Neutral Citation Number: [2017] EWCA Civ 31 Case No: C1/2015/3844

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Queen's Bench Division, Divisional Court
[2015] EWHC 2990
Lord Justice Gross and Mr Justice Charles

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/01/2017

Before :

LADY JUSTICE ARDEN
LORD JUSTICE MCFARLANE
and
MR JUSTICE CRANSTON

- -

Between :

The Queen on the Application of Ferreira	**Appellant**
- and -	
HM Senior Coroner for Inner South London	**Respondent**
King's College Hospital NHS Foundation Trust	**Interested Party**
The Intensive Care Society and the Faculty of Intensive Care Medicine	**1st Intervener**
Secretary of State for Health and Secretary of State for Justice	**2nd Intervener**

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Jenni Richards QC and Victoria Butler-Cole (instructed by **Bindmans LLP**) for the **Appellant**
Jonathan Hough QC (instructed by **London Borough of Southwark Legal Department**) for the **Respondent**
Kings College Hospital NHS Foundation Trust for the **Interested Party** did not attend
Alexander Ruck Keene (instructed by **Browne Jacobson LLP**) for the **1st Intervener**
Joanne Clement (instructed by **Government Legal Department**) for the **2nd Intervener**

Hearing dates : 13 to 14 December 2016

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Approved Judgment

LADY JUSTICE ARDEN:

SUMMARY

1. On 7 December 2013, Maria Ferreira, whom I shall call Maria and who had a severe mental impairment, died in an intensive care unit ("ICU") of King's College Hospital, London ("the hospital"). The Senior Coroner for London Inner South, Mr Andrew Harris, ("the coroner") is satisfied that there has to be an inquest into her death. By a written decision dated 23 January 2015, which is the subject of these judicial review proceedings, the coroner also decided that he did not need not to hold the inquest with a jury. On 29 October 2015, the Divisional Court (Gross LJ and Charles J) held that this decision was not open to judicial review and this appeal is from that decision.

2. A coroner is obliged to hold an inquest with a jury if a person dies in "state detention" for the purposes of the Coroners and Justice Act 2009 ("the CJA 2009"). The appellant is Maria's sister, Luisa Ferreira, whom I will call Luisa. She contends that, as a result of her hospital treatment, Maria had at the date of her death been deprived of her liberty for the purposes of Article 5 of the European Convention on Human Rights ("the Convention") and that accordingly Maria was in "state detention" when she died.

3. Article 5(1) of the Convention provides that, subject to six exceptions:

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

4. There is an exception for the lawful detention of persons of unsound mind as follows:

> (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;…

5. The appellant's principal argument on this appeal is that "state detention" includes, in the case of persons of unsound mind, the deprivation of liberty for the purposes of Article 5(1), and therefore the meaning given to deprivation of liberty for those purposes by the Supreme Court in the recent case of ***Surrey County Council v P***, ***Cheshire West and Chester Council v P*** [2014] UKSC 19, [2014] AC 896 ("***Cheshire West***") applies. I shall need to consider that decision in detail below but in summary the Supreme Court held that three individuals, who were of unsound mind due to their learning difficulties, had been deprived of their liberty as they were under continuous supervision and control in the placements (that is, with the families or care homes) arranged for them by their local authorities, and were not free to leave those placements. Thus the two components of an "acid test" which the Supreme Court formulated in that case for determining when a person of unsound mind was deprived of her liberty were satisfied. This was the case even though the individuals enjoyed activities outside their placements and were content with their situations, and the placements were in their best interests.

6. Section 5 of the Mental Capacity Act 2005 ("the MCA") enables a hospital to give treatment to a person who, like Maria, lacks capacity to consent to it where the treatment is in the patient's best interests. However a hospital may not give treatment which deprives a patient who is unable to give consent of their liberty without an order of the court or the appropriate authorisation under schedule A1 to the MCA: see section 4A of the MCA. It is common ground that the hospital could if needs be have used the procedure in schedule A1. This includes a form of "urgent authorisation". It requires the treating hospital to complete a quantity of paperwork. The authorisation can last for a maximum of 14 days, which may be adequate in most cases of patients in ICUs.

7. The hospital did not seek any authorisation for treating Maria at any time. Section 4B of the MCA also gives authority to deprive a person of her liberty in order to give life-sustaining treatment but this applies only where there is a pending application to the Court of Protection.

8. The Intensive Care Society and Faculty of Intensive Care Medicine (together "the ICS/FICM"), interveners, have filed a detailed witness statement by Dr Daniele Bryden, a consultant in intensive care medicine at Sheffield Teaching Hospital NHS Trust, about the potential impact of a need to seek authorisation for a deprivation of a patient's liberty when the patient is in intensive case. This evidence is not challenged. Dr Bryden states that obtaining authorisation for a deprivation of liberty would divert medical staff in an ICU from caring for the patients. In any event, the vast majority of patients will be physically unable to leave because of their condition and because of the difficulty of withdrawing their treatment to enable them to leave safely. I have summarised Dr Bryden's evidence in the Appendix to this judgment.

9. Following the decision in *Cheshire West*, the Law Society at the request of the Department of Health published *Deprivation of Liberty: A Practical Guide* (April 2015) giving guidance on the meaning of deprivation of liberty of a person with a mental disorder. Further important guidance has been issued by the Chief Coroner (see *Chief Coroner's Guidance No 16 on Deprivation of Liberty Safegaurds* (2014)) and the ICS (*Deprivation of Liberty in Intensive Care* (2014)). The Scottish Law Commission published a report on deprivation of liberty in the context of persons without capacity in October 2014 (*Report on Adults with Incapacity* (Scots Law Com no 240)), and the Law Commission of England and Wales is engaged on preparing a report on mental capacity and deprivation of liberty (see *Mental Capacity and Deprivation of Liberty Interim Statement* (May 2016)). While fully respecting the value of this guidance and work as regards the practical implications of the decision in *Cheshire West*, this judgment is concerned with a point of law on which I must form my own view, and in all the circumstances it is not necessary for me to summarise this guidance.

Summary of my conclusion

10. In my judgment, the coroner's decision was correct in law. Applying Strasbourg case law, Maria was not deprived of her liberty at the date of her death because she was being treated for a physical illness and her treatment was that which it appeared to all intents would have been administered to a person who did not have her mental impairment. She was physically restricted in her movements by her physical infirmities and by the treatment she received (which for example included sedation)

but the root cause of any loss of liberty was her physical condition, not any restrictions imposed by the hospital. The relevant Strasbourg case law applying in this case is limited to that explaining the exception in Article 5(1)(e), on which the Supreme Court relied in *Cheshire West*, and accordingly this Court is not bound by that decision to apply the meaning of deprivation of liberty for which that decision is authority.

11. If I am wrong on this point, I conclude that the second part of the "acid test", namely that Maria was not free to leave, would not have been satisfied.

12. Even if I am wrong on all these points, I would hold that as this is not a case in which Parliament requires the courts to apply the jurisprudence of the European Court of Human Rights ("the Strasbourg Court") when interpreting the words "state detention" in the CJA 2009, and that a death in intensive care is not, in the absence of some special circumstance, a death in "state detention" for the purposes of the CJA 2009. There is no Convention right to have an inquest held with a jury. There is no jurisprudence of the Strasbourg Court which concludes that medical treatment can constitute the deprivation of a person's liberty for Article 5 purposes. The view that it is a deprivation of liberty would appear to be unrealistic. We have moreover not been given any adequate policy reason why Parliament would have provided that the death of a person in intensive care of itself should result in an inquest with a jury. That result would be costly in terms of human and financial resources.

Plan of this judgment

13. I shall set out the background by outlining the key events relating to Maria's death, identifying the relevant legislation concerning the circumstances in which a coroner must hold an inquest with a jury and summarising the relevant part of the decision of the coroner in this case not to hold an inquest with a jury.

14. I will then examine the important judgments in issue in this case: the decision of the Supreme Court in *Cheshire West*, and that of the Divisional Court in this case.

15. Then I will turn to the submissions (as far as relevant to the resolution of this appeal) of the parties and the interveners, namely the Secretary of State for Justice and the Secretary of State for Health ("the Secretaries of State") and ICS/FICM. The King's College Hospital NHS Foundation Trust has been served with these proceedings but it has played no part in this appeal.

16. Under the heading "Discussion", I will set out the reasons for my conclusions in more detail.

BACKGROUND

Key events relating to Maria's death

17. I need only outline the background here as further details are available in the judgments of the Divisional Court.

18. Maria had Down's syndrome and learning difficulties. She was confined to a wheelchair. She lived with Luisa and her parents. There were no formal arrangements for her care.

19. It is common ground that Maria was of unsound mind for the purposes of Article 5. For a person to be "of unsound mind" (in the old-fashioned terminology of the Convention) for those purposes, three conditions must be fulfilled: the patient must be "reliably" shown by objective medical expertise to be of "unsound mind"; (ii) the disorder must be of a nature to justify detention; and (iii) the disorder must persist throughout the period in which the patient is detained (*Winterwerp v Netherlands* (1979) EHHR 387).

20. On their doctor's advice, Luisa took Maria to hospital on 19 November 2013 with breathing difficulties. On admission she was treated for pneumonia and heart problems. She was in unfamiliar surroundings and disliked medical tests. Her condition improved and arrangements were made for her discharge subject to certain checks being completed.

21. In the course of the checks, Maria's condition worsened and she was admitted to an intensive care unit. She was intubated and sedated. She had a mitt placed on one of her hands to prevent removal of the tube, but she was still able to remove the tube.

22. Removal of the tube by Maria led to cardiac arrest, and Maria died shortly thereafter.

23. The coroner decided that there had to be an inquest. The next question is whether section 7 of the CJA 2009 required him to hold the inquest with a jury.

Inquest with a jury: relevant statutory provisions

24. Section 7 of the CJA 2009 provides:

> **7 Whether jury required**
>
> (1) An inquest into a death must be held without a jury unless subsection (2) or (3) applies.
>
> (2) An inquest into a death must be held with a jury if the senior coroner has reason to suspect (a) that the deceased died while in custody or otherwise in state detention, and that either
>
> (i) the death was a violent or unnatural one, or
>
> (ii) the cause of death is unknown . . .
>
> (3) An inquest into a death may be held with a jury if the senior coroner thinks that there is sufficient reason for doing so.

25. The critical words are "or otherwise in state detention". Section 48(2) defines where a death occurs in state detention:

> **48 Interpretation: general**
>
> (1) In this Part, unless the context otherwise requires . . . state detention has the meaning given by subsection (2); . . .

> (2) A person is in state detention if he or she is compulsorily detained by a public authority within the meaning of section 6 of the Human Rights Act 1998.

26. The hospital was a public authority within the meaning of section 48(2) so the only question is whether in the ICU Maria was "compulsorily detained".

27. By using the words "reason to suspect", section 7(2) imposes a low threshold for holding an inquest with a jury. "Reason to suspect" does not mean *prima facie* proof. "'Suspicion' is the state of conjecture in which obtaining a *prima facie* proof is the end" (see *Hussein v Chong Fook Kam* [1970] AC 942).

28. In order for the coroner's decision to be successfully reviewed, the appellant must show that the coroner's decision was perverse, or that the coroner misdirected himself in law on some material matter: *(R(Touche)) Inner London North Coroner* [2001] QB 1206 at [16].

Coroner's decision on Maria's inquest: no requirement for a jury

29. The coroner expressed his reasons for concluding that he was not bound to hold an inquest with a jury as follows:

> It is therefore necessary to consider the status of Ms Ferreira at the time of death. The following features should be noted:
>
> (i) [Feature 1] An authorization for deprivation of liberty under the MCA was not obtained, nor was she admitted under the Mental Health Act 1983. There is no evidence that any public authority took any formal step to put her under detention or take away her liberty.
>
> (ii) [Feature 2] Ms Ferreira was voluntarily admitted to hospital and consented to treatment. It seems likely that she later lacked capacity to consent to at least some of the treatment, but this itself does not mean that she was compulsorily detained at the time of her death.
>
> (iii) [Feature 3] There was an indication from medical staff that, in her own interest, she should stay in hospital for clinical investigations in reply to her sister's request that she should go home. However, as far as I can see, clinical advice was accepted and there was no firm refusal to leave.
>
> (iv) [Feature 4] From the night of 2nd/3rd December she required constant lifesaving treatment and constant observation for medical reasons, being sedated and intubated. There was no question of her leaving the hospital, but that was because of her condition rather than use of coercive powers by the hospital.

> (v) [Feature 5] The use of restraint mittens was to prevent her from extubating herself and not to prevent her from leaving hospital. I understand that it was approved by her sister.
>
> [Conclusion]
>
> In all the circumstances, I do not find reason to suspect that Ms Ferreira was in state detention. She had not been expressly prevented or prohibited from leaving a specified place. She had not been formally deprived of her liberty by authorization, nor detained under Mental Health Services.
>
> [words in square brackets added]

30. Feature 1 alludes to the guidance published by the Chief Coroner following *Cheshire West* that a person was not 'in state detention' for the purposes of the CJA 2009 until the deprivation of liberty had been authorised (Chief Coroner's Guidance No 16, *Deprivation of Life Safeguards,* revised 14 January 2016, para 66). It is common ground on this appeal that this guidance is not correct in law. If, therefore, the coroner followed paragraph 66, there would be an error of law in his decision. This is therefore a matter which I must consider when I come to the coroner's decision (see paragraphs 103 to 105 below).

TWO IMPORTANT JUDGMENTS IN ISSUE ON THIS APPEAL

1. Supreme Court's decision in *Cheshire West*

31. *Cheshire West* is the leading case in this jurisdiction on deprivation of liberty within the meaning of Article 5. I shall need to look at it at some length. *Cheshire West* decides that where a person is cared for in a setting from which she would for her personal safety's sake not be permitted to leave on her own if she wished to do so, that person is deprived of her liberty for Article 5 purposes. Article 5(4) provides that a person who is deprived of her liberty by detention must be entitled to take proceedings for the speedy determination by a court of the lawfulness of her detention. So it followed in *Cheshire West* that there had to be reviews of the placements in issue to ensure that the deprivation of liberty remained in the individual's best interests. The relevant domestic legislation is the MCA, and section 64(5) of the MCA provides that in that Act "references to deprivation of a person's liberty have the same meaning as in Article 5(1)" of the Convention.

32. In *Cheshire West*, the dispute was about the living arrangements which the local authority had made for adults with mental disabilities. There was no question of their leaving their placements on their own because they would not have been able to cope with doing so.

33. In the first judgment, Lady Hale DPSC, with whom Lord Sumption JSC agreed, makes the point that, if the deprivation of liberty in that case does not have to be authorised, there is no independent check on whether the arrangements are in the best interests of the person involved.

34. Lady Hale emphasises that human rights are for everyone, including those with mental disabilities (paragraphs 1, 36 and 45). Lady Hale analysed *HL v UK (*2004) 40 EHRR 761, and traced the history of the relevant legislation. Lady Hale returns to this point at paragraph 36, stating the point that human rights are universal and citing the UN Convention on the Rights of Persons with Disabilities ("CRPD"), from which the Strasbourg Court had deduced that there was a European and worldwide consensus that people with disabilities must be protected from discriminatory treatment (*Glor v Switzerland*, App no 13444/04). (Consensus on a particular approach to human rights across the Convention states is often used by the Strasbourg Court for upholding a right).

35. Lady Hale defined the issue that arose in Cheshire West in the following terms:

> **[32]** The Strasbourg case law, therefore, is clear in some respects but not in others. The court has not so far dealt with a case combining the following features of the cases before us: (a) a person who lacks both legal and factual capacity to decide upon his or her own placement but who has not evinced dissatisfaction with or objection to it; (b) a placement, not in a hospital or social care home, but in a small group or domestic setting which is as close as possible to 'normal' home life; and (c) the initial authorisation of that placement by a court as being in the best interests of the person concerned. The issue, of course, is whether that authorisation can continue indefinitely or whether there must be some periodic independent check upon whether the placements made are in the best interests of the people concerned.

36. At paragraph 37, Lady Hale held that there are three components of a deprivation of liberty for Article 5 purposes, namely:

> (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. Components (b) and (c) are not in issue here, but component (a) is.

37. Lady Hale held that in Strasbourg jurisprudence, the context of the measures was relevant but the following factors were not relevant: the fact that the confinement was imposed in the best interests of the person concerned, the fact that she did not object or was compliant, the relative normality of the care arrangements and the reason or purpose of the confinement (paragraphs 42, 43 and 50).

38. Lady Hale held people with disabilities must have the same rights as others and that included the right not to be deprived of one's liberty. Moreover, the meaning of deprivation of liberty must be the same for everyone. The fact that the arrangements

are comfortable and make the life of the person concerned enjoyable makes no difference. She held:

> **[46]** Those rights include the right to physical liberty, which is guaranteed by art 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty. But, as it seems to me, 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.

39. Lady Hale formulated what she described as the "acid test" for determining whether someone is deprived of their liberty. She held:

> **[48]** So is there an acid test for the deprivation of liberty in these cases? I entirely sympathise with the desire of Munby LJ to produce such a test …
>
> P, MIG and MEG are, for perfectly understandable reasons, not free to go *anywhere* without permission and close supervision. So what are the particular features of their 'concrete situation' on which we need to focus?
>
> **[49]** The answer, as it seems to me, lies in those features which have consistently been regarded as 'key' in the jurisprudence which started with *HL v UK* (2004) 40 EHRR 761: that the person concerned 'was under continuous supervision and control and was not free to leave' (para 91). I would not go so far as Mr Gordon, who argues that the supervision and control is relevant only in so far as it demonstrates that the person is not free to leave. A person might be under constant supervision and control but still be free to leave should he express the desire so to do. Conversely, it is possible to imagine 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. Indeed, that could be the explanation for the doubts expressed in *Haidn v Germany*.

40. Lady Hale held that on the facts the persons concerned in that case were not free to leave and in all the circumstances had been deprived of their liberty.

41. Lady Hale concluded with the following observations:

> ***Policy***
> **[57]** 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. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the deprivation of liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). 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.

42. Lord Neuberger PSC and Lord Kerr JSC gave short concurring judgments agreeing with Lady Hale. Lord Neuberger set out a useful list of the factors that divided the minority judgment from those of the majority. Those points included the fact that the regime was no more intrusive or confining than is required for the protection or well-being of the person concerned.

43. Lord Neuberger also observed that in *Austin v UK* (2012) 55 EHRR 359 the Grand Chamber of the Strasbourg Court made it clear:

> that the fact that "the object is to protect, treat or care in some way for the person taken into confinement" 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 …" To the same effect, the Grand Chamber said in *Creanga v Romania* (2012) 56 EHRR 361, para 93 that "the purpose of measures by the authorities depriving applicants of their liberty no longer appears decisive for the court's assessment of whether there has in fact been a deprivation of liberty", on the basis that the purpose is to be taken "into account only at a later stage of its analysis, when examining the compatibility of the measure with article 5.1 …"

44. In his concurring judgment, Lord Kerr emphasised the objective approach to deprivation of liberty:

> **[76]** While there is a subjective element in the exercise of ascertaining whether one's liberty has been restricted, this is to be determined primarily on an objective basis. … Liberty means the state or condition of being free from external constraint. It is predominantly an objective state. It does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity.

45. Lord Kerr recognised the inevitability of restraints in some situations:

> **[79]** Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable – curtailment of their liberty but this is a condition common to all children of tender age.

46. Lord Carnwath and Lord Hodge JJSC gave a joint dissenting judgment. They held that the Strasbourg Court dealt with the question of deprivation of liberty on a case-specific basis (paragraph 94). They did not consider that the Strasbourg jurisprudence provided sufficient support for Lady Hale's acid test. Lord Clarke JSC agreed with them and held in addition that there was no basis for interfering with the judgments of the trial judges in those cases.

2. Judgments of Gross LJ and Charles J in the Divisional Court

47. Both members of the Divisional Court concluded that there was no reviewable error in the coroner's decision but their reasons were different. The "watershed" issue which divided them was the correct approach to the meaning of "state detention". In essence, Gross LJ considered that there was little difference between compulsory detention for the purposes of section 48(2) of the CJA 2009 and a deprivation of liberty for the purposes of Article 5, but that the situation in the present case was distinguishable from that in *Cheshire West*. By contrast (again in brief), Charles J considered that meaning had to be attached to the term "compulsorily" in section 48(2), that that word meant a third party had to make a decision which was inconsistent with a person's freedom of choice, and that a person in Maria's position could not be said to be compulsorily detained.

48. Gross LJ considered that it was difficult to think of situations where a person has been unlawfully detained that would not also be compulsory detention ([72]). However, he did not consider that Lady Hale's acid test would lead to the conclusion that in general patients in ICUs should be treated as subject to a deprivation of their liberty. He held (at [76]):

> …any such extension would be mechanistic, unwarranted and divorced from the mischief *Cheshire West* was seeking to address.

49. Gross LJ gave four reasons for rejecting the conclusion that patients in ICUs were deprived of their liberty:

    i) The conclusion would apply to persons who had capacity prior to their illness, and not just those of unsound mind.

    ii) It would break new ground as the Strasbourg Court had not considered any case where a person of unsound mind was treated for a physical illness.

    iii) The practical consequences would be significant in the terms of an increased number of inquests and extra work imposed on ICUs.

iv) The conclusion appeared to overlook the fact that a person of unsound mind could be treated on a best interests basis without being deprived of their liberty.

50. Moreover, in the judgment of Gross LJ, it would be contrary to the common sense approach adopted by Lord Taylor LCJ in In *R v Inner London Coroner ex parte Linnane* [1989] 1 WLR 395 at 400 to conclude that Maria was in state detention when she died. The imposition of a requirement to seek authorisation would be damaging to the therapeutic relationship. There was no purpose in asking hypothetically what the response of the hospital would have been if Luisa had sought to remove Maria from the hospital when she was in the ICU. Accordingly, there had been no deprivation of Maria's liberty and she had not been compulsorily detained at the date of her death. The coroner was entitled to conclude as he did.

51. Charles J agreed with the outcome but did so by finding significance in the statutory requirement for a person to be "compulsorily" detained, rather than relying on the Strasbourg jurisprudence on deprivation of authority. He concluded:

> 127. So, in my view, the use by Parliament of the word compulsorily in the definition of state detention in the CJA 2009 is not redundant or merely reflective of an objectively assessed article 5 detention in which a consent given by or on behalf of the relevant person is irrelevant. This is because the use of that word recognises and reflects the points that: (i) the subjective element is relevant to the question whether the state's obligation under article 5.1 arises and so to the determination of whether a person is deprived of his liberty within the meaning of article 5.1; (ii) on an objective assessment: (a) some detentions within article 5 (and more generally) are compulsory in its primary sense that they are imposed in a way that overrides the relevant persons informed freedom of choice, and (b) some detentions are not because they are based on a consent or substituted consent of the relevant person (and so decisions made by or on behalf of, or to promote the interests of, that person); and (iii) when the subjective element is taken into account some of the objective non-compulsory detentions referred to in sub-paragraph (ii)(b) will give rise to an article 5 detention and others will not.

52. Applying this reasoning, Charles J concluded that a person in Maria's position could not be said to be "compulsorily detained":

> 128. As a matter of the ordinary use of language on the assumption that all of the following are on the correct application of Cheshire West objective detentions within article 5 none of them fit with the primary meaning of the words "compulsory article 5 detention":
>
> (i) deprivation of liberty (detention) that is founded on a need for physical treatment that the patient cannot give consent to,

> because it is based on the perceived need for the concrete situation on the ground rather than its imposition by another,
>
> (ii) a lawful deprivation of liberty (detention) that is founded on a substituted decision made on behalf of and in the best interests of a person who lacks capacity because it has a consensual rather than an imposed base, even if there is no real choice after the possible choices have been properly considered and decisions have been made on their availability…

SUBMISSIONS OF THE PARTIES AND THE INTERVENERS

Principal submissions of the Appellant

53. The principal submission of Ms Jenni Richards QC, for the appellant, is that the test in *Cheshire West* for deprivation of liberty must apply as regards Maria's treatment in the hospital, especially while she was in intensive care. She was under the continuous control and supervision of the hospital. She was unable to leave the hospital. For example, she was under heavy sedation for much of the time. She would also have been unable to leave while she was intubated and dependent on artificial ventilation.

54. Ms Richards' principal criticism of the decision of the coroner and of the Divisional Court is that they failed to recognise that the acid test was applicable and should have been applied.

55. Ms Richards submits that, as the *Cheshire West* test applies, it is irrelevant that the hospital were acting or believed that they were acting in Maria's best interests.

56. Ms Richards submits that it was also irrelevant that Maria did not try to leave. The question of whether authorisation is needed cannot be dependent on a person's ability to vocalise, still less be dependent on whether she has a loving family member who is regularly in attendance at the ICU or on her physical ability. While the requirement for continuous supervision and control requires positive acts, the requirement for freedom to leave does not do so. A person who is acquiescent cannot be in a different position from a person who is not. This Court should adopt the realistic approach of Lord Steyn in *R v. Bournewood Community and Mental Health NHS Trust ex parte L* [1999] AC 458 at 495 (where the unsuccessful party was later the successful applicant in *HL v UK*, to which Lady Hale referred). Lord Steyn held:

> Counsel for the trust and the Secretary of State argued that L. was in truth always free not to go to the hospital and subsequently to leave the hospital. This argument stretches credulity to breaking point. The truth is that for entirely bona fide reasons, conceived in the best interests of L., any possible resistance by him was overcome by sedation, by taking him to hospital, and by close supervision of him in hospital. And, if L. had shown any sign of wanting to leave, he would have been firmly discouraged by staff and, if necessary, physically

> prevented from doing so. The suggestion that L. was free to go is a fairy tale.

57. Likewise, submits Ms Richards, any argument based on lack of state resources or on practicality for not accepting that she was deprived of her liberty was irrelevant and should be disregarded.

58. Ms Richards criticises the features noted by the coroner in his decision, particularly feature 2. She submits that Maria could not have consented to her admission to the hospital. Ms Richards submits that the coroner could not reasonably or lawfully conclude that Maria was not in state detention.

59. Ms Richards also criticises the decision of the Divisional Court for not applying *Cheshire West*. The Divisional Court was wrong to distinguish *Cheshire West* on the basis that the mischief it sought to address was not present. It should also have asked the hypothetical question of what would have happened had the person in an ICU tried to leave. The reasons for the treatment in the ICU were irrelevant. The impact on resources, to which Gross LJ referred was also not relevant.

60. Ms Richards does not address the interpretation of the CJA beyond submitting that it is to be interpreted consistently with the acid test established in *Cheshire West*.

Principal submissions of the Coroner

61. Mr Jonathan Hough QC, for the coroner, invites this Court to follow the analysis of Gross LJ in the Divisional Court. *Cheshire West* is distinguishable because it is focused on living arrangements and on whether the care arrangements deprived the individuals of their liberty. As Maria was in an ICU, it would be a misuse of language to say that she was deprived of her liberty. She was simply being treated on a best interests basis, which does not mean that there was a deprivation of liberty.

62. On statutory interpretation, Mr Hough submits that there is a partial overlap between "state detention" under section 48(2) of the CJA 2009 and deprivation of liberty under Article 5. "Compulsorily detained" means to be confined with coercion and without being free to leave. As Gross LJ held (Judgment, [68]), the statutory history suggests that the purpose was to break down distinctions between different types of state custody. A single term was used to bring together detention in prison, detention by the police and detention in an immigration detention centre. However, section 48(2) is not expressly linked to or made synonymous with deprivation of liberty under Article 5. Moreover, submits Mr Hough, there is no logical connection between Article 5 and the holding of an inquest with a jury.

63. Moreover, the statutory test of compulsory detention must be applied with common sense: *Linnane*, cited by Gross LJ (see paragraph 50 above). Maria was not deprived of liberty on the basis of Strasbourg jurisprudence. She could be treated without a deprivation of liberty. State detention should be considered in the common sense manner. So in *Linnane* where the question was whether it was reasonable to suspect that a person, who had started to serve his sentence in a police cell, was in police

custody when he was taken from his cell to a hospital, the court concentrated on a common sense view.

64. On Article 5, Mr Hough submits that it is not enough, in the case of a deprivation of liberty for the purpose of treatment whether in a general hospital or ICU, that a person of unsound mind would hypothetically be stopped from leaving if she chooses to do so, for the following reasons:

    i) Strasbourg jurisprudence holds that "implementation" of the measures which have the effect of taking away a person's liberty is a relevant factor.

    ii) A conclusion that Article 5 is violated does not promote the purpose of that Article. Its aim is to prevent a person from being deprived of liberty with proper safeguards before the person is deprived of their liberty. It would not occur to any clinician to think that there was a loss of liberty in this situation.

    iii) As Gross LJ held, a ruling in the appellant's favour would have extraordinary consequences. If the person were not of unsound mind, the exception in Article 5(1)(e) would not apply and the MCA would not apply.

    iv) As the evidence of Dr Bryden and also the post-Cheshire West guidance of the ICS shows, the hypothetical test requires clinicians to ask questions which could be detrimental to the patient-doctor relationship. If clinicians consider there will be risk of a deprivation of liberty, they can seek a precautionary order.

65. On the facts, Mr Hough submits that, in the case of Maria, Luisa accepted the doctor's advice that Maria should remain in hospital on 26 November. The hospital was also arranging for her discharge. As Mr Richard Hammond, Learning Disabilities Coordinator, said in his report of 4 June 2014 to the coroner, Luisa wanted Maria to leave as soon as it was safe. The doctors did not intend to keep her confined or to impose a regime of deprivation. That, he submits, was simply Luisa's perception.

66. Drawing the threads together, Mr Hough submits that, as was common ground, the appeal can only succeed if there is reason to suspect that Maria was in state detention. He submits that there was no error in the coroner's decision that there was no such reason.

Submissions of the Secretaries of State for Justice and Health (interveners)

67. Ms Joanne Clement, for the Secretaries of State for Justice and Health, also invites this Court to uphold the approach taken by Gross LJ in the Divisional Court.

68. Ms Clement submits that Artile 5(1) (e) applies only to persons of unsound mind. In the view of the Secretary of State for Health, (i) a person who is unconscious with a disorder of consciousness, (ii) a person with a brain injury (with no accompanying mental disorder); and (iii) a temporarily unconscious person are not persons of

unsound mind within the meaning of Article 5(1)(e). Ms Clement submits that it follows that, if individuals with these characteristics in a hospital setting are deprived of their liberty, there is no lawful basis for justifying any such deprivation. Ms Clement submits that it would be absurd if the state could not lawfully provide treatment and care, if it were to amount to a deprivation of liberty, to those of sound mind in intensive care. She submits that this strongly suggests that the state is not depriving persons in an intensive care setting of their liberty at all.

69. Ms Clement also submits that *Cheshire West* should not be applied in the ICU context because:

i) The ratio is directed at long-term social care settings.

ii) The policy justification put forward by Lady Hale does not apply here. There is simply no need for independent reviews, and it is unnecessary to approach deprivation of liberty through Article 5 (1) (e).

iii) The appellant's approach results in discrimination against those without mental disabilities. In lifesaving care, the approach should be the same.

iv) There are serious practical resource consequences. The Secretaries of State consider that, after Cheshire West, there was a ten-fold increase against forecasts in applications for deprivation of liberty safeguards. Ms Clement properly accepts, however, that if Article 5 inevitably leads to the conclusion that a person is deprived of her liberty in the circumstances of this case, then the wider practical and administrative implications are irrelevant.

70. In short, Ms Clement submits that the law either does not require the hypothetical question whether the ICU would stop the patient from leaving to be asked or requires some active coercion. On either basis there would be no deprivation of liberty unless the clinician has taken a decision to prevent the patient from leaving.

Submissions of the ICS/FICM (interveners)

71. Mr Alexander Ruck Keene, for the ICS/FICM, in agreement with Mr Hough, submits that intensive care treatment is not the same as long-term social care. He emphasises the difficulties for clinicians in ICUs as a result of the present uncertainty in the profession as to the current state of the law. He submits on the basis of *Kasparov v Russia* (App No. 53659/07) that the Strasbourg jurisprudence under Article 5 is about coercion. I do not propose to pursue that submission as coercion can take many forms and must in any event have an extended meaning when applied to persons of unsound mind (see, for example, *HL v UK*), and the Strasbourg Court makes it clear in that case that there can be a deprivation of liberty minus direct physical restraint: para. 36 (v).

72. Mr Ruck Keene then makes submissions as to how the position of persons not of unsound mind might be resolved. He also requests this Court to give guidance on

what constitutes consent to treatment by a person of unsound mind and on what constitutes a non-negligible period of time, which, he submits, would on Strasbourg jurisprudence obviate the need for any authorisation for a deprivation of liberty in most cases in ICUs in the light of the evidence of Dr Bryden that the median length of stay is five days.

73. Mr Ruck Keene's request for guidance is supported by the Secretaries of State for Justice and Health. I am grateful for his submissions but agree with Ms Richards that it would not be appropriate for this Court to rule on Mr Ruck Keene's submissions on matters which do not arise in this case or are matters on which this Court does not have evidence or adequate argument.

MY ANALYSIS OF THE ISSUES

Essential issue on this appeal

74. As formulated by Ms Richards, the issue to be determined on this appeal is whether the coroner acted irrationally or misdirected himself when he decided that he had no reason to suspect that Maria had died in "state detention" for the purposes of the CJA 2009 and that accordingly he would hold the inquest into Maria's death without a jury. Essentially, however, the issue on this appeal is whether the coroner correctly directed himself on the question whether the treatment of a patient in intensive care would involve state detention for the purposes of the CJA 2009. I intend to focus on this question. The coroner's decision cannot stand if in law such treatment did deprive Maria of her liberty so that she was in state detention for the purposes of that Act. If she was not in state detention for the purposes of the CJA 2009, no question of the coroner being obliged to hold an inquest with a jury arises. There is no separate issue about the reasonableness of the coroner's decision which might found a sound basis for judicial review.

75. Lady Hale noted in *Cheshire West* that the Strasbourg Court had not yet considered the type of placements in issue in that case. The same point can be made about this case: counsel have not been able to find any case in which the Strasbourg Court has considered the type of hospital treatment in issue in this case save for an old admissibility decision in *Järvinen v Finland,* App No 30408/96, 15 January 1998, to which I refer at paragraph 92 below. That means that, in order to decide what Article 5 requires in this situation, this Court has to form its own view as to what the Strasbourg Court would hold in the light of other Strasbourg jurisprudence and any binding authority of, or guidance on the point given by, the Supreme Court.

Overlap between "state detention" and deprivation of liberty

76. The words "state detention" are used in the critical provisions of the CJA 2009. As explained in paragraph 47 above, Gross LJ and Charles J in the Divisional were of different views as to what these words meant. I prefer the view of Gross LJ. "State detention" is not a term taken from the Convention and need not bear exactly the same meaning as the expression "deprivation of liberty" in Strasbourg jurisprudence but given the common subject matter there is likely to be a substantial overlap.

77. As Gross LJ pointed out, and Mr Hough submits, the words "state detention" replace the terms such as police custody that Parliament used in predecessor legislation.

Moreover section 7 of the CJA 2009 was not designed to implement some Convention right: there is no Convention right to an inquest with a jury. If there had been, a court would be likely to apply a Convention-compliant meaning on the basis that Parliament is to be assumed to intend to give effect to its international law obligations. But that is not this case.

78. In a submission directed at giving the CJA a narrower effect than Article 5 in any event, Mr Hough submits that, for a person to be "compulsorily" detained within section 48(2), an organ of the state must have made a decision to detain that person. This submission informs his further submission that it is not necessary to ask the hypothetical second question required by Lady Hale's acid test (namely, was the person of unsound mind free to leave?). For my own part, I would not read the words "compulsorily detained" as so limited since the phrase "state detention" would exclude the case of a person who had been detained by mistake. As I see it, it would in that case be no answer to say that the decision-maker had not actually decided to detain the deceased. I would prefer to say that, at least to some extent, state detention overlaps with deprivation of liberty under Article 5. I have considered the thoughtful judgment of Charles J, but prefer the approach of Gross LJ to his approach because not all compulsory detentions are within Article 5: I shall explain this below. Moreover, in my judgment, the primary answer to this case is not, in my judgment, as Charles J held, to be found in section 48(2) of the CJA 2009 but in Article 5 for the reasons I shall now explain.

Identifying Strasbourg case law applicable to urgent medical care

79. Under Strasbourg jurisprudence, the test of deprivation of liberty is multifactorial. The Strasbourg Court does not apply a bright line test as to when a person is deprived of their liberty. Rather it looks to a number of factors, which include the "concrete situation", the identity of the person affected and a "whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question" (*Guzzardi v Italy* (1980) 3 EHRR 333, [92]). In *Guzzardi* itself, a person who had been served with a residence order requiring him to live in a particular part of an island (because he was suspected of being a member of the Mafia) was on the facts held to have been deprived of his liberty. The Strasbourg Court looks to the realities of the situation, and not the form.

80. A deprivation of liberty in general requires more than mere restrictions on movement. This follows from Article 2(3) of Protocol 4 to the Convention, which has not been ratified by the United Kingdom and is therefore not one of the Convention articles which have been given protection in domestic law by the Human Rights Act 1998. This sub-article limits "restrictions" on liberty of movement. The Strasbourg Court has thus held that, while Article 2(3) of Protocol 4 does not impose any requirement on the UK, mere restrictions on movement are outside Article 5 of the Convention. This is illustrated by *Austin v UK* (see paragraph 82 below). So not every interference with a person's liberty of movement involves a potential violation of Article 5.

81. The weaknesses in the appellant's analysis, in my judgment, are in (1) the assumption that, because Maria was of unsound mind for Convention purposes, any interference with her liberty had to be justified by complying with Article 5(1)(e); and (2) the contention that no regard could be had to the fact that the interference was considered to be in Maria's best interests. As I see it, a person whose liberty of movement has

been restricted may be found not to have been deprived of her liberty even though none of the exceptions in Article 5(1) apply and regard may be had to the purpose of the interference.

82. *Austin v UK* (referred to by Lord Neuberger in *Cheshire West*: see paragraph 43 above) is authority for these propositions. In that case, police had "kettled" (detained by encircling for a substantial period of time) a crowd of demonstrators who included persons believed to be potentially violent. The Grand Chamber of the Strasbourg Court had regard to the manner of implementation of the measure, which on the facts the police considered necessary to prevent a loss of control. It held that there was a restriction on movement only and no deprivation of liberty. It held:

> 57. As mentioned above, art 5(1) is not concerned with mere restrictions on liberty of movement, which are governed by art 2 of protocol no 4. In order to determine whether someone has been 'deprived of his liberty' within the meaning of art 5(1), 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. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance (see *Engel v Netherlands* [1976] EHCR 5100/71 (8 June 1976) at para 59; *Guzzardi v Italy* [1980] ECHR 7367/76 at paras 92–93; *Storck v Germany* [2005] ECHR 61603/00 at para 71; and also, more recently, *Medvedyev v France* (2010) 51 EHRR 899 at para 73).
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> 58. As Lord Walker pointed out (see para 37, above), the purpose behind the measure in question is not mentioned in the above judgments 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 art 5(1) (see, among many examples, *A v UK* (2009) 26 BHRC 1 at para 166, 19 February 2009; *Enhorn v Sweden* (2005) 19 BHRC 222 at para 33; *M v Germany* (2009) 28 BHRC 521). 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 (see *Storck v Germany* [2005] ECHR 61603/00 at paras 74–78, and the cases cited therein and, most recently, *Stanev v Bulgaria* [2012] ECHR 36760/06 at para 117; see also, as regards validity of consent, *Amuur v France* [1996] ECHR 19776/92 at para 48).

> 59. 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 (see *Engel v Netherlands* [1976] EHCR 5100/71 (8 June 1976) at para 59 and *Guzzardi v Italy* [1980] ECHR 7367/76 at para 92) enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell (see, for example, *Engel v Netherlands* [1976] EHCR 5100/71 (8 June 1976) at para 59; *Amuur v France* [1996] ECHR 19776/92 at para 43). 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. As the judges in the Court of Appeal and House of Lords observed, members of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match (see paras 35 and 37, above). The court does not consider that such commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to the minimum required for that purpose, can properly be described as 'deprivations of liberty' within the meaning of art 5(1).

83. Two matters follow from *Austin*: first, there are cases in which interference with a person's liberty can be justified and thus outside Article 5 even though it does not fall within one of the exceptions to Article 5, and second, in some cases, the purpose of the interference with a person's liberty of movement is relevant.

84. *Austin* also shows that, where the interference is outside the exceptions in Article 5(1) and the Strasbourg Court reaches the conclusion that the interference was justified, it holds that there was no deprivation of liberty (see, for example, the final sentence of paragraph 59 of *Austin*, set out above). This is in contrast to Article 5(1)(e), where for there to be "lawful detention", there must be compliance with particular processes. Under this exception, the Strasbourg Court holds (in the appropriate case) that the interference is a deprivation of liberty before it considers whether the processes were satisfactorily completed.

85. This point also follows from other cases cited in *Cheshire West* and in argument before us, such as *Nielsen v Denmark* [1988] 11 E.H.R.R. 175 and *HM v Switzerland* [2002] 38 E.H.R.R. 314. In *Nielsen*, the applicant, a young boy, who was of sound mind, was admitted to a child's psychiatric ward and treated in good faith for what was described as a physical condition. His mother had sole authority in law to take decisions about his well-being and she decided that he should be so admitted. The Strasbourg Court (by a majority) decided that the mother had acted in good faith and within the terms of her authority under national law (so that the admission was not

imputable to the state). The Strasbourg Court went on to hold that the conditions in the ward did not limit the applicant's liberty to any greater extent than if he had been treated on a non-psychiatric ward. It held that there was accordingly no deprivation of liberty. This case shows, where the detention was not capable of coming within any of the exceptions to Article 5(1), justification is not treated separately from the question whether the person is deprived of her liberty. Moreover, the reason for his detention was relevant, and thus the fact that a person is deprived of his liberty in his own interests may prevent the deprivation of liberty from being a relevant deprivation of liberty for the purposes of Article 5.

86. The same can be seen in *HM v Switzerland* (2004) 38 EHRR 17. In that case, an elderly lady, whom the Strasbourg Court did not describe as of unsound mind, was placed in a care home in her own interests because she could no longer be looked after in her own home or elsewhere. She had freedom of movement and could make social contacts outside the home. The Strasbourg Court particularly relied on *Nielsen.* It held that there was no violation of Article 5(1).

87. This case law shows that the question does not have to be simply whether one of the exceptions to Article 5(1), such as Article 5(1)(e), was satisfied, and I proceed on that basis.

Life-saving medical treatment: in general no deprivation of liberty

88. As explained above, not every interference with liberty is a deprivation of liberty for Article 5 purposes. Whether circumstances amount to a deprivation of liberty involves a question of assessing all the circumstances. The Strasbourg Court in *Austin* has specifically excepted from Article 5(1) the category of interference described as "commonly occurring restrictions on movement". In my judgment, any deprivation of liberty resulting from the administration of life-saving treatment to a person falls within this category. It is as I see it "commonly occurring" because it is a well-known consequence of a person's condition, when such treatment is required, that decisions may have to be made which interfere with or even remove the liberty she would have been able to exercise for herself before the condition emerged. Plainly the "commonly occurring restrictions on movement", which include ordinary experiences such as "travel by public transport or on the motorway, or attendance at a football match", can apply to a person of unsound mind as well as to a person of sound mind. Moreover, my conclusion in this paragraph removes what Ms Clement rightly submits would otherwise be the absurd consequence of the absence of any lawful basis in Article 5 for depriving individuals of sound mind of their liberty for the purposes of administering life-saving treatment (see paragraph 68).

89. On this basis, any deprivation of liberty resulting from the administration of life-saving treatment to a person falls outside Article 5(1) (as it was said in *Austin*) "so long as [it is] rendered unavoidable as a result of circumstances beyond the control of the authorities and is necessary to avert a real risk of serious injury or damage, and [is] kept to the minimum required for that purpose". In my judgment, what these qualifications mean is in essence that the acute condition of the patient must not have been the result of action which the state wrongly chose to inflict on him and that the administration of the treatment cannot in general include treatment that could not properly be given to a person of sound mind in her condition according to the medical evidence.

90. An example of a case where authorisation for a deprivation of liberty will be necessary is *NHS Trust I v G* [2015] 1 WLR 1984, where a hospital considered that it might have to give obstetric care to a pregnant woman of unsound mind who objected to such treatment. Keehan J made an order authorising a deprivation of liberty and invasive medical treatment on a precautionary basis. The pregnant woman in question was to be prevented from leaving the delivery suite and might be compelled to submit to invasive treatment, such as a Caesarean section. If these steps had to be taken, the treatment would be materially different from that given to a person of sound mind. By contrast, I do not consider that authorisation would be required because some immaterial difference in treatment is necessitated by the fact that the patient is of unsound mind or because the patient has some physical abnormality.

91. In reaching this conclusion I accept the submission that *Cheshire West* is distinguishable since it is directed to a different situation, namely that of living arrangements for persons of unsound mind. In addition, I have not identified any guidance in it as to the position with regard to Article 5 in the urgent or intensive care context.

92. Mr Ruck Keene drew the Court's attention to an admissibility decision of the European Commission on Human Rights in *Järvinen v Finland.* In that case, the European Commission on Human Rights ruled inadmissible a complaint under Article 5 by the applicant, who had expressed a clear wish to go to his preferred choice of hospital but was taken to another hospital which, with a view to treating him for what the clinicians in that hospital in good faith understood to be his medical condition, physically restrained him to prevent him from leaving. Although this is an old decision, it is in line with the conclusion I have reached above.

Lack of policy need to apply the "acid test" to urgent medical care

93. I also accept the submission that the policy reasons for finding a violation in *Cheshire West* do not apply in this case. There is in general no need in the case of physical illness for a person of unsound mind to have the benefit of safeguards against the deprivation of liberty where the treatment is given in good faith and is materially the same treatment as would be given to a person of sound mind with the same physical illness. The treatment is neither arbitrary nor the consequence of her impairment. This analysis is supported by the approach of the majority of the Strasbourg Court in *Nielsen v Denmark*. The majority held that there was no deprivation of liberty because the treatment would have been the same if the applicant had been treated on another ward for his physical illness.

94. Moreover, if the treatment reaches the level of severity that Article 3 is engaged, a person of unsound mind will have a remedy under that Article in any event.

Article 5(1)(e) concerned with treatment of mental impairment

95. In addition, in my judgment, Article 5(1)(e) is directed to the treatment of persons of unsound mind because of their mental impairment. The purpose of Article 5(1)(e) is to protect persons of unsound mind. This does not apply where a person of unsound mind is receiving materially the same medical treatment as a person of sound mind. Article 5(1)(e) is thus not concerned with the treatment of the physical illness of a person of unsound mind. That is a matter for Article 8. Where life-saving treatment

is given to a person of sound mind, the correct analysis in my judgment is that the person must have given consent or the treating doctors must be able to show that their actions were justified by necessity or under section 5 of the MCA. If this cannot be shown, then there has to be some method of substituted decision-making, such as obtaining an order from the Court of Protection.

Hospital did not prevent Maria from leaving

96. In any event, even if the acid test in *Cheshire West* were required to be asked, the question whether Maria would have been free to leave would in my judgment have been answered in the affirmative. The approach to this must be realistic as Ms Richards submits. The actual question is unlikely in practice to arise with a patient in an acute condition in an ICU and, as it seems to me, we would be concerned with the patient's wish to leave not that of her relatives to remove her. If it did arise, the scenario would, viewed realistically, be likely to be that the clinicians would try to persuade the patient from leaving. But there is no evidence that they would have gone so far as to prevent her from leaving if there was a lawful decision that she should do so: Dr Bryden's evidence only goes so far as to say that clinicians would seek urgent advice from the legal team. Moreover, I assume that there could be no lawful decision for her to leave if, as seems likely in Maria's case, she lacked capacity to make that decision, unless the court made an order to that event. Moreover, as Mr Hough accepted, if she could be moved to a place which could offer her better care, there is no basis for reaching the conclusion that the hospital would have prevented Maria from leaving. Clearly the hospital would comply with any order of the court.

97. If that is so, then this is a case where there was continuous supervision and control but not lack of freedom to leave. I agree with Mr Hough that it was not enough that Luisa perceived that she would be unable to seek to withdraw Maria from intensive care unless this was truly the position.

98. Moreover, as I read it, the two-part acid test formulated by Lady Hale in *Cheshire West* in my judgment was designed to apply only where the second element – lack of freedom to leave – was the consequence of state action, particularly state action consisting of the continuous supervision and control constituting the first element of the test.

99. In the case of a patient in intensive care, the true cause of their not being free to leave is their underlying illness, which was the reason why they were taken into intensive care. The person may have been rendered unresponsive by reason of treatment they have received, such as sedation, but, while that treatment is an immediate cause, it is not the real cause. The real cause is their illness, a matter for which (in the absent of special circumstances) the state is not responsible. It is quite different in the case of living arrangements for a person of unsound mind. If she is prevented from leaving her placement it is because of steps taken to prevent her because of her mental disorder. *Cheshire West* is a long way from this case on its facts and that, in my judgment, indicates that it is distinguishable from the situation of a patient in intensive care.

100. In *HL v UK*, the critical factor was that the voluntary patient admitted to a mental hospital was under the complete and effective supervision and control of the hospital

staff for the relevant period and was not free to leave. That was a very different situation from that in the present case.

101. Furthermore, I agree with Mr Hough that it was not sufficient that Luisa felt that Maria could not leave if that was not the case in fact. Moreover, there was no evidence leading to the conclusion that the hospital would normally have prevented Maria from leaving the ICU if she had wished to do so.

Maria's treatment materially the same as for persons of sound mind

102. In Maria's case, there is evidence that before her admission into the ICU some adjustments to procedures were made in response to her objections, such as blood tests and the insertion of a cannula. But to all intents the treatment appears to have been the same as that which the hospital would have given to a person who was not of unsound mind, and the differences were in my judgment not material. There is no suggestion that she was not given treatment in good faith.

Coroner's decision: no error

103. If I am correct on my primary approach, there is no basis on which it could be said that there was a deprivation of liberty in this case, and thus there was no reason to suspect "state detention" for the purposes of section 48(2) of the CJA 2009. There was on that basis no error in the coroner's decision. For the reasons given in the next two paragraphs that conclusion is in my judgment valid even if the "acid test" in Cheshire West applies.

104. I agree with Ms Richards that the absence of an authorisation for a deprivation of liberty did not mean that there could be no violation of Article 5. Mr Hough accepted this. It would be highly anomalous if, in order for there to be "state detention", there had to be authorisation for removing a person's liberty. Parliament cannot have intended such an absurd result. Therefore I agree with Ms Richards and Mr Hough that paragraph 66 of the Chief Coroner's *Guidance* is incorrect. However, in agreement with the Divisional Court and as Mr Hough submits, I take the view that the coroner proceeded on the basis that that *Guidance* did not dispense with his obligation to consider whether there were other grounds to suspect that the hospital had deprived Maria of her liberty for Article 5 purposes.

105. If I am wrong on the point made in paragraph 103 above (that under Strasbourg case law there would absent special circumstances be no deprivation of liberty involved in treatment in an ICU), and the coroner had to ask if Maria was free to leave the ICU, then I need to consider the other criticisms of the coroner's decision. Ms Richards is right to say that Feature 2 noted by the coroner was simply incorrect. The coroner was wrong to say that she was "voluntarily" admitted to hospital or that Maria "consented to treatment" or that she later lacked capacity. She had a very serious impairment of her mental ability. Mr Hough accepts that criticism. On Feature 3, Ms Richards submits that a firm refusal is not required, and Mr Hough accepts that criticism. But, even if that is so, there was no evidence to suggest that the hospital would have refused a proper request to remove Maria or that Maria would have asked to leave. As already explained in paragraph 101 above, a perception that permission would have been refused is not enough. As to Feature 4, Ms Richards' essential point is that the purpose for which the treatment was given has to be disregarded, but the point

remains that there is no indication that Maria's inability to leave the hospital was attributable to any action of the hospital as an organ of the state. I consider that the coroner was entitled to take the view that he did here that her inability to leave was the consequence of her very serious physical condition. As explained in paragraph 99 above, that cause is not in my judgment as a matter of law attributable to the state for Article 5 purposes. In all the circumstances, the errors in Features 2 and 3 are immaterial to the coroner's Conclusion even on the basis of the acid test. It remains the case that there was no error in the coroner's decision.

Alternative basis of decision: interpretation of "state detention"

106. So far I have been proceeding on the basis that this Court has to be satisfied that the treatment of Maria in an ICU was outside Article 5. My alternative approach proceeds on the basis that it is enough in the circumstances of this case that if we are satisfied that there is no clear and constant jurisprudence of the Strasbourg Court that it was within Article 5 and that the Court would not in the absence of such jurisprudence take account of the case law that it was within Article 5.

107. In *Cheshire West*, section 64(5) of the MCA (see paragraph 31 above) required the Supreme Court to apply the jurisprudence of the Strasbourg Court. Section 48(2) of the CJA 2009 does not require us to do so. If Parliament had intended to legislate for inquests to be held with juries whenever there was any indication in the Strasbourg case law that there was a deprivation of liberty for Convention purposes, it would in my judgment have said so.

108. So, even if I am wrong on the conclusions that I have expressed above on Article 5, I would hold that section 48(2) of the CJA 2009, properly construed, does not include ICU treatment as "state detention" because there is no clear and constant jurisprudence of the Strasbourg Court that such treatment involves a violation of Article 5. It is well-known that the courts are not bound to follow Strasbourg jurisprudence in that event: see *Manchester City Council v Pinnock* [2011] 2 AC 104 at [45], per Lord Neuberger MR giving the judgment of the Supreme Court.

109. Moreover, for the reasons given below, I consider that the courts would in the absence of such clear and constant jurisprudence be unlikely to give effect to a decision of the Strasbourg Court that the intensive care treatment administered in the ordinary way involved a violation of Article 5. In those circumstances I consider that Parliament could not have intended the courts to give "state detention" a meaning conforming to that decision.

110. The first reason for this conclusion is that in *Linnane* the Divisional Court adopted a practical, realistic and common sense approach to the question whether, where a convicted prisoner was being held by the police needed medical treatment and was sent to the local public hospital, where he died, there was reason to suspect that the deceased died in "police custody". The question arose because he had not been guarded by the police in the hospital. The Divisional Court held that it was enough that there would have been "to anyone properly directing themselves on the circumstances then existing, reason to suspect that he was in police custody". Mr Hough cites this case as establishing the correct approach to what are now sections 7 and 48(2) of the CJA 2009. He submits that on that basis there was no state detention in this case. I agree. No one would ordinarily regard a patient who is in intensive

care as deprived of their liberty because their treatment and condition results in their being physically unable to leave the ICU.

111. Second, the evidence of Dr Bryden set out in Appendix 1 to this judgment powerfully supports the conclusion that treatment in an ICU is not in general appropriately treated as a deprivation of liberty. In short, to require authorisation of the deprivation of liberty in what would be a normal ICU case would involve a significant dilution and distraction of clinical resource, time and attention. That must inevitably risk jeopardising the outcome for all ICU patients, for no apparent policy reason.

112. Third, the Secretaries of State referred to the potential impact on resources if there was a deprivation of liberty when a patient was in intensive care. As Ms Richards submits and the interveners accept, the impact on resources cannot of itself be a reason not to find that there is a statutory obligation to hold an inquest with a jury if that is what Parliament has legislated. But the fact that the conclusion which I have reached will avoid substantial expenditure of human and financial resources, for which no semblance of a policy reason has been given to us, in my judgment is also supportive of the conclusion that I have reached.

Overall conclusion

113. In the result I agree with the Divisional Court. For the reasons explained, my reasoning is closer to that of Gross LJ than that of Charles J, but there are significant differences too between my approach and that of Gross LJ.

114. So, for all the reasons given above, and summarised in paragraphs 9 to 11 of this judgment, I would dismiss this appeal.

Lord Justice McFarlane

115. I agree.

Mr Justice Cranston

116. I also agree.

APPENDIX TO JUDGMENT OF ARDEN LJ

Summary of the relevant parts of the evidence of Dr Daniele Bryden, a consultant in intensive care medicine at Sheffield Teaching Hospital NHS Trust, filed on this appeal on behalf of the ICS/FICM, about the potential implications of a decision that there is a deprivation of liberty in an ICU setting

1. The ICS is a scientific society which is a representative of intensive care professionals in the UK. The FICM is an inter-collegiate Faculty formed under the aegis of the eight medical Royal Colleges and it is the professional body responsible for training and continuing professional development of intensive care medicine consultants and trainees in the UK. Dr Bryden states that ICS/FICM are uniquely placed to assist the court with the realities of clinical practice in ICUs and the potential implications of a judgment on this appeal dealing with the interpretation of the law concerning mental capacity, deprivation of liberty and state detention in the ICU setting.

2. Data from 2014/15 indicates that in that period there were 163,000 admissions to ICUs in England and Wales.

3. Forty per cent of ICU patients receive invasive mechanical ventilation by means of a tube in the wind pipe connected to a ventilator which controls breathing. Only about twenty per cent of admissions to ICU are planned. That means that for the remainder there is no opportunity for prior consultation, provision of information of the likely cause of care and treatment in the intensive care or for consent to be obtained before ICU admission. Effectively, therefore, it is overwhelmingly the case that ICU patients are treated in their best interests in accordance with the MCA and General Medical Council Professional Guidance on the duties of a doctor in relation to patient consent for treatment. ICU patients often suffer from considerable temperamental or cognitive impairment in the form of delirium and paranoia. ICU patients may be restrained by chemical restraint in the form of for example sedatives. There is rarely physical restraint in a UK ICU.

4. The ICS/FICM have done an empirical survey of their members. Some seventy-five per cent have had experience of a patient trying to leave and ten per cent have had experience of a family member trying to remove a patient in all likelihood without the consent of the patient herself. The patient is very unlikely to make their own decision to leave and extremely unlikely to be able physically to leave. The reality of intensive care, however, is that not all patients are constantly sedated to the point of unconsciousness or inability. It is very common for patients to have episodes where they are delirious but they may have periods of lucidity.

5. Additional information and support would be offered if there was a wish for a patient to leave. There is no policy (at least in Dr Bryden's own ICU) to physically prevent removal. Staff would find a proposal to leave by the patient or the patient's family very distressing and indicative of professional failure. Dr Bryden states:

> I have not seen a situation in my clinical practice where a family has insisted on taking a patient where that would require them to be disconnected from lifesaving/preserving treatment, but there is no formal guidance or consensus on how to act in those circumstances. … If the outcome would be the patient's death, ethically we would not be able to stand there and watch and would seek urgent advice from the hospital's legal team…

6. On practice concerning deprivation of liberty safeguards, some but not all ICUs and hospitals have policies in force.

7. The need to obtain authorisation for the deprivation of an ICU patient's liberty would involve a dilution and distraction of clinical resource, time and attention. The necessary forms might take anywhere from thirty minutes to six hours to complete, including time spent in discussion with colleagues. In addition, a senior nurse has also to complete a review of an application form which takes a similar amount of time.

8. There is also some evidence of confusion being caused and damage being done to relations with patients and their families who are sometimes alarmed by the

terminology of "deprivation of liberty". The language can cause concern that clinicians are not doing the right thing or caring for their loved one as they should.

9. Dr Bryden concludes:

> Ultimately, this all detracts from the real priorities for ICU staff; the investigation and treatment of critically unwell patients, their recovery and rehabilitation, and the safe and effective delivery of patient care.