Summary of two cases on the meaning of deprivation of liberty: the "MIG and MEG" case and the "A and C" case

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Two recent decisions examine when a person is deprived of their liberty. The first decision involved 2 girls of 18 (MIG) and 17 (MEG) with middle to severe learning disorders. The other involves 2 cases heard together – the first a child A, the second a young adult C – both living at home with one or both parents, and suffering from Smith Magenis Syndrome. In all 3 cases, the persons required a high degree of care and support, involving a degree of restraint which might amount to a deprivation of liberty. Both decisions however decided there had not been a deprivation of liberty.

EWCA Civ 190; Surrey County Council v CA and LA and MIG and MEG [2010] EWHC 785 (Fam)

In the first case of MIG and MEG, Mrs Justice Parker (MJP) gave the initial judgment in 2010. The Official Solicitor appealed and the Court of Appeal has now given judgment. Both MJP and the

Court of Appeal found that there was no deprivation of liberty for either girl. MIG was living in a foster home, where she was very happy. MEG lived in a small specialist unit with 3 other residents. Both girls had their own room. Neither made any attempt to leave though both would have been restrained had they tried to do so. Both attended a unit of further education. MEG was being given Risperidone to control her anxiety. Both girls lacked capacity and were capable of making only the most trivial decisions of day to day life. Both were allowed contact with family and each other. MEG had some social life. MIG had very little but was taken on trips by her foster mother.

MJP gave a thorough analysis of Strasbourg cases on deprivation of liberty.

She also looked at 2 recent House of Lords cases. In one of these, Austin v Commissioner of Metropolitan Police [2009] UKHL 5, two members of the House of Lords considers the purpose of the restriction was relevant. MJP felt the context of police cordons and demonstrators was very different, and therefore the reference to "purpose" must be treated with caution, but did consider that the purpose of restrictions should be put into the equation when considering the factual matrix. In this case, she held it was important to consider the reasons why both girls were under continuous supervision and control. She cited Baroness Hale in the case of Secretary of State for the Home Dept v JJ & others [2007] UKHL 45 about control orders, "Restrictions designed for the benefit of the person concerned are less likely to be considered a deprivation of liberty than those designed for the benefit of society."

Download details of judgement (PDF, 222K)

P (Otherwise known as MIG) and Q (Otherwise known as MEG) and Surrey County Council v CA and LA and Equality and Human Rights Commission [2011]

The Court of Appeal set out that the European Court of Human Rights had made clear that a deprivation of liberty has three elements:

- "The objective element of confinement to a certain limited place for a not negligible length of time": Storck v Germany (2005) 43 EHRR 96 at [74]
- the "additional subjective element [that] they have not validly consented to the confinement in question" the Storck case, also at [74]
- the confinement must be "imputable to the State": the Storck case, at [89]" i.e a public authority is directly involved.

"Lord Justice Wilson considered whether the fact that MIG and MEG (now referred to as P and Q) were happy in their care environments was relevant to whether they were deprived of liberty. In Mrs J Parker's view, happiness in their placements was relevant to her consideration of the objective element. This was reconsidered by the Court of Appeal which held that happiness in their care environment was not relevant to whether a person was deprived of liberty. However, Lord Justice

Wilson felt that happiness was relevant to whether the deprivation of liberty was in their best interests, as a person can only be lawfully deprived of their liberty if it is in their best interests.

Lord J Wilson then considered if the fact that a person, whether with capacity or not, objected, can also be relevant to the objective test. He argued that where a person was objecting, it could lead to conflict, and possibly physical restraint as in the case of Storck v Germany (2005) 43 EHRR 96. In his view, the presence or absence of an objection is therefore very relevant to whether there is an objective deprivation of liberty."

Similarly, Lord J Wilson considered that medication can be relevant. If a person is being given medication, particularly tranquilisers, it is a pointer to the existence of the objective element, because it suppresses the patient's liberty to express themselves. Even more so, if medication is forcibly given. Similarly, the absence of medication points the other way.

MJP had said she felt it was permissible to look at the reasons why they lived as they did. She found that the principal reason they were where they were was to give them a home and so they could receive care. It was not so they could be treated or managed. Lord J Wilson felt it was wrong to look at the purpose of the arrangements. However, he felt Mrs J Parker was "by implication stressing the relative normality of the living arrangements under scrutiny". He felt that persons living at home will not normally be deprived of their liberty. A foster home or a carer's home was not much less normal. Lord Justice Wilson states that
"even when the person lives in an institution rather than in a family home, there is a wide spectrum between the small children's home or nursing home, on the one hand, and a hospital designed for compulsory detentions like Bournewood; and it is in my view necessary to place each case along it."

Other factors that he felt should also be considered were whether the person went out every day – to college or a day centre, or to pursue some kind of occupation, and whether there were restrictions on their social contacts. Looking at all these factors, Lord J Wilson held that there was clearly no deprivation of liberty for P, and slightly less clearly, there was no deprivation of liberty for Q. In dismissing the appeal he said that the main factors which kept Q's case the right side of the line were
"The small size of the home for adolescents in which she lived; her lack of objection to life there; her attendance at the educational unit; her good contact with such members of her family as were significant for her; and her other, fairly active, social life:"

This view was supported by the other 2 appeal court judges.

An important distinction appears to be emerging in these judgments that people living in their own homes or tenancies, care homes or in "acute" hospitals will, whilst being restrained in their best interests, typically not be deprived of their liberty as those "normal" regimes will typically not achieve that threshold in delivering the treatment or care to which they are unable to consent. If however, their family or carers are indicating that they do not want the person to be there and more importantly, if the person himself is indicating that he doesn't wish to be there, then the question of their confinement arises and the question of deprivation of liberty is now engaged. Other factors to consider are the use of medication, social contact, and whether the person goes out of the home regularly to college, day centre or place of occupation.

Mental health settings are different. As Lord Justice Wilson notes they are designed for compulsory detentions (under the Mental Health Act). If they are to admit and treat those lacking the capacity to consent to being there outside of the Mental Health Act they face a different challenge. They will need to demonstrate that the regime for those not detained under the Mental Health Act (MHA) is distinct and different to the regime for those detained under the MHA. Otherwise, a person who lacks capacity to consent for himself, even when they are not objecting (unlike those settings where there is a relative normality to the living arrangements) is likely to be deprived of his liberty by simply being in that setting. The Deprivation of Liberty Safeguards will need to be applied in those circumstances even when the person is not objecting if the deprivation of liberty in their best interests is to be made lawful.

Details of judgement

A Local Authority v A and B (the Equality and Human Rights Commission) (EHRC) and A Local Authority v C, D and E (the Equality and Human Rights Commission) [2010] EWHC 978

In the A and C cases, both lived at home, one with the mother alone, one with both parents. Both were extremely well looked after. Smith Magenis sufferers have behaviour problems, are aggressive, and self-injure. They also have severe sleep disturbance. The result in both cases was that the parents felt they must lock their bedroom doors at night; as otherwise, they will leave the bedroom and cause damage to themselves and their surroundings. In both cases, the parents checked regularly, A and C were not distressed by being locked in, and both knew their parents would come if they shouted during the night. The Court held that the actions of locking them up were necessary and unavoidable because the parents rightly believed that A and C would otherwise hurt themselves.

Mr Justice (now Lord Justice) Munby (LJM) first considered the role of the local authority (L/A) in both cases.

He criticised their view that they had control over A or C. Although the L/A had important monitoring and safeguarding roles, its major function was to assess needs and provide services. LJM accepted that there were positive obligations on L/As to take reasonable steps to provide protection for vulnerable people and prevent a deprivation of liberty of which they knew or should have known. However, he held that where an L/A is in this position, they should investigate, provide support services where appropriate, and if necessary refer the matter to court. They could do no more unless they could cite specific statutory authority or obtain court sanction from the Court of Protection or the High Court.

LJM therefore concluded that the State was not directly involved in either of these cases. The L/A was providing support services only. It was not directly involved in what happened in the home of either person. It was not the decision-maker. Mere knowledge was not enough, although this might trigger a duty to investigate and seek judicial assistance. He therefore, held that the L/A could not be in breach of art 5 in these cases even if a deprivation of liberty had occurred.

LJM then reviewed whether there was a deprivation of liberty in respect of A or C in their homes. He considered the 2 elements – an objective element and a subjective one. As both lacked capacity, he held the subjective one was satisfied. However, he found the objective element was not. He held that a loving, caring, proportionate and appropriate regime by devoted parents in a loving family relationship whose objective was solely "the welfare, happiness and best interests of A and C respectively – falls significantly short of anything that would engage Art 5." He adopted the reasoning of Mrs J Parker in the case of MIG and MEG. He decided living in a family context was very different from being a prisoner. Locking their rooms at night did not change this. He agreed that the restrictions imposed were not to restrict their liberty but to maximise their opportunities and help them to lead their lives to the full. This amounted to an appropriate and proportionate restriction upon liberty not a deprivation of liberty.

As there was no deprivation of liberty, there was no need to decide whether it could be justified as an Art 5 compliant exercise of parental responsibility.

This briefing needs to be read alongside an earlier case law briefing from the Department, and an earlier practice briefing(see links below).

There are implications not just for those attempting to understand and comply with the Deprivation of Liberty Safeguards but also for safeguarding more generally.

LJM in paragraph 96 of the above judgment says,
"What emerges from this is that, whatever the extent of a local authority's positive obligations under Article 5, its duties, and more important its powers, are limited. In essence, its duties are threefold: a duty in appropriate circumstances to investigate; a duty in appropriate circumstances to provide supporting services; and a duty in appropriate circumstances to refer the matter to the court. But, and this is a key message, whatever the positive obligations of a local authority under Article 5 may be, they do not clothe it with any power to regulate, control, compel, restrain, confine or coerce. A local authority which seeks to do so must either point to specific statutory authority for what it is doing – and, as I have pointed out, such statutory powers are, by and large, lacking in cases such as this – or obtain the appropriate sanction of the court. Of course if there is immediate threat to life or limb a local authority will be justified in taking protective (including compulsory) steps: R (G) v Nottingham City Council [2008] EWHC 152 (Admin), [2008] 1 FLR 1660, at para [21]. But it must follow up any such intervention with an immediate application to the court."

Details of judgement

Briefings on legal cases

Briefing on Mental Capacity Act Deprivation of Liberty Safeguards - May 2010