

DEPRIVATION OF LIBERTY IN ONES OWN HOME: SOME THOUGHTS

1. Article 5 of the European Convention has three requirements that have to be met before it is engaged. First, P must be objectively deprived of his liberty: this is the subject of the “acid test” in the *Cheshire West*¹ case. Secondly, P must not validly consent to that objective state, either because he is able to do, but does not, or is incapable of doing so due to his mental condition. Finally, the deprivation must be imputable to the State.
2. Following the *Cheshire West* case, the test for the objective status is: is P under continuous supervision and control and not free to leave the place in which he is placed/residing? This gave much clarity, and additional paperwork to those on the front line of the provision of care services to the elderly, those with serious mental health problems, including those with acquired brain injuries.
3. The recent decision of Mostyn, J in *Rochdale Council v KW*² has come into conflict with the prior understanding of the objective requirement in *Cheshire West*. The case comes before the Court of Appeal next week and the matter may be further clarified then.
4. One issue that is not likely to be before the Court is state imputability. The issue was considered by the Mostyn, J. in that case. His view was that because the local authority was funding KW’s placement- albeit in her own home and through a wholly private domiciliary care agency- her care plan and its restrictions were still imputable to the state.
5. What is the legal position on private deprivations of liberty, however? In the *Rochdale* case, KW had been placed in a care home for 12 months but then allowed to return home. However, the condition of that return was that a proper care plan, with 24/7 care was put in place. Had such a care plan not been put in place, there would have been a dispute as to whether she could have returned home. In that case, it is easy to see why the Judge (and the parties) considered the state to be responsible for her placement.

¹ P (by the Official Solicitor) v Cheshire West & Chester Council; P&Q (by the OS) v Surrey County Council [2014] UKSC 19 [2014] AC 986.

² [2014] EWCOP 45

6. But what about a situation in which P is continuously living in his own home, perhaps with his life long companion, and loses the capacity to make decisions for himself and begins to need continuous supervision and control and to be prevented from leaving his home (at least until he can be safely escorted to and from the house)?
7. The starting point is the *Mental Capacity Act 2005* (MCA). In very general terms, this puts in place a whole statutory code for determining mental capacity, ensuring that decisions are made in P's best interests where P lacks capacity, and only using the least restrictive option at that. There are provisions for advance decisions to be made, to ensure that P's wishes on specific matters will be fulfilled once he has lost the ability to make that decision. There are provisions for the appointment of deputies and the granting of lasting powers of attorney. Almost every conceivable decision-barring whether to have sexual relations or to get married- can be made on behalf of P, provided that decision is in his best interests.
8. Interestingly, the state (usually a local authority or a CCG/NHS Trust) is not necessarily involved in any of this. The overarching duty that a local authority has to safeguard vulnerable people is always there. But any decision maker- D- can make almost any decision about P provided it is in P's best interests without the involvement of the state. The Court of Protection need only become involved if there is a serious dispute between different would-be decision makers, or if the consequences of the decision is particularly profound (life or death, or life altering surgery, for instance).
9. However, the MCA prohibits any D (including deputies and LPAs) from making a decision that will result in P being deprived of his liberty unless the provisions of ss. 4A or 4B of the Act are adhered to. In brief, D can deprive P of his liberty if, but only if, it is giving effect to a welfare decision by the Court, or it is for life sustaining treatment or a vital act, or it is authorised under the DOLS³.
10. Leaving the life sustaining treatment or vital acts to one side, this leaves two categories of deprivation of liberty. The DOLS apply where P is in a Hospital or a care home. The level of state input into the regime in either does not have any impact on whether an authorisation under the DOLS is required. It is.

³ Schedule A1 MCA- a standard or urgent authorisation- subject to appeal to the Court of Protection under s. 21A MCA.

11. What about the earlier example of the elderly couple⁴? Mr Smith lives in his own home with Mrs. Smith, his wife of 50 years. First, he became forgetful. But then he became more withdrawn, less able to do any of his normal chores without prompting, then assistance, and then not at all. His own self-care has become increasingly neglected. Some external agencies come in from time to time to provide assistance, but do not provide a restrictive package of care. Mrs Smith simply keeps an eye on her husband. She makes sure he is safe. She pays attention to where he is in the house. She makes sure he doesn't have any accidents by trying to make himself a cup of tea- something she now prevents him from doing altogether, and does it for him. If he indicates that he is going out for a walk, she will talk him out of it, or she will make sure she goes with him. All this to ensure he is safe and well and that he comes home.
12. Mr Smith is under continuous supervision and control and he is not free to leave his home. He does not consent to that status because he is unable to do so. Leaving to one side for a moment whether there is any state imputability here, the fact is he satisfies the acid test in the *Cheshire West* case.
13. What can Mrs Smith do? She is allowed to do all the things she does under the principles in the MCA provided she does so in her husband's best interests. Lets assume, as I think we can, that she does everything in his best interests and could not be criticised even if her care for her husband were to be subject to considerable scrutiny. However, the MCA does not allow her to deprive her husband of his liberty- and that is the cumulative effect of all the care she is providing.
14. Is Mrs Smith acting lawfully? A person can only deprive another of their liberty under s. 4A or 4B of the MCA. To act lawfully, it seems Mrs Smith ought to obtain authorisation. Since her husband does not live in a care home or hospital, she can only do this by obtaining the authority of the Court of Protection. How is she to do that? Most likely she will have some engagement with health or social service agencies, and that will mean either her CCG (via her or his GP) or the local authority. She is most likely to raise the issue- if it occurs to her at all- with one of them.
15. The local authority has a positive obligation under Article 5 and its safeguarding responsibilities to ensure that a person who is under restriction to which he cannot consent is not being abused or suffering a more restricted regime than he ought. According to Munby L.J. in *A Local*

⁴ This is a fictitious but typical example.

*Authority v A, C, and the Equality and Human Rights Commission*⁵, that positive obligation means that the local authority must investigate the circumstances at the Smiths' home to ensure the following. First, is Mr Smith deprived of his liberty? If not, then there is still probably a need to monitor the situation just to ensure his rights are not abused. If there is, then the local authority should try to see if there is a less restrictive manner in which Mr Smith can be cared for, which takes the arrangement to below the deprivation of liberty threshold. If that cannot be done- and after *Cheshire West* that is unlikely- then the matter needs to go before the Court.

16. This seems to accord with the scheme of the MCA. It also means, as I see it, that Mr Smith's continuing residence under his wife's highly personalised, loving and benevolent care will continue as it has done for so long as it can. Of course, there may be many families where care provided to a mentally incapable relative will not be in their best interests, and the intervention of the state via a local authority and the court will lead to a change in the circumstances of the vulnerable person. The sad thing is that until an investigation is carried out, a local authority will not know which it is.
17. What about imputability to the state? Once the arrangements at Mr and Mrs Smith's home are authorised by the court, are they not then imputable to the state? Periodic court reviews will follow, as will the need for the local authority at the very least to keep an eye on what is going on there. This is surely the essence of Article 5.
18. Is there not an obvious point here, though? If Mrs Smith is a private person looking after her husband, how can that amount to a deprivation of liberty unless it is imputable to the state in the first place? If it is not, then the obligation upon her to obtain lawful authorisation does not arise.
19. However, the definition of deprivation of liberty in the MCA appears to capture private individuals. At s. 64(5) MCA it says- "*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*". This incorporates the standard Convention cases, including the need for the three requirements outlined above to be met. Except that at s. 64(6) the Act says: "*For the purposes of such references [i.e. to deprivation of liberty] it does not matter whether a person is deprived of his liberty by a public authority or not*".

⁵ [2010] EWHC 978 (Fam).

20. If one considers the whole scheme of the MCA, and the private nature of decisions made in the vast majority of cases, and the special status of deprivation of liberty within that scheme, it seems clear that Mrs Smith is depriving her husband of his liberty within the meaning of the MCA.
21. Of course, in most cases the local authority will know of the circumstances such as those involving Mr and Mrs Smith. They will provide services. Their social workers will be aware. Also the CCG may know through the GP. A responsible local authority will do what Munby, L.J. says they ought to do in the *Local Authority v A, C and EHRC*, and the matter will come before the Court.
22. Difficulties arise in other “private situations” such as those involving the case management of catastrophic personal injury settlements, where those with acquired brain injuries will be deprived of their liberty in supported living arrangements. It seems the duty then falls upon those causing the deprivation of liberty- the case manager or Property and Affairs Deputy to ensure the deprivation of liberty is authorised.

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