Where does care regime stop and deprivation of liberty begin?

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Local Government analysis: Sam Karim, a barrister at Kings Chambers, and Melanie Varey, an associate solicitor at Stephensons Solicitors, advise that the decision in Staffordshire County Council v SKR will result in an increase in applications made by local authorities where they consider that a privately arranged package of care constitutes a deprivation of liberty that will require authorisation by the court.

Original news

Staffordshire County Council v SKR and others [2016] EWCOP 27, [2016] All ER (D) 169 (May)

The Court of Protection (CoP) held that a welfare order was required from the CoP pursuant to the Mental Capacity Act 2005 (MCA 2005) in relation to a patient, SRK, who was being deprived of liberty as defined in article 5 of the European Convention on Human Rights (ECHR). The regime of law, supervision and regulation relating to the patient’s (private) deprivation of liberty within ECHR, art 5 was insufficient.

What as the background to the case?

Staffordshire County Council applied for a welfare order seeking to authorise the deprivation of liberty of SRK who had been severely injured in a road traffic accident some years ago. It was accepted that he lacked capacity to make decisions in relation to the regime of care, treatment and support that he should receive. Previous to this application, he had been awarded substantial damages, and he benefited from a property and affairs deputy previously appointed by the CoP. His care package and property were funded by his damages.

What was the issue for the CoP to decide?

Whether a welfare order would be required in the case of individuals who had been awarded damages for personal injuries; required 24-hour care, which was privately funded; lacked the capacity to make decisions concerning their care. And, taking those factors into account, whether the care regime resulted in a deprivation of liberty within the meaning of ECHR, art 5.

How did the CoP go about deciding that issue?

The relevant local authority, in this case Staffordshire County Council, had no involvement at all in the delivery or funding of his package of care. The fundamental issue for the court was whether the circumstances of his situation amounted to deprivation of liberty, bearing in mind that the third element of the test is whether the deprivation of liberty is imputable to the state, thereby necessitating the need to make a welfare order. In deciding this issue, the court considered the plethora of domestic and Strasbourg jurisprudence to determine whether the third element was satisfied bearing in mind the specific circumstances of SRK’s situation.

What is the difference between a private deprivation of liberty and deprivation under ECHR, art 5?

Not much having regard to this decision.

Charles J decided that the very purpose of MCA 2005, which was to fill the ‘Bournewood gap’ (resulting from the lack of procedural safeguards as outlined in HL v United Kingdom [2004] All ER (D) 39 (Oct)), would be subverted if the court were not to make a welfare order. An order was required to protect the relevant person from arbitrary detention, avoiding a violation of the state’s positive obligations under ECHR, art 5. This was predicated upon the basis that the state knew or ought to know of the situation on the ground, as it was the CoP who appointed the deputy following the award of damages.
What steps are to be taken to obtain welfare orders from the CoP where the arrangements are made by deputies administering damages awards?

Charles J made it clear in his judgment that in circumstances such as this case, knowledge of the courts of the fact that a deprivation of liberty may exist due to the arrangements which constitute the care regime at a private placement is enough to impose an indirect responsibility on the state (para [135]).

This imposes a responsibility on the ‘court awarding the damages, the CoP and trustees or an attorney to whom damages are paid should also ensure that steps are taken’ (para [136]) to notify the local authority of the fact that there may be a private deprivation of liberty. Charles J provided guidance to deputies at para [58] of his judgment:

‘As a result, in my view, a deputy should raise those issues with the relevant providers and the relevant local authority with statutory duties to safeguard adults. By doing so he would be taking proper steps to check whether D and/or the local authority could put in place arrangements that meant that P was not objectively deprived of his liberty or that would make the care arrangements less restrictive and/or remove any restraint...’

The steps that deputies have to now take are limited to notifying the relevant local authority of the cases within which they have arranged privately funded packages of care, that they are of the view may satisfy the test for a deprivation of liberty as set out in Cheshire West (Surrey County Council v P (Equality and Human Rights Commission intervening) [2014] UKSC 19, [2014] 2 All ER 585). The notification should be in writing and should be directed to the local authority responsible for safeguarding P. This will then trigger the obligation to investigate the circumstances of each case, to make a decision as to whether a deprivation of liberty requiring authorisation of the CoP does exist, and if so to make an application to court.

Under what circumstances is a deputy required to bring a deprivation of liberty situation to the attention of the local authority?

Baroness Hale sets out the ‘test’ for what constitutes a deprivation of a person’s liberty in at para [46] of the judgment in the Cheshire West case as follows:

‘Those rights include the right to physical liberty, which is guaranteed by Article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty. But, as it seems to me, 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.’

In all circumstances where the test set out by Baroness Hale in the case of Cheshire West may be met there may exist a deprivation of liberty and as such the deputy must notify the local authority of the circumstances of the case.

Does this case assist in clarifying a local authority’s obligations to bring applications to the court’s attention?

Absolutely.

If the local authority is aware of circumstances that arguably amount to a deprivation of liberty, ie that the individual who lacks capacity is under constant supervision and is not free to leave (Cheshire West), then that triggers the positive obligations enshrined under ECHR, art 5 to investigate the same, try to bring the deprivation of liberty to an end, and if not possible then to authorise the same.

It is worth bearing in mind what Charles J said at paras [137], [138] (emphasis added):

‘This approach means that the local authority with the adult safeguarding role described by Munby J in Re A and Re C knows or should know of the situation on the ground and, as Munby J concluded, I consider that this triggers its obligations to investigate, to support and sometimes to make an application to court (or to consider doing those things).’
‘The safeguarding role of local authorities is an important part of the domestic regime of law, supervision and regulation. If the obligations of the local authority with that safeguarding role to investigate, to support and sometimes to make an application to court (or to consider doing those things) are not triggered in this way the argument that a failure of the CoP to make a welfare order to authorise a (private) deprivation of liberty within Article 5 would violate Article 5, and so satisfy the third component of an Article 5 Deprivation of Liberty, would be stronger. This is because the domestic regime of law, supervision and regulation would be less effective to safeguard against an arbitrary detention.’

What will this decision mean for future deprivation of liberty cases?

The decision will result in an increase in applications made by local authorities where they consider that a privately arranged package of care constitutes a deprivation of liberty that will require authorisation by the court. This will obviously increase the workload of deputies, local authorities and the demand on best interests assessors, although Charles J made it clear that the initial application could be made in accordance with the Re X (Court of Protection Practice) [2015] EWCA Civ 599, [2016] 1 All ER 533 streamlined procedure.

Difficulties may arise if a local authority fails to act upon the notification from the deputy to assess if a deprivation of liberty exists or refuse to mount the application to the court to authorise the deprivation of liberty, which will inevitably mean that they are in breach of their positive obligation to comply with their positive obligations under ECHR, art 5. It has been suggested in commentary on this case that para [59] may place a responsibility on the person notifying the local authority to mount the application to the CoP to ‘ensure that the situation on the ground was authorised’. However, this would not extend to a transfer of responsibility to the deputy of the local authority duty to comply with their obligation under ECHR, art 5 and may in fact result in an argument for costs or damages for breach of these duties under section 7 of the Human Rights Act 1998, and so local authorities should proceed with caution if they are to decide not to proceed to the court and instead attempt to insist that the application is made by the deputy or person notifying.

In terms of the costs of the application being factored into the damages award by PI and clinical negligence lawyers, this is of crucial importance moving forward as a result of this judgment, since the costs of making any application for a welfare order would be in most cases as a result of the accident which is the subject of the litigation and, as such, a direct causal link would be established. Thus, in those cases where an award is made for the costs of any such future litigation, the local authority could recoup the costs of the same from the deputy.

In respect of the cases that will now need to be reviewed and authorised—where the damages claims have been settled in some circumstances long ago and which have not accounted for the costs of the welfare application, which has become necessary following this judgment—then the local authority will bear the cost.

Sam Karim’s key practice areas are: administrative law (including commercial judicial review) and human rights law, regulatory law, public procurement and state aid law, CoP and mental health, arbitration (domestic and international commercial). Sam has been a specialist in CoP cases since the advent of the MCA 2005. His CoP practice covers all types of disputes regarding the social welfare of incapacitated adults and children and medical treatment issues. He has been a member of the Attorney General’s regional panel of Treasury Counsel for almost a decade. In Staffordshire CC he represented SRK.

Melanie Varey specialises in CoP and community care judicial review. She acted for SRK by his litigation friend in the Staffordshire CC case, and represents ‘P’ and respondent family members in welfare and medical treatment cases in the CoP and applicants in judicial review cases challenging decisions of the state.

Interviewed by Kate Beaumont.

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