

When is a DOL not a DOL? When the parents of a 15 year old agree to it

Re D (A Child: Deprivation of liberty) [2015] EWHC 922 (Fam)

For those who support parental rights this case is perhaps, on its facts, a victory for common sense – but for those who have any concern for the rights of disabled children, this is a worrying decision – potentially leaving such children locked in state confinement for years with no rights of appeal or review.

The background

D is almost 16, he suffers with ADHD, Asperger's Syndrome, Tourette's syndrome and learning difficulties. His significantly challenging behaviours at home led to his informal admission to an NHS hospital in October 2013. He has remained there to date although the local authority hope he will soon be placed in a suitable residential placement. D is not 'Gillick' competent to consent to his residence, his care arrangement or to any deprivation of liberty (DOL). His treating psychiatrist considered it inappropriate to use the provisions of the Mental Health Act 1983 as "it was not necessary to detain D in order to treat him". So he has remained confined in hospital for almost 18 months on the agreement of his parents.

Despite the psychiatrist believing it was not necessary to detain D there was no dispute that his hospital placement satisfied the first limb of the test for a DOL, propounded by Baroness Hale in *Cheshire West*; that is the objective component of the confinement in a particular restricted place for a not negligible length of time. The hospital unit had a locked front door and D was not permitted to leave without supervision. He was also under constant supervision and control.

The NHS Trust came to the view that the parents could not consent to a DOL as this fell outside the 'zone of parental responsibility' and hence applied under the inherent jurisdiction of the High Court seeking a declaration that the DOL by the Trust was lawful and in his best interests. All parties agreed that his detention in hospital was indeed in his best interests and that he was making progress. The local authority disagreed on the point of law, arguing that, as parental consent authorised the placement, this was not an Art 5 DOL by the State which would require lawful authorisation.

The essential issue was whether his parents could, in the proper exercise of parental responsibility, consent to D's accommodation in Hospital and thus render what would otherwise be a deprivation of liberty not a deprivation of liberty (i.e. Was the 2nd limb in *Cheshire West* satisfied or not?). Keehan J held that they could.

The decision

The Trust argued that to rely (effectively solely) on parental consent, when D's parents cannot accommodate and care for him (and have no other options for their son) is an insufficient safeguard to protect D's Article 5 ECHR rights. The judge was not persuaded. Nor did he accept that it was outwith the reasonable zone of parental control to authorise the deprivation of liberty for such a prolonged period of time and was inconsistent with a child having any Article 5 ECHR rights.

The Trust submitted that when Baroness Hale in Cheshire West stated:

“Similar constraints would not necessarily amount to a deprivation of liberty for the purpose of article 5 if imposed by parents in the exercise of their ordinary parental responsibilities and outside the legal framework governing state intervention in the lives of children or people who lack the capacity to make their own decisions.”

she was referring only to the situation where parents imposed measures that would otherwise be a DOL in respect of their own children 'living at home' (per Lord Neuberger at paragraph 72) or 'in the normal family setting' (per Lord Kerr at paragraph 79). The judge also dismissed this submission.

He further held that Thorpe LJ in the Court of Appeal RK was speaking obiter when he stated:

“an adult in the exercise of parental responsibility may impose, or may authorise others to impose, restrictions on the liberty of the child. However restrictions so imposed must not in their totality amount to deprivation of liberty. Deprivation of liberty engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the deprivation of liberty of a child” (14-15)

Keehan J felt it was “obvious” that young children will be under the ‘complete supervision and control’ of the parents and ‘will not be free to leave’ the family home without supervision and that such a state of affairs would certainly not amount to a deprivation of liberty, hence he did not consider himself bound by the observations in RK. However, in doing so he did not address the obvious point that in the usual family home there is no intervention by the State to even engage Art 5.

When considering the exercise of parental responsibility and whether a decision falls within the zone of parental responsibility, Keehan J held that it was inevitable and necessary to take into account D's autism and his other diagnosed conditions. In his analysis, the decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the same conditions as D would be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. But the decision to keep an autistic 15 year old boy with erratic, challenging and potentially harmful behaviours



under constant supervision and control is a quite different matter and was the proper exercise of parental responsibility.

Commentary

This analysis by Keehan J is problematic; the facts that a child is disabled should not bring a decision not otherwise within the zone of parental control within it. In holding that it can, Keehan J not just resurrecting the Court of Appeal's concept of "relative normality" by reference to the disabled person's limitations that had been so soundly rejected by the Supreme Court in Cheshire West? As Baroness Hale stated:

"what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. 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 fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage"

The judge accepted the position might well be very different if the parents were acting contrary to medical advice, (which raises the question whether it is within the zone of parental control to agree with doctors, but outside the zone of parental control to disagree?). However, he held, on the facts of this case, "it would be wholly disproportionate, and fly in the face of common sense, to rule that the decision of the parents to place D at Hospital was not well within the zone of parental responsibility". In relying upon the effective agreement of all parties as to what was best for D has Keehan J not again conflated two separate questions: is the decision within the zone of parental responsibility? and is the decision the right one in the circumstances, being in D's best interests? The 'zone of parental control' remains a poorly understood and ill-defined concept. Indeed even providing such a name for the concept reifies it as if to suggest there truly is such a demarcated zone with observable boundaries. Accepting the basic (and sensible) principle that the state (and hence the courts) should generally not have any jurisdiction to meddle in how parents run their family home (save when neglect and abuse arise) should not lead inexorably to the conclusion that the law has no place to review the decision of the parents who have agreed to the State's proposal that the NHS should lock up their child in hospital for 18 months.

Keehan J said he could "see no reasons or justifications for denying the parents that role to make informed decisions about their son's care and living arrangements or permitting the state to interfere in D's life or that of his family". Yet this ignores the fact that the State was already significantly interfering with D by confining him in hospital.

The protection of Article 5 of the Convention and the fundamental right to liberty applies to the whole of the human race; young or old and to those with disabilities just as much as to those without. Yet the "sufficient protection against arbitrary deprivation of liberty" that the ECtHR deemed so important in the Bournemouth case appears wholly absent for D. The only measures in place to review the appropriateness of his placement were weekly



Multidisciplinary NHS reviews of D's care and six weekly care plan reviews to which the Local Authority were invited (but which the Local Authority did not attend as there was no social worker allocated to D). There was therefore not even any independent oversight of what the NHS was doing by another public body.

The judgment reports "the children's guardian confined her submissions to observations that D was well placed at Hospital B and was progressing". It appears then that, because all appeared well with D's placement and all parties agreed it was in his best interests, the guardian did not go on to address specifically the wholly separate point of principle namely, whether D had any right of review or appeal against his confinement. This concerning decision may well therefore lie unchallenged if those who represent the child do not themselves assert the child's rights. Given that D turns 16 on 23 April when as Keehan J noted, "D's liberty would have to be sanctioned by the Court of Protection pursuant to the provisions of the Mental Capacity Act 2005" an appeal by the NHS Trust in this case appears unlikely. Whilst this means that, by chance, D's individual rights will be protected within a short space of time due to his age, what implications does this decision have for those children who are not about to celebrate their 16th birthday and yet are detained by the State?

[Bridget Dolan](#)

[Sarah Simcock](#)

Serjeants' Inn Chambers, CoP team