

Children, Young People & Deprivation of Liberty

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agenda

- 1) Some basics
- 2) What is deprivation of liberty?
- 3) The National DoL Court
- 4) Inherent jurisdiction & unregulated placements
- 5) The Court of Protection

Some basics!

- DoL is not the same as DoLS
- Deprivation of liberty is not necessarily a bad thing!
- A 'happy DoL' is still a DoL ...

Article 5: Right to liberty & security

1. 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:**

...

(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;

...

4. Everyone who is deprived of his liberty by arrest or detention shall be **entitled to take proceedings** by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Authorising DoL of a child / young person

- Inherent jurisdiction of the High Court (National DoL Court)
- Welfare jurisdiction of the Court of Protection (16/17-year-olds)
- Mental Health Act 1983
- Secure accommodation (s.25 Children Act 1989 or s.119 SSWB(Wales) Act 2014)

NB/ DoLS only apply to adults. Due to be replaced by Liberty Protection Safeguards (LPS) which apply to those aged 16+. But Government has announced LPS will be delayed beyond in this Parliament.

What is deprivation of liberty?

Storck v Germany (2005) 43 EHRR 96 (App no 61603/00)

- 1) **Objective component:** confinement in a particular restricted space for a not negligible length of time
- 2) **Subjective component:** lack of valid consent to the confinement
- 3) **State imputability:** attribution of responsibility to the state

The objective component


P v Cheshire West & Chester Council & Others [2014] UKSC 193

Constant/continuous
supervision & control


Not free
to leave

Irrelevant considerations

- Compliance or lack of objection
- Agreement of the family/carers
- “Relative normality” of the placement
- Reason or purpose behind the placement



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. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because they can – and must – now be **compared to children of their own age and relative maturity who are free from disability** and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.



And as a general rule of thumb ...

Re A-F (Children) [2018] EWHC 138 Fam

- A child aged 10, even if under pretty constant supervision, is unlikely to be “confined”
- A child aged 11, if under constant supervision may be “confined” but the court should be astute to avoid coming too readily to such a conclusion
- Once a child who is under constant supervision becomes 12, the court will more readily come to that conclusion

MEG's concrete situation

- 17 years old with mild learning disability & 'cognitive ability of a 4- to 5-year-old'
- Lived with 3 others in a residential home
- Occasional challenging behaviour & sometimes needed physical restraint
- Given tranquillising medication
- Not in locked environment but had 1:1 support - sometimes 2:1
- No wish to go out & no need to prevent going out
- Attended college & had full social life

Valid consent

A NHS Trust v X [2021] EWHC 65 (Fam)

Gillick

Sufficient understanding, maturity & intelligence (competence)

Below 16

in the realm of child & adolescent psychology

MCA

Inability to make decision due to impairment or disturbance of mind or brain

Age 16 +

in the realm of psychiatry

The subjective component

- A child with competence or young person with capacity can give valid consent
- A parent cannot consent to the deprivation of liberty of a young person aged 16/17 lacking capacity to consent (*Re D (A Child)* [2019] UKSC 42)
- A parent can consent to what would otherwise be deprivation of liberty of a child without Gillick competence (*Lincolnshire CC v TGA* [2022] EWHC 2323 (Fam))
- A parent or local authority cannot provide valid consent if the child or young person subject to a care order (*Re A-F (Children)* [2018] EWHC 138 (Fam))

Imputability to the State

A Local Authority v A [2010] EWHC 978 (Fam)

- Child aged 9 & a vulnerable adult (not related) who suffered from Smith Magenis Syndrome
- External doors locked (keys hidden), and locked in bedroom at night
- The local authority was providing care services for the family but not during the night
- Local authority was aware of the night-time arrangements

The court confirmed ...

If a public authority **knows or ought to know** of a potential DoL, the following positive obligations are triggered:

- a duty to investigate and monitor
- a duty to provide support services to the person and family members / carers
- a duty to bring the matter before the court

The National DoL Court

- Established July 2022, based at Royal Courts of Justice under the leadership of Mr Justice Moor
- In response to increasing numbers of High Court applications for deprivation of liberty of children under its inherent jurisdiction
- The aim is to centralise all deprivation of liberty applications & work out which cases are dealt with by Family Division & which dealt with by 'section 9 judges'
- Separate to Court of Protection exercising its section 16 powers for 16/17-year-olds

Children & unregistered placements

Re T (A Child) [2021] UKSC 35

- 15-year-old, subject to a care order & living in approved secure accommodation
- Due to her needs, needed an alternative placement but no available accommodation
- Therefore, was moved to a registered children's home not approved for use as secure accommodation
- Her care regime amounted to a deprivation of liberty
- T had capacity to consent to care regime, & purportedly consented
- Longstanding judicial concern about local authorities using the inherent jurisdiction for these purposes

The Supreme Court's decision

- The inherent jurisdiction can be used in certain cases to authorise the deprivation of liberty of a child in an unregistered setting ('imperative necessity')
- The use of the inherent jurisdiction to authorise the deprivation of a child's liberty is not incompatible with Article 5
- Consent by the child to the arrangements must be enduring & 'genuinely expressed'

Unregulated placements

MBC v AM & Ors (DOL Orders for Children Under 16) [2021] EWHC 2472 (Fam)

- Care Planning, Placement & Case Review (England) Regulations 2010 amended in 2021 to prohibit local authority placements in unregulated settings
- Judgment concerned 4 cases of looked-after children in unregulated placements & deprived of liberty
- The judge confirmed that the inherent jurisdiction could be used to authorise deprivation of liberty in such cases
- The fact that a local authority may be using an unlawful placement did not relieve the court of its 'positive operational duty' under the ECHR
- The issue of the lawfulness of the placement remained one solely for the local authority.

Refusal to authorise placement

Wigan BC v Y [2021] EWHC 1982 (Fam)

- Y, aged 12, had complex medical and behavioural issues (possibly had ADHD & autism) – long history of abuse by his father
- He demonstrated challenging, violent & increasingly self-harming behaviour
- Moved to residential placement & shortly afterwards taken to hospital (in full restraint by police) after self-harming episode
- On the ward, subject to chemical & physical restraint & 5:1 staffing
- Hospital was not CQC registered to provide mental health care
- During one night, police called to ward several times to assist with restraining him (including 13 police officers over a 3 hour period)
- Y contained on ward in a sectioned off area– due to suicide risks the door to shower removed & sleeping on a mat on the floor
- Paediatric ward had to be shut to new admissions & elective surgeries cancelled
- Local authority unable to find an alternative placement

The court's decision

- Judge refused to authorise the deprivation of liberty, even though no alternative
- “Inappropriate, demeaning and, quite frankly, brutal one for a 12 year old child”
- Also, the placement breached Article 5
- “The local authority simply must find him an alternative placement”

16/17-year-olds & *Re X* process

Re KL (A Minor : deprivation of liberty) [2022] EWCOP 24

- KL was 17 years old, diagnosed with ASD & severe learning disabilities, and non-verbal
- Subject to care order & lived with same foster carers since 4
- He had no contact with his birth parents nor siblings
- Accepted that KL lacked capacity to make relevant decisions
- Local authority applied to Court of Protection for deprivation of liberty under its streamlined procedure
- However, the judge took the case out of this procedure & invited the Official Solicitor to act as Litigation Friend for KL
- The local authority sought clarification from the judge of the reasons for her decision
- In the meantime, DoL authorised for 12 months

The judge's reasoning

- 16/17-year-olds are at a 'critical stage' of their development & at the 'unavoidable cusp of transition from childrens to adults services
- Care order was a clear indication of difficult life experience to date
- It does not follow that the review obligations on the local authority mean less scrutiny is required by the court (ie not a 'rubber stamp')
- Absence of family contact indicates 'total dependence' on arrangements made by public bodies
- Parents unlikely to be sufficiently independent to be able to represent the young person in the proceedings
- Accredited Legal Representatives may not have expertise or familiarity with wider issues in respect of minors

The court's decision

- The streamlined procedure is unlikely to be appropriate for authorisation of deprivation of liberty of 16/17 year olds
- Local authorities are not likely to be criticised for an application for authorisation of deprivation of liberty of a 16/17 year old by a standard application (even if the case appears non-contentious)
- It is important that independent representation is provided for 16/17-year-olds in the court (& family members are unlikely to be sufficiently independent)
- In most cases the Official Solicitor will need to be invited to act as Litigation Friend for P



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