



19 March 2014

PRESS SUMMARY

P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)(Appellants) v Surrey County Council (Respondent) [2014] UKSC 19
On appeal from [2011] EWCA Civ 1257; [2011] EWCA Civ 190

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Kerr, Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEALS

These appeals concern the criteria for judging whether the living arrangements made for a mentally incapacitated person amount to a deprivation of liberty. If they do, the deprivation must be authorised by a court or by the procedures known as the deprivation of liberty safeguards (DOLS) in the Mental Capacity Act 2005 ('the Act') and subject to regular independent checks.

P and Q (otherwise known as MIG and MEG) are sisters who became the subject of care proceedings in 2007 when they were respectively 16 and 15. Both have learning disabilities. MIG was placed with a foster mother to whom she was devoted and went to a further education unit daily. She never attempted to leave the foster home by herself but would have been restrained from doing so had she tried. MEG was moved from foster care to a residential home for learning disabled adolescents with complex needs. She sometimes required physical restraint and received tranquillising medication. When the care proceedings were transferred to the Court of Protection in 2009, the judge held that these living arrangements were in the sisters' best interests and did not amount to a deprivation of liberty. This finding was upheld by the Court of Appeal.

P is an adult born with cerebral palsy and Down's syndrome who requires 24 hour care. Until he was 37 he lived with his mother but when her health deteriorated the local social services authority obtained orders from the Court of Protection that it was in P's best interests to live in accommodation arranged by the authority. Since November 2009 he has lived in a staffed bungalow with other residents near his home and has one to one support to enable him to leave the house frequently for activities and visits. Intervention is sometimes required when he exhibits challenging behaviour. The judge held that these arrangements did deprive him of his liberty but that it was in P's best interests for them to continue. The Court of Appeal substituted a declaration that the arrangements did not involve a deprivation of liberty, after comparing his circumstances with another person of the same age and disabilities as P.

JUDGMENT

The Supreme Court, unanimously in the appeal of P, and by a majority of 4 to 3 in the appeal of MIG and MEG, allows the appeals. MIG, MEG and P have all been deprived of their liberty. Lady Hale, with whom Lord Sumption agrees, gives the main judgment. Lord Neuberger agrees with Lady Hale in an additional judgment and Lord Kerr agrees with Lord Neuberger and Lady Hale, also in a separate judgment. Lord Carnwath and Lord Hodge give a joint judgment dissenting in the appeal of MIG and MEG. Lord Clarke agrees with them in an additional judgment.

REASONS FOR THE JUDGMENT

The DOLS were introduced into the Act following the case of *HL v United Kingdom* (2004) 40 EHRR 761, which found that the treatment of a severely mentally disabled adult after his informal admission to hospital amounted to a deprivation of his liberty by the hospital. Their purpose is to secure independent professional assessment of (a) whether the person concerned lacks the capacity to make his own decision about whether to be accommodated in the hospital or care home for care or treatment, and (b) whether it is in his best interests to be detained [8-9].

The European Court of Human Rights (ECtHR) has established general principles relating to the deprivation of liberty of people with mental disorders or disabilities, albeit that it has not yet had to decide a case involving, as here, a person without capacity, who appears content with their care placement, which is in a small group or domestic setting as close to home life as possible, and which has been initially authorised by a court [32]. The general principles make it clear that it is important not to confuse the question of the benevolent justification for the care arrangements with the concept of deprivation of liberty. Human rights have a universal character and physical liberty is the same for everyone, regardless of their disabilities [45]. What would be a deprivation of liberty for a non-disabled person is also a deprivation for a disabled person [46]. The key feature is whether the person concerned is under continuous supervision and control and is not free to leave [49]. The person's compliance or lack of objection, the relative normality of the placement and the purpose behind it are all irrelevant to this objective question [50, 87].

It follows that in P's case the judge applied the right test and his decision should be restored [51]. MIG and MEG were also both under continuous supervision and not free to leave the place where they lived. The deprivation of their liberty was the responsibility of the state and therefore different from similar constraints imposed by parents in the exercise of their ordinary parental responsibilities [54]. Accordingly the decisions of the courts below must set aside and a declaration made that their living arrangements constitute a deprivation of liberty within the meaning of s 64(5) of the Act. Periodic independent checks are needed for such vulnerable people to ensure that the arrangements remain in their best interests, although it is not necessary that the checks be as elaborate as those currently provided for in the Court of Protection or in the DOLS [57-58].

Lord Carnwath, Lord Hodge and Lord Clarke would have upheld the decision of the judge in both cases. They consider that the degree of intrusion is relevant to the concept of deprivation of liberty, and in the appellants' cases the care regime is no more intrusive or confining than required for the protection and well-being of the persons concerned [90]. The ECtHR has yet to decide a case of this kind and it is far from clear that it would adopt a universal test which disregarded any disabilities. It remains wedded to a case-specific test [94]. They are concerned that nobody using ordinary language would describe persons living happily in a domestic setting, like MIG and MEG, as being deprived of their liberty [99].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.shtml>