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Deprivation of Liberty: case law update

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Deprivation of Liberty: case law update

- DoLS: background
- Law Commission proposals
- Re RD
- Staffordshire v SRK
- Re C
- AG v BMBC
- Ferreira
- Briggs v Briggs

What is a ‘deprivation of liberty’?

European Convention on Human Rights

Article 5 – Right to liberty and security

1. 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:

… e. the lawful detention … of persons of unsound mind…

4. 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.

What is a ‘deprivation of liberty’?

European Court of Human Rights case law establishes three essential elements needed for there to be a DoL:

- Objective element
- Subjective element (lack of consent)
- ‘Imputable to the state’

What is a ‘deprivation of liberty’?

HL v UK (2004) – “The Bournewood Case”

- Autistic man living in community
- Readmitted as informal patient to Bournewood hospital and not sectioned under the MHA 1983 as did not resist admission
- Dispute about his care and treatment between hospital and carers
- Deprived of his liberty not in accordance with law – no procedure, no opportunity to review conditions of his detention
- No compliance with Article 5(4) as no procedure to seek a review
- Forces government to change law and introduce Deprivation of Liberty Safeguards (“DoLS”)

Deprivation of Liberty Safeguards

- 'DoLS' regime added to Mental Capacity Act
- But only applies to:
  - **Hospitals (NHS or private)**
  - **Care homes (registered with CQC)**
- In any other type of placement, deprivation of liberty can only be authorised by an order from the Court of Protection.
- If no authorisation in place, deprivation of liberty is unlawful.

P v Cheshire West and Chester Council [2014] UKSC 19

- Facts: P an adult with cerebral palsy and Down's syndrome required 24 hour care to meet personal care needs.
- Placed in local authority community placement – bungalow shared with two other residents
- Court of Protection said this was a DoL
- Court of Appeal overturned CoP ruling and said not a DoL
- P through the Official Solicitor appealed to the Supreme Court

DOL and Cheshire West

- Dispute as to whether his placement amounted to a deprivation of liberty
- Local authority said no, P through Official Solicitor, and mother, said yes – highlighting importance of procedural safeguards under the DoLS regime
- OS and mother argued that DoLS regime and court reviews ensure vulnerable adults afforded protection without having to rely on own ability or family's ability to challenge lawfulness of detention
- Warned against danger of widening "Bournewood gap"

DOL and Cheshire West

- Supreme Court's judgment of 19 March sets out 'acid test':
- 1. Is the person subject to continuous supervision and control?
- 2. Is the person free to leave? (focus is not on the person's ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave).

DOL and Cheshire West

Not relevant to the application of the test:

- the person's compliance or lack of objection;
- the relative normality of the placement (whatever the comparison made); and
- the reason or purpose behind a particular placement (*"a gilded cage is still a cage…"*)

DOL and Cheshire West

Baroness Hale at para 57 of the Judgment:

“Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case”

Law Commission proposals

- Proposals to replace DoLS scheme published 13 March 2017
- Proposals contained in report and draft bill
- “Liberty Protection Safeguards”
- Unlike DoLS, proposed scheme not limited to care homes and hospitals (ie would cover supported living, shared lives, domestic settings etc)
- Scheme would authorise “arrangements” for care/treatment which give rise to DoL
- Definition of deprivation of liberty remains same as Art 5
- Authorisation can include transport arrangements

Law Commission proposals

- Would apply to people aged 16 and older
- “Responsible body” replaces “supervisory body”
- In hospital/NHS CHS cases RB will he hospital manager/CCG
- In other cases local authority will be RB
- Conditions for authorisation: similar to DoLS criteria
- “Necessary and proportionate” test replaces best interests
- New role: “Independent Mental Capacity Professional” carries out independent review
- Authorisation for up to 12 months in first two years, then up to three years.

Law Commission proposals

- Right to challenge remains with Court of Protection
- Potential for challenges to go to tribunal system pending government review
- Maintains separation from Mental Health Act
- Includes proposals to amend Mental Capacity Act to give greater weight to P's wishes and feelings and to restrict use of defence under s5 MCA

- Proposals have been presented to the government and response currently awaited
- Not expected to be implemented before 2020 at earliest

Re RD – duties of RPRs

- Judgment published in December 2016
- Case brought following disputes arising as to when and in what circumstances IMCAs and RPRs should bring s.21A appeals to the COP
- Key question: What triggers the duty to make an application to the Court of Protection?
- Hearing before Mr Justice Baker

Re RD – RPR guidance

- Key distinction made between an IMCA and an RPR made
- IMCA:
  - Limited to assisting P/RPRs to understand effect of the authorisation, purpose, conditions, right to apply to court and request a review
  - Only obliged to apply to court if P wishes to apply to the court
- RPR:
  - Wider role - Must represent and support P in all matters relating to Schedule A1 including taking all steps to identify whether P wishes to apply to court
  - Where the RPR concludes that P wishes or would wish to apply, he does not have to consider whether such an application is in P's best interests – there is an unqualified right of access.
  - The RPR should focus on whether P wishes to apply to court and not simply whether P objects to care or treatment. If P cannot communicate that wish then the RPR has an obligation to support P if he would otherwise think that P would wish to apply.
  - The RPR also has the right to apply in their own right, if they do not feel one of the qualifying requirements are met.

Re RD – RPR guidance

- RPR must consider whether P wishes, or would wish, to apply to the Court of Protection. This involves the following steps:
  - Consider whether P has capacity to ask to issue proceedings. This simply requires P to understand that the court has the power to decide that he/she should not be subject to his/her current care arrangements. It is a lower threshold than the capacity to conduct proceedings
  - If P does not have such capacity, consider whether P is objecting to the arrangements for his/her care, either verbally or by behaviour, or both, in a way that indicates that he would wish to apply to the Court of Protection if he had the capacity to ask.

Re RD – RPR guidance

- If P is not expressing a wish/would not wish to initiate proceedings, the RPR may still apply to the COP to determine any of the 4 questions in s21A(2) and that decision should be made in P's best interests.
- Consideration of P's circumstances must be holistic and usually based on more than one meeting with P, together with discussions with care staff and family and friends
- In considering P's stated preferences, regard should be had to any statements made by P about his wishes and feelings in relation to issuing proceedings/care/residence/emotions, the frequency and consists of these objections and any other reasons there may be for this request

Re RD – RPR guidance

- In considering whether P's behaviour constitutes an objection regard should be had to the reasons for behaviour, any medication being received, active attempts to leave, any steps taken to leave, relation with staff, challenging behaviour and whether his reactions are affected the care P is receiving
- Should always take into account that P's understanding of the process may be poor
- Use of a part 8 review or collaborative work may be more appropriate than a court application in some cases; although this should not prevent an application to court being issued where it appears P would wish to exercise their right of appeal.
- IMCAs should assist in this process where possible

Staffordshire v SRK – DoL in private setting

- SRK has a brain injury following a road traffic accident.
- Personal injury award is administered by deputy, Irwin Mitchell Trust Corporation, which pays for his care from private care providers in his own home which has been adapted for him.
- Receives 24-hour care and assistance seven days a week.
- Uses a wheelchair and requires assistance with all aspects of personal care and daily living. Very limited communication.
- SRK constantly monitored either by support workers or by use of assistive technology.

Staffordshire v SRK – DoL in private setting

- Accommodation and care package was arranged and is provided without any input from Staffordshire County Council or any other public authority.
- Care is arranged by a specialist brain injury case manager and is provided by private carers.
- **All agree care package is in his best interests.**

Staffordshire v SRK

- Court held that a court order required to authorise DoL arising from SRK's circumstances and that there was "state imputability" as the state ought to have known of the situation on the ground.
- As a court had awarded SRK damages and a court had appointed a deputy to manage the money, the state had knowledge of the private deprivation of liberty.
- In these circumstances, the deputy has a duty to make the local authority aware of these circumstances.
- Steps must then be taken to investigate the care regime and if the least restrictive option of care for that person amounts to a deprivation of liberty an application must be made to court to authorise this.
- Judgment upheld on appeal: *Staffordshire CC v SRK [2016] EWCA Civ 1317*

Staffordshire v SRK

- A welfare order by the CoP is needed to provide a procedure that protects P from arbitrary detention and so avoids a breach of positive obligations under Article 5
- The conclusion should be factored into calculations of damages awards in the future
- This is based on the fact that the State knows or ought to know about the situation on the ground
- Knowledge will exist in all of these class of cases because:
  - The court that awards the damages, the CoP that appoints the deputy and the deputy / attorney or trustee to whom the damages are paid should take steps to ensure:

Staffordshire v SRK

1. that the relevant local authority with duties to safeguard adults knows of the regime of care
2. if, as here, the least restrictive available care regime to best promote P's best interests creates a situation on the ground that satisfies the objective and subjective components of a deprivation of liberty (and so a derivation of liberty within Article 5) a welfare order based on that regime of care is made by the COP.

The court awarding damages, the CoP when appointing a deputy, and the deputy trustees, attorneys should all be aware that the regime creates a (private) deprivation of liberty

Staffordshire v SRK

So what should a deputy with that knowledge do?

- Deputy must ensure that it has made a lawful best interests decision applying MCA principles
- Raise the relevant issues with care providers and the relevant local authority with statutory duties to safeguard adults
- Deputy needs to objectively check whether he or the LA could put in place arrangements that would be less restrictive and/or remove any restraint
- LA would then have knowledge of the DoL

Re C

Re C (A Child) [2016] EWHC 3473 Fam:

- C is 15 years old and placed in specialist residential unit
- Local authority applies for authorisation of deprivation of liberty
- Court holds that C is “Gillick competent” and capable of consenting to deprivation of liberty
- C had in fact consented to these arrangements
- Court also holds that authorisation made under the inherent jurisdiction of the High Court is compliant with Article 5 of the European Convention on Human Rights.

AG v BMBC – DoLS and covert medication

- AG is 92-year-old woman living in care home, subject to DoLS authorisation
- During course of s.21A application became clear that AG's care plan includes covert administration of strong sedative medication in form of promethazine and diazepam
- District Judge Bellamy gave guidance on use of covert medication, including:
- Need for full consultation with healthcare professionals and family.
- Existence of such treatment must be clearly identified within the assessment and authorisation.

AG v BMBC – DoLS and covert medication

- Clear provision for regular, possibly monthly, reviews of the care and support plan.
- Regular reviews involving family and healthcare professionals
- Where appointed an RPR should be fully involved in those discussions
- if a person lacks capacity and is unable to understand the risks to their health and refusing to take the medication, it should only be administered covertly in exceptional circumstances

AG v BMBC – DoLS and covert medication

- Before medication administered covertly, must be a best interests decision which includes the relevant health professionals and the person's family members
- If agreed that covert medication is in best interests then this must be recorded and placed on records, with provision for review
- All of the above documentation must be easily accessible on any viewing of the person's records within the care/nursing home.
- If there is no agreement then there should be an immediate application to Court.

Ferreira – DoL in intensive care setting

R (Ferreira) v HM Senior Coroner for Inner South London [2016] EWCA Civ 1317

- Maria Ferreira had diagnoses of Down's syndrome, severe learning disability, limited mobility and required 24 hour care
- Died while in intensive care in hospital aged 45.
- Admitted to hospital with a working diagnosis of pericarditis and pneumonia
- She had a strong dislike of hospitals and found the procedure frightening.

Ferreira – DoL in intensive care setting

- Condition worsened so she was heavily sedated and transferred to the hospital's intensive care unit ("ICU").
- Remained sedated and on a mechanical ventilator as a life-saving treatment intervention.
- While in ICU, the nursing staff put mittens on her hands to prevent her from reflexively grabbing at and disconnecting the endotracheal tube. A few days later she nevertheless dislodged the tube and despite attempts at resuscitation she went into cardiac arrest and died.

Ferreira – DoL in intensive care setting

- An inquest was to be held into her death, and issue arose as to whether she was under ‘state detention’ (and thus no mandatory requirement to summon a jury).

- Does this equate to DoL? The Senior Coroner held that she was not deprived of her liberty for the purposes of Article 5.

- Her sister sought judicial review of this decision.

Ferreira – DoL in intensive care setting

- High Court in essence agreed, decided that Cheshire West did not require treating all patients in an ICU who lacked capacity to consent to treatment for more than a very brief period as subject to a deprivation of liberty

- One of the reasons for this was the practical considerations

Ferreira – DoL in intensive care setting

Court of Appeal upheld decision for 3 reasons:

1. Cheshire West distinguished;
2. If it did apply, Mrs Ferreira was free to leave; and
3. ICU is not ‘state detention’

Ferreira – DoL in intensive care setting

Cheshire West distinguished

"… not deprived of her liberty at the date of her death because she was being treated for a physical illness and her treatment was that which it appeared to all intents would have been administered to a person who did not have her mental impairment. ….. the root cause of any loss of liberty was her physical condition, not any restrictions imposed by the hospital."

Ferreira – DoL in intensive care setting

- The court went on to hold that there is in general no deprivation of liberty where the person is receiving life-saving medical treatment, so long as…

- "the acute condition of the patient must not have been the result of action which the state wrongly chose to inflict on him and that the administration of the treatment cannot in general include treatment that could not properly be given to a person of sound mind in her condition according to the medical evidence."

Ferreira – DoL in intensive care setting

2. If that is wrong, Mrs Ferreira was in any event free to leave:

"99. In the case of a patient in intensive care, the true cause of their not being free to leave is their underlying illness, which was the reason why they were taken into intensive care. The person may have been rendered unresponsive by reason of treatment they have received, such as sedation, but, while that treatment is an immediate cause, it is not the real cause.

Ferreira – DoL in intensive care setting

"The real cause is their illness, a matter for which (in the absent of special circumstances) the state is not responsible. It is quite different in the case of living arrangements for a person of unsound mind. If she is prevented from leaving her placement it is because of steps taken to prevent her because of her mental disorder. Cheshire West is a long way from this case on its facts and that, in my judgment, indicates that it is distinguishable from the situation of a patient in intensive care."

Briggs v Briggs & Ors [2016] EWCOP 48 and 53

- Paul Briggs, a police officer, was the victim of road traffic accident on his way to work in July 2015 and suffered serious brain injuries.
- Nine months after the accident, Mr Briggs was diagnosed as being in a minimally conscious state (MCS) and kept alive by Clinically Assisted Nutrition and Hydration (CANH).
- Mr Brigg's life expectancy was thought to be up to nine years. He underwent expert assessments to determine his condition and prognosis.
- Mr Briggs' wife, Lindsey believed that her husband would not wish to be kept alive by CANH. Her view was supported by Mr Briggs' mother and his two brothers.
- Mrs Briggs brought proceedings, seeking an order that it was not in her husband's best interests to continue to receive life sustaining treatment.

Briggs v Briggs & Ors [2016] EWCOP 48 and 53

Preliminary issue: legal aid and s.21A MCA 2005

- Mrs Briggs brought proceedings under s.21A MCA on the express basis that doing so would allow her to claim non means-tested legal aid.
- The court had to determine whether proceedings were properly brought under s.21A MCA and therefore whether non means-tested legal aid is available in such cases.
- The Official Solicitor's position was that arguments in respect of care, support or treatment of P cannot be made under s.21A as they relate to conditions of detention, and are outside the scope of s.21A (Article 5 not relating to conditions of detention).
- The Secretary of State's position (as the Ministry of Justice and Department of Health collectively) was that such funding is only available where the issues relate to 'physical liberty'.

Briggs v Briggs & Ors [2016] EWCOP 48 and 53

- Charles J noted the inclusion of the best interest requirement under the DoLS scheme (in addition to the necessary and proportionate criteria) which requires the application of the best interest test under s.4 MCA.
- To fulfil the best interest requirement, the court (on a s.21A application) must have a wide view of the nature and purpose of the authorisation, and ask whether care and treatment which gives rise to the need for it, is in the person's best interests.
- Charles J therefore rejected the arguments made by the Official Solicitor and the Secretary of State and concluded that Mrs Briggs could raise the issue of whether CANH should be continued as part of her s.21A challenge.
- Ministry of Justice and the Legal Aid Agency have been granted permission to appeal this decision.

Briggs v Briggs & Ors [2016] EWCOP 48 and 53

- The Court then turned to the substantive issue of Mr Briggs' medical treatment and his best interests.
- Mr Briggs was represented by the Official Solicitor who contended that the court should adjourn the matter for reconsideration after 6 months of treatment and rehabilitation to allow a better neurological diagnosis.
- The NHS Trust and the CCG argued that s.4(5) of the MCA precluded the court from making an order which would result in CANH being stopped.
- The decision before the court was therefore whether it was in Mr Briggs' best interests to
  - (a) to move to a rehabilitation unit for further assessment and treatment, including CANH or
  - (b) to move to a hospice to receive palliative care, his CANH treatment to stop and for him to die as a result.

Briggs v Briggs & Ors [2016] EWCOP 48 and 53

- Charles J, heard powerful evidence from Mrs Briggs in respect of Mr Briggs' views.
- Whilst Mr Briggs had not specifically discussed the possibility of his being in MCS or prepared an advance decision, the court heard that he had had a number of relevant conversations with his family on the subject, having witnessed death and serious accidents during his time in the army and the police.
- He expressed a preference not to receive life sustaining treatment at a time when his mother in law refused PEG feeding. He had also said that if he was on life support, he would want the life support machine to be turned off, as it was not was not "living".
- The Court also heard evidence that Mr Briggs was a risk taker.
- Charles J stated: "This provides a clear indication that Mr Briggs did not consider it was sensible to prolong life at all costs".

Briggs v Briggs & Ors [2016] EWCOP 48 and 53

In light of family's evidence, Charles J concluded*:*

"…in this case the weighing exercise comes down to whether Mr Briggs' best interests are best promoted by giving more weight to:

i) the very strong presumption in favour of preserving life, or

ii) the great weight to be attached to what Mr Briggs as an individual would have decided himself if he had the capacity and so was able to do so.

I have concluded that as I am sure that if Mr Briggs had been sitting in my chair and heard all the evidence and argument he would, in exercise of his right of self-determination, not have consented to further CANH treatment that his best interests are best promoted by the court not giving that consent on his behalf."

Implications of Briggs

- Following judgment of Supreme Court in *Aintree v James,* emphasis continues to shift from sanctity of life (as per W v M), to P's wishes and feelings, as evidenced in Re N, and in Briggs, where evidence as to Mr Briggs' views on life sustaining treatment factored heavily in the decision to grant the application.
- Charles J used the holistic interpretation of the best interests test from *Aintree*, which is concerned with enabling the court to do for the patient what he could do for himself if he had full capacity.
- Best interest test is not a simple 'substituted judgment' test.
- Suggestion that where there is an LPA or advance decision to guide treatment, an application to the court may not be required to authorise withdrawal of life sustaining treatment.
- Decisions in respect of the withdrawal/continuation of CANH may now fall within the ambit of s.21A MCA and, therefore, non-means tested legal aid may be available in some of these cases (although appeal on-going).

Links

Law Commission proposals: http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/

RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS) [2016] EWCOP 49: http://www.bailii.org/ew/cases/EWCOP/2016/49.html

Secretary of State for Justice v Staffordshire County Council & Ors [2016] EWCA Civ 1317: http://www.bailii.org/ew/cases/EWCA/Civ/2016/1317.html

Re C (A Child) [2016] EWHC 3473: http://www.bailii.org/ew/cases/EWHC/Fam/2016/3473.html

Re AG [2016] EWCOP 37: http://www.bailii.org/ew/cases/EWCOP/2016/37.html

R (on the application of Ferreira) v HM Senior Coroner for Inner South London [2017] EWCA Civ 31: *http://www.bailii.org/ew/cases/EWCA/Civ/2017/31.html*

Briggs v Briggs & Ors [2016] EWCOP 48:
http://www.bailii.org/ew/cases/EWCOP/2016/48.html

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