

Deprivation of liberty: keeping the right focus

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Cheshire West: what did the Supreme Court actually want?

“Policy

[Those in the position of P, MIG and MEG] need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.”

Paragraph 57, per Lady Hale

Different policy considerations in different settings?

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

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

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

Arden LJ in *R (LF) v HM Senior Coroner for Inner South London*
[2017] EWCA Civ 31

And a completely different take

“29. The fundamental principle underlying article 5 is the need to protect the individual from arbitrary detention, and an essential part of that protection is timely judicial control, but at the same time *article 5 must not be interpreted in such a way as would make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others.* These twin requirements are not contradictory but complementary, [...].

30. *In balancing these twin considerations it is necessary to keep a grasp of reality and the practical implications.* Indeed, this is central to the principle of proportionality, which is not only embedded in article 5 but is part of the common law relating to a rrest for breach of the peace.”

Lord Toulson in *R (Hicks) v Cmr of Police for the Metropolis*
[2017] UKSC 9

The price of getting it wrong vs doing your best

- ***Essex County Council v RF*** [2015] EWCOP 1 (approval of damages of £60,000 plus costs of between £50,000 and £64,000 and repayment of £23,000 in care home fees where the local authority's conduct - depriving P of his liberty in a care home for 13 months - had been "*reprehensible*")
- ***Bostridge v Oxleas NHS Foundation*** [2015] EWCA Civ 79 (where the Court of Appeal held that a patient unlawfully detained in a mental hospital for over a year was only entitled to nominal damages as the NHS Trust could have lawfully detained him under the MHA 1983: accepted that needed to be detained)

Section 21A – the crunch points

- Why do we need an RPR (or IMCA) and what should they do?
 - Relevant Person's Representative: *Re AJ* [2015] EWCOP 5
 - *Re RD* [2016] EWCOP 49: when to bring a challenge: the flowchart
- What happens where there's only one option?
 - *North Yorkshire CC v MAG* [2016] EWCOP 5 (nb not s.21A challenge but applicable by analogy)
 - *Re MN* [2015] EWCA Civ 411 (Supreme Court December 2016)

Key messages

- Deprivation of liberty is part of a bigger picture (and the language doesn't help)
- Proper MCA compliant care delivery comes first
- MCA compliant care delivery will (if a deprivation of liberty) invariably be a justified deprivation of liberty
- And keep yourself abreast of developments...

Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- <http://www.scie.org.uk/mca-directory/>
- www.mclap.org.uk
- www.mentalhealthlaw.co.uk
- www.courtofprotectionhandbook.com

