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THE ONGOING SAGA OF A DEPRIVATION OF LIBERTY:

Private arrangements, state imputability & the
implication for Deputies appointed by the COP

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“23. The origin of this basic legal principle is to be found in an era long before the invention of local authorities as we know them. Chapter 29 of Magna Carta 1297 provides that:

"No freeman shall be taken or imprisoned, or disseised of his freehold, or liberties, or free customs, or outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, **but by lawful judgment of his peers, or by the law of the land.**"





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- 24. As the Court of Appeal has recently said, this right to freedom is a **fundamental constitutional right**: TTM v Hackney LBC [2011] EWCA Civ 4. It will certainly not lose its importance in the field of adult social care, with an ageing population increasing the responsibilities of families and the State.

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Dols +



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- The decision of Charles J in *Staffordshire County Council v SRK* [2016] EWCA Civ 1317 potentially has serious implications for property and affairs deputies by conferring upon them responsibility to take steps in certain situations where P is being deprived of his liberty.



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- Section 4A of the Mental Capacity Act 2005 (“the Act”) provides that:
*“(1) This Act does **not authorise any person** (“D”) to deprive any other person (“P”) of his liberty.*
*(2) **But that is subject to-** (a) the following provisions of this section, and (b) section 4B.*
*(3) D may deprive P of his liberty if, by doing so, D is giving effect to a **relevant decision of the court.***
(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.
*(5) D may deprive P of his liberty if the deprivation is authorised by **Schedule A1** (hospital and care home residents: deprivation of liberty).”*



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- Gateway provision for incorporation of ECtHR is under section 64 of the Act which states that:
 - *"(5) In this Act, references to deprivation of a person's liberty have the **same meaning** as in Article 5(1) of the Human Rights Convention.*
 - *(6) For the purposes of such references, **it does not** matter whether a person is deprived of his liberty by a public authority or not."*
 - See para. 150 -155 of SRK in relation to argument that meaning of a DOL is that it refers only to objective and subjective requirements.





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- Result:
 - section 64(5) imports the ECHR meaning of "*deprivation of liberty*", in the context of Article 5(1).
 - See *Cheshire West and Chester v P and others* [2014] A.C. 896 as per Baroness Hale at 19: "*it seems clear that **we are expected to turn** to the jurisprudence of the Strasbourg court to find out what is meant by a deprivation of liberty in this context*".



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- In Cheshire West, Baroness Hale described the test at 37 as:
 - *"(a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the state".*
 - Subject to continuous/constant supervision &/or control & not free to leave (**a standard DOLs**)





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SO WHERE DO THE + COME INTO IT?

- The ways in which Article 5 can be engaged for the purposes of the third limb was described in *Stork v. Germany* (2006) 43 EHRR 6, where at [89] the Court said:
- *"**First**, the deprivation of liberty could be imputable to the state due to the direct involvement of public authorities in the applicant's detention. Secondly, the State could be found to have violated Art.5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of Art.5. **Thirdly, the State could have violated its positive obligations to protect the applicant against interferences with her liberty carried out by private persons.**"*





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- In *SRK v. Staffordshire* [2016] EWCOP 27 & EWCA Civ 1317 is the **perfect illustration of the third type of Article 5 engagement**:
- The Court acknowledged that there was **no** direct responsibility because:
 - SRK lived in a *private* residential home, which had been arranged with no involvement of the Council,
 - the package of care was *funded and managed* by his Deputy, **but**
 - the arrangement met the acid test, namely that he was subject to continuous supervision and not free to leave.



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- Positive obligation was described in *Storck* at [102]:
- *"to take measures providing **effective protection** of vulnerable persons, including reasonable steps to prevent a deprivation of liberty [which is not related to the state] of which the authorities have or ought to have knowledge"*



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- In *SRK* the Court concluded that
 - At [122], “... close attention must be paid to **whether** the domestic system of law, supervision and regulation of a (private) deprivation of liberty and its application in a given case **satisfies the spirit** and underlying purposes of Article 5 and so provide practical and **effective substantive and procedural safeguards** against the **arbitrary deprivation of liberty of the relevant person**”
 - There would arbitrary detention with insufficient safeguards in the absence of a welfare order, i.e. there was no effective protection in the absence of a welfare order hence engaging Article 5 in the form of Dols +, because:
 - The need for a WO would focus mind and reduce misjudgments & professional lapses
 - Not all deputies and local authorities will act in the same way, and
 - Not all P’s have supporting families [148]





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- SSJ argued that the procedural safeguards were present by way of
 - the CQC (regulates health/social care provisions), (b)
 - the OPG, which supervises deputies,
 - the GMC and
 - the criminal justice system (s44) and civil law
- Relied on *Chosta: Ukraine* [2014] 35807/07, ECtHR:
 - Article 5 rights do not arise in all private detentions
 - But in some circumstances the existence of a remedy and access to a court would be sufficient enough activate the positive obligation under Article 5 [124]





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Overall Conclusion- Charles J

- Would the “Bournewood Gap” be filled in the absence of a welfare order? **No** for the reasons outlined,
- But that is based on the premise that the State knows or ought to know of the situation on the ground:
 - COP had appointed a deputy, which was sufficient,
 - Deputy had informed the LA that a potential DOLs existed that could be ended.
- **Overall effect:** costs relating to obtaining this welfare order must be factored into damages PI claims



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- COA agreed but specifically considered those safeguards relied upon by the SSJ and concluded that they were **reactive rather than proactive mechanisms**:
 - CQC: regulates the supplier of staff not the activity, no influence in the vetting of staff, and no inspections
 - Care Act: assessments (9), reasonable cause (42), advocates (67-68)
 - The MCA: only if an application is made
 - OPG: duty to ensure that deputy has complied (58)





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- The net consequence:
 - the State is unlikely to be able to provide effective safeguards to protect vulnerable individuals from arbitrary detention based on the current regulatory framework
 - Because the extant regulatory system was considered by the COA and discounted.\
 - There is no difference between a standard DOLs and a DOLs + (private DOLs)



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- Subsequent support found in *Birmingham CC v. D* [2016] EWCOP 8, Keehan J concluded said at [132]:
 - “...the state has a positive obligation under Article 5 (1) to protect him. In support he relies principally upon the decision of Munby LJ, as he then was, in *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam) where at paragraph 95 he said:
 - “For present purposes I can summarise my conclusions as follows. **Where the State – here, a local authority – knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of liberty, then its positive obligations under Art 5 will be triggered.**





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STAGED PRACTICAL APPROACH

- First, these will include the duty to **investigate**, so as to determine whether there is, in fact, a deprivation of liberty;
- Second, if, having carried out its investigation, the local authority is satisfied that the objective element is not present, so **there is no deprivation of liberty**, the duty is **discharged**.
 - However, its positive obligations may in an **appropriate case** require the local authority to continue to **monitor the situation in the event that circumstances should change**;



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- Third, if, the conclusion is that there may be a DOLs then it will be under a positive obligation, both under Art 5 alone and taken together with Art 14, to take **reasonable and proportionate measures to bring that state of affairs to an end:**
 - i.e. to exercise its statutory powers and duties so as to provide support services for the carers that will enable inappropriate **restrictions to be ended, or at least minimised**
- Fourth, if DOLs cannot be ended, then “may” be necessary to ask the assistance of the Court. This is now mandatory.



WHAT ARE THE IMPLICATIONS FOR DEPUTIES?



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- The judgment has **clear** implications for property and affairs deputies who are funding care regimes which (objectively) deprive P of his or her liberty.
 - The judge held that **when applying the best interests** test, a deputy could not properly ignore the issues of (query the source of that duty see [59]):
 - whether P was being deprived of his liberty or restrained, and
 - whether that was lawful or needed authorisation under the DoLS or by the making of a welfare order.
 - Could apply to deputy's who are merely funding care.



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