

Safeguards against What?

A critical analysis of the Deprivation of Liberty Safeguards

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Declaration

I declare that the work contained in this project is my own and that it has not been submitted for assessment in another programme at this or any other institution at postgraduate or undergraduate level. I also confirm that this work fully acknowledges the opinions, ideas and contributions from the work of others.

Signed:

Dated:

1 Introduction

This dissertation considers the meaning of ‘deprivation of liberty’ in the context of the Deprivation of Liberty Safeguards (DoLS) which were implemented in April 2009 to bridge the ‘Bournewood gap’. This was a gap in the law confirmed by the European Court of Human Rights (ECtHR) in October 2002, whereby people lacking capacity were accommodated in situations amounting to deprivation of liberty without sufficient legal safeguards. The dissertation will discuss a fundamental problem with the DoLS, namely that ‘deprivation of liberty’ is nowhere defined: it means what it means in Article 5(1) of the European Convention on Human Rights (ECHR),¹ in other words, it means what the courts consider it to mean on a case-by-case basis.

Chapter 2 considers the creation of the Bournewood gap, the legislative changes which were implemented in order to bridge it, and some of the problems with having no definition of ‘deprivation of liberty’.

Various approaches to deprivation of liberty are analysed in chapter 3. The classic European jurisprudence and the early domestic cases and guidance are analysed. Then some domestic cases in other contexts are considered: conditional discharges granted by the Mental Health Tribunal, and anti-terrorism control orders. The ‘Rubik’s Cube’ nature of ‘deprivation of liberty’ is raised: finding a workable definition in one context is like solving a side, but often another side is unsolved at the same time.

The Court of Appeal cases in the area under discussion are then discussed in chapter 4, including the leading case of *Cheshire West and Chester v P* (2011).² Various new approaches were introduced in those cases which are not obviously consistent with the European or early domestic understanding of ‘deprivation of liberty’. These approaches will be considered by the Supreme Court in October 2013.

Chapter 5 looks at more recent cases, firstly domestic then European. It can be seen that the domestic courts have struggled with the Court of Appeal approach, either following it and reaching surprising conclusions, or sidestepping it. The chapter then analyses some proposals for defining ‘deprivation of liberty’.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms.

² *Cheshire West and Chester v P* [2011] EWCA Civ 1257.

The Conclusion gives a proposed definition for ‘deprivation of liberty’, which is consistent across contexts and workable in practice, but suggests a better alternative would be for the ‘Deprivation of Liberty Safeguards’ to be renamed ‘protective care’ (as originally envisaged in the Bournemouth consultation) and the definition used as a statutory gateway to trigger protective care procedures. As the gateway would be broader than current interpretations, consideration is given to the resource consequences.

The focus of the dissertation is on cases involving residence decisions, although deprivations of liberty can occur in many other situations. It discusses the law of England & Wales: the position in Scotland and Northern Ireland is outside the scope of the dissertation.³ Other limitations in scope are mentioned where relevant.

³ See Scottish Law Commission, *Discussion paper on adults with incapacity* (Scot Law Com CP No 156, 2012) and Northern Ireland Department of Health, Social Services and Public Safety, ‘The Bamford Review of Mental Health and Learning Disability: A comprehensive legislative framework’ (2007).

2 The Bournemouth gap

2.1 Creating the gap

Since the Mental Health Act 1959 was enacted, compliant patients, including those without capacity to consent, were admitted to hospital and treated as ‘informal’ patients.⁴ The informality referred to the fact that the Act’s formal powers of detention were not used.

Included within the ‘informal’ description were not only those ‘voluntary’ patients who had capacity to consent to admission and did consent, but also those patients who did not have capacity but nevertheless did not object. The position for this latter class of ‘compliant, incapacitated patients’ changed after the *Bournemouth* litigation, which progressed through the domestic courts to the House of Lords,⁵ and culminated in the European Court of Human Rights’ decision in *HL v United Kingdom*.⁶

HL was a man with autism and who was unable to speak, and who lacked capacity to make decisions in relation to his treatment.⁷ He was born in 1949 and had been resident at Bournemouth Hospital for over 30 years when in March 1994 he began to reside with paid carers. Following an incident at the local authority’s day-care centre in July 1997 in which HL became agitated, he was sedated and admitted as an informal hospital in-patient. During this period his carers were not permitted to visit or to return HL to their care. He was formally admitted under Mental Health Act 1983 (MHA 1983), section 3, in October 1997 and released back to his carers at a hospital managers’ hearing in December 2007.

Applications for judicial review, habeas corpus, and damages for false imprisonment and assault, were issued on HL’s behalf after the in-patient admission. At issue was whether the informal admission between July and October 1997 amounted to unlawful detention.

⁴ Mental Health Act 1959, s5; Mental Health Act 1983 (MHA 1983), s131.

⁵ *R (L) v Bournemouth Community and Mental Health NHS Trust* [1998] UKHL 24, [1999] 1 AC 458.

⁶ *HL v United Kingdom* (application no 45508/99) [2004] ECHR 471.

⁷ For details, see Kirsty Keywood, ‘Detaining mentally disordered patients lacking capacity: The arbitrariness of informal admission and the common law doctrine of necessity’ (2005) 13 Med L Rev 108.

In summary, the hospital's argument was that HL was not detained (he would only be detained under the Mental Health Act 1983 if he tried to leave) but that if he were detained this was justified by the common law doctrine of necessity which permitted steps to be taken in the best interests of those lacking capacity to decide.

At the time, it was the norm to view the MHA 1983 as a means to achieve compulsory treatment in hospital and to avoid using it if that effect could be achieved otherwise. There was also a feeling that the sectioning process should be avoided if possible so as to avoid additional 'stigma'.

The hospital's argument was successful in the High Court proceedings.⁸ However, the Court of Appeal found that 'informal' admission should only be used for those patients who had capacity to consent and did consent, that HL was being detained, and that this detention was therefore unlawful.⁹ Following this decision HL was formally detained under section 3 MHA 1983.

During the House of Lords proceedings, evidence was given that there would be 'an additional 22,000 detained patients resident on any one day as a consequence of the Court of Appeal judgment plus an additional 48,000 admissions per year'.¹⁰ The majority of the House of Lords decided that HL had not been detained and that his informal admission was lawful under the doctrine of necessity, with Lord Steyn giving a strong dissenting opinion. Therefore, the case proceeded to the European Court of Human Rights.

Article 5(1) of the European Convention on Human Rights, so far as is relevant, provides that:¹¹

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...

⁸ *R (L) v Bournemouth Community and Mental Health NHS Trust* [1997] EWHC Admin 850.

⁹ *R (L) v Bournemouth Community and Mental Health NHS Trust* [1997] EWCA Civ 2879.

¹⁰ *L* (House of Lords) (n 5) 481 (Lord Goff).

¹¹ The full text of Article 5 is set out in the Appendix.

The domestic proceedings had focussed on the tort of false imprisonment, because the Human Rights Act 1998 was not in force and so the European Convention on Human Rights had not been incorporated into domestic law. The ECtHR clarified that it was concerned only with the autonomous meaning of deprivation of liberty for the purposes of Article 5.¹² Subsequent domestic cases have also focussed on Article 5 rather than false imprisonment.

In particular, the ECtHR stated that the distinction between actual restraint and conditional restraint (conditional on the patient seeking to leave) which had been important in relation to false imprisonment was not of central importance in relation to Article 5.¹³ The ECtHR remarked that whether the ward was locked or lockable was not determinative of the issue.¹⁴

Considering HL's 'concrete situation', the ECtHR stated that:¹⁵

the *key factor* in the present case to be that the health professionals treating and managing the applicant exercised *complete and effective control* over his care and movements...

It restated some facts (including that HL had been sedated, would have been prevented from leaving, and contact with carers was controlled by the hospital) before concluding:¹⁶

Accordingly, the concrete situation was that the applicant was *under continuous supervision and control* and was not *free to leave*. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as 'stretching credulity to breaking point' and as a 'fairy tale'.

The quotation from Lord Steyn related to his dissenting rejection, in the House of Lords, of the argument that HL was 'free to go'.¹⁷

¹² HL (n 6) [90].

¹³ HL (n 6) [90].

¹⁴ HL (n 6) [92].

¹⁵ HL (n 6) [91] (emphasis added).

¹⁶ HL (n 6) [91] (emphasis added).

¹⁷ L (House of Lords) (n 5) 493.

The conclusion was therefore that HL's informal admission had amounted to a deprivation of liberty within the meaning of Article 5. The ECtHR proceeded to find that the lack of procedural safeguards inherent in the doctrine of necessity breached Article 5(1)¹⁸ and that the lack of an adequate review mechanism breached Article 5(4).¹⁹ These breaches were termed the 'Bournemouth gap' after Lord Steyn's remarks in Bournemouth about there being a gap in mental health law.

2.2 Bridging the gap

In May 2005 the Department of Health consulted on the approach to be taken in response to the *HL* judgment.²⁰ The main proposal was to adopt a new approach entitled 'protective care'. Other options were to extend the use of detention under the 1983 Act to the Bournemouth group of patients or to use existing arrangements for guardianship under the 1983 Act (modified as necessary). The consultation also raised the issue of care home residents, in addition to hospital patients, as potentially being deprived of their liberty.

The government decided to proceed with 'protective care',²¹ but changed the name to the 'Deprivation of Liberty Safeguards' (DoLS). The scheme was inserted by the Mental Health Act 2007 into the Mental Capacity Act 2005 (MCA 2005) as Schedules 1A and A1, and is supplemented by a separate DoLS Code of Practice.²² In practice, while the MHA 1983 usually applies to those with mental illness, the DoLS usually apply to those with dementia (or learning disability or brain injury), although there are overlaps.

The details of the scheme are outside the scope of this dissertation, but a brief summary follows.²³ The scheme applies to those detained in a hospital or care home,²⁴

¹⁸ *HL* (n 6) [124].

¹⁹ *HL* (n 6) [142].

²⁰ Department of Health, "Bournemouth" consultation: The approach to be taken in response to the judgment of the European Court of Human Rights in the "Bournemouth" case' (23 March 2005).

²¹ Department of Health, 'Protecting the Vulnerable: the "Bournemouth" Consultation: Report of the public consultation on the Government's proposed response to the "Bournemouth" case (the judgment of the European Court of Human Rights in the case of *HL v the UK*): Summary of responses' (29 June 2006).

²² Ministry of Justice, *Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice* (TSO 2008).

²³ Further information can be found in Richard Jones, *Mental Capacity Act Manual* (5th edn, Sweet & Maxwell 2012) pt 2 and Phil Fennell, 'Deprivation of liberty: Part II' (2007) 13(1) ECA 18.

²⁴ As defined in Mental Capacity Act 2005 (MCA 2005), Sch A1, para 175.

for the purpose of being given care or treatment, in circumstances which amount to deprivation of liberty.²⁵ It does not apply in other locations, for instance supported living, for which an application to the Court of Protection must be made instead. The care home or hospital is called the ‘managing authority’ and the relevant local authority is called the ‘supervisory body’.²⁶ When the managing authority identifies that a deprivation of liberty is occurring (or is likely to occur) it must request a ‘standard authorisation’ from the supervisory body, which can last for up to 12 months. If necessary the managing authority must grant an ‘urgent authorisation’, of 7 days, extendable once to a maximum of 14 days, to give time for the standard authorisation assessments to be carried out. The supervisory body will send two assessors – a best interests assessor (often an Approved Mental Health Professional in Mental Health Act 1983 terms) and a medical assessor (often a section 12 approved doctor in MHA terms) – to carry out six assessments which are entitled: the age assessment; the capacity assessment; the mental health assessment; the no refusals assessment; the eligibility assessment; and the best interests assessment. There are two review processes: review by the supervisory body and application to the Court of Protection.

The reception of the DoLS has been almost universally negative. The scheme has variously been described as ‘a significant and costly error’,²⁷ ‘cumbersome and unpopular with nearly all those who have to deal with them’²⁸ and ‘overly complex, excessively bureaucratic and often impenetrable.’²⁹ On a more positive note, Mark Neary, whose son was unlawfully deprived of his liberty, wrote that ‘the Deprivation of Liberty Safeguards saved Steven’ – but even his article shows that the scheme was repeatedly misused and ‘deprivation of liberty’ misunderstood in that case.³⁰

²⁵ MCA 2005, sch A1, paras 1(2), 6, 24.

²⁶ Prior to 1 April 2013, Primary Care Trusts were the supervisory bodies for hospital patients: Health and Social Care Act 2012, sch 5, para 136.

²⁷ Richard Jones, *Mental Capacity Act Manual* (4th edn, Sweet & Maxwell 2010) Preface.

²⁸ Mental Health Lawyers Association, ‘Response of the Mental Health Lawyers Association to Legal Aid, Sentencing and Punishing of Offenders Bill: Destroying Representation for the Mental Unwell for £3 million?’ (11 August 2011) para 2.10 <<http://www.mhla.co.uk/legal-aid/mhla-response-to-consultation-on-legal-aid-sentencing-and-punishing-of-offenders-bill/>> accessed 26 August 2013.

²⁹ Tim Spencer-Lane, ‘Lost in translation’ (2013) 163(7563) NLJ 8.

³⁰ Mark Neary, ‘358 Days’, (2012) 12 Mind Legal Newsletter 4. See *LB Hillingdon v Neary* [2011] EWHC 1377 (COP).

In initial guidance issued to care homes and hospitals, the Department of Health stated:³¹

It is important to remember that depriving someone of their liberty in a hospital or care home should be a relatively rare occurrence. Therefore, only a small number of people should need MCA DoLS authorisation.

Roger Hargreaves commented when DoLS were being implemented that ‘[w]hether or not it is true, this statement is likely to become a self-fulfilling prophecy’.³² This has proved to be the case, at least in some regions. An ongoing problem is that there is a vast geographical variation in the use of DoLS: in 2012/13, applications per local authority ranged from 1 to 488, and applications per 100,000 adults varied across regions from 14.1 to 46.6.³³

Reasons may include variations in local communication and training,³⁴ and the complexity of DoLS combined with cynical underuse on cost grounds.³⁵ Ajit Shah *et al* concluded that the average cost of a single DoLS assessment was £1277 as opposed to the government estimate of £600.³⁶ But probably the major reason for underuse is that the entire scheme is predicated on those detaining hospital patients and care home residents being able to identify when deprivation of liberty is occurring – despite there being no definition of that scheme in the Schedules or Code of Practice.³⁷

³¹ Department of Health, ‘Deprivation of Liberty Safeguards: A guide for hospitals and care homes’ (gateway reference 11229, February 2009) 11.

³² Roger Hargreaves, ‘The Deprivation of Liberty Safeguards: essential protection or bureaucratic monster?’ (2009) (Winter) JMHL 117; cf Julian Hughes, ‘Searching for settled practice’ (2008) 14 ECA 26.

³³ Health and Social Care Information Centre, ‘Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments, England - 2012-13, Annual report: Tables’ (20 August 2013) Table 9; Health and Social Care Information Centre, ‘Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments (England): Annual Report, 2012/13’ (20 August 2013) Figure 6.

³⁴ Susan Varghese *et al*, ‘Deprivation of liberty safeguards (DOLS) – a survey exploring the views of psychiatrists’ (2012) 6(2) *Advances in Mental Health and Intellectual Disabilities* 52.

³⁵ Nasreen Pearce, ‘The Deprivation of Liberty Safeguards Part 3: how the authorisation regime safeguards are working’ [2012] *Fam Law* 567.

³⁶ Ajit Shah *et al*, ‘Deprivation of Liberty Safeguards in England: implementation costs’ (2011) 199 *Br J Psychiatry* 232.

³⁷ See Mental Health Act Alliance, ‘The Mental Health Act 2007: a review of its implementation’ (May 2012) chapter 2.

2.3 Lack of statutory definition

‘Deprivation of liberty’ is not defined in the Mental Capacity Act 2005, or in any other statute. The position is set out as follows:³⁸

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.

Therefore, the whole statutory scheme is based on the courts’ interpretation of ‘deprivation of liberty’, which means that the structure is built on sands which shift with each court decision. Court judgments in this area are often inconsistent and difficult to fathom, which leads to confusion among professionals (let alone those directly affected); even if judgments were models of clarity, there is no reliable way to inform the thousands of managing authorities of changes in interpretation. Court delays compound the problem: it will have taken over 2 years for the *Cheshire West* case (discussed in chapter 4) to go from the Court of Appeal to the Supreme Court, and the judgment is unlikely to be handed down until well after the hearing.³⁹

At the consultation stage, concerns were raised by many about the need for a definition of ‘deprivation of liberty’.⁴⁰ However, the government refused to include a statutory definition as ‘[n]either the ECHR nor the *Bournemouth* judgment defines the expression, because what constitutes deprivation of liberty will depend on the specific circumstances of each individual case’.⁴¹ This stance led to what could be characterised as an ‘elephant test’: ‘It is difficult to describe, but you know it when you see it’.⁴² It was a deliberate decision which led to many of the problems in implementing the DoLS scheme.

The lack of statutory definition is compounded by the nature of what it is linked to: an Article of the European Convention on Human Rights. When the Convention was being drafted, the then Lord Chancellor stated that ‘[t]he real vice of the document

³⁸ MCA 2005, s64(5), inserted by Mental Health Act 2007, s50, sch 9, para 10(4). Section 64(6) is set out in text to n 83.

³⁹ Court of Appeal: hearing 22 September 2011, judgment 9 November 2011; Supreme Court: hearing listed for 21-23 October 2013.

⁴⁰ For instance, Mental Health Lawyers Association, ‘Response to consultation by the Mental Health Lawyers Association (MHLA) and the Mental Capacity Lawyers Association (MCLA)’ (1 December 2007).

⁴¹ Department of Health (n21) para 29.

⁴² *Cadogan Estates Ltd v Morris* [1998] EWCA Civ 1671 [17] (Stuart-Smith LJ).

[is] its lack of precision’,⁴³ his opinion appears to be borne out in relation to Article 5. There is no easy, or generally-accepted definition in practice. In a radio broadcast, Charles J said that if ‘[if] you ask three people you [will] probably get four answers’.⁴⁴ Luke Clements has commented that ‘it can require psychic powers of intuition’.⁴⁵

Michael Kennedy argues that ‘[t]he fundamental problem with the scheme is that it involves expecting a mental health professional (not a lawyer...) to come to a conclusion, not on medical or social grounds ..., but as a legal concept, as to whether or not a person is deprived of their liberty.’⁴⁶ Indeed, the Code of Practice states that this is ‘ultimately a legal question, and only the courts can determine the law’.⁴⁷ However, a study which had various professional groups consider case vignettes found that, while among other groups the level of agreement was only slight, among the *lawyers* it was ‘no better than chance’.⁴⁸ Munby LJ, speaking extra-curially, noted that the study took place before certain Court of Appeal decisions and adds: ‘I should like to think that, between them, these cases have gone some way to clarify the law’. In fact, the Court of Appeal decisions added further layers of confusion, as will be demonstrated in chapter 4.

⁴³ Lord Jowitt LC (as quoted in John O’Donnell, ‘Defining Liberty’ (2012) 156(6) SJ 12).

⁴⁴ William Charles (Charles J), ‘The Report: Deprivation of Liberty Safeguards’ (BBC Radio 4, 24 November 2011) <<http://www.bbc.co.uk/programmes/b017c3n3>> accessed 26 August 2013.

⁴⁵ Luke Clements, ‘Disability, dignity and the cri de coeur’ (2011) 6 EHRLR 675.

⁴⁶ Michael Kennedy, ‘Deprivation of clarity’ (2012) 17(10) PCA 16.

⁴⁷ *Code of Practice* (n 22) ch 2.

⁴⁸ Ruth Cairns *et al*, ‘Judgments about deprivation of liberty made by various professionals: comparison study’ (2011) 35 *The Psychiatrist* 344. See also Ruth Cairns *et al*, ‘Mired in confusion: making sense of the Deprivation of Liberty Safeguards’ (2011) 51 *Med Sci Law* 228.

3 Beginning to define deprivation of liberty

This chapter will consider the early ECtHR and domestic cases which attempt to describe deprivation of liberty, and the relevant guidance and some proposals which have been made in light of these. It will then consider the position in relation to two other contexts (Mental Health Tribunal discharge and control orders) and suggest a definition which would work across contexts.

3.1 Classic European jurisprudence

The two foundational cases are considered to be *Engel v the Netherlands*⁴⁹ (1976) and *Guzzardi v Italy*⁵⁰ (1980). *Engel* considered various measures of military discipline, some of which amounted to deprivation of liberty and some which did not. *Guzzardi* involved a suspected Mafioso confined to a 2.5km² area of a 50km² island, who was held to have been deprived of his liberty. The court considered ‘classic detention in prison or strict arrest imposed on a serviceman’ but noted that ‘Deprivation of liberty may, however, take numerous other forms.’⁵¹ Various other stock phrases, which are repeated in most later ECtHR decisions, derive from these cases.⁵²

Rather than philosophical concepts of liberty of action generally, the ECtHR clarified that:⁵³

In proclaiming the ‘right to liberty’, paragraph 1 of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion.

Describing the difference between restriction and deprivation of liberty, it was explained that:⁵⁴

⁴⁹ *Engel v the Netherlands* (application no 5100/71) [1976] ECHR 3 [58-59].

⁵⁰ *Guzzardi v Italy* (application no 7367/76) [1980] ECHR 5.

⁵¹ *Guzzardi* (n 50) [95].

⁵² For further details, see European Court of Human Rights, ‘Guide on Article 5: right to liberty and security: Article 5 of the Convention’ (2012) <www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf> accessed 26 August 2013.

⁵³ *Engel* (n 49) [57]; *Guzzardi* (n 50) [92].

⁵⁴ *Guzzardi* (n 50) [92]. The concept is first stated in *Engel* (n 49) [57].

[T]he paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4...

Bartlett and Sandland have argued that the terms of Article 2 of Protocol 4 (which has not been ratified by the UK) have ‘little to do with whether the conditions of a given care home are sufficiently strict to constitute a deprivation of liberty under Article 5’.⁵⁵ It is true that the restrictions involved in Protocol 4 are not the type of restriction encountered in a care home or hospital – they are more relevant to immigration control, relating to a person’s liberty of movement, freedom to choose his residence, and freedom to leave any country – but Bartlett and Sandland are right to accept that the ‘deprivation/restriction distinction is now well-entrenched’. Indeed, the MCA itself adopts a distinction between restraint (including restriction on liberty of movement)⁵⁶ and deprivation of liberty, and the DoLS Code of Practice speaks of a scale with restraint or restriction at one end and deprivation at other.⁵⁷ David Hewitt disagrees with this ‘scale’ approach because ‘[w]hen what we most require is a “yes/no” answer, the scale is deliberately designed to yield no such thing’.⁵⁸ However, his alternative – that ‘[if] liberty is absolute, all that need concern us... are these diminutions of liberty, and the only question is whether... they are so significant as to amount to deprivation of liberty’ – appears to amount to the same thing.

The court described the approach as follows:⁵⁹

In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of Article 5, the starting point must be his concrete situation.

It might be thought that reference to the ‘concrete’ situation would preclude consideration of hypothetical or counterfactual situations, for example the case of a patient who does not attempt to leave but would be prevented if he did attempt, but *HL* demonstrates that this *is* included.

⁵⁵ Peter Bartlett and Ralph Sandland, *Mental Health: Policy and Practice* (4th edn, forthcoming, Oxford 2013) ch 5. The book authors kindly sent a draft of the relevant chapter to the author of this dissertation.

⁵⁶ MCA 2005, s5(4): ‘D restrains P if he (a) uses, or threatens to use, force to secure the doing of an act which P resists, or (b) restricts P’s liberty of movement, whether or not P resists.’

⁵⁷ *Code of Practice* (n 22) para 2.3.

⁵⁸ David Hewitt, ‘Off the scale’ (2010) 154(8) SJ 10.

⁵⁹ *Engel* (n 49) [59]; *Guzzardi* (n 50) [92].

In *Engel*, the court proceeded on the basis that each state enjoys a certain margin of appreciation in relation to military discipline, and that a measure which would be a deprivation of liberty for a civilian may not be so when imposed on a serviceman. A measure would be a deprivation of liberty if it ‘clearly deviate[s] from the ‘normal conditions of life within the armed forces of the Contracting States’’.⁶⁰ The court continued:⁶¹

In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.

In *Guzzardi* this text was taken to be the test for deprivation of liberty in any type of case.⁶² Laura Davidson argues that it was taken out of context, but admits that it is now part of the accepted approach.⁶³

A further stock phrase was introduced in *Guzzardi*:⁶⁴

The difference between deprivation of and restriction upon liberty is none the less merely one of degree or intensity, and not one of nature or substance.

Neil Allen has argued that the dichotomy between degree and nature is not easily drawn in this context and points out that it has never been explained by the ECtHR, or explained by or doubted by domestic courts.⁶⁵ Presumably the reference to ‘degree’ is a reference to the ‘scale’ approach discussed above.

The court in *Guzzardi* continued:⁶⁶

Although the process of classification into one or other of these categories [i.e. restriction or deprivation] sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.

⁶⁰ *Engel* (n 49) [59].

⁶¹ *Engel* (n 49) [59].

⁶² *Guzzardi* (n 50) [92].

⁶³ Laura Davidson, ‘Turning back the clock’ (2012) 156(22) SJ 10.

⁶⁴ *Guzzardi* (n 50) [32].

⁶⁵ Neil Allen, ‘Restricting movement or depriving liberty?’ (2009) (Spring) JMHL 19.

⁶⁶ *Guzzardi* (n 50) [32].

It can be noted here that the search for definition of a concept the final arbiter on which has described as ‘pure opinion’ was always going to be difficult. Lord Bingham has noted that there is ‘no bright line’ separating restriction from deprivation.⁶⁷

The final stock phrase relates to the cumulative effect of restrictions:⁶⁸

It is admittedly not possible to speak of ‘deprivation of liberty’ on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5.

Ashingdane v United Kingdom (1985) concerned a psychiatric inpatient who argued an Article 5 breach had resulted from delay in transferring him from high security at Broadmoor hospital to medium security in Oakwood hospital.⁶⁹ This was unsuccessful as – despite being on an open ward at Oakfield, with regular unescorted home leave from Thursday to Sunday and being ‘free to leave the hospital as he pleased’ from Monday to Wednesday – he was deprived of liberty at both locations. This case indicates that little institutional restriction is required for there to be a deprivation of liberty.

In *Nielsen v Denmark* (1988) a boy’s confinement at a psychiatric institution for 5½ months was held not to be a deprivation of liberty because it was ‘a responsible exercise by his mother’ (not the state) ‘of her custodial rights in the interest of the child’.⁷⁰ In *HM v Switzerland* (2002) a woman was removed from home to an ‘old people’s nursing home’ on the ground of serious neglect, but there was no deprivation of liberty because it involved ‘a responsible measure taken by the competent authorities in the applicant’s interests’.⁷¹ Both these cases have received much criticism, with Rosalind English arguing that ‘[o]nly in the strange looking glass world of Strasbourg jurisprudence could [HM’s] situation be conceived of as anything other than a deprivation of liberty’,⁷² David Feldman describing the *Nielsen* judgment as ‘generally regarded as one of the worst ever to have been delivered’ by the

⁶⁷ *SSHD v JJ* [2007] UKHL 45 [17].

⁶⁸ *Guzzardi* (n 50) [95].

⁶⁹ *Ashingdane v UK* (application no 8225/78) [1985] ECHR 8.

⁷⁰ *Nielsen v Denmark* (application no 10929/84) [1988] ECHR 23 [73].

⁷¹ *HM v Switzerland* (application no 39187/98) [2002] ECHR 157 [48].

⁷² Rosalind English, ‘In the autumn of our lives’ (2002) 152 NLJ 474.

ECtHR,⁷³ and Munby LJ, speaking extra-curially, expressing the hope that the decision in *RK* that parents cannot authorise deprivation of liberty had consigned *Nielsen* to the ‘dustbin of history’.⁷⁴ Richard Stone analyses the inconsistent treatment of the objective element between *Ashingdane* on the one hand, and *Nielsen* and *HM* on the other.⁷⁵ He notes that both the latter cases have since been ‘clarified’ by the ECtHR on the grounds that Nielsen’s mother consented and HM herself consented.⁷⁶ Although he has doubts about these interpretations (as if consent had really been the deciding factor then the court would not have needed to spend time considering the level of restrictions) he suggests that *Ashingdane*, together with *Guzzardi*, provides the best guidance.

*Storck v Germany*⁷⁷ (2005) was decided after *HL*. It is from this case that it is said that there are three elements to deprivation of liberty:⁷⁸

1. An objective element, of confinement in a particular restricted space for a not negligible length of time.
2. An additional subjective element, that the person has not validly consented to the confinement in question.
3. The deprivation of liberty must be imputable to the State.

On the facts, *Storck* had been deprived of her liberty during one admission, as she ‘had been under continuous supervision and control of the clinic personnel and had not been free to leave the clinic’,⁷⁹ but not during another admission because she had validly consented.⁸⁰

This dissertation will focus on the first element, although with the limitation that the question of duration will not be addressed because that issue is more relevant to cases

⁷³ David Feldman, ‘Containment, deprivation of liberty and breach of the peace’ [2009] CLJ 243.

⁷⁴ James Munby (Munby LJ), ‘Deprivation of liberty: where are we?’ (2012) 7(16) *Brunswicks’ Healthcare Review* 32, 35 <www.rnha.co.uk/web_images/pdfs/Brunswick_V7I16.pdf> accessed 26 August 2013. *RK* is discussed in chapter 4.

⁷⁵ Richard Stone, ‘Deprivation of liberty: the scope of Article 5 of the European Convention on Human Rights’ (2012) 1 *EHRLR* 46.

⁷⁶ *HL* (n6) [93] and *Storck v Germany* (application no.61603/00) [2005] ECHR 406 [77] respectively.

⁷⁷ *Storck* (n76).

⁷⁸ *Storck* (n76) [74] and [89].

⁷⁹ *Storck* (n76) [73].

⁸⁰ *Storck* (n76) [127].

which do not involve residence decisions.⁸¹ The second element will be met where the person lacks capacity to consent.⁸² The MCA 2005 states that ‘it does not matter whether a person is deprived of his liberty by a public authority or not’ so in these cases the third element will also be met.⁸³

3.2 Early domestic approach

Some of the early domestic cases were decided before the DoLS were implemented in April 2009. Given the Human Rights Act 1998 imperative to make decisions compliant with the European Convention on Human Rights, the High Court attempted to bridge the Bournemouth gap using the inherent jurisdiction to authorise deprivation of liberty and carry out regular review.⁸⁴ Other of the cases arise following implementation of the DoLS scheme and its Code of Practice. Both categories of case are equally relevant to the definition of ‘deprivation of liberty’.

The first domestic case to consider the situation was the case of *JE v DE* (2006).⁸⁵ DE was required to live at a care home, but he and his wife JE wished for him to return to live with her. Munby J held that:⁸⁶

[T]he crucial question in this case, as it seems to me, is not so much whether (and, if so, to what extent) DE’s freedom or liberty was or is curtailed *within* the institutional setting. The fundamental issue in this case, in my judgment, is whether DE was deprived of his liberty to leave...

He clarified that this did not mean *only* leaving for approved trips or outings but *also* ‘leaving in the sense of removing himself permanently in order to live where and with whom he chooses’.

David Hewitt has suggested that the *ratio* might be that many things are capable of amounting to deprivation of liberty, and lack of liberty to leave is but one.⁸⁷ This

⁸¹ For example, *Gillan v United Kingdom* (application no 4158/05) [2010] ECHR 28 (stop and search), *Rantsev v Cyprus and Russia* (application no 25965/04) [2010] ECHR 22 (police station detention).

⁸² *Storck* (n76) [76]-[77].

⁸³ MCA 2005, s64(6).

⁸⁴ Kris Gledhill, ‘The filling of the “Bournemouth gap”: coercive care and the statutory mechanisms in England and Wales’ in Bernadette McSherry and Ian Freckelton (eds), *Coercive Care: Rights, Law and Policy* (Routledge 2013) 122.

⁸⁵ *JE v DE and Surrey County Council* [2006] EWHC 3459 (Fam).

⁸⁶ *JE v DE* (n 85) [115] (original emphasis).

cannot be the case as the *JE v DE* test sets the bar so low already: if the person is permitted to leave permanently (and can do so) then there would be no deprivation of liberty, and the conditions within the institution could not change this.

Other cases also found deprivation of liberty using only the ‘freedom to leave’ approach, including a case where the only restrictions required were ‘perimeter security’ to ensure that an elderly lady could not walk out of the premises and monitoring of visits to ensure her daughter could not remove her,⁸⁸ a case where another elderly lady was accommodated in a care home with the intention ‘that she will not be able to leave unaccompanied’,⁸⁹ and a case where young man was ‘unable to leave the school nor is he able to leave the locked corridor on which his bedroom, bathing and other facilities are located’.⁹⁰

Two judgments in particular should be mentioned here as having lost focus on what is relevant. In *LLBC v TG* (2007) McFarlane J, while considering the case to be near the borderline, saw no deprivation of liberty largely because ‘[i]t was an ordinary care home where only ordinary restrictions of liberty applied.’⁹¹ Unhelpfully, this is not further defined, but the proper approach is to consider the person’s concrete situation, rather than proceeding from a premise that ‘ordinary’ things cannot be a deprivation of liberty. One of the factors listed for determining that there was no deprivation of liberty was that ‘[t]here was no occasion when he was objectively deprived of his liberty’ which demonstrates an entirely circular logic. The judge may have been influenced by the fact that both counsel were arguing that there was no deprivation of liberty whereas the contrary argument was made by a litigant in person whose submissions ‘[did] not descend to the necessary detail required’.⁹²

The other problematic case is *LBH v GP and MP* (2009) in which Coleridge J held that there was not a deprivation of liberty at a care home because: (a) the local authority did not ‘presently’ regard themselves as authorised to keep MP at the care

⁸⁷ David Hewitt, ‘Re-considering the Mental Health Bill: The view of the Parliamentary Human Rights Committee’ (2007) (May) JMHL 57.

⁸⁸ *Re PS (An Adult)*; *City of Sunderland v PS* [2007] EWHC 623 (Fam).

⁸⁹ *Dorset County Council v EH* [2009] EWHC 784 (Fam).

⁹⁰ *C v Wigan Borough Council sub nom C v A Local Authority* [2011] EWHC 1539 (Admin) [48].

⁹¹ *LLBC v TG* [2007] EWHC 2640 (Fam).

⁹² *LLBC v TG* (n91) [107]. See Peter Bartlett, ‘Informal admissions and deprivations of liberty under the Mental Capacity Act 2005’ in Gostin L *et al* (eds), *Principles of Mental Health Law and Policy* (OUP 2010) para 11.41 for further criticism.

home, and would make an urgent application to the Court of Protection for authorisation if MP could not be persuaded not to leave; and (b) there was clear evidence of MP's own views and desire to remain living where he is.⁹³ The former reason is similar to the position in *HL* where the hospital said that HL was not detained but would be if he tried to leave. The latter reason cannot be relevant to deprivation of liberty, as MP lacked capacity to consent. Overall it is difficult to see how this decision is correct.

The DoLS Code of Practice was published in 2008 after some of the earliest cases had been heard,⁹⁴ and discusses some cases where there was deprivation of liberty (*JE v DE*, *HL*, *Storck*) and others where there was not (*LLBC v TG*, *Nielsen* and *HM*). It does so uncritically and not in an attempt to provide a workable definition, although in any event such a definition could only be guidance rather than law.⁹⁵ It contains the following list of factors:

The ECtHR and UK courts have determined a number of cases about deprivation of liberty. Their judgments indicate that the following factors can be relevant to identifying whether steps taken involve more than restraint and amount to a deprivation of liberty. It is important to remember that this list is not exclusive; other factors may arise in future in particular cases.

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
- Staff exercise complete and effective control over the care and movement of a person for a significant period.
- Staff exercise control over assessments, treatment, contacts and residence.
- A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.
- A request by carers for a person to be discharged to their care is refused.

⁹³ *LBH v GP and MP* (2009) FD08P01058.

⁹⁴ *Code of Practice* (n22).

⁹⁵ *SBC v PBA* [2011] EWHC 2580 (Fam).

- The person is unable to maintain social contacts because of restrictions placed on their access to other people.
- The person loses autonomy because they are under continuous supervision and control.

This ‘list’ approach had also been taken in the initial Implementation Tool⁹⁶ and the Draft Illustrative Code of Practice,⁹⁷ and has been taken in the Care Quality Commission’s DoLS guidance⁹⁸ and Richard Jones’s MCA Manual.⁹⁹ All of these lists are different, and none provide a simple approach suitable for use in practice.

As the relatively simple ‘liberty to leave’ approach did not entirely accord with the Code of Practice it is unsurprising that the courts have sometimes relied on other factors as being relevant to whether there is a deprivation of liberty. These have included objections by family members,¹⁰⁰ restrictions on social contacts,¹⁰¹ administration of medication for sedation or reducing agitation and challenging behaviour,¹⁰² and the degree of supervision and control within the placement.¹⁰³

Intuitively it may make sense to consider factors other than whether a person is ‘free to leave’ in determining if he is deprived of his liberty, but some of these additional factors do not seem especially relevant to ‘the physical liberty of the person’ (to quote *Engel*). In particular, it is not easy to see why family objection or approval would affect the concrete situation of the individual. And, although restriction on social contact may be a consequence of a deprivation of liberty, or may be imposed alongside a deprivation of liberty, it is not obvious why it would be relevant to its existence.

⁹⁶ Department of Health, ‘Deprivation of Liberty Safeguards implementation tool’ (gateway ref 9773, 15 April 2008).

⁹⁷ Department of Health, ‘The Bournemouth safeguards: Draft illustrative code of practice’ (gateway ref 7581, 22 December 2006).

⁹⁸ Care Quality Commission, ‘The Mental Capacity Act 2005 deprivation of liberty safeguards: Guidance for providers’ (revised December 2011).

⁹⁹ Jones, *Mental Capacity Act Manual* (n23) pt 2.

¹⁰⁰ *Neary* (n30).

¹⁰¹ *G v E* [2010] EWHC 621 (Fam); *A PCT v P and AH* [2009] EW Misc 10 (EWCOP).

¹⁰² *BB v AM* [2010] EWHC 1916 (Fam) and *G v E* (n 101) respectively.

¹⁰³ *AH* (n 101); *A London Borough v VT* [2011] EWHC 3806 (COP); *Neary* (n30).

3.3 Mental Health Tribunal context

It is important to consider cases from other contexts.¹⁰⁴ Some perfectly workable solutions in one context lead to difficulties in others, just as solving one side of a Rubik's Cube often un-solves another, and any clarification of the law which the Supreme Court offers in *Cheshire West* will have to deal with these other cases. These side-effects apply in particular to *JE v DE* which, from the above analysis, otherwise appears to provide the most promising approach for DoLS.

Under the Mental Health Act 1983, a restricted hospital order patient is one on whom the Crown Court has imposed a hospital order with restrictions.¹⁰⁵ These patients can be discharged by the Mental Health Tribunal (MHT),¹⁰⁶ either absolutely or subject to conditions,¹⁰⁷ and in the latter case may be recalled to hospital by the Secretary of State.¹⁰⁸ In *SSJ v RB* (2011) the Court of Appeal (reversing an Upper Tribunal decision) held that discharge with a condition, or set of conditions, which amount to a deprivation of liberty is not a lawful discharge.¹⁰⁹ Therefore, while a broad definition of deprivation of liberty may be considered desirable for DoLS purposes, this could make it more difficult for a detained patient to achieve conditional discharge.

The reported cases have involved conditions which are relatively rare: a condition of residence at a particular hospital (rather than community accommodation) was unlawful;¹¹⁰ an escort condition for the benefit of the patient was lawful,¹¹¹ whereas the same condition for the protection of the public was unlawful¹¹² (although this differentiation may not withstand the decision in *Austin v UK*: see 4.2 below). But nearly every discharge involves a condition of residence at community accommodation, sometimes with a condition requiring obedience to hostel rules which may include a curfew. It is clear that if the deprivation of liberty definition

¹⁰⁴ See David Hewitt, 'New perspectives on the Mental Health Act' (2008) 152(44) SJ 13.

¹⁰⁵ MHA 1983, ss 37 and 41.

¹⁰⁶ The First-tier Tribunal (Health, Education and Social Care Chamber) (Mental Health) in England, or the Mental Health Review Tribunal for Wales.

¹⁰⁷ MHA 1983, ss72 and 73.

¹⁰⁸ MHA 1983, s42(3).

¹⁰⁹ *SSJ v RB* [2011] EWCA Civ 1608. See also *SSJ v SB* [2013] UKUT 320 (AAC).

¹¹⁰ *R (G) v MHRT* [2004] EWHC 2193 (Admin).

¹¹¹ *R (SSHD) v MHRT (MP as interested party)* [2004] EWHC 2194.

¹¹² *R (SSHD) v MHRT (PH as interested party)* [2002] EWCA Civ 1868

were to be based on the *JE v DE* ‘freedom to leave (permanently)’ test this would make the standard ‘residence’ condition unlawful.

This could be dealt with in various ways. Firstly, if the patient has capacity to consent to the discharge regime then it could be argued that he has provided ‘valid consent’ and the ‘subjective element’ is not met, or alternatively if the patient lacks capacity then consideration could be given to the use of DoLS concurrently with the condition in order to authorise it. The Upper Tribunal’s reasoning that DoLS can be combined with discharge of unrestricted patients,¹¹³ would apply similarly to restricted patients.¹¹⁴ In relation to the subjective element, the Upper Tribunal (UT) stated in *SSJ v RB* (2010) that a detained patient cannot validly consent to a discharge regime which amounts to continued deprivation of liberty.¹¹⁵ A patient seeking discharge could argue that this is not binding on the MHT on the basis that (a) the UT statement was strictly *obiter* and the Court of Appeal did not consider consent; (b) in its reasoning, the UT referred to a case which stated ‘[a] deprivation remains since the consent cannot convert [it] into something else’, which is clearly wrong in light of *Storck*;¹¹⁶ (c) the UT noted that the two choices offered (conditional discharge or continued detention) ‘cannot be equated to a free and unfettered consent’: in doing so it did not apply the correct test (of ‘valid consent’) and was being unworldly in not realising that ‘free and unfettered consent’ rarely exists for psychiatric patients; and (d) a condition that a patient ‘shall comply with medication’ is treated as being obeyed voluntarily,¹¹⁷ and it appears that the UT were not referred to this analogous case.

Second, theoretically, relatively minor amendments to the MHA 1983 (allowing for conditional discharge to constitute deprivation of liberty) could effectively reverse the Court of Appeal decision. This is highly unlikely, because the government only

¹¹³ *DN v Northumberland Tyne and Wear NHS Foundation Trust* [2011] UKUT 327 (AAC); *AM v SLAM NHS Foundation Trust* [2013] UKUT 365 (AAC).

¹¹⁴ See MCA 2005, Sch 1A, Case B.

¹¹⁵ *SSJ v RB* [2010] UKUT 343 (AAC) [60]-[62].

¹¹⁶ *G* (n110) [23].

¹¹⁷ *R (SH) v MHRT* [2007] EWHC 884 (Admin).

legislates for this purpose after *losing* court cases:¹¹⁸ in the *RB* case, the Secretary of State won.

Third, to solve two sides of the ‘Rubik’s Cube’, it should be possible for the Supreme Court to adopt a definition for deprivation of liberty in *Cheshire West* which does not interfere with the current operation of the conditional discharge scheme. This would require residence and overnight curfew conditions to fall outside the definition of deprivation of liberty, but accept that the addition of leave and escort conditions would amount to deprivation of liberty. This would be broadly similar to the *JE v DE* ‘free to leave’ approach, except that inability to leave permanently is not sufficient for there to be a deprivation of liberty.¹¹⁹ In those cases where deprivation of liberty does exist, the workarounds suggested above could be used, as at present.

3.4 Control order context

Several suspected terrorists were imprisoned without charge in 2001. When this was held to be unlawful,¹²⁰ the suspects were made subject to a new control order regime.¹²¹ A ‘non-derogating’ control order would not be lawful if it amounted to a deprivation of liberty. The House of Lords and Supreme Court heard three cases in which various claimants appealed against control orders.¹²² These orders varied but all contained curfews of various lengths (from 12 to 18 hours), alongside restrictions such as requirements only to meet pre-authorised people and to remain within specified urban environments.¹²³

Control orders have been replaced by the less stringent Terrorism Prevention and Investigation Measures (TPIMs),¹²⁴ but the control order judgments are still relevant since TPIMs include the possibility of an ‘overnight’ curfew, one case has been taken

¹¹⁸ For instance, see Social Security (Persons Serving a Sentence of Imprisonment Detained in Hospital) Regulations 2010 which reverses *R (D and M) v SSWP* [2010] EWCA Civ 18.

¹¹⁹ It is also similar in structure to the Scottish Law Commission’s proposals for a ‘negative test’ and a ‘positive test’, although the content of these tests is different: Scottish Law Commission (n3).

¹²⁰ *A v SSHD* [2004] UKHL 56, making declaration of incompatibility in relation to Anti-terrorism, Crime and Security Act 2001, s23.

¹²¹ Prevention of Terrorism Act 2005, s1.

¹²² *SSHD v JJ* [2007] UKHL 45; *SSHD v E* [2007] UKHL 47, *SSHD v AP* [2010] UKSC 24.

¹²³ See *JJ* (n 122) [20].

¹²⁴ Terrorism Prevention and Investigation Measures Act 2011.

to the ECtHR,¹²⁵ and when the Supreme Court in *Cheshire West* take account of these cases there is likely to be an overlap of judges (Lady Hale, for instance).

As Neil Allen correctly notes, the *JE v DE* ‘free to leave permanently’ approach would mean that anyone subject to a control order curfew would be deprived of his liberty.¹²⁶ The House of Lords were not referred to that case, but considered ECtHR mafia ‘external exile’ cases involving curfews (which did not amount to deprivation of liberty) and house arrest cases (which did). In the lead case of *SSH D v JJ* (2007) the premise was that ‘merely being required to live at a particular address ... does not, without more, amount to a deprivation of liberty’.¹²⁷ The majority in *JJ* preferred an ‘expansive’ approach to Article 5, allowing for deprivation of liberty well beyond the ‘paradigm case’ of being in prison.¹²⁸ Looking at the cases overall, some of the orders were held to constitute a deprivation of liberty and some were not,¹²⁹ with Lord Brown suggesting that a 16-hour curfew is ordinarily the acceptable limit.¹³⁰

The House of Lords considered that measures which were justifiable breaches of Article 8 (private and family life) or other Articles were relevant to the existence of deprivation of liberty.¹³¹ These factors make it difficult to formulate a clear definition for deprivation of liberty, so it would provide clarity if the Supreme Court in *Cheshire West* were to follow Lord Hoffman’s dissenting view in *JJ* in this regard.¹³² If Article 5 is to be separated from Article 4 Protocol 2 (restriction on liberty) then it should be separated from Article 8 as well.

The options in the DoLS context are either to argue for the *JE v DE* approach on the basis that the contexts are different,¹³³ or for the Supreme Court to adopt a definition such as suggested at 3.3 which accepts that residence and certain curfews do not amount to deprivation of liberty. The better option, to the extent possible, would be a

¹²⁵ In *AF v United Kingdom* (application no 7674/08) [2013] ECHR 634, the statement of facts and questions to the parties, lodged on 5 February 2008, was communicated to the parties on 11 June 2013.

¹²⁶ Neil Allen, ‘Restricting movement or depriving liberty?’ (2009) (Spring) JMHL 19.

¹²⁷ *JJ* (n 122) [57] (Lady Hale). See also *Raimondo v Italy* (9pm-7am curfew not DoL) cited in *JJ* (n 122) [18] (Lord Bingham).

¹²⁸ See *JJ* (n 122) [97]-[98] (Lord Brown).

¹²⁹ *E* (n 122) (12 hours, no DoL); *E* (n 122) (14 hours, no DoL); *JJ* (n 122) (18 hours, DoL).

¹³⁰ *JJ* (n 122) [108]

¹³¹ *JJ* (n 122). And could be decisive: *AP* (n 122).

¹³² *JJ* (n 122) [36] (Lord Hoffman).

¹³³ *Austin v UK* (application no 39692/09) [2012] ECHR 459; cf *Cheshire West* (n142) [31] (Munby LJ).

workable definition across contexts: an ‘overnight curfew’ is the approach taken in TPIMs¹³⁴ (as not being a deprivation of liberty) so should work also for DoLS.

¹³⁴ Home Office, ‘Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR memorandum by the Home Office’ (undated).

4 Court of Appeal

The approach taken by the domestic courts changed with the case of *Re A (Adult) and Re C (Child)* (2010).¹³⁵ In that case, Munby LJ (by the time of the judgment's publication a Lord Justice of Appeal) considered the case of two young sufferers of Smith Magenis Syndrome who were locked in their bedrooms at home at night to protect them from their own behavioural problems, and concluded that there was no deprivation of liberty. He cited with approval, and at length, the (then) unpublished judgment of Parker J in *MIG & MEG* (2010).¹³⁶ He adopted her reasoning to spare 'the burden of having to read two judgments by puisne judges which both in essence say the same thing', so this dissertation will focus on the judgment of Parker J. When eventually published, *MIG & MEG* was therefore not merely 'another' first instance decision: it was one that a Court of Appeal judge had favoured.¹³⁷ It set in train a new domestic approach to deprivation of liberty, to which we will now turn. Although some of the 'early' cases (at 3.2 above) decided during this time continued with the old approaches, by the time of Munby LJ's Court of Appeal decision in *Cheshire West*, the landscape had changed and the new approach had taken hold.

The principles promoted in the relevant Court of Appeal cases will be considered under separate headings in this chapter.

It may aid understanding to set out the chronology and the case names at the outset. *MIG & MEG* was heard in the Court of Protection in May and October 2009, and the judgment was published in September 2010.¹³⁸ *RK* was heard in the Court of Protection and judgment given in December 2010.¹³⁹ *MIG & MEG* was heard (under the name *P & Q*) in the Court of Appeal in October 2010 and judgment was handed down in February 2011.¹⁴⁰ Judgment was handed down in *Cheshire West* in the Court of Protection¹⁴¹ and Court of Appeal¹⁴² in June and November 2011 respectively.

¹³⁵ *Re A (Adult) and Re C (Child)* [2010] EWHC 978.

¹³⁶ *Re MIG & MEG; Surrey Council Council v CA* [2010] EWHC 785 (Fam).

¹³⁷ See *Re P & Q; P & Q v Surrey County Council* [2011] EWCA Civ 190 [34] (Wilson LJ).

¹³⁸ *MIG & MEG* (n 136).

¹³⁹ *Re RK; YB v BCC* (2010) EWHC 3355 (COP).

¹⁴⁰ *P & Q* (n 137).

¹⁴¹ *Cheshire West and Chester Council v P* [2011] EWHC 1330 (Fam).

¹⁴² *Cheshire West and Chester v P* [2011] EWCA Civ 1257. In the footnotes, 'Cheshire West' refers to the Court of Appeal decision unless otherwise stated.

Finally, the lead judge in *P & Q* gave permission to appeal *RK*, which was heard just before the *Cheshire West* appeal, and the Court of Appeal judgment in *RK* was handed down in December 2011.¹⁴³

None of these cases related to the DoLS scheme, either because of the type of accommodation or the age requirement, or both; however, the approach to identifying deprivation of liberty is still relevant. In *MIG & MEG*, MIG was an 18-year-old who lived with her former respite carer in a family home, and MEG was her 17-year-old sister who resided in a supported living service (a small group home with four residents). In *Cheshire West*, P was a 38-year-old man who had been removed from his mother's care to a residential placement (at the time of the hearing he was in a placement with four residents). In *RK*, RK was a 17-year old child accommodated in a care home under Children Act 1989, section 20. The effect of a finding of deprivation of liberty in these cases would therefore be that, rather than DoLS being required, the court would have to review the matter on an ongoing basis. The Court of Appeal held that none were deprived of liberty.

4.1 The foundation of the new approach

In *P & Q* the Court of Appeal explicitly rowed back from the quotation from *HL* that 'the Court considers the key factor in the present case to be that the health care professionals treating and managing [Mr HL] exercised complete and effective control over his care and movements' by stating that this 'was the key factor only in "the present case"' (rather than necessarily the generality of cases).¹⁴⁴ They therefore looked for material differences in the facts, and other approaches more generally.

Had the classic ECtHR test been applied, it is likely that both MIG and MEG would have been considered to be deprived of their liberty, as Parker J found that both were under 'continuous supervision and control'¹⁴⁵ and that '[i]f either wished to leave in the immediate sense each would be restrained or brought back for their safety'.¹⁴⁶ On

¹⁴³ *Re RK; RK v BCC* [2011] EWCA Civ 1305.

¹⁴⁴ *P & Q* (n 137) [22].

¹⁴⁵ *MIG & MEG* (n 136) [210], [215].

¹⁴⁶ *MIG & MEG* (n 136) [233].

the classic approach, at first instance, P in *Cheshire West* was found to be deprived of his liberty.¹⁴⁷

4.2 Purpose

In *Austin v Commissioner of Police of the Metropolis* (2009) the House of Lords considered the ‘kettling’ of protesters and others in London by the Metropolitan Police, and decided that measures of crowd control taken in the interests of the community would not be arbitrary, and therefore not cause a deprivation of liberty, if resorted to in good faith, proportionate and not enforced for longer than reasonably necessary.¹⁴⁸

In *MIG & MEG* Parker J, in an attempt to follow the reasoning of the House of Lords, stated that a person’s ‘motive’ or ‘intention in the sense of mental attitude’ (e.g. good or benign intentions or in their best interests) or ‘belief’ (as to whether they were depriving another of his liberty) was irrelevant. However, the ‘reasons’ were relevant: there were overwhelming welfare grounds for the girls not to live in their family of origin; the primary intention was to provide them each with a home; they were not there principally for the purpose of restraint, treatment or management, but to receive care.¹⁴⁹ In *P & Q*, Wilson LJ stated that, to the extent that Parker J attached significance to the ‘best interests’ purpose of the arrangements, she was wrong.¹⁵⁰

In *Cheshire West*, Munby LJ elaborated on the relevance of purpose by distinguishing between ‘reason’ and ‘purpose’ (which are both objective) and ‘motive’ (which is subjective).¹⁵¹ ‘Reason’ here is the same as what Parker J meant by ‘reason’. ‘Purpose’ here is the same as the House of Lords in *Austin* meant by ‘purpose’ or ‘aim’. ‘Motive’ here is equivalent to ‘intention’ in *Austin*. He stated that the two objective factors are relevant to whether there is a deprivation of liberty, but the subjective factor is of limited relevance: improper motives or other arbitrary

¹⁴⁷ *Cheshire West* (first instance) (n 141).

¹⁴⁸ *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5. But see Feldman (n73) (arguing that lawfulness entails non-arbitrariness but not *vice versa*).

¹⁴⁹ *MIG & MEG* (n 136) [230]. See also [164].

¹⁵⁰ *P & Q* (n 137) [27]. Discussed in Tracey Elliott, ‘Incapacitated persons and deprivation of liberty’ (2011) 19(4) *Med L Rev* 636.

¹⁵¹ *Cheshire West* (n 142) [47].

behaviour may cause a situation to be deprivation of liberty, but good intentions cannot render innocuous what would otherwise be a deprivation of liberty.¹⁵²

He attempted to explain all this by comparing the old case of *R v Jackson*¹⁵³ (where a husband had confined his wife to the matrimonial home with the intention of doing so until she restored his ‘conjugal rights’) with a hypothetical case (of a husband confining his wife to the home because of her dementia). The following table sets out his reasoning.

	Reason	Purpose (aim)	Motive (intention)
<i>R v Jackson</i>	Because his wife was disobeying the decree for restitution of conjugal rights	To induce his wife to restore conjugal rights	To have his way, to coerce his wife in accordance with what he seems to have conceived to be his rights as a husband and her duties and obligations as a wife
Hypothetical dementia case	Because his wife has dementia	To safeguard and protect his wife against some of the adverse consequences of her dementia	To further his wife’s best interests, acting out of love and, it may be, his sense of obligation as a husband

Munby LJ thought that Jackson had deprived his wife of her liberty, but that it would be absurd to consider the husband confining his wife because of dementia as doing so, particularly because this would lead to the conclusion that if the local authority paid for a carer some days of the week then Article 5 would be engaged.

In an attempt to explain that ‘best interests’ is not relevant, Munby LJ quotes himself from *JE v DE*:¹⁵⁴

¹⁵² *Cheshire West* (n 142) [76].

¹⁵³ *R v Jackson* [1891] 1 QB 671.

¹⁵⁴ *Cheshire West* (n 142) [73].

I have great difficulty in seeing how the question of whether a particular measure amounts to a deprivation of liberty can depend on whether it is intended to serve or actually serves the interests of the person concerned. ... The argument, if taken to its logical conclusion, would seem to lead to the absurd conclusion that a lunatic locked up indefinitely for his own good is not being deprived of his liberty.

However, following his definitions, this can only apply to his ‘motive’ and not to his ‘purpose’, and it is difficult to distinguish between the two. David Hewitt has written: ‘One might be forgiven for seeing this as a distinction without a difference (to put it kindly)’,¹⁵⁵ and, considering ‘reason’ as well, Laura Davidson goes as far as to claim that ‘these three matters equate to the same thing’.¹⁵⁶ Hewitt understands the judgment to mean that objective ‘purpose’ can include ‘best interests’, and that because ‘purpose’ is relevant:¹⁵⁷

[W]e appear to have a paradox: the DoLS are relevant where an incapable person is deprived of liberty in his own best interests; yet, if strict observation of best interests will prevent there being deprivation of liberty, there will be no patient to whom the DoLS apply.

Later in the same paper he suggests the same logic would mean that patients detained under the Mental Health Act 1983 are not deprived of their liberty either. David Mead argues that the approach ‘smacks of benevolent authoritarianism’¹⁵⁸ and Davidson, meanwhile, argues that improper motives (although perhaps relevant to, for instance, a misfeasance claim) cannot be relevant to the objective element of deprivation of liberty.¹⁵⁹

In *RK*, Mostyn J found that the objective element was not met because the restraint of the 17-year-old RK in a care home was to prevent her from attacking others, and the supervision and medicine were necessary to keep RK safe and to discharge a duty of

¹⁵⁵ David Hewitt, ‘Objection, purpose and normality: three ways in which the courts have inhibited safeguarding’, (2012) 14(6) *J Adult Protection* 280.

¹⁵⁶ Laura Davidson, ‘The relevance of purpose in deprivation of liberty cases’ (2012) 156(29) *SJ* 10.

¹⁵⁷ Hewitt (n155). A similar conclusion is drawn in Gwynneth Knowles, ‘Deprivation of liberty outside care homes and hospitals: the role of the local authority’ [2012] *Eld LJ* 76.

¹⁵⁸ David Mead, ‘Of kettles, cordons and crowd control: *Austin v Commissioner of Police for the Metropolis* and the meaning of “deprivation of liberty”’ (2009) 3 *EHRLR* 376.

¹⁵⁹ Davidson (n156).

care. The Court of Appeal upheld his decision in relation to the objective element, stating that ‘[t]he restrictions were no more than what was reasonably required to protect RK from harming herself or others within her range’.¹⁶⁰ Although not explicitly, the courts were saying that there was a benevolent *Cheshire West*-type ‘purpose’ so no deprivation of liberty.

The relevance of purpose (of any type) was cast into doubt by *Austin v UK* (2012), in which the ECtHR held that:¹⁶¹

[T]he purpose behind the measure in question is not mentioned in the [judgments cited by the court] as a factor to be taken into account when deciding whether there has been a deprivation of liberty. Indeed, it is clear from the Court’s case-law that an underlying public interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty ... The same is true where the object is to protect, treat or care in some way for the person taken into confinement ...

David Hewitt has written that *Austin v UK* does not support Munby LJ’s approach to ‘purpose’ in *Cheshire West*.¹⁶² Indeed, the judge himself has now (in a personal capacity) offered a ‘provisional and very tentative view’ that, in light of *Austin v UK*, ‘questions of reason, purpose, aim, motive and intention are wholly irrelevant to the question of whether there is a deprivation of liberty’.¹⁶³

This may not be the full story, however. The judgment continues:¹⁶⁴

However, the Court is of the view that the requirement to take account of the “type” and “manner of implementation” of the measure in question ... enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. ... It is important to note, therefore, that the measure was imposed to isolate and contain a large crowd, in volatile and dangerous conditions. ... The trial judge

¹⁶⁰ *RK* (CA) (n143) [27]-[28].

¹⁶¹ *Austin v UK* (application no 39692/09) [2012] ECHR 459 [58].

¹⁶² David Hewitt, ‘Purpose alone can no longer determine if there is a deprivation of liberty’ (2012) 156(15) SJ 12. See also Hewitt (n155).

¹⁶³ Munby LJ (n74).

¹⁶⁴ *Austin v UK* (n161) [59], [66].

concluded that, given the situation in Oxford Circus, the police had no alternative but to impose an absolute cordon if they were to avert a real risk of serious injury or damage.

It is mere sophistry to say that ‘purpose’ is not being taken into account here. Indeed, the dissenting opinion states that ‘the majority’s position can be interpreted as implying that if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty’.¹⁶⁵

Two other, more recent, ECtHR cases are relevant. In *Munjaz v UK* (2012), one reason for holding that seclusion had not deprived the patient of his ‘residual’ liberty was that it was not imposed as a punishment and ‘the aim of seclusion at the hospital is to contain severely disturbed behaviour which is likely to cause harm to others’.¹⁶⁶ This clearly considers purpose, albeit in an entirely different context. The very recent case of *MA v Cyprus* (2013) states that ‘the purpose of measures by the authorities depriving applicants of their liberty no longer appears decisive for the Court’s assessment of whether there has in fact been a deprivation of liberty’.¹⁶⁷ Finally, it should be noted that, except in passing in *Munjaz*, purpose is not relied upon in any of the ECtHR care home or psychiatric detention cases. Where other domestic cases do hold purpose to be relevant,¹⁶⁸ it appears that they are wrong.

4.3 Relative normality

In *MIG & MEG*, Parker J had said that, in general, that ‘the question of whether “P” is in an institutional setting also cannot be left out of the evaluation’¹⁶⁹ and, in relation to *MIG* and *MEG* in particular, ‘the primary intention is to provide them each with a home’ and that ‘[t]hey are there to receive care’.¹⁷⁰ Wilson LJ in *P & Q* interpreted this as meaning that ‘by her reference to the provision for the girls of *care* in a *home*,

¹⁶⁵ *Austin v UK* (n161), dissenting opinion [3]. See Donna Cline, ‘Deprivation of Liberty: Has the European Court of Human Rights Recognised a “Public Safety” Exception?’ (2013) 29(76) *Merkourios* 23.

¹⁶⁶ *Munjaz v UK* (application no 2913/06) [2012] ECHR 1704 [70].

¹⁶⁷ *MA v Cyprus* (application no 41872/10) [2013] ECHR 717.

¹⁶⁸ Including *R (SSHD) v MHRT (PH as interested party)* [2002] EWCA Civ 1868 (MHT discharge), *SSHD v JJ* [2007] UKHL 45 (control orders) and *Davis v SSHD* [2004] EWHC 3113 (Admin) (licence conditions).

¹⁶⁹ *MIG & MEG* (n 136) [202].

¹⁷⁰ *MIG & MEG* (n 136) [230].

the judge was by implication stressing the relative *normality* of the living arrangements under scrutiny'.¹⁷¹

In discussing the different types of accommodation Wilson LJ said that living with parents or family in the family home is the most normal life possible, and typically there will be no deprivation of liberty. Not much less normal is placement with foster parents, or carers, in their home. Then there is a 'wide spectrum' of institutions, between the small children's home or nursing home and a hospital designed for compulsory admissions.¹⁷² The 'enquiry into normality' applies not only to the residential arrangements but the life lived outside, including social contact: for instance, it is normal for a child to go to some sort of school or college, and for an adult to go to a college, day centre, or occupation.¹⁷³

He listed the factors relevant to P and Q (that P was living in a family home with limited social life, and Q was living in a 'home' for four residents and had a fuller social life) and noted that, in relation to Q, her residence outside a family home pointed to deprivation of liberty but the small size of the home and her educational and social life outside were significant in the other direction. Beyond that, there was no analysis of these factors so it is unclear what was determinative.

In *Cheshire West*, Munby LJ listed decided cases from various types of placement along Wilson LJ's spectrum of normality: (a) the family home;¹⁷⁴ (ii) foster and analogous placements (MIG);¹⁷⁵ (c) sheltered accommodation (MEG);¹⁷⁶ (d) a children's home (RK);¹⁷⁷ (e) an 'ordinary' care home;¹⁷⁸ (f) a residential special school;¹⁷⁹ (g) a support unit.¹⁸⁰ Of the examples he chose, deprivation of liberty had only been found in the last two listed. He added that two cases lay towards the other end of the spectrum: *HL* itself, and his *JE v DE* case. No explanation is given for putting *JE v DE* (a residential care home which, to the extent that this phrase has any

¹⁷¹ *P & Q* (n 137) [28] (original emphasis).

¹⁷² *P & Q* (n 137) [28].

¹⁷³ *P & Q* (n 137) [29].

¹⁷⁴ *Re A and C* (n135).

¹⁷⁵ *MIG & MEG* (n 136).

¹⁷⁶ *MIG & MEG* (n 136).

¹⁷⁷ *Re RK* (COP) (n139).

¹⁷⁸ *LLBC v TG* (n91).

¹⁷⁹ *C v Wigan Borough Council* (n90).

¹⁸⁰ *Neary* (n30).

meaning, was ‘an ordinary care home where only ordinary restrictions of liberty applied’) alongside *HL* (a psychiatric hospital) at the far end of spectrum.

As Wilson LJ used the *HL* case to illustrate both ends of the spectrum (foster care and hospital) it can be inferred that Wilson LJ saw a contrast where *HL* was not deprived of liberty with his carers but was so deprived in Bournemouth hospital, and that this contrast is explained by the ‘relative normality’ concept. Certainly there was no mention in the *HL* litigation that *HL* would be deprived of his liberty with the carers. Robert Robinson and Lucy Scott-Moncrieff, lawyers for *HL*, have argued that *HL* would have been under ‘complete and effective control’ even with his carers, and that the two situations can only be distinguished by ‘asserting the primacy of home and family life over institutional care’, albeit qualifying this by conceding that life at home is not necessarily better or freer than life in an institution.¹⁸¹

Clearly, as Phil Fennell states, in considering the concrete situation, the ‘type’ of measure can include who imposes it and where.¹⁸² And it is certainly intuitive to think that there is more likely to be a deprivation of liberty in, say, a psychiatric hospital than a family home. But this raises the question: what then is the test for deprivation of liberty in each environment? In this regard, ‘more likely’ is of no practical assistance. It would make it impossible for a ‘free to leave’ test – or any test – to work across the board unless, which is impermissible, it could be said that deprivation of liberty does not apply in certain environments.

The answer must be that although deprivation of liberty is *statistically* more likely to occur in a psychiatric institution, or other institution at that end of the spectrum of normality, in an *individual* case it is only the concrete situation which is relevant. ‘Signs of normality’ outside the accommodation are no more than a consideration of the concrete situation. In other words, the ‘relative normality’ approach to accommodation can act as a ‘pointer’ to cases where the question of deprivation of liberty ought to be examined, but is of no assistance in answering the question.

¹⁸¹ Robert Robinson and Lucy Scott-Moncrieff, ‘Making Sense of Bournemouth’ (2005) (May) *JMHL* 17.

¹⁸² Phil Fennell, *Mental Health: Law and Practice* (2nd edn, Jordans 2011) 161.

4.4 Relevant comparator

In *MIG & MEG*, Parker J said that the concrete situation was that ‘each lives exactly the kind of life that she would be capable of living in the home of her own family or a relative: their respective lives being dictated by their own cognitive limitations.’¹⁸³

Later she added: ‘Each lacks freedom and autonomy dictated by their own disability, rather than because it is imposed on them by their carers. Each is under the continuous supervision and control of her carers ... so as to meet her care needs rather than to restrain her in any way;’¹⁸⁴ In *P & Q*, Smith LJ said: ‘The test is an objective one but the assessment must take account of the particular capabilities of the person concerned. What may be a deprivation of liberty for one person may not be for another.’¹⁸⁵

Munby LJ picked up on this theme and developed it in *Cheshire West*. Going back to ‘first principles’, he interpreted *Engel* as introducing the concept of relevant comparator: in that case ‘the relevant comparator is not a civilian but another soldier who is not subject to that measure’. He quoted himself in *Re A and Re C* (the case in which he first supported Parker J’s analysis), where he agreed with an argument that ‘[t]he restrictions upon C ... are ... as “normal” as they could conceivably be for someone with C’s condition’, in order to demonstrate that ‘some people are inherently restricted by their circumstances’ and that ‘the “normality” with which we are here concerned is the normality of the life of someone with the relevant condition...’¹⁸⁶

The test which he set out was that when assessing the ‘relative normality’ of the concrete situation, account must be taken of the particular capabilities of the person concerned, so the ‘relevant comparator’ (for an adult) is ‘an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations as X’ or (for a child) ‘a child of the same age and development as X’.¹⁸⁷ It is *not* ‘the ordinary adult going about the kind of life which the able-bodied man or woman on the Clapham omnibus would normally expect to lead’.

¹⁸³ *MIG & MEG* (n 136) [229].

¹⁸⁴ *MIG & MEG* (n 136) [233].

¹⁸⁵ *P & Q* (n 137) [40].

¹⁸⁶ *Cheshire West* (n 142) [87] quoting *Re A and C* (n135) [154].

¹⁸⁷ *Cheshire West* (n 142) [102].

The application of the approach can be seen by examining the decisions in the case itself. At first instance, Baker J had considered the ‘relative normality’ test but not the ‘relevant comparator’. He noted (in favour of there being no deprivation of liberty) that staff took care to ensure P’s life was as normal as possible, the accommodation was not of a type designed for compulsory detention, P had regular contact with his family, attends a day centre five days a week, and enjoys a good social life with other residents and staff in the community. Against that, he balanced the fact that P’s life was ‘completely under the control of members of staff at Z house: firstly, he could not go anywhere or do anything without their support and assistance, and, second, the steps needed to deal with his challenging behaviour (including restraint and finger sweeps to prevent ingestion of continence pads) meant that, looked overall, P was deprived of his liberty.’¹⁸⁸ Munby LJ sidestepped the relevance of ‘complete control’ by taking issue with the two reasons given. As to the first, the ‘support and assistance’ was a positive feature of P’s life which fostered normality, and the inability to do anything without it was *not* ‘imposed on him by Z House’ but was ‘inherent in and dictated by his various disabilities’: P’s life both within and outside the care home was ‘as normal as it can be for someone in his situation.’¹⁸⁹ As to the second (the measures required), these were ‘far removed from the physical or chemical restraints which one sometimes finds, for example, in mental hospitals’ but rather were ‘the kinds of occasional restraint that anyone caring for P in whatever setting – for example, his own mother if he was still living at home – would from time to time have to adopt’. Munby LJ made several other comparisons between P and an infant (interestingly, not the relevant comparator): the body suit was nothing like a strait-jacket and more like a Babygro; being strapped to a wheelchair was ‘for his own safety’ like a baby’s buggy or child’s car seat; and the finger sweep was ‘little different from what any properly attentive parent would do if a young child was chewing or about to swallow something unpleasant or potentially harmful’.¹⁹⁰ For these reasons, P had not been deprived of his liberty.

In *RK* the ‘relevant comparator’ was not mentioned explicitly, but the approach taken is consistent with it: Mostyn J remarked that ‘I am not sure that the notion of

¹⁸⁸ *Cheshire West* (first instance) (n 141) [58]-[60].

¹⁸⁹ *Cheshire West* (n 142) [108]-[112].

¹⁹⁰ *Cheshire West* (n 142) [113]-[116].

autonomy is meaningful for a person in RK's position¹⁹¹ and, on appeal, Thorpe LJ concluded that '[i]n other words wherever RK is accommodated the same restrictions on her liberty are essential'.¹⁹²

Admittedly, in theory, the comparator approach is initially attractive. Interestingly, none of the parties argued for it,¹⁹³ so presumably it was Munby LJ's way of squaring a difficult intellectual circle. But, on further analysis, it becomes clear that the approach is flawed, both in practice and principle.

One fundamental problem with the approach is that it subverts the meaning of 'deprivation of liberty'. As Bartlett and Sandland note, it turns what is supposed to be a consideration of the individual's concrete situation into a consideration of the group to which he belongs: 'if all similarly situated people are treated similarly so that there is no discrimination between them, there is no deprivation of liberty'.¹⁹⁴

Linked to this is the problem of discrimination against disabled people who lack capacity. David Hewitt has argued that the reasoning is 'dubious' as it appears to 'abandon the idea that there are common standards – common liberties, we might say, or common protections – that are available to everyone';¹⁹⁵ it 'entails that mentally incapable people are entitled to less in the way of liberty than the rest of us'.¹⁹⁶ This discrimination is based on the false premise that restrictions imposed on such people are not external but are intrinsic to the person himself. It breaches the prohibition on discrimination in Article 14 ECHR – that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as [...] or other status' – as disability comes within the ambit of 'other status'.¹⁹⁷

¹⁹¹ *RK (COP)* (n139) [36].

¹⁹² *RK (CA)* (n143) [38].

¹⁹³ Neil Allen, 'Mind your Ps and Qs' (speech at the Seventh North West Mental Health Law Conference, Northumbria University, 12 July 2013).

¹⁹⁴ Bartlett and Sandland (n55).

¹⁹⁵ David Hewitt, 'Deprivation of liberty can never be normal' (2012) SJ 156 220.

¹⁹⁶ David Hewitt, 'Comparison Contrast' (2013) SJ 157(16) 9; David Hewitt, 'Children, some adults and liberty' (Lecture at Deans Court Chambers conference, Civil Justice Centre, Manchester, 24 February 2012).

¹⁹⁷ Discussed in Loukis Loucaides, 'The European Convention on Human Rights and the rights of persons with disabilities' available in Loukis Loucaides, *The European Convention on Human Rights* (Martinus Nijhoff 2007) <www.coe.int/t/e/social_cohesion/soc-sp/text_LoucaidesE.pdf> accessed 26 August 2013.

It also breaches Article 14 of the Convention on the Rights of Persons with Disabilities,¹⁹⁸ paragraph 1 of which states that:

States Parties shall ensure that persons with disabilities, on an equal basis with others:

- (a) Enjoy the right to liberty and security of person;
- (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

For these reasons it would be preferable to distinguish this aspect of *Engel* as being based on its own special context than to use it as the basis for a new comparator approach.¹⁹⁹ Taken to its logical conclusion, it could be applied to any other group as a basis for avoiding the conclusion that there is a deprivation of liberty, such as the Mafioso in the *Guzzardi*-era cases or suspected terrorists in the control order cases, and it is instructive that it has not been. Bartlett and Sandland give murderers as an example: it is normal for convicted murderers to be in prison, which would (absurdly) mean while there they are not deprived of their liberty.²⁰⁰ In response, it might be said that the altered normality for *Cheshire West* cases is different as it is *inherent* to the person. But being in the armed forces, as in *Engel*, is not inherent to the person.

A further problem is that the comparator approach is based on the person's perceived 'needs'. Ben Troke has argued that the *Cheshire West* reasoning 'seems to risk going full circle - back to before Bournemouth and the DOLS system - re-establishing deference to a professional assessment ... without significant scrutiny'.²⁰¹ The analogy is between the doctrine of necessity (where measures, including detention, which were necessary in the person's best interests were justified as such under common law) and the comparator approach (where measures necessary to meet a person's intrinsic needs are not relevant to the decision as to whether there is a

¹⁹⁸ Ratified by the UK on 8 June 2009.

¹⁹⁹ See Alex Ruck Keene, 'Tying ourselves into (Gordian) knots?' (39 Essex Street, December 2012) para 28 <www.39essex.com/docs/articles/ark_deprivation_of_liberty_paper_december_2012.pdf> accessed 26 August 2013. See also David Harris et al, *Law of the European Convention on Human Rights* (2nd edn, Oxford 2009).

²⁰⁰ Bartlett and Sandland (n55) 221.

²⁰¹ See Ben Troke, 'The death of deprivation of liberty safeguards (DOLS)?' (2012) 3(2) *Social Care and Neurodisability* 56.

deprivation of liberty). In *all* of the cases mentioned in this dissertation, the restrictions were imposed because of the person's inherent needs, and on the comparator approach it is hard to see how any of them could be said to have been deprived of their liberty. The same could be said for patients detained under the MHA 1983 or (although outside the scope of this dissertation) serious medical treatment cases.

Linked with this is the need firstly to identify exactly what the comparator is in any given case, then come to an agreement on what the court, or society, considers 'normal' given his needs. The treatment of HL in hospital could have been said to be 'normal' and necessary because of his inherent needs, particularly given that he had spent over 30 years in hospital and only the previous 3 outside. It is hard to see how 'an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations as X' is anyone other than X himself. The person would then have to argue that *he* ought to be elsewhere or subject to less intensive restrictions.²⁰² However, the alternative approach, to define the group to whom the person belongs, and find facts in relation to what is normal for that group, could in many cases be equally as time-intensive as the original individual approach. John O'Donnell, solicitor for P in the *Cheshire West* case, has written: 'It would lead to a case by case examination as to whether or not particular disabilities were sufficiently similar to establish the comparison. Considerable evidential issues will arise and the scope for legal argument is enormous.'²⁰³

Perhaps, leaving aside the practical and conceptual problems, the death knell for the 'relative comparator' is simply that it does not feature in the recent ECtHR jurisprudence on care homes (considered at 5.2 below).

4.5 Past, future and 'somewhere else to go'

In a question related to the 'relative normality' concept, Wilson LJ raised the question of whether a comparison between levels of autonomy in current arrangements and life

²⁰² See text to n 241 (*LDV* case).

²⁰³ John O'Donnell, 'Cheshire West and Chester Council v P (2011) EWCA Civ 1257' (O'Donnells Solicitors, Information sheet, January 2012 no.2) <http://www.mentalhealthlaw.co.uk/images/O%27Donnells_Cheshire_Info_sheet_Jan_2012_no2.pdf> accessed 26 August 2013.

before the protective steps were imposed is relevant, but preferred not to answer it.²⁰⁴ Smith LJ did answer it, in the negative,²⁰⁵ and Mummery LJ said the argument that the local authority had enhanced P & Q's liberty was instinctively attractive but risked confusing the lawfulness of deprivation of liberty with its existence.²⁰⁶ In *Cheshire West*, Munby LJ agreed with Smith LJ, stating that the comparison is not between the present and the person's previous (or potential future) life.²⁰⁷ The ECtHR decision in *Munjaz v United Kingdom* (2012) may be inconsistent with this as one reason for holding that seclusion had not deprived the patient of his 'residual' liberty was that as 'a long-term patient in a high security hospital ... even when he was not in seclusion, he would already have been subjected to greater restrictions on his liberty than would normally be the case for a mental health patient'.²⁰⁸ However, this involves a very different context, and the better view must be that the concrete situation of the person relates to the *present* situation.

Munby LJ, having set out the new *Cheshire West* approach, stated that '[m]atters are, of course, very different where a person has somewhere else to go and wants to live there but is prevented from doing so by a coercive exercise of public authority'.²⁰⁹ This is arguably a comparison with a future life. On the facts of the case, there was no alternative, as during the case P's mother accepted that she was no longer able to care for him.

There is an internal inconsistency with Munby LJ's approach here. If the concrete situation is judged not to be a deprivation of liberty, based on the 'relative normality' and 'relative comparator' tests, then how would having 'somewhere else to go' make a difference? If the restrictions would be the same in both places then neither would be a deprivation of liberty. If there is a difference, then how would having 'somewhere else to go' remove the normality of the current placement? It is therefore not clear how this extra element fits in. Perhaps it is simply a need to explain how there being a deprivation of liberty in previous cases (in particular, *HL*, *JE v DE* and *Neary*²¹⁰) is consistent with the other tests in *Cheshire West*. In this regard, Ben Troke

²⁰⁴ *P & Q* (n 137) [30].

²⁰⁵ *P & Q* (n 137) [39].

²⁰⁶ *P & Q* (n 137) [52].

²⁰⁷ *Cheshire West* (n 142) [95].

²⁰⁸ *Munjaz* (n166) [69].

²⁰⁹ *Cheshire West* (n 142) [58].

²¹⁰ *Neary* (n30).

infers from the judgment that ‘Lord Justice Munby also seems to suggest that if there is no meaningful alternative to the current placement, there may be no deprivation at all’.²¹¹

Giving relevance to whether there is currently ‘somewhere else to go’ leads to a form of discrimination. A person who has the money to pay for home care, or an alternative placement, or who has family who can provide ‘somewhere else to go’, is put in a more favourable position in relation to safeguards than a person who does not have these benefits. This is compounded by the possibility that the lack of ‘somewhere else to go’ may often be the result of a decision by the State in the form of a local authority: for instance, returning home was not an option for RK as the local authority would not provide the necessary home support. So the ‘coercive exercise of public authority’ may be preventing the person from having *anywhere* else to go without this being relevant to the existence of deprivation of liberty.

4.6 Happiness and objections

At first instance Parker J had held that ‘the fact of happiness in their respective environments, each regarding the place where they live as home, and their wish to stay there, must be relevant to the question of both the objective and the subjective element.’²¹² Previously, only the badly-reasoned *LLBC v TG* and *LBH v GP and MP* had considered happiness as relevant.²¹³ In relation to the subjective element, there was a lack of valid consent in *MIG & MEG* so it is unclear what difference happiness would make. She also thought it significant that if the local authority thought MEG would run away they could have sought an order under Children Act 1989, section 25, or under the inherent jurisdiction, but had not done so.²¹⁴

In relation to the objective element, the Court of Appeal stated that happiness is *not* relevant but the lack (or presence) of objection is.²¹⁵ Although the two concepts are described as ‘overlapping’²¹⁶ it is difficult to see the material difference – they are opposite sides of the same coin. The logic given by the Wilson LJ is that objection

²¹¹ Troke (n201).

²¹² *MIG & MEG* (n 136) [204].

²¹³ *LLBC v TG* (n91); *LBH v GP and MP* (n93).

²¹⁴ *MIG & MEG* (n 136) [231].

²¹⁵ *P & Q* (n 137) [25] (Wilson LJ).

²¹⁶ *P & Q* (n 137) [24].

leads to conflict, which in turn leads to arguments, the stress of being overruled, tussles and physical restraint, and perhaps forcible return by the police, but the absence of objection leads to an absence of conflict and thus a peaceful life.

To bolster this view, Wilson LJ stated that Munby J in *JE v DE* had held that objections were relevant ('indeed in that case apparently of determinative relevance') to the objective element, and quotes that DE had been deprived of his liberty 'by being prevented from returning to live where *he* wants and with those *he* chooses to live with...' ²¹⁷ This is a misinterpretation. The local authority had argued that DE was 'free to leave' because they would not object to *certain* placements, and Munby J was pointing out that their refusal to let him go to a *particular* place (the place he wanted) meant that he was not 'free to leave'. It was not his objection that was relevant, as the same situation would have existed had DE been compliant and JE wanted to take him home. This point does not appear to have been mentioned in the literature.

David Hewitt criticises the Court of Appeal's analysis by saying that it 'appears to confuse objection with how that objection manifests itself and is addressed' and rhetorically asks: 'What of the person who objects to her confinement fervently but silently?' ²¹⁸

Laura Davidson also argues that objection is not relevant to the objective element, noting that the *Bournewood* litigation related to non-objecting incapacitated patients, and concludes that: ²¹⁹

Those least likely, or able, to complain about a violation of their rights most need access to a review of their detention. If a lack of dissent means that restrictions are less likely to be found to amount to a deprivation of liberty, English law appears to be regressing to the darker days of *Bournewood*.

She argues that, in addition to objection being irrelevant, 'consequent force and restraint' are not relevant factors. This appears to taking the argument too far. The correct interpretation must be that (a) contrary to the Court of Appeal decision,

²¹⁷ *P & Q* (n 137) [25] (Wilson LJ) quoting *JE v DE* (n85) [125] (Munby J) (original emphasis). Parker J made a similar point in support of her 'happiness' factor: *MIG & MEG* (n 136) [204].

²¹⁸ David Hewitt, 'A contradictory approach to deprivation of liberty' (2012) 156(26) SJ 10.

²¹⁹ Laura Davidson, 'Close comfort' (2011) 155(14) SJ 14.

objection is irrelevant to the objective element; (b) restraint may be relevant (at least, if it stops the person from leaving) but not *because* it is a response to objection.

4.7 Medication

MEG was prescribed the anti-psychotic tranquiliser Risperidone for the purpose of controlling her anxiety. Parker J held that ‘the fact of administration of medication in itself cannot create deprivation of liberty’.²²⁰ She then noted that MEG had not been medicated to secure her admission or prevent her leaving, and that she would require it in any setting, and concluded that it did not create a deprivation of liberty. Wilson LJ held that the administration of medication, in particular tranquilisers, is a pointer towards the existence of the objective element because ‘it suppresses her liberty to express herself as she would otherwise wish’; administration by force would increase relevance, as would medication which suppresses objections; and the absence of medication is a pointer in the other direction.²²¹ The facts were not considered in detail, beyond repeating Parker J’s points about purpose and noting that there was no force.

Phil Fennell has argued that the administration (in any context) of strong psychotropic medication or ECT would be a factor ‘tipping the balance firmly’ towards there being a deprivation of liberty.²²² The correct approach must be more modest: in some cases a deprivation of liberty will be necessary to administer medication and in others the medication may give effect to a decision to deprive of liberty, but whether there is a deprivation of liberty depends on the concrete situation in relation to residence and leave. Medication (like locked doors) is a means of enforcing a deprivation of liberty decision, not a deprivation of liberty in itself. Wilson LJ is correct that it is a ‘pointer’ towards deprivation of liberty, in the sense that it suggests an enquiry is appropriate.

²²⁰ *MIG & MEG* (n 136) [217].

²²¹ *P & Q* (n 137) [26].

²²² Phil Fennell, ‘The Mental Capacity Act 2005, the Mental Health Act and the common law’ (2005) (Nov) *JMHL* 167.

4.8 Summary

Having originally set out a very broad approach to ‘deprivation of liberty’²²³ and a system of review with significant resource implications for the Court of Protection and Official Solicitor,²²⁴ Munby LJ has been instrumental in restricting the implications of his earlier decisions.²²⁵

The Court of Appeal’s approach takes factors which would be relevant to justification of deprivation of liberty (for instance, purpose) and uses them to determine whether there is a deprivation of liberty at all. The approach is apparent in the opinion of Barbara Hewson (who represented the local authority in *P & Q*):²²⁶

[The Court of Appeal decision] can be seen as a common sense response to an unduly formalist approach to Art 5. P and Q had to live somewhere; they plainly needed care and support, and no one suggested that the High Court’s decisions on contact and residence were wrong.

In introducing the ‘relevant comparator’ concept in particular, Munby LJ’s stated purpose was to find a ‘benchmark or yardstick’ which was ‘more focussed and less time-consuming’ than reference to the degree and intensity of the restriction, and which would avoid the need for a ‘minute examination of all the facts in enormous detail’.²²⁷ It is clear that he did not achieve his aim. David Hewitt has written that ‘[t]he decision in the *Cheshire West* case has exasperated practitioners and been criticised by them in equal measure.’²²⁸ One best interests assessor went so far as to write: ‘I am no longer confident that I know how to do my job ... I am dismayed by this judgement, which I feel throws yet more mud into waters that were already murky and difficult to navigate’²²⁹ Nasreen Pearce, a retired circuit judge, comments broadly favourably on *Cheshire West* and states that ‘[t]he valuable message is that

²²³ *JE v DE* (n85).

²²⁴ *PS* (n88); *Salford City Council v GJ* [2008] EWHC 1097 (Fam); *Salford City Council v BJ* [2009] EWHC 3310 (Fam).

²²⁵ *Cheshire West* (n142); *Re A and C* (n135).

²²⁶ Barbara Hewson, ‘Family: rescue or detention?’ (2011) 161 NLJ 383.

²²⁷ *Cheshire West* (n142) [38]-[39].

²²⁸ Hewitt (n162).

²²⁹ Sue Neal, ‘Comment on the Cheshire Judgment’ (Comment by Mental Capacity Act Implementation Lead NHS North Lancashire, 39 Essex Street Court of Protection Newsletter, issue 16, December 2011) <www.39essex.com/docs/newsletters/cop_newsletter_december_2011.pdf> accessed 26 August 2013.

each case must be considered on its own facts and that careful consideration of P's individual circumstances will provide the clue as to whether or not his accommodation and/or treatment deprives him of his liberty.'²³⁰ But this demonstrates that there still is no straightforward 'benchmark or yardstick'.

It has been argued that the ulterior aim (or perhaps, it could be said, 'motive') behind *P & Q* and *Cheshire West* was a policy one. Laura Davison has argued: 'Despite the courts' assertions otherwise, I suggest that these key decisions were made for policy reasons in order to reduce the volume of authorisations required and the number of cases finally starting to come before the Court of Protection'²³¹ She speculates that they 'might explain the 16 per cent dip in authorisations being made between December 2011 and April 2012'. The 16% decrease actually refers to the number of authorisations in *existence* at quarter end, and these figures have continued a downward trend from the December 2011 peak of 1,976, with the 2012/13 statistics showing percentage changes of -6%, 0%, -2% and 4%.²³² Court of Protection judges have frequently complained of lack of resources. For instance in *P & Q* Wilson J stated that he would ignore:²³³

the fact that, were this appeal to be allowed, the vast, if unquantifiable, number of necessary reviews of such a character would surely be beyond the present capacity of the Official Solicitor's department and in particular of the Court of Protection.

By December 2011 the Official Solicitor had indeed 'reached the limit of his resources with regard to Court of Protection welfare cases' (which would include deprivation of liberty cases).²³⁴

We will now consider more recent domestic and ECtHR cases.

²³⁰ Nasreen Pearce, 'The Deprivation of Liberty Safeguards Part 6: definition of deprivation of liberty' [2012] Fam Law 999.

²³¹ Laura Davidson, 'Blurring the boundaries' (2012/13) 18(2) PCA 26.

²³² Health and Social Care Information Centre (n33) Table 1.

²³³ *P & Q* (n 137) [5].

²³⁴ Official Solicitor, 'Official Solicitor: Court of Protection: Acceptance of Appointment as Litigation Friend' (21 February 2012) <<http://www.justice.gov.uk/downloads/protecting-the-vulnerable/official-solicitor/litigation-friend-note.pdf>> accessed 26 August 2013.

5 More recent developments

5.1 Domestic cases

There have been five reported domestic cases which have had to consider the *Cheshire West* case, and each demonstrates a problem with some aspect of that decision.

Two cases illustrate the problem with the ‘somewhere else to go’ concept. In *C v Blackburn with Darwen Borough Council* (2011) Peter Jackson J decided that a man with brain injury who had previously kicked down the care home door in an attempt to leave, and for whom the police were called, was not deprived of his liberty.²³⁵ The decisive factor appeared to be that, although C wanted to live elsewhere and an independent social worker had recommended another placement as more suitable, there was no ‘actual alternative at the present time’ and the case could be distinguished from a person removed from a home that is still ‘realistically available’.²³⁶ In *CC v KK* (2012) Baker J decided that an elderly lady who was removed from her bungalow and required to reside in a nursing home for 10 months against her will was not deprived of her liberty.²³⁷ No explicit consideration was given to whether she had ‘somewhere else to go’, which is especially odd in hindsight as, after he decided that she had capacity, she returned home.²³⁸

These cases also demonstrate a difficulty with the consideration of objections and consequent conflict. In *C v Blackburn* there was no explicit reference to objections despite the obvious conflict which resulted. In *CC v KK* the judge did consider objections but concluded that, while KK did strongly object, and her wishes being frustrated caused her stress and distress, her earlier difficult behaviour had subsided and there was ‘little evidence that her overruled objections lead to a significant degree of conflict’. This appears to extend the *P & Q* requirement to require an unusual level of conflict, especially in the context of institutional living, and led to a surprising decision.

²³⁵ *C v Blackburn with Darwen Borough Council* [2011] EWHC 3321 (COP).

²³⁶ *C v Blackburn* (n 235) [26].

²³⁷ *CC v KK* [2012] EWHC 2136 (COP) [97-102].

²³⁸ Leonie Hirst, ‘The ability to choose: *KK v CC*’ [2012] PCA 31 October.

In *CC v KK*, having considered *Austin v UK*, Baker J held that until the Supreme Court consider ‘purpose’ in *Cheshire West*, ‘the right course is to have regard to the purpose for a decision as part of the overall circumstances and context, but to focus on the concrete situation in determining whether the objective element is satisfied’²³⁹ However, the purpose of restrictions was considered as relevant in *C v Blackburn* – where the judge held that the locked doors and 1:1 supervision were not a deprivation of liberty ‘where their purpose is to protect a resident from the consequence of an epileptic fit, or harm caused by a lack of awareness of risk, or from self-harm’ – and in *Y County Council v ZZ* (2012) – where Moor J, in holding that was a deprivation of liberty, considered it relevant that ‘the purpose of the restrictions was, in significant part, designed to protect others, particularly children, as well as to protect ZZ’.²⁴⁰

In *A Primary Care Trust v LDV* (2013) Baker J mentions treatment with medication as being one of the factors from the DoLS Code of Practice that were present in the case.²⁴¹ But, despite C in *C v Blackburn* being in receipt of antipsychotic medication as a mood stabiliser this was not addressed as a ‘pointer’ towards deprivation of liberty.

‘Relative normality’ was considered in *CC v KK*, where KK’s regular leave to visit her bungalow were considered as evidence of normality outside the placement, but it may be questioned how this fits in with the examples, such as college and occupation, which Wilson LJ set out in *P & Q*. It was also considered in *LDV*, where the point was made that Munby LJ had accepted HL to be deprived of liberty so similar cases (*LDV* was an informal patient) should not be excluded by the *Cheshire West* approach.²⁴²

The ‘relative comparator’ was also considered in these two cases. In *CC v KK* it was identified as ‘anybody with KK’s disability’, who would ‘experience a significant physical restriction on the life that they are able to lead’. It was noted that the care home was not ‘*significantly* more restrictive’ (emphasis added) than life at her bungalow – which appears to extend the principle, and ignore the requirement that life be (to quote *Cheshire West*) ‘as normal as it can be for someone in his situation’. In

²³⁹ *CC v KK* (n237).

²⁴⁰ *Y County Council v ZZ* [2012] EWHC B34 (COP).

²⁴¹ *A Primary Care Trust v LDV* [2013] EWHC 272 (Fam) [25].

²⁴² *LDV* (n241) [26].

LDV the ‘relative comparator’ was used in a novel way. The MHT had deferred discharge and recommended a community placement which met specified needs, but *LDV* remained in a hospital. Baker J decided that the relevant comparator was ‘a person placed in a residential placement in the community of the nature recommended by the tribunal’ – in other words, *LDV* where she wanted to be.

Two other considerations are notable from the recent domestic cases. One is the way that the *Cheshire West* approaches, including ‘relative comparator’, are treated as mere ‘factors’ rather than decisive tests.²⁴³ The other is the tendency to sidestep *Cheshire West* by considering the classic ECtHR question of whether there was ‘continuous control’ (in *CC v KK*) or ‘complete and effective control’ (considered as a factor in *LDV*, and decisive in *Y v ZZ* where the facts included that *ZZ* ‘was not allowed to leave, including to the garden, without an escort’).

In the most recent case, *A Local Authority v WMA*,²⁴⁴ HHJ Cardinal deliberately does not follow *Cheshire West*, preferring the ‘elephant test’ approach:

I confess for my part it is not easy to follow the reasoning of the *Cheshire West* decision. That said, I agree strongly with the Official Solicitor that moving *WMA* to *B* would be a deprivation of liberty... I will not delve into the meaning of ‘restraint’ and ‘deprivation of liberty’ as analysed in the *Cheshire West* case.

The odd results resulting from application, and extension, of *Cheshire West* principles, and the side-stepping of them by considering the classic ECtHR approach, demonstrate the failure of *Cheshire West* to provide a workable solution. The willingness of an experienced Court of Protection circuit judge publicly to admit that he cannot understand the decision must be the final nail in the coffin.

5.2 ECtHR cases

Since *Cheshire West* there have been four ECtHR cases involving care home residents. These have applied the classic ECtHR approach – essentially the same

²⁴³ See *LDV* (n241) [16]

²⁴⁴ *A Local Authority v WMA* [2013] EWHC 2580 (COP).

approach as in the *HL* case which led to the DoLS – rather than the extra elements from the domestic Court of Appeal approach.

In *Stanev v Bulgaria* (2012) the Grand Chamber held that the applicant was deprived of his liberty. It is notable that at the outset the court held that:²⁴⁵

[I]t is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a “deprivation of liberty” within the meaning of Article 5 § 1.

The remainder of the quoted paragraph seems to say that the reason the question will not be answered relates to the ‘state’ (third) element rather than the ‘objective’ (first) element, although this is not clear. Interestingly this leaves open the possibility that Parker J was wrong in stating that it ‘casts the net too wide’ to say that MIG and MEG were deprived of their liberty simply ‘because they lack the capacity to consent or to object to their placement, and ... they lack the freedom to leave where they are living’.²⁴⁶

In relation to the objective element, the main factors were the system of leave of absence and the duration of the placement.²⁴⁷ Under the leave scheme, Mr Stanev was able to leave the block in which he was housed, but his absence from the care home, which was remote, was entirely at the discretion of the home’s management. On the one occasion that he failed to return, the management called the police to search for him, and staff returned him against his wishes. Accordingly, ‘he was under constant supervision and was not free to leave the home without permission whenever he wished’ and was deprived of his liberty. Notably, he did not have ‘somewhere else to go’ but still was deprived of his liberty.²⁴⁸ The government argued that *Dodov v Bulgaria* (2008) imposed a positive ‘*Osman*’ obligation to look after people in care homes, but the court noted that it had ‘not shown that the applicant’s state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb’.²⁴⁹ Such a risk may justify deprivation of

²⁴⁵ *Stanev v Bulgaria* (application no 36760/06) [2012] ECHR 46 [121].

²⁴⁶ *MIG & MEG* (n 136) [225].

²⁴⁷ *Stanev* (n245) [132].

²⁴⁸ *Stanev* (n245) [153].

²⁴⁹ *Dodov v Bulgaria* (application no 59548/00) [2008] ECHR 43. See also *Osman v UK* (application no 23452/94) [1998] ECHR 101.

liberty but could not prevent confinement from being a deprivation of liberty, so it is unclear what the relevance of this case is here.²⁵⁰

In relation to the subjective element the court stated that, although he lacked legal capacity, Mr Stanev was ‘able to comprehend his situation’²⁵¹ and had wished to leave. The implication of this approach is that someone deprived of *legal* capacity (in many European countries, under ‘guardianship’ provisions) could still validly consent. This is not so relevant in our domestic law where there is an issue-specific approach to legal capacity. The overall position is still that what is relevant to the subjective element is lack of valid consent.

In *DD v Lithuania* (2012) the court again considered residence at a care home and again found a deprivation of liberty.²⁵² The court held that: ‘the key factor in the circumstances of the present case is that the Kedainiai Home’s management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement...’²⁵³ The court noted that DD was ‘not free to leave the institution without the management’s permission’, that on at least one occasion she was brought back from the police, and that the director had full control over her social contacts and telephone calls. Accordingly she was ‘under continuous supervision and control and [was] not free to leave’. Interestingly, the final sentence was that: ‘Any suggestion to the contrary would be stretching credulity to breaking point’. This echoes Lord Steyn’s comment in *HL* in relation to the Trust’s and Secretary of State’s argument that HL was ‘free to go’, in which he used the same language, before concluding: ‘The suggestion that “L” was free to go is a fairy tale.’ This would suggest that, when considering the restrictions within the home, that they were considering the ‘free to leave’ test.

In *Kedzior v Poland* (2012) the court again found a deprivation of liberty in a care home.²⁵⁴ In relation to the objective element, the ‘key factor’ was essentially the same as in *DD*.²⁵⁵ It was noted that while he was able to leave, including on extended visits

²⁵⁰ See *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74.

²⁵¹ This formulation was introduced in *Shtukaturvov v Russia* (application no 44009/05) [2008] ECHR 223 [108].

²⁵² *DD v Lithuania* (application no 13469/06) [2012] ECHR 254.

²⁵³ *DD* (n252) [146].

²⁵⁴ *Kedzior v Poland* (application no 45026/07) [2012] ECHR 1809.

²⁵⁵ *Kedzior* (n254) [57].

to his family, he was under constant supervision and was not ‘free to leave’ the institution without the management’s permission whenever he wished.²⁵⁶

A similar approach was taken in *Mihailovs v Latvia* (2013): the ‘key factor’ was set out as above, various facts were considered, and it was concluded that ‘the applicant was under constant supervision and was not free to leave the institution without permission whenever he wished.’²⁵⁷ In relation to a second care home, there was no deprivation of liberty because Mihailovs had given valid consent by tacitly agreeing to stay.²⁵⁸

In none of these four cases involving deprivation of liberty are the Court of Appeal approaches mentioned.

5.3 Proposals for definition

It can be seen that the classic ECtHR approach, in *HL* and *Storck*, and in the recent cases, is to state that the ‘key factor’ relates to whether there is ‘complete and effective control’, to set out salient facts in that regard, and to conclude on that basis whether there was ‘continuous supervision and control’ and whether the person was ‘free to leave’.

After a lengthy and careful analysis of the ECtHR jurisprudence, Alex Ruck Keene argues that:²⁵⁹

The guiding principle in determining whether or not an adult is deprived of their liberty is whether they are free to leave a particular place. All other considerations (in particular, considerations regarding the regime to which they are subject within that place) are subsidiary to that ultimate question.

In other words, the only salient facts for considerations are those which relate to the ‘free to leave’ test.

²⁵⁶ *Kedzior* (n254) [57].

²⁵⁷ *Mihailovs v Latvia* (application no 35939/10) (2013) ECHR 65 [131]-[132].

²⁵⁸ *Mihailovs* (n257) [139].

²⁵⁹ Ruck Keene (n199) [97] (original emphasis). See also the shorter version: Alex Ruck Keene, ‘Tying ourselves into (Gordian) knots? – Deprivation of liberty and the MCA 2005’ [2013] Eld LJ 69.

He adds that (a) there is a context-specific *de minimis* time element, and the more draconian the measures or the smaller the space the sooner there will be a deprivation; (b) there is a context-specific *de minimis* geographical element, whereby the more isolated and distant from home the more likely will there be a deprivation of liberty, the ‘rein’ on a person can be long but the key question remains whether departure is at the sufferance of those in control; (c) those in authority must be prepared to give effect to the requirement that the person is not free to leave (this can include supervision and control, but supervision and control is not relevant unless aimed at preventing departure).²⁶⁰ In relation to this last point, what ‘freedom to leave’ means is context-specific and ‘in the case of an adult whom the authorities consider should reside at a care home on a sustained basis, then the freedom to leave will be the freedom to reside other than at the care home’,²⁶¹ and it is not relevant whether or not the person has somewhere else to go, or whether or not family members or carers wish them to leave.²⁶²

This chimes with the *JE v DE* test which was the domestic approach before other factors were introduced, and, consequently, has similarities with many of the responses to the Bournewood consultation,²⁶³ the Joint Committee on Human Rights’ report on its pre-legislative scrutiny of the Mental Health Bill,²⁶⁴ and the more recent draft statutory test proposed by George Szmukler *et al*, in their ‘model law fusing incapacity and mental health legislation’²⁶⁵

It may be too wide, however, when considered alongside the MHT cases, the control order cases, and the ECtHR cases upon which they were based, which seem clear that a requirement to reside at a specified address will not *per se* amount to deprivation of liberty. As Lady Hale said, ‘There must be a greater degree of control over one’s physical liberty than that. But how much?’²⁶⁶

²⁶⁰ Ruck Keene (n199) [98].

²⁶¹ Ruck Keene (n199) [99].

²⁶² Ruck Keene (n199) [101].

²⁶³ For instance, Mental Health Lawyers Association (n40).

²⁶⁴ Joint Committee on Human Rights, ‘Legislative Scrutiny: Mental Health Bill: Fourth Report of Session 2006-07’ (HL Paper 40 / HC 288, 4 February 2007).

²⁶⁵ George Szmukler *et al*, ‘A model law fusing incapacity and mental health legislation’, (2010) 20 (Special Issue) JMHL 11 (clause 18(2)).

²⁶⁶ JJ (n122) [57].

Neil Allen has argued that the answer is a ‘theory of coerced confinement’ which involves confinement (to distinguish restricted movement from detention) together with coercion (to distinguish between detention and deprivation of liberty).²⁶⁷ This is a neat conceptualisation but does not provide any further clarity as each term requires further definition with similar ambiguities as currently exist.

The *Cheshire West* approach is clearly unworkable, and probably wrong, so the next chapter will set out a more sensible proposal based on the ideas discussed above (mainly in chapter 3).

²⁶⁷ Allen (n126); Allen (n193).

6 Conclusion

The intellectual gymnastics required to apply the expansive approach to Article 5, in a consistent fashion, to cases beyond the paradigm of confinement in a cell makes one wonder whether Article 5 is a square peg being used for a round hole. Ewing and Tham, discussing the ‘autonomous’ meaning of deprivation of liberty, speak of the ‘Lewis Carroll and George Orwell schools of treaty and statutory interpretation’.²⁶⁸ However, Ben Troke is right to note that:

We must remember that it is the existence of a possible deprivation of liberty which triggers the procedural safeguards to scrutinise the situation and give P a legal framework and due process to challenge this. Where no deprivation is identified, this does not happen, and P must fall back on the competence and integrity of any professionals involved (which was held to be so inadequate in *Bournewood*) or the already stretched professional regulators, such as the Care Quality Commission.

In *A Local Authority v PB* Charles J said *P & Q* ‘causes as many problems as it solves’²⁶⁹ and hoped that *Cheshire West* in the Court of Appeal would clarify the law. Pending that decision he recommended a ‘prudent’ approach of granting DoLS authorisations in cases of doubt (to protect against future decisions, and in any event to inform a best interests decision).²⁷⁰ The Court of Appeal caused yet further problems. Alex Ruck Keene has argued that domestic courts could, using the statutory link between s64(5) and Article 5, decline to follow *Cheshire West* on the basis that it is inconsistent with subsequent ECtHR jurisprudence,²⁷¹ although he concedes that this would be a ‘brave step’, and it is not one which has been adopted. Hopes are now pinned on the *next* big decision, namely the Supreme Court’s joint decisions in *P & Q* and *Cheshire West* which is listed for 21-23 October 2013.

²⁶⁸ KD Ewing and Joo-Cheong Tham, ‘The continuing futility of the Human Rights Act’ [2008] PL 668.

²⁶⁹ *A Local Authority v PB* [2011] EWHC 2675 (COP) [63].

²⁷⁰ He reached the same conclusion, on the basis of the word ‘likely’ in MCA 2005, Sch A1, para 24, in *AM v SLAM NHS Foundation Trust* [2013] UKUT 365 (AAC) [59-60].

²⁷¹ Ruck Keene (n199) fn 24 to para 19; cf *Kay v London Borough of Lambeth* [2006] UKHL 10 and *R (RJM) v Secretary of State For Work and Pensions* [2008] UKHL 63.

In relation to the future of DoLS, there are two main options. Firstly, to wait and see how the courts explain the meaning of ‘deprivation of liberty’. This is not as simple as waiting for the Supreme Court in October, as there will be other cases, including ECtHR cases, and it is unlikely that the Supreme Court will provide a simple answer: Lady Hale, for instance, appears to have been sympathetic to the ‘relevant comparator’ and ‘objective purpose’ approaches.²⁷²

The second option is to amend the DoLS by adding a statutory gateway. This is partly because it is questionable whether it is *possible* to define deprivation of liberty in these non-paradigm cases: Munby LJ, speaking extra-curially, has called the problem ‘intractable’ and the stock phrase from the ECtHR is that it is a matter of ‘pure opinion’ in borderline cases. David Hewitt has suggested that those subject to DoLS and other regimes are ‘all doomed to frustration when they try to find out what it means to be deprived of liberty’.²⁷³ The statutory gateway need not state that it constitutes the *definition* of ‘deprivation of liberty’ but should cover those cases, and the title ‘protective care’ should be resurrected to decouple the safeguards from ‘deprivation of liberty’ and for the secondary purpose of stopping people wanting to avoid admitting it is happening.²⁷⁴

There are two potential knock-on effects of the second option. The first involves resources, as a wider gateway would lead to a vastly increased use of the safeguards. The government’s DoLS impact assessment estimated that there were ‘roughly 500,000 people in England and Wales who have a mental disorder and who lack capacity, including over 190,000 people with severe learning disabilities and about 230,000 older people with dementia living in institutions’.²⁷⁵ It quoted an analysis which had concluded that ‘about 50,000 people would require additional restrictions for their protection, including restrictions that would prevent them from leaving the facility, which in some cases may amount to a deprivation of liberty.’ The Court of Protection and Official Solicitor can hardly cope as it is. To take some pressure off the court, other accommodation such as supported living would need to be brought within

²⁷² See *Savage* (n250) [101] and *JJ* (n122) [58] respectively.

²⁷³ David Hewitt, ‘This strange republic of good: Community treatment orders and their conditions’ (2011) (Spr) *JMHL* 39.

²⁷⁴ Neil Allen, ‘Dare to care’ [2011] *Eld LJ* 167.

²⁷⁵ Ministry of Justice and Department of Health, ‘Impact Assessment of the Mental Capacity Act 2005 deprivation of liberty safeguards to accompany the Code of Practice and regulations’ (22 May 2008) para 22.

the scope of the DoLS.²⁷⁶ More generally, procedures would need to be streamlined, and consideration should be given again to amending MHA guardianship for the purpose. This has consistently been recommended by Richard Jones²⁷⁷ and Phil Fennell,²⁷⁸ and Kris Gledhill has given details of how this could be done (for instance, amending burden of proof for tribunals and introducing automatic tribunal referrals).²⁷⁹

The second knock-on effect is that more people might be assessed as *having* capacity to provide valid consent in order to avoid the safeguards being used. However, although not without its own issues,²⁸⁰ mental capacity can be quite reliably assessed,²⁸¹ which is more than can be said for ‘deprivation of liberty’, so external inspection and judicial oversight could deal with this more effectively than the current problem. It would be no more of a problem than the existing need to assess the capacity of informal patients in hospital.

The solution discussed in chapter 3, following a detailed study of the ECtHR and domestic cases, and a consideration of other contexts, would involve s64(5) being replaced by:

(5) A ‘residence condition’ is necessary but not sufficient for protective care to be required.

(a) This means a requirement to live at a certain address.

(b) It can include a ‘curfew condition’ to stay there overnight.

(5A) If a ‘leave condition’ is also present, protective care is required.

²⁷⁶ Paul Gantley, ‘The Mental Capacity Act 2005 Deprivation of Liberty Safeguards’ [2011] Eld LJ 159.

²⁷⁷ Richard Jones, ‘Deprivations of liberty: Mental Health Act or Mental Capacity Act?’ (2007) (Nov) JMHL 170.

²⁷⁸ Phil Fennell, ‘Deprivation of liberty’ (2007) PCA, 2 October

²⁷⁹ Gledhill (n84).

²⁸⁰ Charlotte Emmett *et al*, ‘Residence capacity: complexity and confusion’ [2013] Eld LJ 159; Charlotte Emmett *et al*, ‘Homeward bound or bound for a home? Assessing the capacity of dementia patients to make decisions about hospital discharge: Comparing practice with legal standards’ (2013) 36(1) Intl J L & Psychiatry 73. See also *CC v KK* (n237).

²⁸¹ Ruth Cairns *et al*, ‘Reliability of mental capacity assessments in psychiatric inpatients’ (2005) 187 Br J Psychiatry 372

- (a) This means a requirement not to leave the address without permission.
- (b) It applies to the question of whether P *would* be required not to leave *if* an attempt were made.
- (c) It can include an ‘escort condition’, not to leave without an escort.

The gateway would be clearly defined and related to real-life situations which are easy to decide and allow for effective enforcement by the CQC, similarly to the MHA but in contrast to the current nebulous DoLS gateway. For simplicity (and on principle) it deals only with those restrictions which are related to ‘physical liberty’, as mentioned in *Engel*.

This solution would mean that the people in *Cheshire West* and *P & Q* were each deprived of liberty on the basis of there being a ‘residence condition’ plus a ‘leave condition’. Others may be placed in accommodation but not be subject to such a condition. Defining matters in this way would encourage the ‘least restrictive alternative’²⁸² by incentivising managing authorities to allow people day-to-day freedom.

Although it attracted no Parliamentary debate before enactment,²⁸³ the problems subsequently caused by the lack of definition have not gone unnoticed by the legislature. The House of Lords Select Committee on the Mental Capacity Act 2005 has received oral evidence on the problems caused.²⁸⁴ The House of Commons Health Select Committee, in its post-legislative scrutiny of the Mental Health Act 2007, noted evidence from the CQC that there was ‘confusion amongst staff as to the legal status of patients’, and similar evidence from others, and recommended that the Department of Health initiate an urgent review of the implementation of DoLS and present it to Parliament with ‘an action plan to deliver early improvement’ within 12 months of 14 August 2013.²⁸⁵

²⁸² MCA 2005, s1(6).

²⁸³ Jones, *Mental Capacity Act Manual* (n23) Preface.

²⁸⁴ Transcripts of evidence are available at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/mental-capacity-act-2005/>

²⁸⁵ House of Commons Health Committee, ‘Post-legislative scrutiny of the Mental Health Act 2007: First Report of Session 2013-14’ (HC 584, 14 August 2013).

It is hoped that the Supreme Court will adopt a clear-cut solution such as is as proposed above. If it does not, then it is incumbent on the Department of Health in its action plan to include not only improvements to the procedures themselves but also to provide for a workable gateway to trigger the safeguards procedures. The suggestion above would solve the definitional problem.

Appendix

Mental Capacity Act 2005

Interpretation

64. — (1)-(5) [not reproduced]

(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.

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:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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.

5. 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.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 2 of Protocol 4 – Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Convention on the Rights of Persons with Disabilities

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Bibliography

Books

Cited

Bartlett P and Sandland R, *Mental Health: Policy and Practice* (4th edn, forthcoming, Oxford 2013)

Fennell P, *Mental Health: Law and Practice* (2nd edn, Jordans 2011)

Harris D *et al*, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (2nd edn, Oxford 2009)

Jones R, *Mental Capacity Act Manual* (4th edn, Sweet & Maxwell 2010)

——— *Mental Capacity Act Manual* (5th edn, Sweet & Maxwell 2012)

Consulted

Ashton G *et al*, *Court of Protection Practice 2013* (Jordans 2013)

Bartlett P, *Blackstone's Guide to the Mental Capacity Act 2005* (2nd edn, OUP 2008)

Bartlett P and Sandland R, *Mental Health Law: Policy and Practice* (3rd edn, OUP 2007)

Bartlett P *et al*, *Mental Disability and the European Convention on Human Rights* (Martinus Nijhoff 2006) (chapters 2 and 6)

Bowen P, *Blackstone's Guide to The Mental Health Act 2007* (OUP 2007)

Emmerson B, Ashworth A and Macdonald A (eds), *Human Rights and Criminal Justice* (3rd edn, Sweet & Maxwell 2012) (chapter 5)

Hale B, *Mental Health Law* (5th edn, Sweet & Maxwell 2010)

Jones R, *Mental Health Act Manual* (15th edn, Sweet & Maxwell 2012)

White R and Ovey C, *Jacobs, White & Ovey: The European Convention on Human Rights* (5th edn, OUP 2010)

Chapters

Cited

Bartlett P, 'Informal admissions and deprivations of liberty under the Mental Capacity Act 2005' in Gostin L *et al* (eds), *Principles of Mental Health Law and Policy* (OUP 2010).

Gledhill K, 'The filling of the "Bournewood gap": coercive care and the statutory mechanisms in England and Wales' in McSherry B and Freckelton I (eds), *Coercive Care: Rights, Law and Policy* (Routledge 2013)

Loucaides L, 'The European Convention on Human Rights and the rights of persons with disabilities' in Loucaides L, *The European Convention on Human Rights* (Martinus Nijhoff 2007) and online <www.coe.int/t/e/social_cohesion/soc-sp/text_LoucaidesE.pdf> accessed 26 August 2013

Consulted

Richardson G, 'Rights-based legalism: some thoughts from the research' in McSherry B (ed), *Rethinking Rights-Based Mental Health Laws* (Hart 2010)

Articles

Cited

Allen N, 'Restricting movement or depriving liberty?' (2009) (Spring) JMHL 19

—— 'Dare to care' [2011] Eld LJ 167

Cairns R *et al*, 'Reliability of mental capacity assessments in psychiatric inpatients' (2005) 187 Br J Psychiatry 372

—— *et al*, 'Judgments about deprivation of liberty made by various professionals: comparison study' (2011) 35 The Psychiatrist 344

—— *et al*, 'Mired in confusion: making sense of the Deprivation of Liberty Safeguards' (2011) 51 Med Sci Law 228

Clements L, 'Disability, dignity and the cri de coeur' (2011) 6 EHRLR 675

Cline D, 'Deprivation of Liberty: Has the European Court of Human Rights Recognised a "Public Safety" Exception?' (2013) 29(76) Mercurios 23

Davidson L, 'Close comfort' (2011) 155(14) SJ 14

—— 'The relevance of purpose in deprivation of liberty cases' (2012) 156(29) SJ 10

—— 'Turning back the clock' (2012) 156(22) SJ 10

—— 'Blurring the boundaries' (2012/13) 18(2) PCA 26

Elliott R, 'Incapacitated persons and deprivation of liberty' (2011) 19(4) Med L Rev 636

Emmett C *et al*, 'Homeward bound or bound for a home? Assessing the capacity of dementia patients to make decisions about hospital discharge: Comparing practice with legal standards' (2013) 36(1) Intl J L & Psychiatry 73

—— *et al*, 'Residence capacity: complexity and confusion' [2013] Eld LJ 159;

English R, 'In the autumn of our lives' (2002) 152 NLJ 474

Ewing KD and Tham J, 'The continuing futility of the Human Rights Act' [2008] PL 668

Feldman D, 'Containment, deprivation of liberty and breach of the peace' [2009] CLJ 243

Fennell P, 'The Mental Capacity Act 2005, the Mental Health act and the common law' (2005) (Nov) JMHL 167

—— 'Deprivation of liberty' (2007) PCA, 2 October

—— 'Deprivation of liberty: Part II' (2007) 13(1) ECA 18

- Gantley P, 'The Mental Capacity Act 2005 Deprivation of Liberty Safeguards' [2011] Eld LJ 159
- Hargreaves R, 'The Deprivation of Liberty Safeguards: essential protection or bureaucratic monster?' (2009) (Winter) JMHL 117
- Hewitt D, 'Re-considering the Mental Health Bill: The view of the Parliamentary Human Rights Committee' (2007) (May) JMHL 57
- 'New perspectives on the Mental Health Act' (2008) 152(44) SJ 13
- 'Off the scale' (2010) 154(8) SJ 10
- 'This strange republic of good: Community treatment orders and their conditions' (2011) (Spr) JMHL 39
- 'A contradictory approach to deprivation of liberty' (2012) 156(26) SJ 10
- 'Deprivation of liberty can never be normal' (2012) SJ 156 220
- 'Objection, purpose and normality: three ways in which the courts have inhibited safeguarding', (2012) 14(6) J Adult Protection 280
- 'Purpose alone can no longer determine if there is a deprivation of liberty' (2012) 156(15) SJ 12
- 'Comparison Contrast' (2013) SJ 157(16) 9
- Hewson B, 'Family: rescue or detention?' (2011) 161 NLJ 383
- Hirst L, 'The ability to choose: KK v CC' [2012] PCA 31 October
- Hughes J, 'Searching for settled practice' (2008) 14 ECA 26
- Jones R, 'Deprivations of liberty: Mental Health Act or Mental Capacity Act?' (2007) (Nov) JMHL 170
- Kennedy M, 'Deprivation of clarity' (2012) 17(10) PCA 16
- Keyword K, 'Detaining mentally disordered patients lacking capacity: The arbitrariness of informal admission and the common law doctrine of necessity' (2005) 13 Med L Rev 108
- Knowles G, 'Deprivation of liberty outside care homes and hospitals: the role of the local authority' [2012] Eld LJ 76
- Mead D, 'Of kettles, cordons and crowd control: Austin v Commissioner of Police for the Metropolis and the meaning of "deprivation of liberty"' (2009) 3 EHRLR 376
- Neary M, '358 Days', (2012) 12 Mind Legal Newsletter 4
- O'Donnell J, 'Defining Liberty' (2012) 156(6) SJ 12

Pearce N, 'The Deprivation of Liberty Safeguards Part 3: how the authorisation regime safeguards are working' [2012] Fam Law 567

—— 'The Deprivation of Liberty Safeguards Part 6: definition of deprivation of liberty' [2012] Fam Law 999

Robinson R and Scott-Moncrieff L, 'Making Sense of Bournemouth' (2005) (May) JMHL 17

Ruck Keene A, 'Tying ourselves into (Gordian) knots? – Deprivation of liberty and the MCA 2005' [2013] Eld LJ 69

Shah A *et al*, 'Deprivation of Liberty Safeguards in England: implementation costs' (2011) 199 Br J Psychiatry 232

Spencer-Lane T, 'Lost in translation' (2013) 163(7563) NLJ 8

Stone R, 'Deprivation of liberty: the scope of Article 5 of the European Convention on Human Rights' (2012) 1 EHRLR 46

Szmukler G *et al*, 'A model law fusing incapacity and mental health legislation', (2010) 20 (Special Issue) JMHL 11

Troke B, 'The death of deprivation of liberty safeguards (DOLS)?' (2012) 3(2) Social Care and Neurodisability 56

Varghese S *et al*, 'Deprivation of liberty safeguards (DOLS) – a survey exploring the views of psychiatrists' (2012) 6(2) Advances in Mental Health and Intellectual Disabilities 52

Consulted

—— '*Amuur v France* (1996) 22 EHRR 533 (ECHR)' (1997) 22 EL Rev 122 (note)

—— '*HL v United Kingdom*' (2005) 1 EHRLR 107 (note)

—— '*HM v Switzerland* (Application on 39187/98)' (2002) EHRLR 688 (note)

—— 'Human rights and protection of vulnerable persons – the Scottish Law Commission considers *Bournemouth*' (2012) 33 SLT 201

—— '*Munjaz v United Kingdom*' (2012) 6 EHRLR 698 (note)

—— '*Storck v Germany* (Application no 61603/00)' (2005) 5 EHRLR 557 (note)

Ashworth A, 'Human rights: article 5 – application to measures of crowd control by police' [2012] Crim LR 544

Armstrong N and Rook A, 'Court of Protection for public lawyers' (2012) 17(1) JR 28

Bailey-Harris R, '*Re MIG and MEG* [2010] EWHC 785 (Fam)' [2011] Eld LJ (March) (note)

- Bielanska C, 'The Bournemouth gap: the conclusion' (2004) PCA, 9 December
- 'Deprivation of liberty centres on ability to leave' (2007) 12(3) ECA 7
- Bingham T, 'The Human Rights Act' (2010) 6 EHRLR 568
- Cairns R, Richardson G and Hotopf M, 'Deprivation of liberty: Mental Capacity Act safeguards versus the Mental Health Act' (2010) 34 Psychiatrist 246
- Cragg S, '*Surrey CC v CA* [2011] EWCA Civ 190' [2012] Eld LJ 264 (note)
- '*Cheshire West and Chester Council v P*' [2012] Eld LJ 43 (note)
- Davidson L, 'Last resort' (2009) 153(40) SJ 23
- Dawson, '*R v Bournemouth Community and Mental Health NHS Trust Ex p L* [1999] 1 AC 458 (HL)' (1999) 115 LQR 40
- Douglas G, '*G v E* [2010] EWHC 621 (Fam)' [2012] Eld LJ 142 (note)
- '*G v E* [2010] EWCA Civ 822' [2012] Eld LJ 142 (note)
- Elliott T, 'Deprivation of liberty and the Mental Capacity Act 2005' (2011) 19(1) Med L Rev 132
- Fennell P, 'Co-ordinating deprivation of liberty: human rights turned upside down' [2012] Eld LJ 82
- Fenwick H, 'Marginalising human rights: breach of the peace, "kettling", the Human Rights Act and public interest' [2009] PL 737
- Hale B, 'What can the Human Rights Act 1998 do for my mental health?' (2005) 17(3) CFLQ 295
- 'Taking Stock' (2009) (Win) JMHL 111
- Hewitt D, 'Whose liberty?' (2009) 153(6) SJ 17
- 'Cold comfort' (2010) 154(23) SJ 17
- 'No place like home?' (2010) 160(7403) NLJ 160
- 'A different way of thinking about liberty' [2013] Eld LJ 186
- 'Who guards the guardians?' (2012) 162(7501) NLJ 243
- Hughes R, '*CC v KK* [2012] EWHC 2136 (COP)' [2012] Eld LJ 337 (note)
- Kennedy M, 'Deprivation of liberty: six months down the road' (2009) 15(1) ECA 25
- Lennon G, 'The purpose of the right to liberty under the ECHR, Article 5' [2012] 3 Web JCLI

- Mackintosh N and Butler-Cole V, 'Update on the Court of Protection' (2010) (Nov) *Legal Action* 37
- Mant P and Butler-Cole V, 'Playing it safe' (2012) 102 *PS* 26
- Mead D, 'Kettling comes to the boil before Strasbourg court: is it a deprivation of liberty to contain protesters en masse?' [2012] *CLJ* 472
- Middleton B, 'Drawing a (not-so-bright) line under control order liberty challenges' (2010) 74(5) *J Crim L* 405
- Morris F, 'Mental health law after Bournewood: some legal and practical implications' (1999) (Feb) *JMHL* 41
- Murdoch J, 'Safeguarding the liberty of the person: recent Strasbourg jurisprudence' (1993) 42(3) *ICLQ* 494
- Oreb N, 'Case Comment: The Legality of "Kettling" after *Austin*' (2013) 76(4) *MLR* 735
- Patel P, 'Focus on Article 5 of the ECHR' [2005] *JR* 303
- Pearce N, 'The Deprivation of Liberty Safeguards Part 7: has the UK bridged the Bournewood gap?' [2012] *Fam Law* 1123
- Pedain A, 'Requiem for a fairytale' [2005] *CLJ* 11
- Phull, JS, 'The Deprivation of Liberty Safeguards: observations and limitations' (2011) 51 *Med Sci Law* 187
- Robinson R, "'Discharge" from what?' (2003) (July) *JMHL* 102
- 'Amending the Mental Capacity Act 2005 to provide for deprivation of liberty' (2007) (May) *JMHL* 25
- Selmes T *et al*, 'Prevalence of deprivation of liberty: a survey of in-patient services' (2010) 34 *Psychiatrist* 221
- Shah A, 'Newly introduced deprivation of liberty safeguards: anomalies and concerns' (2010) 34 *Psychiatrist* 243
- Spencer-Lane T, 'Out of harm's way?' (2011) 161(7493) *NLJ* 1689
- Ward C, 'Restraint of deprivation of liberty in disguise?' (2009) 14(3) *ECA* 13
- Weeraratne A, 'Safeguards for informal patients' (2010) (Special Ed) *JMHL* 71

Other documents

Cited

Care Quality Commission, 'The operation of the Deprivation of Liberty Safeguards in England, 2009/10' (March 2011)

— 'The Mental Capacity Act 2005 deprivation of liberty safeguards: Guidance for providers' (revised December 2011)

— 'The operation of the Deprivation of Liberty Safeguards in England, 2010/11' (March 2012)

— 'The operation of the Deprivation of Liberty Safeguards in England, 2011/12' (2013)

Department of Health, "'Bournewood" consultation: The approach to be taken in response to the judgment of the European Court of Human Rights in the "Bournewood" case' (23 March 2005)

— 'Protecting the Vulnerable: the "Bournewood" Consultation: Report of the public consultation on the Government's proposed response to the "Bournewood" case (the judgment of the European Court of Human Rights in the case of HL v the UK): Summary of responses' (29 June 2006)

— 'The Bournewood safeguards: Draft illustrative code of practice' (gateway ref 7581, 22 December 2006)

— 'Deprivation of Liberty Safeguards implementation tool' (gateway ref 9773, 15 April 2008)

— 'Deprivation of Liberty Safeguards: A guide for hospitals and care homes' (gateway reference 11229, February 2009)

Health and Social Care Information Centre, 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments (England): Annual Report, 2012/13' (20 August 2013)

— 'Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments, England - 2012-13, Annual report: Tables' (20 August 2013)

Hewitt D, 'Children, some adults and liberty' (Lecture at Deans Court Chambers conference, Civil Justice Centre, Manchester, 24 February 2012)

Home Office, 'Terrorism Prevention and Investigation Measures (TPIM) Bill: ECHR memorandum by the Home Office' (undated)

Joint Committee on Human Rights, 'Legislative Scrutiny: Mental Health Bill: Fourth Report of Session 2006-07' (HL Paper 40 / HC 288, 4 February 2007)

Mental Health Act Alliance, 'The Mental Health Act 2007: a review of its implementation' (May 2012)

Mental Health Lawyers Association, 'Response to consultation by the Mental Health Lawyers Association (MHLA) and the Mental Capacity Lawyers Association (MCLA)' (1 December 2007)

Ministry of Justice, *Deprivation of Liberty Safeguards: Code of Practice to Supplement the Main Mental Capacity Act 2005 Code of Practice* (TSO 2008)

Ministry of Justice and Department of Health, 'Impact Assessment of the Mental Capacity Act 2005 deprivation of liberty safeguards to accompany the Code of Practice and regulations' (22 May 2008)

Northern Ireland Department of Health, Social Services and Public Safety, 'The Bamford Review of Mental Health and Learning Disability: A comprehensive legislative framework' (2007)

Scottish Law Commission, Discussion paper on adults with incapacity (Scot Law Com CP No 156, 2012)

Consulted

Department for Constitutional Affairs, *Mental Capacity Act 2005: Code of Practice* (TSO 2007)

Department of Health, 'Post-legislative assessment of the Mental Health Act 2007: Memorandum to the Health Committee of the House of Commons' (Cm 8408, July 2012)

Mental Health Alliance, 'Briefing Paper 1: Deprivation of Liberty Safeguards: an initial review of implementation' (compiled by Roger Hargreaves, May 2010)

Paul Bowen, 'Deprivations of liberty in the health and social care context' (presentation at LAG Community Care Conference, 14 July 2010)

Series L, 'The Mental Capacity Act 2005 and the Institutional Domination of People with Learning Disabilities' (PhD thesis, Exeter University 2013)

Online sources

Cited

Charles W (Charles J), 'The Report: Deprivation of Liberty Safeguards' (BBC Radio 4, 24 November 2011) <<http://www.bbc.co.uk/programmes/b017cjn3>>

European Court of Human Rights, 'Guide on Article 5: right to liberty and security: Article 5 of the Convention' (2012)
<www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf> accessed 26 August 2013

Mental Health Lawyers Association, 'Response of the Mental Health Lawyers Association to Legal Aid, Sentencing and Punishing of Offenders Bill: Destroying Representation for the Mental Unwell for £3 million?' (11 August 2011) para 2.10
<<http://www.mhla.co.uk/legal-aid/mhla-response-to-consultation-on-legal-aid-sentencing-and-punishing-of-offenders-bill/>> accessed 26 August 2013

Munby J (Munby LJ), 'Deprivation of liberty: where are we?' (2012) 7(16) Brunswicks' Healthcare Review 32, 35
<www.rnha.co.uk/web_images/pdfs/Brunswick_V7I16.pdf> accessed 26 August 2013

Neal S, 'Comment on the Cheshire Judgment' (Comment by Mental Capacity Act Implementation Lead NHS North Lancashire, 39 Essex Street Court of Protection Newsletter, issue 16, December 2011)
<www.39essex.com/docs/newsletters/cop_newsletter_december_2011.pdf> accessed 26 August 2013

O'Donnell J, 'Cheshire West and Chester Council v P (2011) EWCA Civ 1257' (note) (O'Donnells Solicitors, Information sheet, January 2012 no.2)
<http://www.mentalhealthlaw.co.uk/images/O%27Donnells_Cheshire_Info_sheet_Jan_2012_no2.pdf> accessed 26 August 2013.

Official Solicitor, 'Official Solicitor: Court of Protection: Acceptance of Appointment as Litigation Friend' (21 February 2012)
<<http://www.justice.gov.uk/downloads/protecting-the-vulnerable/official-solicitor/litigation-friend-note.pdf>> accessed 26 August 2013

Ruck Keene A, 'Tying ourselves into (Gordian) knots?' (39 Essex Street, December 2012) <www.39essex.com/docs/articles/ark_deprivation_of_liberty_paper_december_2012.pdf> accessed 26 August 2013

Consulted

Essex Autonomy Project, 'Deprivation of liberty and DoLS' (report of AHRC Public Policy Roundtable held at the Medical Research Council on 16 January 2012, published 26 January 2012) <<http://autonomy.essex.ac.uk/deprivation-of-liberty-and-dols-roundtable>> accessed 26 August 2013

Lords Select Committee on the Mental Capacity Act 2005 web page (Transcripts of oral evidence for June and July 2013) <<http://www.parliament.uk/>>

business/committees/committees-a-z/lords-select/mental-capacity-act-2005/publications/> accessed 26 August 2013

Morris F and Ruck Keene A, 'Deprivation of liberty: the Bournemouth proposals, the Mental Capacity Act 2005 and the decision in JE v DE and Surrey County Council' (39 Essex Street, 25 June 2007) <http://www.39essex.com/docs/articles/FM_Deprivation_of_Liberty_250607.pdf> accessed 26 August 2013

Allen N, 'Restricting movement or depriving liberty?' (39 Essex Street, Court of Protection Note (undated) < www.39essex.com/docs/newsletters/restriction_or_deprivation_note.pdf> accessed 26 August 2013

Munro N, 'Stanev v Bulgaria' (note) (Mental Health and Mental Capacity Law Blog, 19 January 2012) <<http://mentalhealthandcapacitylaw.wordpress.com/2012/01/19/stanev-v-bulgaria/>> accessed 26 August 2013

Series L, 'The Small Places Blog' (various blog posts) <<http://thesmallplaces.blogspot.co.uk/>> accessed 26 August 2013

Szerletics A and O'Shea T, 'The Deprivation of Liberty Safeguards: Essex Autonomy Project Briefing' (December 2011) <<http://autonomy.essex.ac.uk/deprivation-of-liberty-and-dols>> accessed 26 August 2013

Domestic casesCited

- A Local Authority v PB [2011] EWHC 2675 (COP)
- A London Borough v VT [2011] EWHC 3806 (COP)
- A PCT v LDV [2013] EWHC 272 (Fam)
- A PCT v P and AH [2009] EW Misc 10 (EWCOP)
- AM v SLAM NHS Foundation Trust [2013] UKUT 365 (AAC)
- BB v AM [2010] EWHC 1916 (Fam)
- C v Blackburn with Darwen Borough Council [2011] EWHC 3321 (COP)
- C v Wigan Borough Council [2011] EWHC 1539 (Admin)
- Cadogan Estates Ltd v Morris [1998] EWCA Civ 1671
- CC v KK [2012] EWHC 2136 (COP)
- Cheshire West and Chester Council v P [2011] EWCA Civ 1257
- Cheshire West and Chester Council v P [2011] EWHC 1330 (COP)
- City of Sunderland v PS [2007] EWHC 623 (Fam)
- Davis v SSHD [2004] EWHC 3113 (Admin)
- Dorset CC v EH [2009] EWHC 784 (Fam)
- G v E [2010] EWHC 621 (Fam)
- JE v DE and Surrey County Council [2006] EWHC 3459 (Fam)
- Kay v London Borough of Lambeth [2006] UKHL 10
- LB Hillingdon v Neary [2011] EWHC 1377 (COP)
- LBH v GP and MP [2009] FD08P01058
- LLBC v TG [2007] EWHC 2640 (Fam)
- R (D and M) v SSWP [2010] EWCA Civ 18
- R (G) v Mental Health Review Tribunal [2004] EWHC 2193 (Admin)
- R (L) v Bournemouth Community and Mental Health NHS Trust [1997] EWCA Civ 2879

- R (L) v Bournemouth Community and Mental Health NHS Trust [1997] EWHC Admin 850
- R (L) v Bournemouth Community and Mental Health NHS Trust [1998] UKHL 24, [1999] 1 AC 458
- R (RJM) v Secretary of State For Work and Pensions [2008] UKHL 63
- R (SH) v MHRT [2007] EWHC 884 (Admin)
- R (SSHD) v MHRT (MP as interested party) [2004] EWHC 2194
- R (SSHD) v MHRT (PH as interested party) [2002] EWCA Civ 1868
- R v Jackson [1891] 1 QB 671
- Re A (Adult) and Re C (Child); A Local Authority v A [2010] EWHC 978 (Fam)
- Re MIG and MEG; Surrey County Council v CA [2010] EWHC 785 (Fam)
- Re P & Q; P & Q v Surrey County Council [2011] EWCA Civ 190
- Re RK; RK v BCC [2011] EWCA Civ 1305
- Re RK; YB v BCC [2010] EWHC 3355 (COP)
- Salford City Council v BJ [2009] EWHC 3310 (Fam)
- Salford City Council v GJ [2008] EWHC 1097 (Fam)
- Savage v South Essex Partnership NHS Foundation Trust [2008] UKHL 74.
- Secretary of State for the Home Department v AP [2010] UKSC 24
- Secretary of State for the Home Department v E [2007] UKHL 47
- Secretary of State for the Home Department v JJ [2007] UKHL 45
- SSJ v RB [2010] UKUT 454 (AAC)
- SSJ v RB [2011] EWCA Civ 1608
- SSJ v SB [2013] UKUT 320 (AAC)
- Y County Council v ZZ [2012] EWHC B34 (COP)

Consulted

- Austin v Commissioner of Police of the Metropolis [2009] UKHL 5
- JMcA's Application [2013] NIQB 77
- LB Tower Hamlets v BB [2011] EWHC 2853 (Fam)

Lockhart v Rodriguez [2012] ScotSC 94

R (IT) v SSJ [2008] EWHC 1707

R (RB) v First-tier Tribunal (Review) [2010] UKUT 160 (AAC)

R (SSHD) v MHRT (PH as interested party) [2002] EWHC 1128 (Admin)

Re T (A child: murdered parent) [2011] EWHC B4 (Fam)

ECtHR casesCited

- AF v United Kingdom (application no 7674/08) [2013] ECHR 634
- Ashingdane v UK (application no 8225/78) [1985] ECHR 8
- Austin v UK (application no 39692/09) [2012] ECHR 459
- DD v Lithuania (application no 13469/06) [2012] ECHR 254
- Dodov v Bulgaria (application no 59548/00) [2008] ECHR 43
- Engel v Netherlands (application no 5100/71) [1976] ECHR 3
- Gillan v United Kingdom (application no 4158/05) [2010] ECHR 28
- Guzzardi v Italy (application no 7367/76) [1980] ECHR 5
- HL v UK (application no 45508/99) [2004] ECHR 471
- HM v Switzerland (application no 39187/98) [2002] ECHR 157
- Kedzior v Poland (application no 45026/07) [2012] ECHR 1809
- MA v Cyprus (application no 41872/10) [2013] ECHR 717
- Mihailovs v Latvia (application no 35939/10) [2013] ECHR 65
- Munjaz v UK (application no 2913/06) [2012] ECHR 1704
- Nielsen v Denmark (application no 33488/96) [2000] ECHR 81
- Rantsev v Cyprus and Russia (application no 25965/04) [2010] ECHR 22
- Shtukaturv v Russia (application no 44009/05) [2008] ECHR 223
- Stanev v Bulgaria (application no 36760/06) [2012] ECHR 46
- Storck v Germany (application no 61603/00) [2005] ECHR 406

Consulted

- Amuur v France (application no 19776/92) [1996] ECHR 25
- Blume v Spain (application no 37680/97) [1999] ECHR 90
- Haidn v Germany (application no 6587/04) [2011] ECHR 39
- Stojanovski v Macedonia (application no 1431/03) [2009] ECHR 1615

Primary legislation

Anti-terrorism, Crime and Security Act 2001

Children Act 1989

Health and Social Care Act 2012

Human Rights Act 1998

Mental Capacity Act 2005

Mental Health Act 1959

Mental Health Act 1983

Mental Health Act 2007

Prevention of Terrorism Act 2005

Terrorism Prevention and Investigation Measures Act 2011

Secondary legislation

Social Security (Persons Serving a Sentence of Imprisonment Detained in Hospital) Regulations 2010

Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms
(European Convention on Human Rights)

United Nations Convention on the Rights of Persons with Disabilities