

Case Summary

Birmingham City Council v D and W [\[2016\] EWCOP 8 \(Cobb J\)](#)

Issue

Article 5 ECHR – Deprivation of liberty – children and young persons

Facts

D was a 16-year-old boy who had been diagnosed with ADHD, mild learning disability, Asperger's syndrome and Tourette's syndrome. He had previously been detained in a psychiatric unit but was discharged to a residential home. The residential unit was funded by the local authority with his parent's consent under section 20 of the Children Act 1989. All parties agreed that D was deprived of his liberty. The issue was whether D's parents were able to consent on his behalf and whether the arrangements were imputable to the State.

Decision

Whilst D was under 16 his parents could consent to his hospital confinement if that was an appropriate exercise of parental responsibility. However, once D turned 16, all things changed, for his parents could not consent on his behalf. The local authority argued that the effect of the parents' consent under section 20 of the Children Act 1989 meant that D's placement and confinement were not imputable to the state, but this argument was rejected by the court. The local authority also stressed that the outcome of this decision would have significant resource implications for all local authorities but this argument was also rejected.

Practice implications

To summarise the current state of the law:

1. Adults (over 18) who are confined and lack capacity require Article 5 safeguards;
2. 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, Article 5 safeguards are required;
3. Those under 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;
4. For all those under 18 under an interim or final care order who are confined and lack capacity, Article 5 safeguards are required.

Where care orders or parental responsibility do not cover a child's or young person's confinement, separate legal proceedings will be required to authorise the resulting deprivation of liberty. This application will be the same as the *Re X* applications that are made on the COPDOL10 applications form, although the form is likely to be amended soon.

The full version of this case report can be found [here](#). Further reports, articles and guidance notes can be found on our dedicated Mental Capacity Law Resources Page by [clicking here](#).