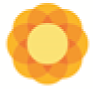
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BRIEFING

Deprivation of Liberty of Looked After Children –Legal and Practice Position at December 2021

Deprivation of Liberty of children - the basics

Article 5 European Convention on Human Rights 1950:

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:

(amongst others) the lawful detention …. of persons of unsound mind, (this may include children who are unable to decide for themselves because of an impairment or disturbance in the functioning of the mind or

Children without a mental disorder might, depending on the circumstances, be covered by the exception in Art 5(1)(d): "*the detention of a minor by lawful order for the purpose of educational supervision…*"

NB. "educational supervision" has a broad meaning. It is not limited to classroom teaching, but covers many aspects of the exercise by a public body of parental rights for the benefit and protection of the person concerned (see, e.g. P & S v Poland (§147); D.G. v Ireland, §80)

It should be noted that children without a mental disorder will probably not fall within Art 5(1)(e) but may fall within Art. 5(1)(d).

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.**

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.**

Article 5 applies to everyone irrespective of age.

The rights in *Article 5 ECHR* are added to for children by *the United Nations Convention on the Rights of the Child*, which provides (at *Article 37*) that states:

"Parties shall ensure that:

… (b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily*. … The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) *Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner, which considers the needs of persons of his or her age. In particular, every child deprived of liberty shall … have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances*

Pending Legislative Changes

The Mental Capacity Amendment Act 2019 added 16- and 17-year olds to the Liberty Protection Safeguards LPS scheme so that a standard authorisation can be put in place. This is anticipated to come into force in April 2022.

This means that in most cases after April 2022 an application to court will not be required where a child has reached 16 and lacks mental capacity.

Key Cases

Storck v Germany [2005]

Deprivation of liberty has 3 elements:

a) The objective element of confinement in a restricted space for a non-negligible period of time
b) The subjective element that the person has not validly consented to that confinement; and
c) The detention being imputable to the state

P v Cheshire West and Chester Council/P and Q v Surrey County Council [2014]

The objective element consists of determining whether the person concerned was **under continuous supervision and control, and not free to leave**. Both conditions must be satisfied.

This has become known as the "acid test"

All 3 elements must be present for there to be a deprivation of liberty

For children where there is a deprivation of liberty it must be authorised by a court

The position is continually being interpreted though case law. The most significant cases are:

The Birmingham case of RE D (A CHILD) 2017 Court of Appeal which considered the issue of whether a parent could consent where a child was under continuous supervision and not free to leave and the detention was imputable to the state – deciding that a parent could (at least, where everyone was agreed that it was necessary, proportionate and in the child's best interests) consent so that the subjective element would not be met. This decision was overturned by the Supreme Court, by a majority of 3 to 2 (see below).

Re AF children January 2018 which concerned children involved in care proceedings or subject to a care order and the differences between restricting liberty for children as opposed to objectively confining them and the processes for making an application to the court

In August 2018 the president of the Family Court gave further guidance in **Re AF no 2.**

In *D (A Child)* [2019] UKSC 42 the Supreme Court decided in the further appeal in this Birmingham case that where a 16/17 year old lacked capacity to consent to a deprivation of their liberty, there is a confinement and the care arrangements are imputable to the state, then there will be a DoL, and unless another legal route (such as the LiPS, when they come into force) is available an application to authorise the DoL will need to be made whether or not parents are consenting to the arrangement. This case has significant implications for Local Authorities who up until then were relying on parental consent.

In Re T (A Child) [2021] UKSC 35 the Supreme Court decided that it was lawful to use the inherent jurisdiction of the High Court for a DOL application. This could be in an unregistered setting but only as a temporary solution in exceptional circumstances where there is no alternative and where the child is likely to come to grave harm if the court does not act.

The Court also decided that there must be "imperative considerations of necessity" and strict compliance with the President's guidance where the proposed placement was unregulated.

This judgment also considered whether a competent child could consent to her placement removing the need for an application. The Supreme Court determined that this was just one factor for a Judge to consider and the fact that a child had or had not expressed their consent would not be a deciding factor.

There is a series of helpful authorities which consider the issue of whether or not a child is being deprived of liberty or whether it is being restricted which would not then require an application to court.

A Judgment by Mr Justice Cobb in the case of **Re RD [2018] EWFC 47 (28.06.18**) concerned a non-Gillick competent 14-year-old child subject to care proceedings, who was placed in a residential unit. Cobb J found that although the girl was not free to leave, the arrangements for her care did not amount to continuous supervision and control, so the "acid test' was not met. He considered the fact that she presented younger than her age.

On 23.01.20 in **A Local Authority v NK [2020] EWHC 139 (Fam)** Mr Justice McDonald gave judgment in respect of a 16-year-old accommodated under Section 20 who presented with ADHD, conduct disorder, absconding and self-harm. The Judge found that the current regime was restrictive but not a confinement and that it would not be appropriate to make a contingent or anticipatory authorisation of a deprivation of liberty on the basis that there might be a DoL in future should NK's behaviour deteriorate and other elements of NK's care plan (not currently in force) be implemented.

The impact of these cases on the key questions is considered further below.

A-When is a child Confined? - the "objective element"

In what circumstances is the child under continuous supervision and control and not free to leave?

In the 2018 case of **AF** the court of appeal considered this issue.

The case concerned test cases for children (aged between 11 and 16), subject to care orders. All of the children had difficulties and were subject to restrictions on their movement or liberty.

The court considered that there was a difference between a "deprivation of liberty" (a confinement) of a child and "restrictions on liberty"

Whether any particular accommodation is “locked” or “lockable” is not in and of itself determinative

The question was posed when in a child’s development does a “restriction” on liberty become a “deprivation of liberty”

The court took a realistic approach considering that many aspects of the exercise of PR that interfere with a child’s movements or freedoms do not involve a deprivation of liberty

Importantly the court recognised that the key component of the “acid test is whether the child is “under complete supervision and control” rather than whether they are “free to leave” (which children clearly are not in reality free to do).

The key question is:

whether a state of affairs which satisfies the "acid test" amounts to a "confinement" for the purposes of Storck component (a) has to be determined by comparing the restrictions to which the child in question is subject with the restrictions which would apply to a child of the same "age", station", "familial background" and "relative maturity" who is "free from disability" (NB. this derives from the judgment of Lord Kerr in Cheshire West)

Although it stressed that each case must be decided on its own facts, the court gave the following 'rule of thumb':
i) A child aged 10, even if under pretty constant supervision, is unlikely to be "confined"
ii) A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion.
iii) Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

The Supreme Court in D set out the test as whether “the restrictions fall within normal parental control for a child of this age”

The 2018 case of **Re RD (see above)** shows the complexity of the task of considering whether or not a regime amounts to a confinement

The Judge found in that case that the regime did not possess the "degree or intensity" of complete control or supervision of RD which justifies the description of 'deprivation' of her liberty…insofar as the staff impose limits or boundaries on her movements and freedoms, these represent restrictions of the type which a child of her age, station, familial background and relative maturity would have placed upon her."

B - Valid consent to confinement who can give it and in what circumstances – (if valid then there is not a DoI)

Until the case of Re T it was thought that a Gillick competent child (who has sufficient understanding, maturity, and intelligence to understand fully what is proposed) or a young person with capacity can consent on their own behalf. The outcome of T was that generally a child cannot consent because their consent can be fluctuating and is often not true consent. It is advisable to assume that a child cannot consent and that if there is a confinement then a court order authorising a DOL should be sought.

Where there is any doubt a capacity assessment should be carried out.

In Re D (a Child) 2019 the Supreme Court considered the case of a child who was 16, disabled, lacked capacity to make decisions about his residence and care and was placed in a residential home with locked external doors and from which he was not allowed to leave unaccompanied and was confined. His parents were consenting and the court of appeal had previously ruled in 2017 that a person with PR **could (at least where parents and professionals were agreed that it was necessary, proportionate and in the child's best interests), consent** to a confinement on behalf of a child (including one aged 16 or 17) who lacks *Gillick* competence.

The Supreme Court by a majority decided parents could not consent to a confinement on behalf of a 16 or 17 year-old who lacked mental capacity, and that where the confinement was imputable to the state, there would be a deprivation of liberty, and an application to the court would be necessary. The consent did not take the confinement out of the scope of Article 5 EHCR.

The court clarified that a child in need of life saving treatment who could not give consent did not result in a deprivation of liberty.

For children under 16 who are accommodated the original case of Re D is authority that parental agreement can operate to prevent a confinement being a deprivation of liberty for a Section 20 accommodated child. In light of *obiter* (persuasive but non-binding) comments by Lady Hale in the Supreme Court in Re D, this may be re-visited in future.

In those cases, it must be considered whether the person with PR *is able* to exercise it *appropriately* (for example, proportionately and in the child's best interests). This will depend on the facts of the individual case. Where their exercise is seriously called into question, it may not be right or appropriate within the spirit of the conclusion of the Supreme Court in *P v Cheshire West & Chester Council* [2014] to permit such a parent to consent (*Re AB (A Child) (Deprivation of Liberty: Consent)* [2015]

For children subject to care or interim care orders the position was made clear in re ***AB (A Child) (Deprivation of Liberty: Consent)*** **[2015]**

Where a child is subject to a care order or interim care order neither the Local Authority nor a parent can exercise their parental responsibility in such a way as to provide a valid consent for the purposes of *Storck* component b.

Further a foster carer does not have parental responsibility enabling the carer to provide a valid consent for the purposes of *Storck* component (b): see ***Re D (A Child)*** **[2017]**

C –Is Detention imputable to the State?

Children subject to care or interim care orders

In re AF the law was set out in this way

It is so obvious that where a child is subject to a care order (whether interim or final) there is involvement and "responsibility" by the State satisfying Storck component (c) – both the State in the form of the court and the State in the form of the local authority named in the care order – that the point requires neither elaboration nor citation of authority.

Children in Section 20 accommodation

In the case of Re D the Local Authority argued that a 16-year-old child on section 20 with consent of parents was not imputable to the state.

At first instance Keehan J found:

This would ignore the involvement of the LA in identifying the unit, assessing the child's needs and care regime and approving the package of care and the regime and payment of costs

This could not be seen as a private arrangement with no state involvement

Just because the arrangements were necessary and, in the child's, best interests did not prevent the arrangements amounting to a confinement

The Judge and Court of Appeal went further stating that this limb is satisfied when the LA is directly responsible for a confinement or the LA knows or ought to know of a private confinement and is under a positive obligation to make an application.

The Judge (approved by the Court of appeal) also rejected the relevance of an LA argument that there would be resource implications for LA's through having to make many applications saying that this was a matter for Local Authorities and government and was not a relevant consideration for the court.

The Court of Appeal agreed with Keehan J. The fact that parents could object and remove the child did not provide the answer. The state had assumed statutory responsibilities towards D by accommodating him under S20. This was not altered by the Supreme Court's judgment.

Post Re D - for 16/17 Year Olds prior to coming into force of Liberty Protection Safeguards (LPS)

Where children of this age are looked after and meet the acid test, lawful authority is required to deprive them of their liberty. This could be MHA 1983, Section 25 of CA 1989 where the statutory test is met or an order of the court.

This could either be the High Court Family Division or the **Court of Protection by form COP DOL 11** application where a child is 17+

Process for DOL applications in care proceedings the Family Court as set out in Re AF

General

An application to the Court should be made where the circumstances in which a child is living, or will live, **at least *arguably*** (taking a realistic rather than a fanciful view), amount to a deprivation of liberty.

<u>What has to be approved?</u>
The Court should authorise
(i) the child's deprivation of liberty in the placement cross referenced to a plan,
(ii) medication and the use of restraint if required

<u>Process: The key elements</u>

There must be an oral hearing in the Family Division (though this can be before a section 9 judge) for any substantive order, but directions can be made without an oral hearing.

- The child must be a party to the proceedings and have a guardian (if possible, the children's guardian in the care proceedings)
- The child, if of an age to express wishes and feelings, should be permitted to do so to the judge *in person* if that is what the child wants.
- A 'bulk application' is not lawful, though where there is significant evidential overlap there is no reason why a number of separate cases should not be heard together or in sequence on the same day before one judge.
- Application is made using form C66 with a supporting statement using the approved template.

Evidence: Key issues

- The nature of the regime in which it is proposed to place the child, identifying those issues which are said to amount to a confinement (included in a care plan)
- The child's circumstances, why the regime is needed and the future prognosis
- Why the restrictions/confinement is necessary, and that no less restrictive regime will do – i.e. that the care arrangements are the least restrictive means of meeting the child's needs in his/her best interests.
- The views of the child, the child's parents and the IRO, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health considerations which from the care proceedings
- Expert evidence on whether or not the child is competent to consent to the confinement usually from a psychiatrist

Where Care Proceedings to be commenced or already started

- If a DoL is evidenced, then the proceedings ought to be issued in the Family Court but listed before a Section 9 Judge – this should be made plain by the Local Authority within the C110A form.
- if a DoI arises in proceedings already commenced then ensure re-allocated to a Section 9 Judge,
- The proceedings must not be transferred to the High Court: both sets of proceedings should be determined by the Section 9 Judge in the Family Court.
- If this is not possible, then a separate hearing for the application under the Inherent Jurisdiction should be listed before a Section 9 Judge as soon as possible after the conclusion of the care proceedings (*if at all possible, within days at most*).

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Case kept under review by LA and Court

There should be regular reviews of need for DOL through the Looked After Child review process.

- There should be review by a judge at least every 12 months (but in cases concerning children it may be more frequently). This review should be sooner if there has been a significant change (either improvement or deterioration) or if it is proposed to move the child's placement.
  - The child must be a party to the review and have a Guardian (preferably the same Guardian who previously acted).

- Such reviews can be on paper, subject to judicial approval. A Judge may direct an oral hearing.
- The form of the next review is a matter on which the judge can give appropriate directions at the conclusion of the previous hearing

In **Re AF No 2 August 18** the President found that cases involving 16-year olds in care proceedings were better dealt with in the Family Court rather than the Court of protection

He also gave approval to a standard statement template and draft orders for use in these cases which have been adopted in templates for use in these cases.

F - Secure Accommodation Placements and Dols applications

There is a crisis in the availability of secure beds.

In circumstances in which the child does not fall within section 25 of the CA 1989 or the placement available is not (approved) secure accommodation, local authorities and courts have been turning to the inherent jurisdiction to authorise confinement

There is unease about this as the law under Section 25 of the CA 1989 put in place a strict statutory regime while the inherent jurisdiction is a best interests test.

These issues are under continuing scrutiny but for now the courts are making orders under the inherent jurisdiction despite the unease while continuing to make it plain through judgements that there ought to be more and better provision of approved secure beds.

The use of Section 25 was considered as part of the Re D Judgment and in a further Court of Appeal Judgment Re B (Secure Accommodation Order) [2019] EWCA Civ 2025.

Other cases in which the inherent jurisdiction has been exercised to authorise a DoL where the s.25 criteria are met, but there is no regulated s. 25 accommodation include:

- S (Child in Care: unregistered placement) [2020] EWHC 1012 – Cobb J expressed misgivings but made the order
- Z (A Child – DoLS: lack of secure placement) [2020] EWHC 1827 – Judd J expressed “significant misgivings” but made the order.

The difficulty in finding either secure or registered placements has resulted in the President of the Family Division producing guidance for courts and local authorities on placements in unregistered children’s homes.

Following Re T above there have been more decisions in this area.

In Tameside MBC v AM [2021] EWHC2472 the court found that it is lawful for the court to authorise a DoL in an unregistered placement if the Re T test is met. (despite the recent coming into force of the Care Planning Placement and Review Regulations as amended which prohibited the placement of a looked after child under 16 in unregistered accommodation.

The case of Wigan BC v Y 2021 EWHC 1982 considered suitability of placement and illustrates the point that some circumstances are unlikely to be suitable in that case continuing DOL in a hospital ward.

In Derby CC v CK and others [2021] EWHC 2931 the court considered whether it could authorise a DoL where an unregistered placement would or could not make an application to

register. The Judge decided that the Court should not ordinarily countenance making an order in these circumstances but left the door open to making an order where there was no other available option.

To sum up

- Following Re D there has been an ongoing risk that there may be regimes in place for children which are a DOL and unlawful without an application to court.
- Local Authorities will need to be ready for the coming into force of Liberty Protection Safeguards for 16 – 17-year olds who lack mental capacity.
- Re T has made it plain that Local Authorities should not readily rely on the consent of a child to their confinement whether Gillick Competent or over 16.
- Where Children are over 16lack mental capacity and are confined this confinement will need to be authorised whether accommodated or subject to a care order. From April 2022 under LiPS
- Where children are subject to care orders and are confined their confinement will need to be authorised.
- Children under 16 who are confined and looked after under Section 20 may be lawfully confined if their parents' consent.
- For children under 16 in Section 20 accommodation the person giving consent must be doing so in the proper exercise of their parental responsibility.
- Children who have capacity and are competent are not caught by LiPS scheme and where deprived of their liberty an application to court will be needed.
- Regimes of strict supervision and lack of freedom to leave are more likely to be confinement as a child reaches their early teens.
- Whether or not a child is confined as opposed to having some restriction of their liberty is fact specific.
- Failure to make applications may give rise to a claim for compensation.
- The AF regime is clear that applications ought to be made when the arrangements are "arguably" a Dol leaving it for a judge to decide widening the scope for applications.
- Once an order has been made authorising a Dol there will need to be a reviewing process which will require both legal and social work resource.
- Local Authorities who have not done so should put in place reviews to consider those placements which may be a Dol and consider these carefully against the key questions.

Are the restrictions of the type which a child of her age, station, familial background and relative maturity would have placed upon him or her?

Precedent documents have been drafted to assist legal and social work staff following Re AF no 2

For further advice on this contact:

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