevant comparator is the ordinary adult going about the kind of life which the able-bodied man or woman on the Clapham omnibus would normally expect to lead.

xi) But not in the kind of cases that come before the Family Division or the Court of Protection. A child is not an adult. Some adults are inherently restricted by their circumstances. The Court of Protection is dealing with adults with disabilities, often, as in the present case, adults with significant physical and learning disabilities, whose lives are dictated by their own cognitive and other limitations.

xii) In such cases the contrast is not with the previous life led by X (nor with some future life that X might lead), nor with the life of the able-bodied man or woman on the Clapham omnibus. The contrast is with the kind of lives that people like X would normally expect to lead. The comparator is an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations as X. Likewise, in the case of a child the comparator is a child of the same age and development as X."

Ultimately the judges parted company with Baker J because he had failed to draw a comparison with the sort of life that P would have had living in a normal family setting-essentially the difficulties he faced were the consequence of his disabilities. The restraints used were of a type which were occasional in nature and which anyone caring for him might have to use.

ARTICLE 5-IS THE STATE UNDER A DUTY TO INTERVENE?

In *A Local Authority v A* [2010] EWHC 978 (Fam), Munby LJ accepted that the positive obligations arising under Article 5 were 'of various and overlapping kinds, including the following':

(i) First, an obligation to put in place a legislative and administrative framework designed to provide effective deterrence against conduct that would infringe the relevant Convention right, a positive obligation which he demonstrates has been implied under a number of Articles, including Article 5: see *Storck v Germany* (2005) 43 EHRR 96 at paras [103]-[107] and [149]-[152].

(ii) Second, an obligation to establish an effective independent judicial system so that responsibility for conduct infringing Convention rights may be determined and those responsible made accountable, an obligation which again arises under Article 5: see *Storck v Germany* (2005) 43 EHRR 96 at paras [92]-[99].

As the court said at para [93]:

"In securing the rights protected by the Convention, the Contracting States, notably their courts, are obliged to apply the provisions of national law in the spirit of those rights. Failure to do so can amount to a violation of the Convention Article in question, which is imputable to the State. In this respect, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."

(iii) Third, an obligation to carry out an effective investigation into credible claims that serious violations of Convention rights have occurred, in particular where the State may bear responsibility. However, the obligation is not, says Mr Bowen, limited solely to acts or omissions of State agents, for which proposition Mr Bowen relies upon various authorities including, in relation to Article 5, Kurt v Turkey (1999) 27 EHRR 373.

(iv) Fourth, an obligation in "certain well-defined circumstances" to take operational measures to protect an individual from the acts of third parties, that is, non-State agents, which would, if carried out by the State, constitute a violation of the Convention: see Osman v United Kingdom (2000) 29 EHRR 245. Again, in the context of Article 5, Mr Bowen points to Storck v Germany (2005) 43 EHRR 96, where, as we have seen, the Court ruled (at para [102]) that the State owes a positive obligation "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."

(v) Fifth, an obligation to provide information and advice to individuals who are or may be at risk of a violation of their Convention rights: see Guerra v Italy (1998) 26 EHRR 357 and Őneryildiz v Turkey (2004) 39 EHRR 12 at para [90]. Mr Bowen submits that this obligation may be understood as one which thereby enables the individual either to avoid the risk or, if exposed to it, to take steps to mitigate its effects and/or to seek a remedy if thereby harmed.

(vi) Sixth, and in order to prevent unlawful discrimination, an obligation which is violated when the State, without an objective and reasonable justification, treats differently persons whose situations are the same or fails to treat differently persons whose situations are significantly different: see Pretty v United Kingdom (2002) 35 EHRR 1 at para [88]. Mr Bowen submits that this duty may arise where a measure – or a failure to adopt a measure – has disproportionately prejudicial effects on a particular group with a protected 'status' for the purposes of Article 14 (see Adami v Malta [GC] (2007) 44 EHRR 3 at para [80]), in which circumstances the State may come under an obligation to take positive measures to remedy the inequality.

Munby LJ went on to enumerate the obligations on a local authority under Article 5:-

"Where the State – here, a local authority – knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of of liberty, then its positive obligations under Article 5 will be triggered.

(i) These will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty. In this context the local authority will need to consider all the factors relevant to the objective and subjective elements referred to in paragraph [48] above.

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

(iii) If, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation, both under Article 5 alone and taken together with Article 14, to take reasonable and proportionate measures to bring that state of affairs to an end. What is reasonable and proportionate in the circumstances will, of course, depend upon the context, but it might for example, Mr Bowen suggests, require the local authority to exercise its statutory powers and duties so as to provide support services for the carers that will enable inappropriate restrictions to be ended, or at least minimised. (iv) If, however, there are no reasonable measures that the local authority can take to bring the deprivation of liberty to an end, or if the measures it proposes are objected to by the individual or his family, then it may be necessary for the local authority to seek the assistance of the court in determining whether there is, in fact, a deprivation of liberty and, if there is, obtaining authorisation for its continuance."

The SLC paper recognised this notion of state responsibility under Article 5. At paragraph 2.78 the Commission noted on a consideration of *Storck v Germany* that as regards state responsibility taking steps after the event of deprivation of liberty when in a private facility is not sufficient. There was a further duty to review places where persons may be held in a situation where they have been deprived of liberty and to take steps to deal with that situation.

Scott Blair, Advocate
Murray Stable
Faculty of Advocates
Edinburgh
EH1 1RF

scott.blair@advocates.org.uk

Ref WB/SB

About Scott Blair

Scott is a member of the Murray Stable www.murraytable.com

He can be contacted via the Stable or by email as above. Scott worked as a solicitor in private practice before becoming an advocate in 2000. He has a particular interest in public law and human rights law. He is or has been instructed in cases in the European Court of Human Rights, Supreme Court, Judicial Committee of the Privy Council, House of Lords, Court of Session, High Court of Justiciary, Sheriff Court and before various tribunals.

He is an Immigration Judge of the First- Tier Tribunal (Asylum and Immigration Chamber) and a Legal Convener of the Mental Health Tribunal for Scotland.

He has advised and appeared in court for both local authorities and private citizens in relation to a range of issues arising under the Adults With Incapacity legislation and Mental Health (Care and Treatment) (Scotland) Act 2003. His most recent case was his successful appearance for the local authority in M v. MHTS and MHO, Glasgow Sheriff Court, 15 November 2012 (Sheriff Principal Scott, appeal against removal of Named Person).

He is widely published in the public law field. He is a columnist in Scottish Human Rights Journal and contributes to the Scottish Human Rights Service. He is currently external examiner in Human Rights the LLB Honours and Diploma in Legal Practice courses at Glasgow University.