Human Rights in the Court of Protection

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Introduction

1. The introduction of the Deprivation of Liberty Safeguards ("DoLS") to the MCA 2005 on 1 April 2009 imposed a statutory responsibility on local authorities to oversee and operate a scheme to lawfully deprive the liberty of adults who lack the capacity to consent to arrangements made for their care or treatment in either hospitals or care home in their own best interests.

2. The responsibility of local authorities was further extended by the decision of the Supreme Court in ***P v Cheshire West and Cheshire Council, and P and Q v Surrey County Council*** **[2014] UKSC 19** which effectively broadened the scope of when it could be said that an incapacitated individual has been deprived of their liberty. Since ***Cheshire West*** there has been an exponential growth in claims involving scrutiny of the lawfulness of the placement of individuals who lack capacity in a variety of care settings, including those who receive care at home.

3. This seminar will focus on how the right to liberty under Art.5 of the European Convention of Human Rights ("ECHR") has been interpreted and applied by Court of Protection ("CoP") within the context of the Mental Capacity Act 2005 ("MCA 2005"). It will consider the major developments in this rapidly evolving area of law, the recent focus on cases involving children and practical and procedural considerations involved in claims that are brought under the Human Rights Act 1998 ("HRA 1998") in the CoP.

Deprivation of Liberty: The Statistics for England and Wales

England

4. The latest (6th) CQC annual report on monitoring DoLS in England was published in December 2015[1]. It identifies that since their introduction in 2009, numbers of applications to use DoLS were consistently low. This changed in March 2014 following the ruling in ***Cheshire West***

[1] See: http://www.cqc.org.uk/content/deprivation-liberty-safeguards-201415

which clarified the test to determine when an individual is deprived of their liberty. Since then, applications for DoLS have increased tenfold from 13,715 in the year ending March 2014 to 137,540 by March 2015.

5. Of applications submitted in 2014/15, 62,645 were completed by local authorities and 52,125 of these were granted. The proportion of applications approved is higher than in previous years. Furthermore, by March 2015, 56,835 applications for DoLS had not been completed by local authorities creating a significant backlog in the system.

6. By contrast, there is some evidence to suggest that applications for judicial authorisation of a deprivation of liberty in community care placements (e.g. supported living) pursuant to sections 4A and 16(2)(a) MCA 2005 have remained low. According to figures obtained from 110 of 152 English councils under the Freedom of Information Act[2], local authorities made 286 applications to the CoP to get legal authorisation for deprivations of liberty in community care placements in 2014-15. This constitutes just 1.6% of the 17,829 applications that councils had identified in a scoping exercise that would be needed to comply with ***Cheshire West***. Furthermore, almost half of the 286 applications made in 2014-15 came from just 11 local authorities. There were 52 councils that made no applications to court at all despite previously scoping that almost 6,000 might be needed between them.

Wales

7. The latest report by the Care and Social Services Inspectorate Wales (CSSIW) and Healthcare Inspectorate Wales (HIW) in relation to the operation of the DoLS is for the years 2013 – 2014[3].

8. The report found that the awareness of deprivations of liberty and the process for making an application has increased, but concluded that more still needed to be done. There were 631 (526 in 2012-13) applications submitted to supervisory bodies. This report was pre-***Cheshire West*** and therefore does not take into account the increase that would have been demanded by the judgment. In light of the tenfold increase in England reported by the CQC in December 2015, we should expect a similar increase to have taken place in Wales.

[2] See: http://www.communitycare.co.uk/2015/06/17/councils-failure-make-court-applications-leaving-widespread-unlawful-deprivations-liberty-year-cheshire-west-ruling/ (accessed on 15 June 2016)

[3] See: http://www.hiw.org.uk/sitesplus/documents/1047/Deprivation%20of%20Liberty%20Safeguards%20-%20Annual%20Monitoring%20Report%20for%20Health%20and%20Social%20Care%202013-14.pdf

9. Of course, an important function of DoLS is the right to review, in compliance with Art. 5(4) ECHR. CSSIW and HIW's National Review of the use of DoLS in Wales carried out in April – May 2014[4] tracked 84 DOLS applications. Not one of them resulted in an application to the CoP.

Article 5 ECHR: Deprivation of Liberty

10. In so far as it is material for the purposes of this seminar, Art.5 ECHR states:

> *(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 of unsound mind…*
>
> *…*
>
> *(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.*
>
> *(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

A Brief Recap: P v Cheshire West and Cheshire Council, and P and Q v Surrey County Council

11. The Supreme Court in ***Cheshire West*** has now established the essential features of when an individual is deprived of liberty. The fact this case was heard by 7 Supreme Court Justices and the final decision was reached by a majority of 4 to 3 demonstrates the difficulty of the topic.

The facts

12. P & Q, (also known as MIG and MEG), were sisters, both of whom had learning disabilities. They had been subject to care proceedings at the ages of 15 and 16 respectively. MIG was placed in foster care and attended an educational facility every day. She loved her foster mother and had never attempted to leave, but had she done so she would have been restrained. MEG had been placed in a residential care home for adolescents with complex care needs and learning disabilities, and was under constant supervision. She received

[4] http://www.hiw.org.uk/sitesplus/documents/1047/A%20National%20Review%20of%20the%20use%20of%20Deprivation%20of%20Liberty%20Safeguards%20%28DoLs%29%20in%20Wales.pdf

tranquilising medication and sometimes needed to be physically restrained. In 2009 the CoP found that MIG and MEG's care arrangements were in their best interests and that, despite them being under constant supervision and not being free to leave, neither was being deprived of their liberty. The Court of Appeal upheld that decision.

13. In the other case, P, who had Down's syndrome and cerebral palsy, needed 24-hour care. He had lived with his mother until he was 37 years old but his health had then deteriorated and the CoP made an order that it was in his best interests to live in accommodation arranged by the local authority. At the material time he lived in a staffed bungalow, with other residents. He was not free to leave the accommodation on his own but had one-to-one support, which enabled him to leave the home on a frequent basis to undertake visits and activities. He sometimes required interventions for challenging behaviour. The CoP found that P was not deprived of his liberty because care arrangements were in his best interests. The Court of Appeal agreed with the CoP's conclusion but reached it on another basis, after comparing the restrictions on P's liberty with those that might be placed on another person with his disabilities.

What constitutes a deprivation of liberty?

14. At para 37 of ***Cheshire West***, Lady Hale set out three components derived from ***Storck v Germany*** **[2005] 43 EHRR 6** as representing the 'essential character' of a deprivation of liberty. The three limbs of the so-called *Storck* test are:

    (1) the objective component of confinement in a particular restricted place for a not negligible length of time;

    (2) the subjective component of lack of valid consent; and

    (3) the attribution of responsibility to the State."

The acid test

15. In considering limb 1, the objective component of 'confinement', and in seeking to identify whether there is any 'acid test' in this area, Lady Hale stated the key question as being: whether or not the individual was *"…under complete supervision and control and not free to leave."* At para 49, with reference to that concept, she said that:

> *"…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 (Application no 6587/04), 13 January 2011 [to which she had earlier referred at paragraph 39]."*

16. As such, if an individual: (i) under continuous supervision and control and not free to leave; and (ii) satisfies the subjective component (by virtue of lacking capacity) of being unable to provide valid consent; and (iii) the restriction imposed on them is imputable to the state, there is a deprivation of liberty.

17. Cases decided by Strasbourg, including ***HL v UK* [2004] 40 EHRR 761** and ***Stanev v Bulgaria* [2012] 55 EHRR 696**, now repeated in ***Cheshire West***, further establish that:

> *"…in order to determine whether there has been a deprivation of liberty, the starting point must be the specific ['concrete'] situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance."*

What is <u>not</u> relevant to determining whether there is a deprivation of liberty

18. The following features were accepted by the majority of the Supreme Court in ***Cheshire West*** as <u>not</u> being relevant factors to whether there is a deprivation of liberty: (a) the person's compliance or lack of objection; (b) the relative normality of the placement; (c) the reasonable (benevolent) purpose behind the placement.

19. The majority also held that the test is not to compare the situation of the individual concerned with the situation of someone having the same or similar disabilities, because at [45]: *"…it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race".* Again, at para [46] Lady Hale said this:

> *"…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 dissenting judgments

20. Lords Carnwath, Hodge and Clarke dissented in the case of MIG and MEG. In their Lordships' view, the first objective component of the *Storck* test was not met because:

    (a) The degree of intrusion and confinement was no more than was necessary for the protection and wellbeing of MIG and MEG;

(b) Nobody using ordinary language would describe people, such as MIG and MEG, who were living happily in a domestic setting, as being deprived of their liberty;

(c) The acid test goes against the grain of Strasbourg case-law, which has always proceeded on a case by case basis;

Grey areas in the judgment

21. ***Cheshire West*** has left some areas of uncertainty, some of which have been addressed in later case law. For example:

(a) Lord Neuberger suggested that the acid test might not always apply, stating that it should be applied '*unless there is good reason not to do so'* (para [63]). It is not immediately apparent from the judgment what might constitute a good reason;

(b) It is unclear from the judgment how, or to what extent, the 'acid test' applies to those aged under 18. Lord Kerr suggested that age and maturity comparators should be applied (see, e.g. para [76]) but it is unclear exactly how this would work. *Obiter dicta* of Lady Hale and Lord Neuberger (at paras [54] and [72], respectively) suggest that parents may sometimes, in the exercise of their parental responsibility, be able to consent – on behalf of their children – to conditions that meet the objective limb of the *Storck* test. An argument along this line was successfully employed in relation to a 15 year old boy in ***Re D (a child) (deprivation of liberty: parental responsibility)*** **[2015] EWHC 922 (Fam)** (see paras 64 to 66 below);

(c) The Supreme Court's judgment also does not clarify precisely what is meant by 'not free to leave'. In particular, it leaves open the question of whether it includes people who are physically incapable of leaving in any event, or have nowhere else to go. This issue was addressed by Mostyn J in ***Rochdale Metropolitan Council v KW (No. 1)*** **[2014] EWCOP 45**, although this decision has since been overturned (twice) by the Court of Appeal.

<u>DoLS in Care Homes and Hospitals</u>

22. A deprivation of liberty in a residential care home or hospital is authorised by way of an urgent or standard authorisation made pursuant to Sch. A1 MCA 2005.

AJ v A Local Authority

23. The significant decision of ***AJ v A Local Authority*** **[2015] EWCOP 5** addresses, among other things, the question of the extent of the duty on a local authority to ensure that a person who lacks capacity is able to challenge a standard authorisation in compliance with Art. 5(4) ECHR.

24. AJ was an 88-year-old woman with dementia who lived with her niece (Mrs C) and her niece's husband (Mr C). She objected to a decision to move her to a care home on a long-term basis after a respite placement when Mr and Mrs C were on holiday. The council appointed Mr C as AJ's RPR. An IMCA was instructed to support Mr C. Yet despite AJ's known opposition to the care home placement, no legal challenge was made to the DoLS authorisation until more than six months after she was admitted into residential care. There was no effective communication between Mr C as RPR and the IMCA. When the IMCA finally spoke to Mr C he realised that Mr C was not going to initiate proceedings to challenge the DOLS authorisation. At that point the IMCA agreed to act as AJ's litigation friend and instruct solicitors to make an application to the CoP on her behalf.

25. Baker J found that the BIA in the case should not have recommended Mr C as AJ's RPR because it was clear that Mr C supported her being placed in the care home long term. As a result, his own views conflicted with supporting AJ in any challenge. The court also found that the local authority should have scrutinised the BIA's decision, identified the conflict, and referred the matter back to the BIA.

26. Baker J's decision is firmly oriented towards the positive obligations of supervisory bodies to uphold and facilitate people's ECHR rights, and in particular their rights of appeal under Article 5(4) ECHR. At various points the supervisory body has obligations to ensure that these are upheld by third parties – for example by ensuring the RPR that is selected and appointed is willing and able to help P to appeal, to ensure that IMCAs are provided to help them to do so and are appropriately resourced to help a person to challenge in court. To monitor the RPR and the IMCA in whether or not they are helping a person who objects to appeal.

27. In theory, provided all these steps are taken, a combination of the IMCA and the RPR should be enough to get a case to court if the person is objecting. But it cannot be guaranteed that this will always happen, in which case, Baker J said:

> *"126. As a last resort, the local authority should have considered bringing proceedings before the court itself. Plainly this is a last resort, because of the comprehensive and complex provisions for the selection and appointment of RPRs and the appointment of IMCAs are*

> *followed, and if RPRs and IMCAs appointed under these provisions carry out their responsibilities as they should, the rights of an incapacitated person to challenge a deprivation of liberty normally will be protected. But the local authority remained under a continuing and positive obligation to ensure that AJ's Article 5(4) rights were respected. Thus, if it was not satisfied that the IMCA was taking the necessary steps to apply to the court, and if in all the circumstances it considered such a course to be appropriate, it should have brought court proceedings itself. In this case, however, it is likely that an inquiry of Mr. R by the local authority into the steps he was proposing to take would have clarified the position and led him to initiate proceedings at an earlier stage."* (emphasis added)

28. In light of ***AJ v A Local Authority***, there is a growing trend for local authorities to now be proactive and issue applications to challenge or vary the standard authorisation pursuant to s.21A MCA 2005 in the event that P is objecting to remaining in a care home or hospital. We submit that this is the right position. Whilst some local authorities may question why they shoulder the burden of bringing a challenge to a decision that they consider to be in P's best interests, they must remember that the primary concern is P's best interests. Bringing those cases to the CoP is consistent with promoting independence and empowering vulnerable adults to have a say in important decisions.

29. To lessen the impact of any burden caused by ***AJ,*** the careful appointment of RPR is crucial. They should not appoint a disinterested relative or one with contrasting views to P, as this will reduce the likelihood of an appropriate application being made if necessary.

30. The role of the RPR should be a proactive one. However, the impact of the ***AJ*** judgment is being felt across local authorities as the preference shifts to appointing paid RPRs who are more likely to issue proceedings where necessary. This places a greater burden on advocacy organisations which normally fulfil the RPR role, because the numbers required has increased exponentially since ***Cheshire West***.

31. In situations involving a deprivation of liberty local authorities and professionals need to be alert to cases where vulnerable people were admitted to residential care, ostensibly for respite care, when the underlying plan was for a permanent placement without proper consideration of their rights under Art. 5 ECHR.

Practical steps: the role of the RPR

32. A RPR should be taking stock of any conditions placed on previous authorisations where no progress is being made or where there is non-compliance. These concerns should be raised initially with the supervisory body with a request for the review of the standard authorisation.

The supervisory body must then carry one out[5]. This may result in a variance of the conditions or an application to the CoP.

33. The same duty is placed on the managing authority, if it appears to them that one of the qualifying requirements of the grant of the standard authorisation is no longer met. However, in practice we have never seen a review initiated by a managing authority.

34. As mentioned above, the RPR is entitled to non-means tested legal aid in order to issue an application under s.21A MCA 2005. The RPR does not need to seek permission to bring such an application. This procedure is most often used to challenge standard authorisations where there are concerns that the current care plan is not the least restrictive approach or where P may have regained capacity. Often, the trigger for such an application comes from P's own objections but that should not be viewed as the only circumstance in which it is proper for an application to be made.

35. The DoLS Code of Practice provides:

> *"10. To comply with Article 5(4) of the ECHR anybody deprived of their liberty in accordance with the safeguards described in this Code of Practice is entitled to the right of speedy access to a court that can review the lawfulness of their deprivation of liberty. The Court of Protection … is the court for this purpose.*
>
> *…*
>
> *10.2 Once a standard authorisation has been given, [P] or [the RPR] has the right to apply to the Court of Protection*
>
> *…*
>
> *10.5 Whenever possible, concerns about the deprivation of liberty should be resolved informally or through the supervisory body's or managing authority's complaints procedure, rather than through the Court of Protection … The review processes covered in chapter 8 of this Code also provide a way of resolving disputes or concerns, as explained in that chapter.*
>
> *10.6 The aim should be to limit applications to the Court of Protection to cases that genuinely need to be referred to the court. However, with deprivation of liberty at stake, people should not be discouraged from making an application to the Court of Protection if it proves impossible to resolve concerns satisfactorily through other routes in a timely manner."*

36. Though it is more obvious that an application is required where P is overtly objecting to a placement, it should not be assumed that no application is required if P is not vocal in his or her objections. Section 39D(8) MCA 2005 sets out that:

> *(8) The advocate is, in particular, to take such steps as are practicable to help P or R—*

[5] Deprivation of Liberty Safeguards Code of Practice

(a) to exercise the right to apply to court, if it appears to the advocate that P or R wishes to exercise that right, or

(b) to exercise the right of review, if it appears to the advocate that P or R wishes to exercise that right.

37. There are no further guidelines in the MCA 2005 or the DoLS Code of Practice on the definition of "where it appears" to the IMCA or the RPR that P would wish to appeal a standard authorisation to the CoP. However, we would submit that the threshold is very low. Where P is non-verbal or has disabilities which would prevent him or her from expressing wishes clearly, the threshold for bringing the concerns held by the IMCA or the RPR to court should arguably be lower as the assistance P requires to assert his Article 5 and Article 8 rights is greater.

Re JM

38. Following the exponential increase in DoLS applications in ***Re JM*** **[2016] EWCOP 15** Charles J held at [7]:

> *"A consequence of this conclusion of the Supreme Court [in Cheshire West] is that it has, in a time of austerity, imposed major and perhaps unforeseen difficulties and burdens on those responsible for providing, authorising and monitoring the placement and care of a wide range of vulnerable people and if extra resources (alone or coupled with changes to the underlying statutory framework) are required to meet the procedural safeguards required by the Cheshire West conclusion in DOL welfare applications within the class represented by the test cases either:*
>
> *(i) those resources have to be provided by central or local government, or*
>
> *(ii) the COP cannot operate a procedure that meets those procedural requirements of Article 5 and the common law and so a procedure that is lawful.*

39. It is well acknowledged within the judgment the conflicting resourcing issues that the post-***Cheshire West*** era is troubled with. Mr Justice Charles goes on to state at para [22] that:

> *This has led to a "resources led Catch 22" for the COP, and for Ps and their families, because neither central nor local government are offering to create or to try to create a practically available resource to enable the COP to meet the minimum procedural requirements by appointing professional Rule 3A representatives.*

40. All RPRs, whether paid or not, should be prepared to issue appeals to DoLS under s. 21A MCA 2005. They are both entitled to non-means tested legal aid to do so.

Unlawful removal from home – breach of Article 5 and Article 8

41. The judgment in ***AJ*** follows previous warnings about the importance of taking steps to prevent deprivations of liberty from occurring or to ensure that they are authorised at the point of any move.

42. One such case was ***Milton Keynes Council v RR & Ors*** **[2014] EWCOP B19** which included a failure of the local authority to investigating safeguarding allegations which had prompted the removal. This case concerned an elderly lady with dementia who had been removed from her home by Milton Keynes Council in October 2012 following safeguarding concerns about her welfare, which included bruising to her face, over the previous few months. RR was taken from her home, which she was said to have left 'willingly' and placed in a care home. Her son, SS, was not present at home at the time and was not told for another 19 days where his mother was. There had been no safeguarding investigation into the concerns that had been raised. The Council did not seek the court's authorisation for the removal and placement in the care home. A standard authorisation was sought but not put in place for two weeks after removal.

43. The Council applied to the CoP 15 days after RR was removed from her home. Interim declarations were subsequently made in respect of RR's continued residence at the care home. During proceedings, many allegations were made against SS, who denied them. The Council subsequently decided not to pursue the allegations. By this stage, it was some 16 months after RR had been removed from her home. The Council then determined that it would not fund a package of care at home for RR, and that it would not provide direct payments to RR via SS. The proceedings were resolved by consent, with final declarations that RR lacked capacity to litigate, to decide where to live, and to make decisions about care and contact with others, and that it was in her best interests to reside at the care home and to have contact with SS, substantially in accordance with the general rules on visiting that the care home operated for all families.

44. Notwithstanding the fact that it was considered to be in RR's best interests to remain at home, DJ Mort was deeply critical of Milton Keynes' approach:

> *"23. The initial failure of MKC to investigate the safeguarding concerns was deplorable as was their failure to apply to the Court of Protection for authority to remove RR from her home. The 19 day delay in applying to the court compounds their failure as does their failure to advise SS of his mother's whereabouts for the same period. Furthermore the safeguarding investigation was not completed until 12/9/13 with the result that contact between RR and her son was subject to restrictions for longer than was necessary. There can be no excuse for*

> *MKC's initial failure to investigate the safeguarding alerts. The way they have dealt with this case has been woefully inadequate from the start. It has resulted in avoidable and unlawful interference in respect of RR's Art. 5 right to liberty and security of person and her Art. 8 right to respect for her private and family life and her home. Those rights are not invalidated, nor are the unlawful interferences with those rights rendered any less serious by virtue of RR's incapacity."*

45. The court declared that RR's Art. 5 ECHR rights were breached when she was removed from her home with no lawful authority, and that her unlawful detention continued until the DOLS authorisation was later made. It likewise found that her Article 8 ECHR rights had been violated. This reiterates the lesson of the ruling in ***London Borough of Hillingdon v Neary*** **[2011] EWHC 1377** and, that local authorities must seek court authorisation before acting in a high handed way which interferes with a person's Article 8 rights.

Deprivation of liberty in the community: non-regulated care settings

46. Following the decision in ***Cheshire West***, the CoP has also seen a rise in applications for judicial authorisations of a deprivation of liberty pursuant to sections 4A and 16(2)(a) MCA 2005 in 'non-regulated' care settings that are not governed by Schedule A1 MCA 2005, i.e. in care settings beyond hospitals and residential care homes.

Re X streamlined procedure

47. The CoP has provide guidance and model orders in respect of such cases following the decisions of the President in *Re X (Deprivation of Liberty)* [2014] EWCOP 25 and *Re X (Deprivation of Liberty) (No.2)* [2014] EWCOP 37. It is envisaged by the CoP that many such non-disputed cases can be authorised by way of a paper application without the need for a court hearing via the "*Re X* streamlined procedure".

48. Notwithstanding the Court of Appeal's caustic (but *obiter*) comments in *Re X (CoP Practice)* [2015] EWCA Civ 599 regarding the lawfulness of the *Re X* streamlined procedure, the procedure has largely remained intact following the most recent decision of Charles J in *Re NRA & Ors* [2015] EWCOP 59. The detail of this case, whilst highly significant, is beyond the ambit of this paper.

Law Society guidance

49. The Law Society has published invaluable guidance commissioned by the Department of Health to help lawyers and frontline health and social care professionals identify when a deprivation of liberty may be occurring in a number of different health, psychiatric and social care settings, including supported living placements and care at home. It can be found here: http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/.

Meaning of 'free to leave' - the KW litigation

50. In ***Rochdale MBC v KW (No.1)*** **[2014] EWCOP 45** Mostyn J considered the meaning of 'free to leave'. KW was a severely physically and mentally disabled woman, who was provided with care, arranged and funded by the Local Authority, in her own home. As a result of her disabilities, she did not have the motor skills to remove herself from her own home. Consequently Mostyn J found that there was no deprivation of liberty. The court went on to find that if a person does not have the physical or mental ability to leave the place in which he or she is restrained, s/he cannot realistically be prevented from leaving it and there can be no deprivation of liberty. In reaching this conclusion, Mostyn J then granted permission to appeal to the Court of Appeal (the parties having declined the offer of a "leapfrog" appeal to the Supreme Court). The Court of Appeal allowed the appeal by consent without a hearing and without giving reasons for its decision.

51. In ***Rochdale MBC v KW (No.2)*** **[2015] EWCOP 13** Mostyn J reflected on the Court of Appeal's decision. He doubted the Court of Appeal's jurisdiction to allow the appeal by consent without a hearing but considered himself bound by the decision. He observed, with surprise, that the Court of Appeal, despite allowing the appeal, had failed expressly to state that KW was being deprived of her liberty. In those circumstances Mostyn J considered that her status was in limbo.

52. The order in ***KW No.2*** was itself appealed on the basis that Mosytn J was wrong to hold the Court of Appeal's decision was *ultra vires* and had also misconstrued the Court of Appeal's first order in finding that they had not made a declaration that KW was under a deprivation of liberty.

53. In a rather scathing decision the Court of Appeal allowed the appeal (***KW & Others v Richmond Metropolitan BC*** **[2015] EWCA Civ 1054**). The Master of the Rolls held that the Court of Appeal's meaning had been clear from the context of the consent order it had approved, namely it had made a finding that KW was deprived of liberty. It was denied that the Court of Appeal's first decision was *ultra vires* or procedurally impermissible. Mostyn J's

first judgment did not raise any issue of law. The basis of the appeal was that he had failed to apply ***Cheshire West*** to the facts properly.

54. Mostyn J's "common sense" approach has attracted sympathy and approval from a number of commentators. However, the message from the Court of Appeal was overwhelmingly clear that Judges at first instance need to apply ***Cheshire West*** rather than seek to depart from it.

W City Council v Mrs L

55. In ***W City Council v Mrs L*** **[2015] EWCOP 20**, Bodey J also found that there was no deprivation of liberty in the case of a 93 year old woman with dementia, who was cared for at home, under a care package that was shared between the Local Authority and Mrs L's daughter. Under this care package, Mrs L was visited three times each day. The garden gate was kept shut, preventing her from leaving the property unescorted, door sensors were activated at night, so that they would be alerted if she left, and it was agreed that there might be circumstances in which, in an emergency, she might be confined to her flat.

56. Bodey J's conclusion, at para [27] of his judgment, that there was no deprivation of liberty was influenced by the fact that the restrictions on Mrs L's freedom were not continuous or complete. Visits from her carers were the minimum necessary to ensure her safety and wellbeing. Furthermore, although it was right to exercise caution, the fact that Mrs L (although lacking capacity) was content to reside in her home was also a relevant factor to be taken into account (paras [23]-[24]).

57. At para [28] of his judgment, Bodey J said that neither the fact that Mrs L was cared for in her own home, nor the fact that she wished to be there, would, on its own, be sufficient to prevent her care from amounting to a deprivation of liberty. They were simply factors to be taken into account in the mix. Nonetheless, his position is notable. In particular – at least so far as taking into account wishes and feelings is concerned – Bodey J's position is in apparent conflict with Lady Hale's statement, in ***Cheshire West***, that an individual's compliance and contentment with his/her care arrangements will never be relevant to the question of whether (s)he has been deprived of his/her liberty.

Staffordshire County Council v SRK & Ors

58. In the very recent decision of ***Staffordshire County Council v SRK & Ors*** **[2016] EWCOP 27** Charles J was concerned with a man, SRK, who due to a road traffic accident, lacked capacity

to make decisions on his care and whose care regime objectively created a deprivation of liberty. SRK had received substantial damages as a result of the accident and these had been paid to a property and affairs deputy appointed by the court.

59. The question before the court was whether SRK's care package amounted to a deprivation of liberty within the meaning of the *Storck* test and thus was one that had to be authorised by a welfare order of the CoP. It was common ground that in this case there was: (a) an objective component of confinement in a particular restricted place for a not negligible length of time; and (b) there was a subjective component of lack of valid consent. However, the Secretary of State for Justice (joined as party) argued that component (c) was not met, namely the attribution of the responsibility to the state.

60. Charles J concluded that a welfare order was required and the third component of state responsibility would be satisfied in all similar cases. He determined that the state knows, or ought to know, of the situation on the ground, and as such a welfare order was needed to avoid a violation of Art. 5 ECHR. The state's knowledge in this case was due to the court awarding damages and the CoP appointing a property and affairs deputy. In cases such as these, the deputy or other trustee should take steps to ensure that the relevant local authority knows of the care regime and that if the least restrictive regime creates a deprivation of liberty, that a welfare order is made by the CoP.

61. In lengthy discussion, Charles J referred to the case of *Storck* where Strasbourg held that: (i) the state is responsible if it has had sufficient direct involvement in the imposition or implementation of a care regime, and so it cannot be described as private, and (ii) that such responsibility does not only arise from such a direct involvement but can also be founded on (a) failure to interpret and apply national law in a way that promotes the sprit of Art. 5 or (b) failure to perform the positive obligations imposed on a state by Art. 5.

62. The steps taken by Staffordshire Council and the CQC in this case did not amount to direct involvement that makes the state responsible for P's (private) deprivation of liberty within Art. 5. However, the knowledge of the courts in: (i) awarding damages, (ii) appointing a deputy and (iii) trustees or an attorney having to make decisions on the application of damages for SRK's best interests, means the state cannot successfully say it does not have knowledge of the situation. The local authority with the adult safeguarding role knows or should know of the situation on the ground and this triggers its obligations to investigate, support and consider making an application to court.

Children and deprivation of liberty

63. In recent months there have been a series of cases (all determined by Keehan J) involving children and the issue of whether a lawful authorisation of a deprivation of liberty is required.

Children under 16: Re D (A Child: deprivation of liberty)

64. The case of ***Re D (A Child: deprivation of liberty)*** **[2015] EWHC 922 (Fam)** raised two interesting questions: (i) the extent and scope of parental responsibility; and (ii) the Article 5 rights of children before they reach the age of 16.

65. In ***Re D*** a 15-year-old boy (who was very close to his 16th birthday) had been diagnosed with ADHD, Asperger's Syndrome and Tourette's Syndrome. His treating community psychiatrist made a referral to Hospital B and he was informally admitted for assessment and treatment. When his treating psychiatrist assessed the boy as being fit for discharge the local authority sought to identify a placement outside the hospital for him. The hospital trust applied for a declaration that the deprivation of the boy's liberty by the trust was lawful and in his best interests.

66. Keehan J held that D, whilst subject to continuous supervision and control and is not free to leave the hospital setting, was not deprived of his liberty under Article 5 ECHR because his parents had consented to the placement and such decisions fell within the "zone of parental responsibility". The Judge further held that in the case of a young person under the age of 16, the court may, in the exercise of the inherent jurisdiction, authorise a deprivation of liberty. Once a child has reached the age of 16, the CoP may authorise a deprivation of liberty pursuant to its powers under sections 4A and 16(2)(a) MCA 2005.

Children aged 16-17: Birmingham City Council v D & W

67. The case of ***Birmingham City Council v D & W*** **[2016] EWCOP 8** is the sequel to ***Re D***. Having turned 16 and discharged from hospital, D, was transferred to a residential unit, funded by the local authority, with his parent's consent under s.20 of the Children Act 1989.

68. All parties agreed that the Supreme Court's nuanced acid test was met in respect of the arrangements for D at the residential unit. The attempts by the Official Solicitor to persuade Keehan J to reverse his earlier decision in ***Re D*** were resisted. However, once D had turned 16,

the position had fundamentally changed as his parents could no longer consent on his behalf. The court identified that Parliament had chosen to distinguish the legal status of those: (a) under 16; (b) aged 16 and 17; and (c) adults (paras [64] and [103]). For example, incapacitous 16 and 17 year olds are within the remit of the MCA 2005 but an incapacitous person under 16 is generally excluded.

69. Keehan J acknowledged that parents still have parental responsibility for their 16 and 17 year old children. However, he held that the various international conventions and statutory provisions referred to, the UNCRC and the HRA 1998, recognise the need for a greater degree of respect for the autonomy of all young people but most especially for those who have attained the age of 16 and 17 years. Accordingly, the "clear conclusion" that however close the parents are to their child and however cooperative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of that young person's liberty.

70. The local authority stressed that the outcome of this decision had significant resource implications for this and all local authorities nationally. But the argument was rejected at [137]. The protection of the human rights of those with disabilities or the vulnerable members of our society, most especially in respect of the protection afforded by Art. 5 (1), was too important and fundamental to be sacrificed on the "altar of resources".

Looked after children/children subject to care orders

71. In ***Re AB (A child: deprivation of liberty)*** **[2015] EWHC 3125 (Fam)** Keehan J held that local authorities must also now consider whether looked-after children are being deprived of their liberty. A local authority cannot consent to the deprivation without applying to the court (whether to the CoP or inherent jurisdiction of the High Court). The court ruled that in some circumstances a parent may be able to consent (e.g. for children under 16) but a local authority cannot and court authorisation will *always* be required.

72. ***Re AB*** concerned a 14 year old child, AB, who presents with Moderate (Severe) Learning Disability and ADHD and is on medication. AB requires assistance with taking his medicine, daily activities and preparation of food. AB was voluntarily accommodated when aged 13 (pursuant to s.20 Children Act 1989) in November 2013 and placed in foster care, but moved to a residential home in December 2013 where he remains to date. A rehabilitation plan was in place for AB to return home. However, as a result of emerging child protection concerns, care proceedings were initiated. In June 2015 AB was made the subject of an interim care

order. Due to AB's needs, the residential home set in place restrictions to minimise any risk of harm to him. These included AB not being allowed to go out alone and if he left he would be brought back to the residential home.

73. The local authority considered the "acid test" as set out in ***Cheshire West*** was met and considered there it was arguable that AB was deprived of his liberty. Due to his age, 14 years old, the provisions of the MCA 2005 were not applicable. As such, an application for a deprivation of liberty authorisation was made under the inherent jurisdiction under s.100(4) of the Children Act 1989 in the High Court. Under the MCA 2005, the first question would be whether an adult has the capacity to consent to the arrangements. If they do, then any such restrictions would not amount to a deprivation of liberty. However, the test for a child under 16 is competence and in this particular case it was accepted that AB did not have the competence to understand the restrictions imposed upon him.

74. In considering the facts of this case Keehan J concluded that: *"in circumstances whereby a child is a child in need or being accommodated by a local authority - Where the local authority and parents co-operate, it may be an appropriate exercise of parental responsibility and prevent what would otherwise amount to a deprivation of Liberty."* However at the "other extreme", if accommodation under s.20 Children Act 1989 is just the prelude to care proceedings (i.e. where the local authority contends that the threshold criteria under s.31 CA 89 is met) it is difficult to see how parents' consent would fall within 'zone of parental responsibility'.

75. Keehan J further confirmed that in circumstances whereby a child is subject of an Interim Care Order/Care Order the local authority <u>cannot consent to the deprivation</u>. The local authority is acting as organ of the state and therefore, it would be wrong to see a local authority as having to consent: this would be a breach of Art.5 ECHR and would not afford the 'proper safeguards' for legal justifications for constraints. Furthermore, *"it would be inappropriate for parents to consent due to the concerns about their ability to properly exercise their parental responsibility."* where the child is subject to an Interim Care Order or Care Order and is not in Secure Accommodation (s.25 of the Children Act 1989) then a local authority cannot consent to such deprivation of liberty.

76. The practical repercussions of this judgment remain to be seen. It certainly now poses a fundamental question for local authorities to consider – are those looked after children who are not competent to consent to and who have restrictions in their placements potentially

being deprived of their liberty? This could have serious ramifications on embattled local authorities.

77. The current state of the law in relation to adults and children can be summarised thus:

(a) Adults who are confined and lack capacity require Art. 5 ECHR safeguards;

(b) For 16 and 17 year olds who are confined and lack capacity (or do have capacity and refuse), those with parental responsibility cannot give valid consent: Art. 5 ECHR safeguards are required;

(c) For those under the age of 16 who are confined and lack capacity (or refuse to give it), parents can give valid consent if that is an appropriate exercise of parental responsibility;

(d) For all those under 18 under an interim or final care order who are confined and lack capacity, Art. 5 ECHR safeguards are required;

HRA Damages claims in the Court of Protection

78. Damages will not automatically flow from a finding of an unlawful deprivation of liberty in the CoP.

79. The court may only award damages to the extent that it is necessary to provide the wronged party *"just satisfaction"* for the breach. Often the remedy that will provide the requisite *"just satisfaction"* will be a declaration that the public body has violated the individual's Convention rights and, most importantly, a correction of whatever wrongdoing is complained of. Damages are therefore very much a secondary consideration, only to be awarded where other remedies simply are not good enough.

80. In what circumstances then, will damages be the only way of affording the wronged party "just satisfaction"? There is no hard and fast rule. Damages will more likely be awarded where:

- There has been pecuniary (financial) loss (e.g. care home fees);

- The violation has caused the actual deprivation of liberty complained of (i.e. the violation resulted in a material change in a person's circumstances). Such violations have been described as "substantive" rather than merely "procedural" breaches;

- In respect of non-pecuniary loss, where there has been a substantial degree of suffering, frustration or inconvenience

81. This is not an exhaustive list and damages may be awarded in other cases where the individual circumstances require it.

82. Precedents in relation to damages awarded for a breach of Art. 5 ECHR in CoP cases are slim. There is no reported case as yet where a CoP judge has been required to determine the quantum of any damages claim arising out of a breach of Article 5 ECHR. The decisions that exist tend to be approvals of settlements only and therefore do not have the benefit of legal argument and principled reasoning to act as a guide for future cases.

83. Settlement figures approved by the CoP have tended to be fairly generous. Examples are provided below:

(a) In ***London Borough of Hillingdon v Neary*** **[2011] EWHC 3522 (COP)**, a period of 12 months' detention resulted in an award of £35,000 (or £2,917 per month). No judgment accompanying the consent order approved by the High Court was made public;

(b) ***A Local Authority v Mrs D & Another*** **[2013] EWCOP B34 (COP)** concerned an elderly couple. In August 2011 the wife had been admitted to a care home for respite care for 2 weeks but when her husband tried to take her home the staff there said he could not because there were concerns about his ability to care for her. There were then substantial delays putting authorisations in place and, when they were put in place, they were accompanied by conditions that there be an application to the CoP. No application was in fact made until September 2012, and during May – September 2012 there was no authorisation in place at all. The couple protested throughout the entire period. The couple argued that the wife had been unlawfully deprived of her liberty for the whole period. In a settlement agreement, the Local Authority accepted liability for the May-September period and agreed to pay the wife £15,000, together with an apology and costs. The court, which was asked to approve the settlement owing to the wife's lack of capacity, said that it fell within "a reasonable range", although it was in fact towards the lower end of the award in *Neary* (above). Assuming that the judge took

the claimed 10 month period into account, this would suggest damages calculated at approximately £1,500 per month. If the judge only took the May-September period into account, damages were calculated at £3,000 per month.

(c) In ***Essex County Council v RF & Ors*** **[2015] EWCOP 1**, DJ Mort approved a settlement of between £3,500 and £4,600 per month in damages for the unlawful deprivation of liberty of a 91 year old man with dementia who had been removed from his home against his wishes following a safeguarding alert, and placed in a locked dementia unit. The council also agreed to waive all the man's care home fees, amounting to some £25,000. The case concerned substantive breaches of Article 5, including failures to apply to the CoP where there were clear disputes about both capacity and best interests. The judge concluded that, *"…had it not been for the unlawful actions of ECC, P would have continued to live at home with the type of support that has now been put in place."* The court referred to *Neary* and *D* but concluded that the level of damages for the unlawful deprivation of an incapacitated person's liberty was between £3,000 and £4,000 per month.

84. Public authorities may seek to argue that the settlement figures approved in the CoP are not reflective of the Strasbourg principles and therefore should not be followed as precedent figures. It should be recalled that the purpose of incorporating the ECHR into the HRA 1998 was not to give victims better remedies at home than in Strasbourg, but simply to "Bring Rights Home", so that those rights could be enforceable domestically and without delay.

85. The court's approach to an award of damages will depend on whether the breach is considered to be substantive or procedural. The substantive vs. procedural demarcation was approved in ***Essex County Council v RF and others***. District Judge Mort stated that:

> *"Procedural breaches occur where the authority's failure to secure authorisation for the deprivation of liberty or provide a review of the detention would have made no difference to P's living or care arrangements.*
>
> *…Substantive breaches occur where P would not have been detained if the authority had acted lawfully. Such breaches have more serious consequences for P."*

86. By stark contrast (albeit in a case emerging from a Mental Health Tribunal rather than the CoP) in ***Bostridge v Oxleas NHS Foundation Trust*** **[2015] EWCA Civ 79**, the Court of Appeal approved a damages payment of just £1 for procedural breaches which rendered the Claimant's 442 day detention under the MHA 1983 technically unlawful. The sum was nominal

as during the period he remained ill and there were two Tribunal panel reviews which concluded his condition required continued detention in hospital. The court held:

> *"In my judgment, once it is clear that the appellant sustained no loss, because he would in fact have been lawfully detained anyway whether or not the breach had occurred, it is hard to see how an award of anything more than nominal damages could be justified, whether as compensatory damages or as a just satisfaction."*

87. Similarly, in ***R (Faulkner) v Secretary of State for Justice*** **[2013] UKSC 23**, the Supreme Court considered the Article 5 rights of a prisoner who had suffered delays in accessing a Parole Board. The court concluded that the Claimant had not suffered a violation of Article 5(1) as his detention was authorised by law. However, he had suffered a violation of Article 5(4) because of the delay in bringing his case before a tribunal. The Supreme Court concluded that where it is established that an earlier hearing would have resulted in earlier release, damages should be awarded as there would be a direct causal connection between the breach and the deprivation of liberty. However, in this particular case, the causal connection was not made out. No damages should be awarded for mere loss of chance.

88. In ***A County Council v MB, JB and a Residential Home*** **[2010] EWHC 2508 (COP)** - Charles J granted a declaration that a woman had been unlawfully deprived of her liberty at a care home from for just over three weeks (29 March 2010 to 13 April 2010) but made no award of damages, noting that the breach was 'procedural' rather than 'substantive'.

89. In the cases cited at para 82 above, the court also awarded P's costs. This enabled P to receive all his damages without concern that the statutory charge would be levied by the Legal Aid Agency. In many respects, damages would not be appropriate in cases where there was no order for costs as this would not amount to 'just satisfaction' for P, whose damages would likely be subject to the statutory charge. That being said, it would not be appropriate for the court to make a costs order as a way of avoiding the statutory charge. The court may find however that a costs order is appropriate in its own right which paves the way for an award of damages, often relying on the same factors.

90. Should damages not be sought in CoP proceedings, a separate claim can be issued in the County Court under the HRA 1998. Means-tested legal aid is available for this. Although

seemingly separate proceedings and a costs order being more likely, the statutory charge may still apply. Part 5.6(1) of the Statutory Charge Manual[6] states the following:

> *The costs of the civil legal services (excluding the costs of assessment) in a legally aided dispute count towards the statutory charge even if recovery is only in part of the proceedings. The wording in section 25(1) of the Act refers to recovery "in proceedings, or any compromise or settlement of a dispute, in connection with which the services were provided", similarly s10(7) of the AJA 1999 refers to funded services and this means* ***all*** *of the work funded by the Lord Chancellor in connection the client's proceedings or dispute. In a family case, this means, all of the costs arising out of the relationship breakdown.*

91. The statutory charge may well apply if no costs order was made in previous CoP proceedings. Should the Legal Aid Agency ("the LAA") choose to levy the statutory charge in these circumstances, there is an argument that the LAA itself would fall foul of Art. 5 ECHR compliance as P would be denied 'just satisfaction' in respect of his deprivation of liberty. We are not aware of the LAA seeking to levy the statutory charge in these circumstances but for now, it certainly remains a possibility.

92. On 7 June 2016 Bindmans LLP published details of a successful judicial review regarding the availability of funding to bring HRA claims in the CoP. The LAA conceded that legal aid funding was available bring a claim for damages under the HRA 1998, within the CoP, for both ongoing and historic breaches. As with funding for other HRA claims, the grant of funding would be subject to application of paragraph 22 of Part 1 of Schedule 1 of LASPO[7].

93. Whilst welcome news for practitioners, this does not address the issue of the application of the statutory charge, which is likely to continue to remain a barrier to bringing HRA claims where costs are not recovered.

Deprivation of Liberty – What next?

94. It has long been recognised that DoLS are in need of urgent reform. The Law Commission has affirmed that "legislative change is the only satisfactory solution". The question is the scope, content and speed of that change.

95. In July 2015 the Law Commission consulted on a comprehensive and principled approach to those who are deprived of liberty, including much greater emphasis on the prevention of a deprivation of liberty arising. However, the proposals were also very expensive (the impact

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324163/legal-aid-stat-charge-manual.pdf
[7] https://courtofprotectionhandbook.com/posts/

assessment put the costs of implementation at £1.8 billion over 10 years) and, were arguably, even more complex than the DoLS scheme it would replace.

96. At the Government's request, the Law Commission has recently published an 'interim statement'[8] setting out the proposed direction of travel now through to the final report and draft legislation (due to be published by December 2016). The "compelling case" for replacing DoLS is reaffirmed and the scale of workloads and pressure on resources mean that *"any notion that the existing system can be patched up to cope, even in the short term, in our view is not sustainable"*. However, financial and resource pressures meant that many viewed the expansive scale of the initial proposals as unrealistic, and simply too costly to implement at the moment in the current economic climate. These concerns have clearly influenced the interim response, which accepts that reform must "demonstrably reduce the administrative burden", and provide "maximum benefit for the minimum cost".

97. As a result, the interim statement sets out that the proposals to reform DoLS will now be for:

- a 'more straightforward, streamlined and flexible scheme' focussed solely on authorising deprivation of liberty, and going no further, abandoning the aspirations of the wider 'supportive care' scheme, though some amendments to the MCA 2005 may be proposed to reinforce those Art. 8 ECHR concerns (adding emphasis on P's wishes in best interests decisions, and testing the necessity for any removal of P from home into institutional care);

- the responsibility of establishing the case for a DoL shall be shifted from the provider of the care to commissioner (i.e. usually the local authority or CCG), using where possible the same assessments already in place for the care planning;

- there will still be rights to reviews, legal proceedings and advocacy;

- there may be 'a defined group of people who should receive additional independent oversight of the DoL' by an AMCP, but it appears that not only is the central role of the AMCP as scrutinising and authorising the DoL in every case lost (saying that the vast numbers affected by ***Cheshire West*** means it is 'not proportionate of affordable' to offer this to everyone caught by Art. 5), but even the current universal role of the BIA is dropped, so a proportion of those DoL will apparently have no independent oversight, which we anticipate may be controversial;

[8] http://www.lawcom.gov.uk/wp-content/uploads/2016/05/mental_capacity_interim_statement.pdf

- a single scheme to be applied uniformly across every setting, i.e. dropping plans for a dedicated hospital / hospice scheme and, presumably, leaving in-patient DoLS as the responsibility of the CCGs to authorise;

- the proposal to amend the MHA 1983 is also dropped, on the basis that the policy aim can be met by provision that the existing powers under MHA 1983 should be used for patients who lack capacity to consent to admission and treatment for their mental disorder, even where they are compliant;

- the inadvertent impact on inquests from ***Cheshire West*** should still be addressed by an amendment to the Coroners and Justice Act 2009 to explicitly remove the proposed scheme from the definition of 'state detention', which triggers the need for an inquest, in some cases with a jury;

- the proposal for a tribunal to replace the CoP jurisdiction remains in the balance, and a final decision on this has not been reached;

98. Finally, one of the most controversial aspects has been the nomenclature used. It can be counterproductive to have to discuss 'deprivation of liberty' in some of the sensitive and emotional situations in which health and social care is delivered. The Law Commission have explicitly requested further suggestions / feedback on this (to Olivia.Bird@lawcommission.gsi.gov.uk).

99. The scaling back of the original proposals by the Law Commission may be viewed by some as common sense prevailing, a scheme with more limited scope, less complexity and, presumably, reduced costs. Alternatively, it could be seen as a missed opportunity to address the wider issues, and in particular the prevention of a deprivation of liberty before it arises and aspects of Art. 8 ECHR rights, potentially simply delaying the need for more comprehensive reform, and arguably diluting the independent scrutiny and safeguards provided going forward.

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