IMPORTANT NOTICE

These proceedings were conducted remotely and in private, pursuant to an order made on 24th September 2020. This judgment may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number:

Case No: 12986049

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF AEL

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 4th January 2021
[2021] EWCOP 9

Before :

Her Honour Judge Hilder

LONDON BOROUGH OF HAVERING

Applicant

and

(1) AEL
(by her litigation friend, the Official Solicitor)
(2) JSL
(3) CL

Respondents

Hearing: 28th October 2020
Written submissions subsequently

Mr. Mathieson (instructed by oneSource Legal Services) for the Applicant
Mr. Patel QC (instructed by The Official Solicitor) for the First Respondent
JSL did not attend the hearing and is unrepresented.
CL took no part in proceedings

The hearing was conducted by telephone and in private pursuant to an order made on 24th September 2020. The judgment was handed down to the parties by e-mail on 4th January 2021. It consists of 15 pages, and has been signed and dated by the judge.
The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

A. THE ISSUE

1. AEL is a 31 year old woman who lives with her parents (the Second and Third Respondents) in their family home, and nobody is suggesting that this should change. The issue before the Court is a narrow one, namely whether or not the arrangements for AEL's care amount to a deprivation of her liberty.

2. Where a person ('P') lacks capacity to make the relevant decisions for themselves and care arrangements made for them outside a care home or hospital involve a deprivation of their liberty attributable to the state, those arrangements require authorisation from the Court, with regular reviews. Where arrangements are agreed by all relevant persons to be in the best interests of P, there is a 'streamlined procedure' set out in Practice Direction 11A Part 2 for such authorisations to be granted without a hearing.

3. In this matter, disagreement about whether or not AEL's living and care arrangements amount to a deprivation of her liberty has led to extended proceedings in each of the last three years, causing considerable stress to all parties. It is everyone's ardent wish that further such proceedings can be avoided. The purpose of this judgment is therefore to determine the issue, for as long as AEL's current care arrangements subsist.

B. MATTERS CONSIDERED

4. I have considered all the documents in the hearing bundle and written submissions filed after the hearing, including:

    a. on behalf of the Applicant:
        i. a COP24 statement by Andrew Sykes dated 1st June 2020 [**G1**];
        ii. a Care Plan dated 14th October 2020 [**H1**]
        iii. position statements dated 27th October 2020 and 18th November 2020;

    b. on behalf of AEL:

        position statements dated 28th October 2020 and 18th November 2020;

    c. on behalf of JSL:
        i. position statements dated 26th June 2020 [**A1**], 31st July 2020 [**A5**], 28th October 2020 and 11th November 2020;
        ii. a COP24 statement dated 1st September 2020 [**G39**]

C. THE BACKGROUND

5. AEL has a diagnosis of Trisomy 4p syndrome, a rare chromosomal condition leading to a number of physical and mental disabilities. She has severe learning disability, significant visual impairment and profound deafness. She suffers from asthma, eczema and severe allergies. She is non-verbal and can only walk short distances. She does not have a regular sleep pattern. At times, she may behave in a way which causes herself injury.

6. From a young age AEL attended a specialist school, latterly living in a residential unit under the school's management. When that placement closed in July 2015, after a few months in an alternative placement, she returned to live in the family home at 35 RPW. Since 2016 a care package has been funded by direct payments.

7. When the London Borough of Havering first made an application to the Court in this matter, the scope of the issue was already clear: there was general agreement that it was in AEL's best interests for her living and care arrangements at the family home to continue and the sole issue between the parties was whether or not the arrangements amounted to a deprivation of liberty requiring authorisation. This was considered to be an issue of principle requiring referral for consideration by a Tier 3 judge but, having been referred, it was remitted without determination.

8. At an attended hearing before me on 23rd June 2017 the parties agreed, and the Court declared, that "in so far as" AEL's care arrangements amounted to a deprivation of her liberty, such was authorised by the court, with consequential provisions for review. It was a compromise to avoid unnecessary litigation but also ensure appropriate oversight of AEL's circumstances.

9. Reviews of the authorisation took place and orders were made in the same terms (i.e. "in so far as") on 27th July 2018, 23rd May 2019 and 21st August 2019 **[D1**]. However, on each occasion the process was protracted. The parties do not agree as to why that was so but a note of the August 2019 hearing [**J1**] records my observation that

> "The issues which prevented submission of an agreed draft order, as they have been outlined to me today, are not issues of a kind directly susceptible to determination directly by the court, or therefore clearly in the best interests of [AEL] to pursue. I am concerned that they reflect a degree of intransigence on the family's part, and continued reluctance to grasp the legal framework within which we are operating."

10. The order made at the hearing on 21st August 2019 records that the parties agreed to the appointment of an Accredited Legal Representative as Rule 1.2 representative for AEL in the next review (as opposed to the Official Solicitor continuing to act as Litigation Friend). It also records that JSL was given a costs warning.

11. The London Borough of Havering made the current application for review by COPDOL11 dated 26th May 2020 [**D6**], confirming that "AEL's care regime has not

changed since the matter was last before the court" [**D21**]. In Annex C, JSL vigorously confirmed his belief that AEL is not deprived of her liberty but confirmed that he was content to adopt the "insofar as" formulation of previous orders. [**D31**]

12. Belinda Adu was duly appointed as R1.2 representative for AEL. She subsequently applied [**D34/D39**] for the discharge of her appointment on the basis of JSL's position in respect of deprivation of liberty. She informed the Court that "JSL feels unable to engage with the current review process until this dispute is determined." [**D36**] In response and prior to any direction, JSL filed a position statement [**A5**] in which he "forcibly affirm[ed]" that he did "not want further court appearances", is "completely opposed to the appointment of legal representatives who have to date contributed nothing that could even vaguely be described as representing AEL" and has "no choice but to remain content with" the wording of the previous authorisations.

13. On 6th August 2020 I made an order [**D44**] directing JSL to file a short statement confirming whether or not he now seeks determination of whether AEL's current living arrangements amount to a deprivation of her liberty; if he did, an explanation of why he now takes this position when it appears that there has been no significant change either in law or in AEL's living arrangements; and his understanding that the Court may order any party to pay the costs of these proceedings if the circumstances so justify.

14. In his response JSL did not squarely address the directions but he stated that he "do[es] not seek any further court appearances, do[es] not seek any further judicial involvement, do[es] not seek any further involvement of legal representatives and do[es] not want any legal costs to be incurred." [**G40**]

15. By order made on 24th September 2020 [**D49**] Ms. Adu's appointment as R1.2 representative was discharged and the Official Solicitor was reappointed as AEL's litigation friend. In view of the coivd-19 pandemic circumstances, the matter was listed for a remote hearing (by telephone) on 28th October.

16. JSL did not attend the hearing. Mr. Patel informed the Court that there had been a (remote) meeting between the parties shortly before the hearing. JSL had subsequently sent Mr. Patel an e-mail in which he complained that "you are trying to bounce me" into a particular position. The Court twice tried to join JSL to the hearing using the telephone number he had previously provided but on both attempts the connection was disconnected immediately. I concluded that JSL had chosen not to participate in the hearing.

17. I heard submissions from Mr. Mathieson and Mr Patel as to whether the hearing could proceed. Mr. Mathieson contended that the matter should be relisted for attended hearing. Mr. Patel invited the Court to make the order sought in the application (ie authorising deprivation of liberty in AEL's living arrangements), pointing out that a further hearing was actually contrary to JSL's wishes.

18. I concluded that determination of the dispute as to whether or not there was a deprivation of liberty was required because the previous compromise approach had failed in its objective of avoiding litigation and costs; but that a proportionate and appropriate

approach would be to give each party an opportunity to make written submissions, and then determine the matter on the papers.

19. Mr. Patel agreed to inform JSL by e-mail of this decision by e-mail immediately so that there need be no delay caused by waiting for the order to be issued (and he has subsequently confirmed that such e-mail was sent.)

D. THE PARTIES' POSITIONS

20. The Second Respondent: JSL is AEL's father and central to her care arrangements. In his words,

> "I have robustly and successfully cared for and represented AEL throughout her life and it is accepted by all that I am a decisive factor (second only to AEL) in her being the oldest surviving person (wherever in the world records are kept) with the chromosomal abnormality -partial deletion tri-somy 4p."

21. JSL regards the suggestion that his daughter's care arrangements amount to a deprivation of her liberty as "palpably nonsense" [**A2/D31**]. He considers that a further court hearing would be "a complete waste of everyone's time including the court's and a complete waste of public money." [**ps 28/10/20**] It is obvious to him that AEL "is not the subject of 'continuous control'… " [**D31**], given that his approach to his daughter's care is founded on "the principle" that :

> "AEL decides what she wants to do and when she wants to do it excepting if her safety could be compromised."

22. An illustration of how this works in practice is set out in the COPDOL11 application form in the following terms:

> "Due to AEL's irregular sleep pattern and requiring only a few hours sleep. It has been highlighted, if AEL wanted to leave the family home in the middle of the night; if the parents or carers are not able to distract her then they would support AEL to leave the property. [JSL] has often left the family home environment with AEL, driving to an all-night McDonalds or all-night cafes….."

23. JSL considers that the exception to giving effect to AEL's wishes if her safety could be compromised is "allowed by the Mental Capacity Act 2005 and as such not considered a deprivation of liberty." [**A1/D31**] The basis of this contention is apparently section 4B of the Mental Capacity Act (eg **ps 31st July 2020 para 5.2**).

24. JSL does assert that AEL's care plan "is more restrictive than it should be" but this seems to be in substance an objection to levels of financial support provided – reflective of "activity and support expenditure which has decreased in value due to inflation and is operated on a completely artificial basis …" [**A7**] Rather than a concession about the

degree of restriction in AEL's care arrangements, I understand this observation to be part of JSL's generally critical view of agencies and authorities involved in AEL's life:

a. he asserts that "no party has been interested in examining the rigorous testing that is carried out to ensure [AEL]'s liberty is never deprived."

b. he has had an unhappy, fractious relationship with the London Borough of Havering over several years. He emphasises that his representations have led to Havering paying the family "over £60 000 in compensation/damages for their failure to accurately assess the need of AEL and for misrepresenting those needs" and also to a commitment that a particular employee would "never again be involved with" the family. (On the other hand, he also says that Rachael Hunt is "an excellent social worker who has made a close bond with AEL" and acknowledges that Havering has agreed to her remaining as AEL's social worker notwithstanding a change in her employment role.)

c. he contends that "solicitors and barristers have taken substantial legal aid monies, put in virtually no work at all and contributed no real representation in forwarding their one size fits all, disability automatically equals deprivation of liberty, 'representation.' "

d. he is disappointed that the Court has "allowed this to happen." He describes having entered the court process "full of hope that the court or legal experts might be able to identify areas of AEL's care and support that were indeed a deprivation of liberty such that we could try and evolve and improve the care and support provided"; and "great sadness" that "the reality has been nothing of the sort and AEL is simply written off as being learning disabled and as such her liberty must automatically be being deprived."

e. he considers that it has "always been the case" that the Official Solicitor "has been not just hopeless but incompetent."

f. he denies Ms. Abu's description of their interactions in the current review process: "At no stage did I say or even infer that I would not engage in the process … nor did I try and compel Ms Adu in any way. It is surely self-evident that I am not in a position to be able to compel her to do anything."

25. JSL did file written submissions after the latest hearing. Over three pages he says that he received the relevant order on 2nd November (without mentioning Mr. Patel's e-mail 5 days earlier, or an e-mail from the Court providing an electronic copy of the order on 30th October); that he is "very disappointed and shocked that the court could instruct me to produce a position statement;" and that the earliest he could properly prepare the directed statement would be "when the current lockdown is finished dependent on what new regulations were in place and AEL's status."

26. In that submission JSL does however give an account of how the current pandemic has had an impact on AEL's day to day experience. He describes how AEL is classed as "in the vulnerable group of people most at risk of dying" and so:

> "The vast majority of her photos of reference (her main means of communication) have had to be withdrawn producing great anxiety leading to self-injurious behaviour. A situation made much worse…as she insists on being out in the community, has lost confidence in her walking and needs much greater levels of support. … additional support beyond one or two carers is essential to keep people away from her and sanitise any surface she may come into contact with. Because of the continuous need to sanitise the eczema on her hand is very bad and the worst it has ever been."

27. The Applicant Local Authority considers that AEL's current living arrangements are in her best interests and had anticipated that the "in so far as" format would again be adopted in its current application. However, in the light of "the stance taken by JSL since" and the position of the Official Solicitor, it now considers that determination of whether or not there is deprivation of liberty in AEL's living arrangements is required - without it, "this matter will continue to return to court in a manner which involves disproportionate use of public funds and does not serve AEL's best interests" (**ps para 27**). The Local Authority is particularly keen to establish a clear position ahead of the expected transition to new authorisation arrangements under the Liberty Protection Safeguards, currently due to be implemented in 2022.

28. The Local Authority has assessed AEL as needing 24-hour care and supervision, with 2:1 support for some activities in the community. In addition to her parents, two private carers have been consistently involved in AEL's care for some time, but she does not require sedation or restraint, and no assistive technology is used in her care arrangements. If the current level of care was not provided, AEL would be a danger to herself and others because she has no concept of road safety, is unable to alert others to her needs, and unable to manage her own nourishment or hygiene [**D19**].

29. The Local Authority contends that "the undisputed fact" that AEL is "never out of sight from her parents or carers to ensure her safety at all times" [**D16**] demonstrates constant supervision. It does not accept JSL's contention that "the principle" underlying his approach to care arrangements means either something less than continuous control, or that she is free to leave:

    a. in normal times those caring for AEL show exceptional patience in complying with AEL's demands but the outcome that AEL gets what she wants is ultimately the result of *their* decision to give her what she wants, rather than deriving from AEL objectively being at liberty to do whatever she pleases. AEL may be taken to McDonald's in the middle of the night if that is what she wishes but she does not have the freedom to remove herself permanently from care, to go out unaccompanied or without continuous supervision. (**ps 27/10/20 paras 23,24 & 25**) AEL's carers may choose to do as she wishes, but AEL's ability to live life as she desires is ultimately still subject to their control.

    b. plainly, AEL's wishes are not always not complied with, and other factors can outweigh her carers' desire to cater for her every preference: from March 2020,

AEL 'shielded' due to her vulnerability to Cocid-19 and was not able to access the community.

30. The Official Solicitor considers that JSL's stance "is not a defensible position" (**ps 28/10/20 para 14**). She assures him that a conclusion that care arrangements involve a deprivation of liberty is not a criticism of the care and support provided. "The principle" underlying JSL's approach to his daughter's care is no answer because

> "…restrictions have to be considered as a whole. AEL is under close supervision all day not because her safety is constantly compromised but because there is a risk at any moment that it could be. AEL is not 'free to leave… For completely understandable reasons, AEL would not be allowed to leave the home without the assistance of a carer or parent. And if neither a parent nor a carer were available to accompany her, she would not be allowed out for her own safety and well-being" (**ps 18/11/20 para 7**)

E. THE LAW

31. The Mental Capacity Act 2005 ("the Act") begins with a set of principles by which decisions made or acts done on behalf of a person who lacks capacity to make the decision or do the act for themselves must be guided. They include, at section1(6), the principle that:

> "before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

32. However, it is not sufficient simply to act in accordance with that principle. The Act makes specific provision in respect of acts or decisions which amount to deprivation of liberty. Deprivation of liberty is only permitted in three circumstances[1]:

    a. it is authorised by the Court of Protection by an order under section 16(2)(a) (which is the purpose of the current application);

    b. it is authorised under the procedures provided for in Schedule A1 (which relates only to deprivations in hospitals and in care homes, and therefore does not apply in the matter currently under consideration);

    c. it falls within section 4B.

33. Sections 4A and B of the Act were amendments inserted pursuant to the Mental Health Act 2007. They provide as follows:

> "**4A Restriction on deprivation of liberty**
>
> (1) This Act does not authorise any person ('D') to deprive any other person ('P') of his liberty.

[1] As identified by Lady Hale in *Cheshire West and Chester Council v. P and another* [2014] AC 896 at paragraph 8.

(2) But that is subject to –
    (a) the following provisions of this section, and
    (b) section 4B.
(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.
(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.
(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

4B Deprivation of liberty necessary for life-sustaining treatment etc.

(1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.
(2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.
(3) The second condition is that the deprivation of liberty –
    (a) is wholly or partly for the purpose of –
        (i) giving P life-sustaining treatment, or
        (ii) doing any vital act, or
    (b) consists wholly or partly of –
        (i) giving P life-sustaining treatment, or
        (ii) doing any vital act.
(4) The third condition is that the deprivation of liberty is necessary in order to –

    (a) give the life-sustaining treatment, or

    (b) do any vital act.

(5) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.

34. It is important to understand that that sections 4A and B do <u>not</u> provide a general, unrestricted authority to deprive a person of their liberty if that is considered necessary to maintain their safety. The three "conditions" must be fulfilled before it applies. So, section 4A sets out the statutory basis of authorisation to deprive someone of their liberty; and section 4B permits deprivation of liberty wholly or partly consisting of *limited* acts for *limited* purposes *whilst a decision is sought from the court*.

35. It follows from this statutory approach that, just because carers strive at all times to avoid restricting liberty unnecessarily, and even where carers are prepared to go to extraordinary lengths to do that, care arrangements *may* amount to a deprivation of liberty.

36. There is no statutory definition of 'deprivation of liberty.' Currently, the domestic understanding of the term derives from the Supreme Court decision in *Cheshire West and Chester Council v. P and another* [2014] AC 896. That decision was not unanimous,

which doubtless reflects the complexity of the issue, but the majority view expressed by Baroness Hale binds this Court and all parties to these proceedings.

37. The "essential character" of deprivation of liberty was a matter of agreement before the Supreme Court:

> "It is common ground that three components can be derived from [the Strasbourg authorities], as follows:
>
> (a) the objective component of confinement in a particular restricted place for a not negligible length of time;
>
> (b) the subjective component of lack of valid consent; and
>
> (c) the attribution of responsibility to the state."
>
> (**per Baroness Hale at paragraph 37)**

38. The underlying principle of determining when circumstances amount to a deprivation of liberty was then set out:

> ".. what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. *A gilded cage is still a cage*."
>
> (**per Baroness Hale at paragraph 46,** emphasis added)

39. An 'acid test' was then distilled: there is deprivation of liberty where a person

> "was under continuous supervision and control and was not free to leave."
>
> (**per Baroness Hale at paragraph 49**)

40. It is not relevant that that the care arrangements have a benevolent or beneficial purpose. For that very reason, a conclusion that a person's living arrangements amount to a deprivation of liberty does not of itself imply any criticism of persons who arrange and/or provide the care. Rather,

> "It is merely a recognition that human rights are for everyone, including the most disabled members of our community, and that those rights include the same right to liberty as has everyone else." (**per Baroness Hale at paragraph 1**)

and a reflection of "policy" that

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

deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests…. Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us." (**per Baroness Hale at paragraph 57**)

41. There has been judicial consideration of what it means to be "free to leave." In the Court of Appeal decision in *Birmingham City Council v. D* [2018] PTSR 1791 Sir James Munby P confirmed that

> "As I read her judgment (see paras 40–41), Baroness Hale DPSC was using "free to leave" in the sense I had described in *JE v DE* [2007] 2 FLR 1150, para 115:
>
> > 'The fundamental issue in this case … is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses …'

42. JSL has referred to three cases which he says are "most closely associated with AEL". There is limited usefulness in comparing facts of reported cases, since whether or not a deprivation of liberty exists is to be determined on the facts of each specific case and not by analogy. In any event, in my judgment, the three authorities on which JSL relies in truth do not assist him:

a. *W City Council v. L* [2015] EWCOP 20:

> Mrs. L continued to live in the home where she had lived before she lost capacity. Bodey J identified (at paragraph 8) the facts relied on for considering that her care arrangements amounted to a deprivation of Mrs L's liberty as that:
>
> > (a) the garden gate is kept shut, thereby preventing or deterring her from leaving the property unless escorted;
> >
> > (b) door sensors are activated at night, so that Mrs L could and would be escorted home if she left; and
> >
> > (c) that there might be circumstances in an emergency, say if the sensors failed to operate at night, when the front door of the flat might have to be locked on its mortice lock, which Mrs L cannot operate (as distinct from the Yale lock, which she can). She would then be confined to her flat;
>
> and noted (at paragraph 14) acceptance even by the applicant that there are periods of the day when Mrs L was left to her own devices. Carers' visits three times a day were described (at paragraph 26) as "the minimum necessary for her safety and wellbeing, being largely concerned to ensure that she is eating, taking liquids and coping generally in other respects." Bodey J concluded that the restrictions in place "are not continuous or complete. Mrs L has ample time to spend as she wishes."

Mrs. L's arrangements are markedly different to AEL's. There is no factual basis for contending that the same conclusions should also be drawn in respect of AEL.

b. *Bournemouth BC v PS & DS* [2015] EWCOP 39:

Mostyn J identified (at paragraph 14) that the subject of the proceedings, Ben, had some privacy, including periods of free unsupervised access to all parts of the bungalow where he lived and the garden; and (at paragraph 33) that "he is free to leave. Were he to do so his carers would seek to persuade him to return but such persuasion would not cross the line into coercion."

At paragraph 16 there is reference to a social worker acknowledging that "[i]f Ben was unescorted in the community it is highly likely he would walk out into the road…" and so he is escorted and "staff would intervene should he put himself at risk of significant harm." In the following paragraph Mostyn J noted that the social worker "accepted under cross-examination that such an act of humanity could not amount to a deprivation of liberty, and I emphatically agree." It may be that JSL is particularly focussed on this vignette.

However, care arrangements must be considered as a whole package. The "act of humanity" vignette in the context of the wider arrangements for Ben is clearly different to "the principle" which JSL says underlies AEL's care. The supervision and control of the activities which AEL is permitted to choose is more generalised than a response to immediate danger, as is seen clearly in JSL's account of the difficulties which the covid pandemic have brought for AEL. Again, there is no factual basis for contending that the *Bournemouth BC v PS & DS* conclusions should also be drawn in respect of AEL.

c. *Rochdale MBC v. KW* [2014] EWCOP 45:

The third case relied upon by JSL was a first instance decision of Mostyn J which was overturned by the Court of Appeal. The appeal was allowed by consent, with a statement of reasons attached to the approved order recording that

> 'The reason for inviting the Court of Appeal to allow the appeal by consent is that the learned judge erred in law in holding that there was not a deprivation of liberty. He was bound by the decision of the Supreme Court in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and others* [2014] UKSC 19, [2014] AC 986 ('*Cheshire West*') to the effect that a person is deprived of their liberty in circumstances in which they are placed by the State in a limited place from which they are not free to leave. It is accepted by both parties on facts which are agreed that this was the position in the case of KW.'

In a subsequent judgment reported at [2015] EWCA Civ 1054, following Mostyn J's second consideration of the matter, the Court of Appeal confirmed (at paragraph 31) that the Supreme Court had settled the question of what amounts to deprivation

of liberty and accordingly Mostyn J's analysis "was, and could be, of no legal effect. It was irrelevant."

43. Additionally, I have considered *A Local Authority v. AB* [2020] EWCOP 39 - a recent decision by Sir Mark Hedley concerning a 36-year-old woman living in a supported living placement. She was subject to Guardianship Order under s7 of the Mental Health Act 1983 which meant that she was not 'free to leave' the placement, so the dispute was limited to whether or not her care arrangements amounted to continuous supervision and control. It was noted (at paragraph 10) that AB

> "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 placement…There is extensive support available to her but it is support for her to take up or not as she pleases. …[Staff] have access to her property whenever they think fit."

Nonetheless, Sir Mark Hedley concluded that AB was subject to deprivation of her liberty:

> "14. 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…
>
> 15. When looking at 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."

F. DISCUSSION

44. AEL's living arrangements in her parents' home have been sustained now for several years. The particular circumstances of the covid-19 pandemic bring additional pressures to be coped with, perhaps more so for this family than for most, but it is common ground that current arrangements are in AEL's best interests and should continue. To date JSL has amply demonstrated a fierce devotion to his daughter's wellbeing, and I have no doubt that he will continue to do so. However, it is not his good intentions and achievements which determine the issue now before the Court.

45. At times JSL's actions have been experienced by others with a role in AEL's wellbeing, as hostile and obstructive. It is perhaps incumbent on professionals who choose to work in the field of incapacity to make some allowances but they should not be subjected to accusations of professional incompetence without good reason. In the proceedings before me, I have seen no grounds at all for making such accusations. Fortunately, it is not JSL's opinion of those who seek to give effect to legal requirements, or indeed his view of the law itself, which determines the issue either.

46. The law is now settled, and the facts of AEL's care arrangements are not in dispute. Viewed objectively, the key aspects of AEL's experience are that:

    a. she requires, and is given, 24-hour care and supervision - she is never "left to her own devices" but is accompanied by carers at all times; and

    b. although she is regularly given the opportunity to make choices, and carers generally strive to facilitate realisation of her choices, there is an acknowledged limit to AEL's ability to do what she wants – ultimately, all the activities she undertakes are risk assessed by AEL's parents and/or carers (**H4**) and "the principle" of such assessment is that they may decide <u>not</u> to allow her to do anything which <u>they</u> consider could compromise her safety.

47. In my judgment, these two aspects of AEL's living arrangements clearly amount to "continuous supervision and control." Even if carers are available and willing to take AEL to McDonald's at whatever hour she wishes, she is not "free to leave" their care. The reality of her disabilities is that AEL's safety is permanently at risk unless she has support. Therefore, she has 24-hour support and she is thereby under continuous control in the sense that her freedom may be interfered with at any moment. The intention may be benevolent; the arrangements may indeed ensure that she has a much happier, healthier and longer life than she would otherwise have; but "a gilded cage is still a cage." The 'acid test' of deprivation of liberty is made out.

48. JSL contends that "the principle" by which AEL's care is delivered is permitted by the Mental Capacity Act 2005. I understand him to be saying effectively that, when carers decline to facilitate AEL's choices because they consider that to do so would compromise her safety, this is within the scope of section 4B i.e. he interprets that provision effectively as a free-standing, unrestricted authority to deprive a person of freedom of action whenever a third party considers her safety is at risk, without any contemplation of seeking a decision from the court and much more generally than an immediate "act of humanity" intervention to prevent catastrophe. In my judgment, and with due acknowledgment of the fact that he is an unrepresented litigant, JSL's understanding of section 4B is wrong.

49. Looking at AEL's circumstances "in the round", I have regard to the "underlying principle" of *Cheshire West* - what it means to be deprived of liberty must be the same for everyone. Although I have not asked him, rhetorically I invite JSL to consider how he would categorise AEL's living arrangements and "the principle" if they were applied to him. I strongly suspect that he, and ordinary members of the public, would consider such arrangements to deprive them of their liberty.

50. Finally, like Sir Mark Hedley in *A Local Authority v. AB*, I have regard to the "policy" of *Cheshire West*. However benevolent AEL's carers, however much all relevant parties consider that the current arrangements for her care are in her best interests, AEL's disabilities make her vulnerable. If there is any room for doubt as to whether or not AEL's living arrangements are a deprivation of her liberty (which in my judgment there is not), as Baroness Hale identified, we should err on the side of caution. AEL should have the benefit of a periodic, independent check that arrangements continue to be in her best interests. Such requirement is not to stigmatise her or her loving family, but quite the opposite – to *ensure* recognition of her equal dignity and status as a human being.

G. CONCLUSIONS

51. All in all, I am in no doubt that AEL's current care arrangements amount to a deprivation of her liberty. I do not regard that as in any way a criticism of JSL or her other carers. I hope that they will draw some comfort from having that clearly stated in a published judgment, and work constructively within that determination going forwards.

52. On the basis of the evidence before me, which is undisputed, I am satisfied that the deprivation of liberty is a necessary corollary of care arrangements which are in AEL's best interests, and I authorise such for a review period of 12 months from the date of handing down this judgment, on the standard terms.

53. This judgment will be kept on the court file. A copy should also be kept with AEL's social service records. If there is no earlier change in the care plan or actual arrangements, I anticipate that the Applicant will make a review application no later than one month before expiry of the review period, using the procedure set out in Part 2 of Practice Direction 11A; and the review should be capable of completion on the papers.

54. I invite the parties to consider whether it is now appropriate for an agreed, named person to be appointed as Rule 1.2 representative for AEL for the purposes of monitoring arrangements during the period of the authorisation and for the review; and for the Official Solicitor's appointment as Litigation Friend to be discharged. If a suitable person is agreed and confirms their willingness to act, I will consider making such an order.

55. In the light of the history of this matter, for the first review after this judgment, that application (or any earlier application in this matter) should be referred to me for consideration.

HHJ Hilder

4th January 2021