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CASE NO: 13293681

IN THE COURT OF PROTECTION

20th August 2020

Before
Sir Mark Hedley

BETWEEN

A LOCAL AUTHORITY

Applicant

And

AB
(By her litigation friend, the Official Solicitor)

Respondent

MS L TWIST of Spire Barristers appeared on behalf of the Applicant.

MR S KARIM QC of Kings Chambers appeared on behalf of the Respondent.

J U D G M E N T

1. AB is now 36 years old. She has a diagnosis of Asperger's and as a result has come within the jurisdiction of the Court of Protection. Until recently she had been detained under the Mental Health Act 1983 and was discharged under a Guardianship Order under Section 7 of that Act to a supported living placement. As will appear, the question that I have to determine is whether the arrangements under which this placement operates amount to a deprivation of liberty pursuant to Article 5 of the ECHR.

2. AB has had a troubled life that has involved extensive contact with social and psychiatric services including many placements, none of which can be said to have been wholly successful. She has from time to time been subject to Guardianship and Detention Orders under the Act. In November 2016 she was placed at WC but on 12th July 2019 she was subject to detention under Section 2 of the Act, which on 7th August 2019 was converted into a Section 3 detention. On 27th January 2020 she was made subject to a further Guardianship Order and transferred to her present placement, where she seems to have settled satisfactorily.

3. The current proceedings in the Court of Protection were instituted on 12th July 2018 and there have been numerous orders since that date culminating in an order of 20th May 2020 by the nominated District Judge. That order contains the following material provisions –

1. AB lacks capacity to:

- a. Conduct these proceedings;*
- b. Make decisions as to where she should live;*
- c. Make decisions as to what care and support she should receive; and*
- d. Enter into and terminate a tenancy agreement.*

2. It is in AB's best interests to receive a package of care and support in accordance with her assessed needs, which includes authority for AB's landlord and/or their servants or agents to enter the property in order to carry out an inspection of its condition and to undertake any essential maintenance or cleaning.

All parties accept those findings and agree the best interests declaration. The matter has been referred to me simply on the question as to whether there is a deprivation of liberty. However I think there should only be one order in these proceedings and, accordingly, I propose to incorporate the above findings in my final order.

4. It follows that the balance of this judgment will focus on the question of whether or not the present arrangements amount to a deprivation of liberty. If they do not, then the order of the District Judge can stand as the final order in the proceedings but, if they do, all parties continue to agree that these are the best arrangements and do not oppose the court authorising the deprivation of liberty subject to review provisions which the parties believe they are capable of agreeing.

5. Central to my consideration of this question are the judgments of the Supreme Court in **P -v- Cheshire West [2014] UKSC 14**. I propose to focus principally on the leading judgment of Baroness Hale. That judgment contains a review of the European authorities, which I do not propose separately to review as it is the judgment of the Supreme Court that is the binding authority. The propositions laid down in that case are not controversial as between the parties.

6. Every citizen has the benefit of Article 5 of the European Convention on Human Rights and the same law is applicable to every person whatever their

nature or disability. Moreover it is clear that deprivation of liberty must be given its literal sense irrespective of the beneficent intention that might lie behind the arrangements. The difficulty lies in distinguishing between restrictions of liberty, which do not offend Article 5, and a deprivation of liberty, which does. Both the European authorities and the Supreme Court recognise that at the borders there will be issues of degree and intensity. However in approaching that I must bear in mind the policy articulated by Baroness Hale when she said this –

"(57) Because of the extreme vulnerability of people like... I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection... Nor should we regard the need for such checks as in any way stigmatising of them or their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us."

7. There are three tests that have to be applied in determining whether or not there has been a deprivation of liberty –

- (a) The person is confined to a limited space for a not negligible time;
- (b) There is a lack of a valid subjective consent; and
- (c) The confinement is imputable to the state.

It is accepted in this case that the second and third tests are satisfied as is apparent from the order of the District Judge. The question is limited to a consideration of the first test.

8. The first test has two separate components –

- (i) Whether the protected person is subject to continuous supervision and control; and
- (ii) Whether the protected person is free to leave.

It is common ground that, by reason of the Guardianship Order and the condition of residence therein, the protected person is not free to leave the accommodation. The contentious issue in this case is whether or not she is subject to continuous supervision and control. Clearly the fact that she is not free to leave is a material consideration but, as Baroness Hale observed –

"... It is possible to imagine certain situations in which a person is not free to leave but is not under such continuous supervision and control as to lead to the conclusion that he was deprived of his liberty."

Thus it is necessary to consider the precise arrangements under which AB is required to live in order to determine whether or not she is subject to such supervision and control as will amount in law to a deprivation of liberty.

9. I have been helpfully referred to two decisions of trial judges in the Family Division who have had to consider the question of deprivation of liberty. In re RD (Deprivation or Restriction of Liberty) [2018] EW FC 47, Cobb J gave detailed consideration to the arrangements under which a 14-year-old was required to live and he concluded that there was in that case no deprivation of liberty. In Re HC (a Minor Deprivation of Liberty) [2018] EWHC 2961 (Fam) Bodey J gave

similar consideration in a separate case. Whilst both cases are helpful, it is vital to bear in mind that they relate to young people who would in any event have been under the watchful eye and authority of concerned parents had they not been in public care. The case of an adult is very different, for part of the rights of an adult are to behave in ways which others might regard as foolish without those others having the right of interference. Thus what may only be a restriction of liberty in a young person may yet be a deprivation of liberty in an adult.

10. AB lives in a flat in supported accommodation where there is always support available at any time of the day and night. She is broadly at liberty to do as she pleases within her own flat. She is free to leave the accommodation but her leaving and returning will always be seen by a member of the supervisory staff simply because of the geography of the property. She is required to reside at that property and thus if she fails to return the police would ordinarily be notified. There is extensive support available to her but it is support for her to take up or not as she pleases. She has a long record of being unable to look after her own accommodation and accordingly staff will enter her flat for the purposes of inspecting, cleaning or repairing. Indeed they will often wait for her to leave in order to do that so as to cause the least possible distress to her. It follows that they have access to her property whenever they think fit.

11. The Official Solicitor contends that these arrangements when all taken together amount to a deprivation of liberty. She contends through Leading Counsel that the requirement to return to the property, the amount of support that is made available, the monitoring of her coming and going and the access to her property when seen in the context of the Guardianship Order amount to a deprivation of liberty. The Local Authority contend through Counsel that the voluntary nature of the support, the freedom to come and go as she pleases and her freedom of action once she has left the accommodation speak more powerfully of a lack of continuous control and supervision. What makes this case difficult is that both approaches are inherently reasonable. This is a case at the borderline and is, as the law of the European Court recognises, *“one of degree or intensity, and not one of substance or nature.”* There is a judicial judgment required.

12. It would not be right to say that the mere presence of a Guardianship Order with a condition of residence of itself amounts to a deprivation of liberty, though it must be recognised that it is a very significant restriction of liberty. That much appears from the passage cited from Baroness Hale's judgment above. There must be something more. In my view supervision and control should be viewed as separate requirements in considering this test and the word “continuous” applied to both. At the end of the day, however, the court is also constrained to follow the policy of caution set out by the Supreme Court.

13. In the end, and only after very careful consideration, I have come to the conclusion that these arrangements do indeed amount to a deprivation of liberty. It seems to me that the question of supervision and control must be viewed in the context of the prescribed condition of residence. Thus whilst she may be free to leave the property as she chooses, she is always subject to state control

requiring her return should she be otherwise unwilling to do so. The fact that she generally willingly returns does not of itself negate this point. Again whilst the supervision of her coming and going is not intrusive, it is the fact that all her movements are known and noted. Moreover, while she is free to do as she pleases in the community, there will inevitably be some obligation to restrain or control those movements should they become seriously detrimental to her welfare. That control could lawfully be implemented without recourse to the Court.

13. When considering a deprivation of liberty it is not sufficient just to see what actually happens in practice but to consider what the true powers of control actually are. Again the power to enter someone's private residence is a major intrusion on liberty however much, as it is here, it is to the benefit of the protected person for it to happen.

14. When looking at all these matters it is essential to consider them in the round and to ask whether in all the circumstances that actually prevail, or might reasonably come about, the arrangements amount to a deprivation of liberty. In my view they do here. In reaching that conclusion I have drawn upon the policy set out by Baroness Hale and that has, I should acknowledge, been a critical factor in my conclusion. However much these arrangements may be to the benefit of AB, and undoubtedly they are, one has to reflect on how they would be observed by an ordinary member of the public who, I strongly suspect, would regard them as a real deprivation of liberty. The policy that everyone should be treated the same leads me to the conclusion that I have set out.

15. Although I have concluded that the AB is deprived of her liberty in the present circumstances, however much they may be to her benefit, this does not seem to me a case in which any complicated arrangements for review are required other than the basics that are provided for in the Court of Protection by way of annual review. The parties informed me, and I fully accept, that they will be able to agree an order to implement this judgment.