DEPRIVATION OF LIBERTY AND THE *CHESHIRE* CASE

The Mental Capacity Act 2005 ("MCA") provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves. The MCA also contains the Deprivation of Liberty Safeguards ("DOLS"). These apply to those who for their own safety and in their own best interests needs to be accommodated under care and treatment regimes that may have the effect of depriving them of their liberty, but who lack the capacity to consent to such arrangements. The safeguards were created to ensure that any decision to deprive someone of their liberty is made following defined processes and in consultation with specific authorities.

What are the Deprivation of Liberty Safeguards?

The DOLS provide legal protection for those people to whom the MCA applies and who do not require treatment under the Mental Health Act 1983 who are deprived of their liberty within the meaning of Article 5 of the European Convention on Human Rights ("ECHR") in a hospital or care home. If an individual is deprived of their liberty elsewhere, for example in their own home or supported living arrangements other than in a care home, such a deprivation will only be lawful if authorised by the Court of Protection as the DOLS processes will not apply.

Where the DOLS do apply, they provide detailed requirements for when and how the deprivation may be authorised. They provide for an assessment process that must be undertaken before a deprivation may be authorised as well as detailed arrangements for renewing and challenging the authorisation. In summary, the process for obtaining authorisation for a deprivation of liberty is as follows:

- The managing authority has responsibility for identifying those at risk of deprivation of liberty and requesting authorisation of the deprivation from a supervisory authority. In the case of an NHS hospital the managing authority would be the NHS body responsible for running the hospital. In the case of a care home or private hospital the managing authority would be the person registered under part 2 of the Care Standards Act 2000 in respect of that hospital or care home.

- The supervisory body will then consider the request for authorisation and commission the assessments required by the DOLS. Where the DOLS are applied to a hospital the supervisory body will be either the PCT commissioning the individual's care or treatment, or if the care is commissioned by the Welsh Ministers or LHB the Welsh Ministers. In the case of a care home, the supervisory body will be the local authority for the area in which the person is ordinarily resident or, if this is not applicable to the individual, the local authority for the area in which the care home is situated.

- If there is nobody appropriate to consult as to the individual's best interests, other than people providing care of treatment to the individual in a professional capacity, the managing authority must notify the supervisory body when it applies for an authorisation and the supervisory body must then instruct an IMCA to represent the individual.

- The assessments required by the DOLS must be completed within 21 days for a standard authorisation, or, where an urgent authorisation has been given, before this expires. A standard authorisation must be requested when it appears likely that at some time in the next 28 days a deprivation of liberty will occur. Wherever possible this authorisation should be obtained in advance, but where the managing authority believes it is necessary to deprive someone of their liberty before the standard authorisation process can be completed, the managing authority itself must give an urgent authorisation and then obtain standard authorisation within 7 calendar days.

- The relevant assessments are:

    - Age assessment
    - Mental health assessment
    - Mental capacity assessment
    - Best interest assessment

- Eligibility assessment
- No refusals assessment

If all the assessments support authorisation, this will be granted and the relevant person's representative will by appointed. The authorisation will be implemented by the managing authority. If any assessment does not support an authorisation, the request will be declined.

Where a person's deprivation of liberty is authorised under the DOLS, the managing authority has a duty to monitor the case on an ongoing basis to determine whether the individual's circumstances have changed such that they no longer need to be deprived of their liberty. A standard authorisation can be reviewed at any time, but will expire after a maximum of 12 months. The managing authority must make clear in the individual's care plan what the procedures are for monitoring that person's authorisation and under what circumstances a review is necessary. If a person's condition is changing frequently then their deprivation of liberty should be reviewed more frequently.

Further details about the DOLS can be found in the Deprivation of Liberty Safeguards Code of Practice:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

What is a deprivation of liberty?

In order to establish whether or not the DOLS will apply or authorisation will be needed from the Court of Protection, it is necessary to determine whether a deprivation of liberty exists. The starting point is Article 5 ECHR, further to section 64(5) of the MCA which states *"In this Act, references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the Human Rights Convention"* The relevant provisions of Article 5 are as follows:

"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 … 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."

Whether or not a deprivation of liberty exists is ultimately a legal question, and one which is a source of much debate and uncertainty. In March 2011 the Care Quality Commission published a report on the operation of the DOLS which noted a lack of awareness of these safeguards and recommended that the Department of Health publishes "*clear and concise briefings that are accessible and easily applied in practice"* in order to demystify the question of what constitutes a deprivation of liberty. Guidance for practitioners, including indicators of potential deprivations of liberty as opposed to restraint, can be found in the Deprivation of Liberty Safeguards Code of Practice. However, recent case law has developed the legal test in this area, and as a result identifying a deprivation of liberty is not a straightforward task.

It was established in the case of *Storck v Germany (2005) 43 EHRR 96* that there are three broad elements to consider when determining whether or not a person is deprived of their liberty.

1. *The objective element of a person's confinement to a certain limited place for a not negligible length of time*. In other words, the individual's particular circumstances – are they kept in a locked ward or room? Are they subject to restraint? Are they under the continuous supervision and control of care staff?

2. *The additional subjective element that they have not validly consented to the confinement in question"* So has the individual indicated that they do not wish to remain where they are being confined or expressed a wish to live elsewhere?

3. The confinement must be "*imputable to the State"* i.e. is there direct involvement of public authorities in the individual's detention?

Caselaw

A number of cases have examined the question of what constitutes a deprivation of liberty, focusing particularly on the objective requirement.

R v Bournewood Community Health and Mental Health NHS Trust, ep p L [1999] AC 458

In the case of *Bournewood* a 48 year old autistic man with profound learning disabilities. He was resident at Bournewood Hospital for over 30 years before being discharged to live with adult foster carers in the community. He was later readmitted to the Hospital but as he was compliant he was not detained under the Mental Health Act but admitted as an informal patient. The ward he was kept on was unlocked, he never attempted to leave and there was never any attempt to detain him against his will or to carry out any tests or assessments to which he had not consented. However, had he sought to leave he would have been detained compulsorily. An action was brought for judicial review, habeas corpus and damages on the basis that he had been falsely imprisoned.

The House of Lords held that the Claimant's readmission to hospital as an informal patient did not constitute a deprivation of his liberty. In coming to this view, the court placed great emphasis on the fact the Claimant had not been kept on a locked ward, he had never attempted or expressed the wish to leave and drew a distinction between actual restraint and restraint conditional on a person seeking to leave. Further, to the extent that the Claimant had been detained, the Court found that any such detention was justified under the common law doctrine of necessity.

The case reached the European Court of Human Rights, in *HL V UK (2004) Application No:00045508/99* which was asked to consider whether the Claimant's rights under Article 5(1) of the European Convention on Human Rights had been infringed, and the Court held that they had. Further, the Court found striking *"the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted"* and considered there was a risk of arbitrary detention as a result. The legislative response to this was the introduction of the Mental Capacity Act 2005 and the deprivation of liberty safeguards which were incorporated in 2007.

JE v DE [2006] EWHC 3459 (Fam) [2007]

This case considered the situation in a residential care home, and accepted that the key indicator of a deprivation of liberty in HL was *the exercise of complete and effective control over the person's care and movements.* Mumby J noted with regard to the objective element that *"the starting point must be the concrete situation of the individual concerned 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 distinction between a deprivation of and a restriction upon liberty is merely one of degree or intensity and not one of nature or substance."* The court concluded that there was a deprivation of liberty in this case because DE was not "free to leave" to leave his residential care home, in the sense of *"removing himself permanently in order to live where and with whom he chooses."* This approach was accepted in the context of a residential housing unit in the case of *G v E [2010] EWHC 621 (Fam)*.

P and Q v Surrey County Council [2011] EWCA Civ 190

The concept of "deprivation of liberty" was significantly reduced in this Court of Appeal case where the following factors were held to be relevant:

1. Whether or not the individual expresses an objection to their living arrangements
2. The use of drugs which might suppress the expression of such objections
3. The normality of the living arrangements
4. The opportunities for leaving the place of residence for the purposes of recreation, education and social contact.

In this case, where P lived in a foster home and Q in a specialist care home, both with unlocked bedrooms and where P would have been restrained had she tried to leave and Q was continuously supervised, neither scenario was held to be a deprivation of liberty. This was a clear move away from the reasoning in HL that "complete and effective control" of an individual's movements and care" was a key factor in determining whether there was a deprivation of liberty.

Cheshire West and Chester Council v P [2011] EWCA Civ 1257.

The waters were muddied further and even greater restriction placed on the concept of deprivation of liberty by the recent case of *Cheshire West*. In this case P was a 39 year old man with cerebral palsy and Down's Syndrome who lived in a bungalow with up to 3 other residents. The normal staffing ratio was 2 staff for all four residents, although P received additional 1:1 close personal supervision during the daytime.

P's needs demanded a high level of care – he required prompting and assistance with all aspects of daily living including mobility, nutrition, personal hygiene and continence. P also had a long history of pulling at his continence pads and ingesting their contents which, in addition to the obvious hygiene risk, also put him at risk of choking. In order to manage P's behavior, care staff sometimes needed to resort to physical intervention where preventative strategies had been unsuccessful. P would resist such interventions and as a result they required 2:1 staffing. Other behaviours also required some form of intervention. For example, if P became uncooperative and sat on the floor various techniques would be used to encourage him to stand but if he were unsafe and refusing to stand two staff would need to hold his hand on either side and support him to stand or move to a chair or his wheelchair.

P was unable to leave his accommodation without a member of staff accompanying him, however he received 98 hours of 1:1 care support each week to facilitate activities such as going swimming, going to a club and going to a local pub for curry night.

The court held that P was not deprived of his liberty. In doing so, the court highlighted a number of principles which would be significant in similar cases in the Court of Protection:

1. The starting point is the concrete situation, looked at as a whole and taking into account criteria such as the type, duration, effects and manner of implementation of the measures in question and distinguishing between deprivation and restraint. The context is crucial.

2. No one factor (such as the presence or absence of a lock) is determinative of a deprivation of liberty.

3. Mere lack of capacity to consent to living arrangements cannot of itself create a deprivation of liberty

4. In determining whether there is a deprivation of liberty, it is legitimate to have regard both to the objective "reason" why someone is placed and treated as they are, and also to the objective "purpose" or "aim" of the placement. However, subjective motives or intentions have only limited relevance – a good motive or intention cannot render innocuous what would otherwise be a deprivation of liberty although an improper motive or intention may cause a deprivation to exist where it otherwise would not.

The main element emphasized in the judgment, and that which has given rise to the greatest controversy in application, is the concept of the relevant comparator. Mumby LJ stated"*reference to the degree and intensity of the restriction placed no doubt gives some indication of the principle in play but it hardly provides a benchmark or yardstick by which to evaluate the circumstances and assess whether or not there is a deprivation of liberty… There must be something more which enables us to pursue a more focused and less time-consuming enquiry. In my judgment there is. The task is to identify what it is we are comparing X's concrete situation with. In short, what is the relevant comparator?"*

Munby LJ continued *"I would hold that, when evaluating and assessing the "relative normality" (or otherwise) of X's concrete situation in a case such as this, the contrast is not with the previous life led by X (nor with some future life that X might lead), nor with the life of the able-bodied man or woman*

on the Clapham omnibus, but with the kind of lives that people like X would normally be expected to lead. The comparator, in other words, is an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations (call them what you will) as X. Likewise, in the case of a child the comparator is a child of the same age and development as X."

Applying this test to the facts of the case, Munby LJ held Baker J in the Court of Protection erred in *"never comparing P's situation in the Z House with the kind of life P would have been leading as someone with his disabilities and difficulties in what for such a person would be a normal family setting. He never grappled with the question whether the limitations and restrictions on P's life at Z House are anything more than the inevitable corollary of his various disabilities. The truth, surely, is that they are not. Because of his disabilities, P is inherently restricted in the kind of life he can lead… There is nothing to show that the life P is living at Z House is significantly different from the kind of life that anyone with his concatenation of difficulties could normally expect to lead, wherever and in whatever setting they were living… Baker J referred to the fact that P "cannot go anywhere or do anything without their support and assistance." That, no doubt, is a fact. But it is surely the reality inherent in and dictated by his various disabilities. It is not something imposed on him by Z House."*

The court accepted that P's domestic arrangements were not the only determinant of normality, and a vital aspect is the nature and extent of P's participation in and interaction with the wider community outside Z House, whether in terms of education or occupation, social contact, sport or other outdoor activities. Munby LJ considered that *"Not merely is P, when he is at Z House, living a life which is as normal as it can be for someone in his situation, his life outside Z House is as normal as it can be for someone… with his capabilities."*

Finally, the court noted that "*the measures applied from time to time to P are far removed from the physical or chemical restraints which one sometimes finds, for example, in mental hospitals. They are, in truth, the kinds of occasional restraint that anyone caring for P in whatever setting – for example his own mother if he was still living at home – would from time to time have to adopt."*

Implications of the *Cheshire West* decision

At first glance the "relevant comparator" test may appear helpful. It simplifies the decision making process when determining whether or not a DOL exists and calls for a subjective consideration of the individuals circumstances rather than the application of a rigid and objective set of criteria. However, there are significant disadvantages to this approach. Firstly, the test places a large amount of discretion in the hands of those required to make decisions about the existence of deprivations of liberty. Once the relevant comparator has been identified, it is then for the decision maker to decide whether the restrictions they themselves have deemed necessary in order to care for and manage P they would also impose on a hypothetical person with the same disabilities, limitations and restrictions as P. Looked at in this way, in what circumstances would the decision maker say the care plan they devised and deem appropriate is suitable for P but would not be suitable for someone else with P's characteristics? The answer is surely very few. It would be possible to say that a less restrictive care plan could be applied to a hypothetical P if he or she possessed the same physical characteristics as P, but their situation was different. For example, P may be deprived of his or her liberty in a care home because he or she wished to live with their family who are unwilling or unable to accommodate them, whereas a hypothetical P with different family circumstances may be able to live at home.

From the court's perspective, reducing the ambit of what constitutes a deprivation of liberty in this has the result of dramatically decreasing the number of cases challenging standard authorisations simply because fewer deprivations of liberty will now be found to exist. However, in doing so the ruling in *Cheshire West* is denying the protections of the DOLS to a large proportion of people they were designed to protect. Without DOLS in place or an authorisation from the Court of Protection there would be no requirement for regular review of the individual's situation, nor would there be the opportunity for the individual to challenge their confinement via the courts. More worryingly, in applying the relevant comparator test it becomes clear that the greater the extent of an individual's disabilities the easier it will be to say that they are not deprived of their liberty and so the DOLS will not apply.

Also, the test in *Cheshire West* arguably confuses the question of what is in someone's best interests with that of what constitutes a deprivation of liberty. Where a supervisory body commissions the relevant assessments for determining the existence of a deprivation of liberty, one of these is a best interests assessment carried out by a best interests assessor. Pre-*Cheshire West* it would not be until this assessment was completed that factors such as relative normality would be considered in detail in the context of making a decision about whether P's arrangements were in his best interests. Now, if a managing authority asks itself whether a hypothetical P sharing P's physical characteristics would be subject to the same care arrangements this question (which is arguably a question of best interests) would be answered by the managing authority, most likely by P's own clinicians or care staff, before ever reaching the best interests assessment stage.

Further, the *Cheshire West* judgment differs in its ratio from the judgment in *Stanev v Bulgaria (Application No. 36760/06)* dated 17 January 2012. In this case the Grand Chamber of the European Court of Human Rights ruled that the placement of the Applicant in a social care home for people with mental disorders and his inability to obtain permission to leave the home justified a finding that he was deprived of his liberty. A key factor influencing the European court's decision was the inability of the Applicant to leave, in contrast to the Court of Appeal's approach in *Cheshire West*.

The Official Solicitor has made an application to appeal the decision in *Cheshire West* and the Supreme Court is currently considering the application. There is a general hope within the community of practitioners in this area that permission will be granted and broad agreement that there remains an urgent need for clarification of this issue from the Supreme Court.

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