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# Deprivation of Liberty *legal clinic*

*Making effective applications to the Court of Protection*



*"The whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to "everyone" (article 1). They are premised on the inherent dignity of all human beings whatever their frailty or flaws."*

Lady Hale at para 36 of her leading judgment in *P v Cheshire West & Ors*  
UKSC [2014] 19

*"Far from disability entitling the state to deny such (those with disabilities) people human rights: rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities."*

Lady Hale at para 45 of her leading judgment in *P v Cheshire West & Ors*  
UKSC [2014] 19

# 2005

# 2007



# 1998

# 2000

# Article 5

# European Convention on Human Rights

No one shall be deprived of his liberty unless in accordance with a **procedure** prescribed by law

No one shall be deprived of his liberty unless it is the lawful detention of persons of **unsound mind**

Everyone who is deprived of his liberty 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.**

# European Jurisprudence

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\* Objective Element



\* Subjective Element

\* State Imputability



# England & Wales

# 2004

*"Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave."*

Paragraph 91, HL v UK  
[2004] ECHR 45508/99



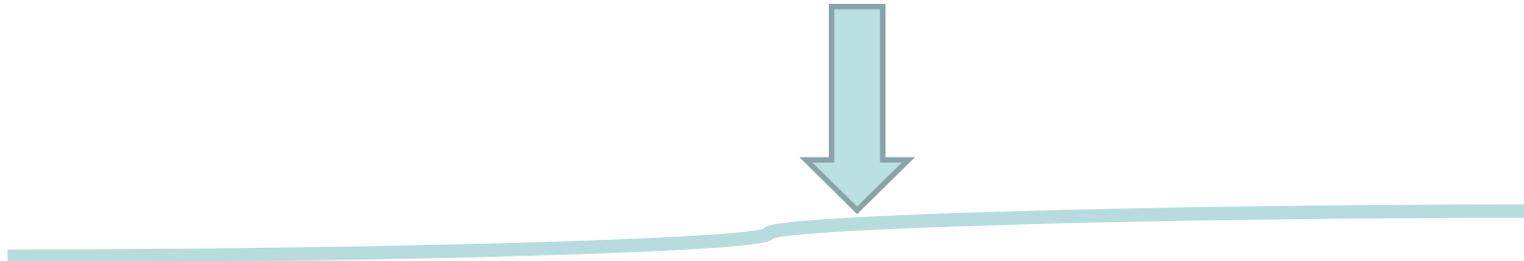
**MIND THE GAP**

# 2005

# 2007

# 2009

# Defining 'Deprivation of Liberty'



# Defining 'Deprivation of Liberty'



# Defining 'Deprivation of Liberty'



# 2014

# Defining 'Deprivation of Liberty'



# An Acid Test

*'concrete situation.....is that he is under continuous supervision and control and not free to leave'*

Lady Hale in P v Cheshire  
West & Ors UKSC [2014] 19

# Where have we heard this before?

*"Accordingly, the concrete situation was that the applicant was under **continuous supervision and control and was not free to leave.**"*

Paragraph 91, HL v UK  
[2004] ECHR 45508/99

# Free to leave

*'I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses.'*

Lord Justice Munby at para 115 JE v DE  
[2007] 2 FLR 1150 para 115

# What is not relevant?

- \* *the person's compliance or lack of objection*
- \* *the relative normality of the placement  
(whatever the comparison made)*
- \* *the reason or purpose behind a particular  
placement*

*'A gilded cage is still a cage'*



*'We should not let the comparative benevolence of the living arrangements with which we are concerned blind us to their essential character if indeed that constitutes a deprivation of liberty.'*

Lady Justice Hale,  
Supreme Court,  
Cheshire West, Para 47







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# Six Assessments

- \* Mental Health
- \* Mental Capacity
- \* Best Interest
- \* Age
- \* Eligibility
- \* No Refusals



# Best Practice

- \* Mental Capacity Assessments
- \* Best Interests Assessments



# When to apply to court?



# 2015



# AJ v A Local Authority [2015] EWCOP 5

- \* Declaration of unlawful deprivation A5(1)
- \* Declaration that LA infringed A5(4)
  - Wrongly appointing RPR who wouldn't support challenge and failing to terminate appointment
  - Failure to bring a timely challenge in face of objection by P
- \* Plan in advance
- \* Respite or permanence?
- \* Choice and role of the RPR / s39D IMCA
- \* LA to monitor and bring to court





*"...it is a fundamental principle.. that P should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. In the absence of these safeguards, he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty."*

Mr Justice Baker,  
Paragraph 128 , AJ v A  
Local Authority EWCOP 5

# Importance of good assessments

- \* Less court time
- \* Less delay
- \* Less expense
- \* Less time with lawyers
- \* Quicker resolution for P

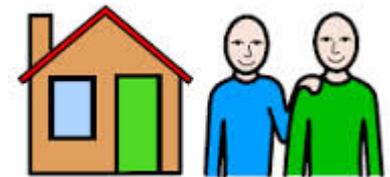






# Re X: A Streamlined Process

*If it ain't broke, don't fix it*



COP  
DOL10  
10.14

Court of Protection

## Application to authorise a deprivation of liberty

(section 4A(3) and 16(2)(a) of the  
Mental Capacity Act 2005)

A streamlined procedure pursuant to Re X and Ors (Deprivation  
of Liberty) [2014] EWCOP 25 and Re X and Ors (Deprivation of  
Liberty)( Number 2) Re [2014] EWCOP 37

PRINT FORM RESET FORM

For office use only
Date received
Case no.
Date issued

Before completing this form please read the guidance leaflet attached. You can download forms and leaflets at [hmctsformfinder.justice.gov.uk](http://hmctsformfinder.justice.gov.uk). Search for form type: 'Court of Protection'.



# Evidential Requirements

- \* Draft Order
- \* Over 16
- \* Unsoundness of mind
- \* Care Plan and how arrangements amount to a DoL
- \* Mental Capacity
- \* Imputable to the state
- \* Best Interests and less restrictive option
- \* Steps to notify P and other relevant people
- \* Wishes, feelings and views (P and others)
- \* Advance decisions/ LPA/ Deputy decisions
- \* P's eligibility for public funding
- \* Litigation Friend
- \* Urgency or other factors that need judicial scrutiny



# Evidential Requirements



## \* Mental Capacity

### 1. Assessment of capacity

- I confirm that the person the application is about has been assessed as having an impairment or disturbance in the functioning of the mind or brain and lacks capacity to consent to the measures proposed and the deprivation of liberty which is identified within the application.
  
- I attach form COP3 or other evidence of capacity

# Evidential Requirements

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Unsoundness of mind

If your assessment of capacity on form COP3 has not been completed by a registered medical practitioner, you must also attach written evidence from a registered medical practitioner containing a diagnosis that the person this application is about suffers from a diagnosis of 'unsoundness of mind'.



# Evidential Requirements



Care Plan and how arrangements amount to a DoL

- Constant supervision and control?
- Restraint?
- Sedation?
- Prevention of contact with others?
- Measures or restrictions that impede access to community?



# Evidential Requirements

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\* Best Interests and less restrictive option

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# Evidential Requirements

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\* Imputable to the state



# Evidential Requirements

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\* Steps to notify P and other relevant people

\* Wishes, feelings and views (P and others)

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# Evidential Requirements

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\* P's eligibility for public funding  
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# Evidential Requirements

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Litigation Friend



# Evidential Requirements

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\* Urgency or other factors that need judicial scrutiny



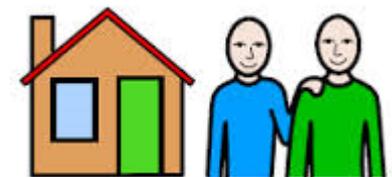
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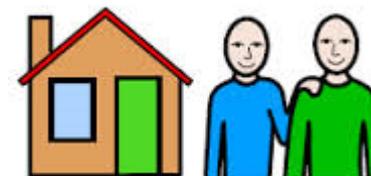
# Oral Hearing

- \* Any contest to the evidential requirements
- \* Failure to comply with requirements
- \* Any concerns
- \* Objection by P
- \* Conflict with existing decision makers
- \* Because the court thinks a hearing is necessary or appropriate



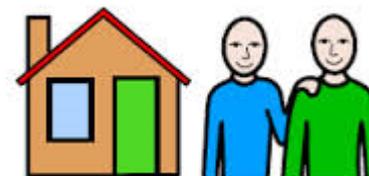
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# Where are we now?

- \* Court of Appeal decision Re X (all listed?)
- \* Re MOD
- \* Mr Justice Charles...
- \* Re NRA for non-contentious cases



# What next for Deprivation of Liberty?

- \* Law Commission proposals
  - Protective Care?
  - Supportive Care
  - Restrictive Care and Treatment
  - Deprivation of Liberty
  - Hospital authorisations
  - Mental health care and treatment

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"Because of the extreme vulnerability... we should err on the side of caution in deciding what constitutes a deprivation of liberty... *They 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... Nor should we regard the need for such checks as in any way stigmatising of them or of their carers...

Lady Hale at para 57  
of her leading judgment in  
P v Cheshire West & Ors UKSC [2014] 19

*...Rather, they are a recognition of their equal dignity and status as human beings like the rest of us."*

Lady Hale at para 57 of her leading judgment in P v Cheshire West & Ors  
UKSC [2014] 19

# My details

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