Social Rights Tuesday 16th July 2013

This session will look at two issues which involves the relationship between more traditional civil rights and more modern (?) special rights, in this case rights involving the provision of care to adults, and, in particular, to adults who do not have the capacity to take decisions for themselves. There three sections to this reading:

1. Some of the relevant provisions of the UN Convention on the Rights of Person with Disabilities and the EU Charter of Fundamental rights – it will be assumed that you are familiar worth the relevant provisions of the ECHR, particularly Articles 5 and 8.
2. An extract from an article comparing the fate of claims under Art 8 ECHR in the case of a prisoner and of an adult in need of social care.
3. An extract from a UK case which sets out the current understanding of deprivation of liberty in cases involving adults with incapacity. This has been the subject of a number of court cases in the UK, and also was a prominent consideration in a recent paper issued by the Scottish Law Commission (the body that makes recommendations to the Scottish Government for reforms in the law).

Some Questions

1. Can ECHR rights be used to secure adequate social care?
2. Is the focus on deprivation of liberty the right one? What do/should we mean by ‘deprivation of liberty’ in the case of adults who have no capacity to take their own decisions?
3. What implications do the rights set out in the UN Convention have?
1 Extracts from UNCRPD and Charter

UNCRPD

Art 12.2 States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

Art 14

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
   a. Enjoy the right to liberty and security of person;
   b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Art 19 States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
   a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
   b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
   c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Art 26.1 States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services ...

Art 28.1 States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
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<td>Art 1</td>
<td>Human dignity is inviolable. It must be respected and protected.</td>
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<td>Art 25</td>
<td>The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.</td>
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<td>Art 26</td>
<td>The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.</td>
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<td>Art 34</td>
<td>The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.</td>
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Disability, dignity and the cri de coeur.

Luke Clements
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This paper contrasts the rhetorical concern, expressed by the European Court of Human Rights and domestic UK courts, for the rights of disabled people to be enabled to live lives ‘with dignity’ – with the judgments of such courts, which it suggests signally fail to provide such protection. The analysis uses as its paradigm case that of the UK’s Supreme Court in R (McDonald) v Royal Borough of Kensington and Chelsea which it contrasts with a judgment of the Scottish Outer House, of the Court of Session in Napier v Scottish Minister. The paper argues that there is no fundamental jurisprudential reason why the privileged status accorded by courts to the rights of prisoners to minimum ‘dignity’ standards should not also be accorded to disabled people. In so doing, it challenges the notion that there is an inherent trade off between the loss of liberty and the right to minimum standards of care: that such an argument fails in relation to disabled people, for whom institutionalisation has historically been the default position and for whom ‘liberty’ is, in the context of the social model of disability, a far from unambiguous concept.

It is a truth universally acknowledged that a senior judge in possession of a hard ‘disability’ case is want to expound at length on ‘dignity’. The process is no doubt cathartic, but it generally results in a Delphic judgment that leaves us none the wiser on the practical: as to what constitutes ‘indignity’. There are precious few case reports concerning disabled people that provide a benchmark, where judges actually finger a concrete situation and identify it as indignity. In Strasbourg jurisprudential terms one might be tempted to trade a 100 Pretty’s for one Peers. In Pretty ‘dignity’ gets 15

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mentions, but results in no violation; in Peers it gets but two, and yet a violation is found.

In the context of disability and the European Court of Human Rights, many commentators might challenge this assertion and point to the ringing declaration in Price v United Kingdom\(^3\) where Judge Greve memorably identified a Convention obligation on states to ‘ameliorate and compensate for the disabilities faced by disabled persons: ‘compensatory measures’ that were, in her opinion ‘part of the disabled person’s bodily integrity’. Price however concerned a prisoner – who happened also to be a disabled person – and it is this dichotomy that this article explores; somehow such declarations roll out so much more easily when the disabled person is detained. Is there really a qualitative difference between a state’s international human rights obligations to detained disabled people than to those who it has not ‘deprived of their liberty’?

This paper challenges the accepted wisdom that a self-evident difference exists and suggests instead that the absence of judicial *cri de coeur* concerning the rights of non-detained disabled people stems in part from a certain aspect-blindness\(^5\) by a portion of the judiciary – who appear to comprehend dignity on an objective intellectual plane but are unable to express (or perhaps ‘experience’) subjectively the meaning of what it is to suffer indignity. In effect, that ‘dignity’ becomes something defined by a process and perforce ‘indignity’ in terms of a flawed process – and not as an issue of substance. Conceptions of dignity, such judges would claim, are (like all legal principles) matters for the head and not the heart – and certainly not to be identified by reference to non-rational emotional benchmarks – such as ideas of revulsion or the mores of a civilised society.

\(^2\) Peers v. Greece (2001) 33 E.H.R.R. 51 where the Court held that the prison conditions in which the applicant was detained amounted to degrading treatment within the meaning of Article 3 of the Convention – not least because he ‘had to use the toilet in the presence of another inmate’


\(^4\) Other analogous dichotomies warrant similar exploration – for example the difference in the approach taken by courts to the social care needs of destitute asylum seekers and of disabled people – see for example, MSS v Belgium & Greece, Application no 30696/09, judgment of 21 January 2011 and R (Adam and othersx) v Secretary of State for the Home Department . [2005] UKHL 66; [2005] 3 WLR 1014; (2006) 9 CCLR 30.

\(^5\) Wittgenstein likens what he calls ‘aspect-blindness’ to lacking a musical ear – ie hearing but not experiencing; and suggests that in a legal sense it is the difference between ‘how someone meant a word’ and how they ‘experienced the meaning of a word’ - see L. Wittgenstein *Philosophical Investigations* 2\(^{nd}\) edition translated by G. E. M. Anscombe. Oxford: Blackwell (1958) p214.
The paper uses as its paradigm case, that of the United Kingdom’s Supreme Court in *R (McDonald) v Royal Borough of Kensington and Chelsea* since this judgement (which concerned a non-detained disabled person) has been contrasted by several commentators with a judgment of the Scottish Outer House, of the Court of Session in *Napier v Scottish Minister* (which concerned a non-disabled detained person). In both cases the applicants were continent and their need was to access a toilet. In *McDonald* she needed help to get to her commode and in *Napier* he objected to using a chamber pot and claimed a right to a private flush toilet. Whereas *Napier*’s claim succeeded as a clear violation of article 3, *McDonald*’s claim under article 8 was rejected with something akin to legal contempt.

This paper argues that the courts have grave difficulties in identifying atypical human rights abuses experienced by disabled people – atypical in the sense that they are different to the ‘typical’ abuses identified in relation to non-disabled people: in much the same way that the courts found it particularly challenging to identify abuses experienced by Roma.

**R (McDonald) v Royal Borough of Kensington and Chelsea**

*McDonald* is a triumph of black letter law. The applicant was 67 and a former principal ballerina with the Scottish Ballet. In 1999 (when aged 56) she suffered a stroke and subsequently a broken hip which left her with reduced mobility. She was assessed by the council as needing assistance at night to access her commode. Once a community care need of this nature has been ‘assessed’ as eligible, then domestic law obliges the local authority to meet that need: it is what is known as a ‘non-resource dependent’ duty. Assessed community care needs of this kind must be met, regardless of the cost of meeting them.

Although the council provided this support it decided in 2008 (a decision that coincided with the economic recession) that it could save money by putting her in incontinence pads and on ‘special sheeting’ at night and sorting her out the next day: effectively withdrawing exiting support and requiring her (as Baroness Campbell of Surbiton

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7 See for example the comments of Baroness Campbell of Surbiton, Hansard HL Deb, 5 May 2011, c606.
8 [2002] UKHRR 308.
expressed it\textsuperscript{10} ‘to lie in [her] own urine and faeces’. There was however, a domestic law problem with the council’s approach. Elaine McDonald’s need was not for incontinence pads (because she was not incontinent): her need was quite different, namely to access her commode.\textsuperscript{11} To address this problem (albeit that nothing had changed) the council undertook a desktop reassessment and re-defined her need as a need to ‘be kept safe from falling and injuring herself’.

The majority of the Supreme Court, in dismissing the claim in trenchant language, thought nothing wrong with this process and doubted that the facts engaged article 8 at all. The dissenting speech of Baroness Hale is a \textit{cri de coeur} – that people should be ‘assessed against the standards of civilised society’ and that on this basis (regardless of cost) the UK does not ‘oblige people who can control their bodily functions to behave as if they cannot do so, unless they themselves find this the more convenient course. We are, I still believe, a civilised society.’ As could be predicted such dissent was bound to attract disdain from the majority, although the scorn with which it was communicated is startling – referring to her judgment as ‘nothing short of remarkable’; as ‘regrettable’; as one with which Lord Walker ‘totally disagree[d]’ and ‘deplore[d]’.

In rejecting the argument that there might be the a wisp of a human right in issue, the court cited three European Court of Human Rights disability related judgments, the most celebrated of which being \textit{Sentges v. Netherlands}.\textsuperscript{12} Drawing solace from these, Lord Brown observed ‘[r]eally one only has to consider the basic facts of those three cases to recognise the hopelessness of the article 8 argument in the present case.’ In \textit{Sentges} the court (when referring to the margin of appreciation in such cases) observed that ‘the national authorities are in a better position to carry out this assessment than an international court’. We see here, therefore, the mature expression of the ‘pass the parcel’ deference game: the Strasbourg Court defers to national courts who then use that deference as justification for rejecting similar claims.

\textit{Napier v Scottish Minister}

\textit{Napier} is a thoughtful, carefully constructed judgment, interspersed with references to external benchmarks such as reports of the Chief Inspector of Prisons for Scotland and the Committee for the Prevention of Torture; as well as to the European Prison Rules;\textsuperscript{13}

\begin{thebibliography}{9}
\bibitem{10} Hansard HL Deb, 5 May 2011, c606.
\bibitem{11} See legal analysis in Gordon, R. \textit{Counting the Votes: A Brief Look at the McDonald Case} 2009 CCLR.
\bibitem{13} Recommendation No.R(87)3 adopted by the Committee of Ministers of the Council of Europe on 12 February 1987.
\end{thebibliography}
the United Nations Standard Minimum Rules for the Treatment of Prisoners;¹⁴ and Strasbourg case law (not least Peers v. Greece). Although such comparators did not suggest that the circumstances of the applicant’s incarceration were at the severe end of the indignity scale, the conclusions that he had been subjected to a violation of article 3 are incontrovertible.

In 2001 Robert Napier, who faced charges including robbery, abduction and attempted murder was remanded in custody to Barlinnie Prison, where he had served previous prison sentences. He alleged that the totality of his prison conditions amounted to degrading treatment. This included having to share a cell with one other prisoner, the size and layout of the cell, the prison regime, his food, his underlying ill-health (atopic eczema) and the attitude of staff. None of these factors (imperfect as they were) in themselves were considered to be of a severity to found a violation.

The pivotal finding, however, concerned the practice of slopping out. Barlinnie is an old prison and at that time not all of the cells were fitted with flush toilets. As the court noted the two principal components to slopping out were ‘(1) the use of a bottle to urinate and a chamber pot to defecate in the cell and (2) the practice of groups of prisoners emptying both’. In fact the applicant did not use the chamber pot on any occasion and his cell mate did so on only twice. Nevertheless the court considered in detail his feelings about the idea of having to use the chamber pot in his cell: that it made him feel ‘like you don't exist because you are forced to use that toilet ... you shouldn't need to do that and I was not prepared to do that myself ... it just makes you feel low all the time’ (§ 76). On this basis Lord Bonomy concluded that he was ‘entirely satisfied that the petitioner was exposed to conditions of detention which, taken together, were such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation’ (§ 78).

The prisoner’s dialectic

The duty to treat prisoners with humanity and with respect for their inherent dignity is a fundamental obligation of all states and a specific provision of the International Covenant on Civil and Political Rights (article 10). Prisoners are of course especially vulnerable, as the state has total control over almost every aspect of their lives; they are deprived of the ability to decide where they live, or with whom they live and have little

choice about their health and social care arrangements. Prisoners are also hidden from the public gaze and dependant on the good services of state agents. It is for these reasons that a variety of inspectorates / committees exist (domestic and international) to safeguard their well-being – and do so (as noted above) by a reference to a number of international benchmark standards.

Given the totality of state control, the European Court of Human Rights\textsuperscript{15}, to its credit, has placed substantial obligations on member states to ensure that minimum standards are upheld. Because of the ‘vulnerability’ of detainees with ‘physical or mental conditions’\textsuperscript{16} the Court has subjected to particular scrutiny their material conditions, to establish whether they are ‘compatible with Article 3. In Slyusarev v Russia,\textsuperscript{17} for example, it found a violation of article 3 in relation to the non-provision of glasses to a short-sighted prisoner.

The above analysis suggests that if Elaine McDonald had been a detained person, the court (at the very least) would have subjected her conditions to significantly greater scrutiny. The question is then, whether this difference in scrutiny (let alone outcome) is attributable to an objective qualitative difference between the state’s obligations in such cases – or is there in a dialectical sense, a contradiction that is in human rights jurisprudential terms irreconcilable? Should the substance of a state’s obligations to a disabled person hinge on whether that person is or is not in a public place of detention?

On several levels such a distinction is open to challenge – two of which call for particular analysis. Firstly, given that there is no bright line distinguishing a deprivation of liberty and a restriction on liberty – can there be any philosophical reason why the former alone, should attract concrete procedural and substantive obligations. The second ground concerns Carr’s\textsuperscript{18} observation that in such contexts, the private / public separation of state responsibility is unsatisfactory, not least because it assumes a clear dividing line which does not exist: ‘instead there is a spectrum of care provision which has emerged in response to policies of de-institutionalisation combined with the retraction and refocusing of welfare’.

\textsuperscript{15} The right has also been recognised by the ‘positive obligation averse’ US Supreme Court, albeit in a restricted form: Estelle v Gamble 429 U.S. 97 (1976).


\textsuperscript{17} Application No. 60333/00, 20 April 2010.

CC & KK v STCC [2012] EWHC 2136 (COP)

1. Any analysis of whether [an individual] has been in fact deprived of his liberty must therefore have close regard to the jurisprudence of the European and English courts on the interpretation of that Article. A comprehensive list of the earlier cases is set out in the judgment of Munby LJ in Cheshire West and Chester Council v P [2011] EWCA Civ 1257 [2001] 2 FLR 583 at para 15. The most important authorities are, first, the cases described by Munby LJ as “the two foundational decisions of the Strasbourg court”, namely Engel and Others v The Netherlands (No 1) (1976) 1 EHRR 647 and Guzzardi v Italy (1981) 3 EHRR 333; the two most recent decisions of the European Court in the field of community and social care, namely HL v United Kingdom (supra) and Storck v Germany (2005) 43 EHRR 96; and the series of recent domestic cases in the same field, starting with the decision on Munby J (as he then was) prior to the implementation of the Mental Capacity Act in DE v JE and Surrey County Council [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150 and culminating in two recent decisions of the Court of Appeal following the implementation of that Act, P and Q v Surrey County Council [2011] EWCA Civ 190, [2011] 2 FLR 583 [2011] COPLR Con Vol 931 in which the Court upheld a decision of Parker J at first instance reported as Re MIG and MEG [2010] EWHC 785 (Fam), [2010] COPLR Con Vol 850, and Cheshire West and Chester Council v P (supra) in which a different constitution of the Court overturned a decision of mine reported as Cheshire West and Chester Council v P and M. [2011] EWHC 1130 (COP), [2011] COPLR Con Vol 273. In both of those recent cases, the Court of Appeal also cited and attached weight to cases involving alleged breaches of Article 5 in other contexts, in particular cases involving control orders and police crowd control methods known as “kettling”, of which the most significant was the decision of the House of Lords in Austin and another v Commissioner of Police of the Metropolis (supra).

2. ...

3. The law as it stands can be summarised as follows.

4. 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 certain limited 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) (supra) and JE v DE and Surrey CC. (supra).

5. In this case, the second and third elements are plainly satisfied. I have found that KK has capacity to make decision as to her residence and care, and at no times has she consented to her placement at STCC. It should be noted that, had I decided that she did not have capacity, the second element would also have been satisfied, because any consent can only be valid if the person has capacity to give it: Storck v Germany (supra). So far as the third element is concerned, although the confinement may effected by a private individual or institution, the third element will be satisfied if it is imputable to the State as a result of the direct involvement of public authorities, through the authorisation procedure under Schedule A1, or an order of the court. The question in this case is thus whether the first, objective, element is satisfied.

6. When considering the objective element, the starting point is as described in Guzzardi v Italy (supra) at paras 92-93:

   i. “in proclaiming the “right to liberty”, paragraph 1 of Article 5 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 … the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No 4 … In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question …

ii. 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 depends.”

7. Thus when determining whether the circumstances amount to a deprivation of liberty, as opposed to a mere restriction of liberty, the court looks first at the concrete situation in which the individual finds herself and takes account of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question, bearing in mind that the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. As Munby LJ observed in Cheshire West at paras 34-35 and 102, “account must be taken of the individual’s whole situation … the context is crucial.”

8. At a more practical level, guidance is given as to the identification of a situation that amounts to a deprivation of liberty in the Deprivation of Liberty Safeguards Code of Practice 2008. Chapter 2 of the Code is entitled “What is a deprivation of liberty?” At paragraph 2.5, there is what is described as a “non-exhaustive” list of factors pointing towards there being a deprivation, namely where

(a) restraint is used, including sedation, to admit a person to an institution where that person is resisting admission (although “restraint by itself is not deprivation of liberty” and “neither the presence or absence of a lock is determinative”, per Munby LJ in Cheshire West at paras 23 and 37 respectively);

(b) staff exercise complete and effective control over the care and movement of a person for a significant period;

(c) staff exercise control over assessments, treatment, contacts and residence;

(d) a decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate;

(e) a request by carers for a person to be discharged to their care is refused;

(f) the person is unable to maintain social contacts because of restrictions placed on their access to other people;

(g) the person loses autonomy because they are under continuous supervision and control.
9. In *P and Q (supra)*, Wilson LJ (as he then was) gave further guidance to be followed when determining whether an individual’s circumstances amount to a deprivation of liberty. A person’s happiness, as such, is not relevant as to whether he or she is deprived of their liberty (para 24). If the person objects to their confinement, however, that is relevant to the objective element of the test (para 25, citing *DE v JE and Surrey County Council, supra*). The consequence of such an objection will be conflict. At the very least there will be arguments and P will suffer the stress of having his or her objections overruled. More probably, there will be tussles and physical restraints. As Wilson LJ said at paragraph 25, “this level of conflict inherent in overruled objections seems to me to be highly relevant to the objective element.” He added, however, that “equally the absence of objections generates an absence of conflict and thus a peaceful life, which seems to me to be capable of substantial relevance in the opposite direction.”

10. Importantly, Wilson LJ (approving the approach of Parker J at first instance) considered that the relative normality of the individual’s life will be relevant. If P is living with his parents or other members of his natural family, in their home, he is living what Wilson LJ described (at para 28) as “the most normal life possible”. Typically, but not always, there will be no deprivation of liberty in such circumstances. Even when the person lives in an institution rather than a family home, there is a wide spectrum which Wilson LJ portrays as running between “the small children’s home or nursing home, on the one hand, and a hospital designed for compulsory detention”. It is necessary, he advised, to place each case along the spectrum. A further factor which Wilson LJ considered relevant is whether the individual goes out of the residential home for any purpose. The example he gave was of a child or a young adult who attends school or college or a day centre or other form of occupation. He described this as “a sign of normality which may indicate that the circumstances do not amount to a deprivation of liberty”. In the context of the present case, this observation also applies, in my judgment, to regular visits by KK to her bungalow. Such visits may amount to “a sign of normality”.

11. In *Cheshire West*, the Court of Appeal reiterated the importance of “normality” in assessing whether the circumstances amount to a deprivation of liberty, but added a further dimension – the concept of the relevant comparator – to address a problem posed by Munby LJ at paras 38-39:

12. “38. The emphasis upon the concrete situation, the context, is obviously important but in truth it does little more than describe a forensic process. Reference to the degree and intensity of the restriction no doubt gives some indication of the principle in play but it hardly provides a benchmark or yardstick by which to evaluate the circumstances and assess whether or not there is a deprivation of liberty. And the call to examine the facts can too easily lead to the worrying and ultimately stultifying conclusion that the decision in every case can safely be arrived at only after a minute examination of all the facts in enormous detail.

13. 39. This cannot be right. There must be something more which enables us to pursue a more focussed and less time-consuming enquiry. In my judgment there is. The task is to identify what it is we are comparing X’s concrete situation with. In short, what is the relevant comparator?”

14. This question is analysed in the following paragraphs leading to the following conclusion at para 102 (viii) to (xii):

(1) “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 …. 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. … 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 …. 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 …. 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 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.”

15. I anticipate that this aspect of the decision in Cheshire West will receive particular scrutiny in the Supreme Court. It has been the subject of academic criticism on the grounds that, insofar as it may permit some people to be denied a declaration of deprivation of liberty in circumstances where others would be entitled to such a declaration, it may be discriminatory. The decision of the Court of Appeal is, of course, binding on this court.

16. A further uncertainty arising from the Cheshire West decision in the Court of Appeal concerns the relevance of the purpose for which the individual is in the placement when determining whether that placement amounts to a deprivation of liberty. On this point, it would not be appropriate, in a first instance judgment that is already lengthy, to traverse the ground analysed by Munby LJ in Cheshire West (supra) at paras 60 to 77. His conclusion, however, is stated at para 102 (vi) and (vii):

17. “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 …. 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.”

18. This analysis was, to some extent, based on the speeches in the House of Lords in the Austin (“kettling”) case. It now has to be read in the light of the decision of the Grand Chamber of the European Court in that case, reported as Austin and others v United Kingdom [2012] ECHR 459, and in particular the observation at para 58 – 59 of the majority judgment:

19. “… [T]he purpose behind the measure in question is not mentioned in [previous judgments of the European Court] as a factor to be taken into account when deciding whether there has been a deprivation of liberty. Indeed, it is clear from the Court’s case-law that an underlying public interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty, although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of Article 5(1) …. The same is true where the object is to protect, treat or care in some way for the person taken into confinement, unless that person has validly consented to what would otherwise be a deprivation of liberty …. However, the Court is of the view that the requirement to take account of the “type” and “manner of implementation” of the measure in question … enables
it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell …. Indeed, the context in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good.”

20. In his subsequent lecture entitled “Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?” cited above, Munby LJ made these observations about the impact of the Grand Chamber decision in *Austin*:

21. “Where does this leave us? And where in particular does it leave the decisions in *P* and *Q* and *Cheshire West*? It is early days and you will understand that I must be careful what I say. A provisional and very tentative view might be that questions of reason, purpose, aim, motive and intention are wholly irrelevant to the question of whether there is a deprivation of liberty; that anything in the domestic authorities (and particular in *Cheshire West*) which suggests otherwise needs to be reconsidered; that in all other respects *P* and *Q* and *Cheshire West* stand as good law; that none of this affects the correctness of the actual decisions in the two cases; and that none of this is likely to have any decisive effect on the outcome in the general run of cases of the kind with which we are concerned.”

22. One anticipates that the impact of the Grand Chamber decision in *Austin* will be a further aspect of the forthcoming appeals to the Supreme Court. But how is a judge at first instance to approach the problem pending those appeals? In my judgment, the right course is to have regard to the purpose for a decision as part of the overall circumstances and context, but to focus on the concrete situation in determining whether the objective element is satisfied.