

CDC case law update – March 2020

This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases, either for families or public bodies. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

Re D (A Child) [2019] UKSC 42

The Supreme Court decided that consent to care arrangements by parents of a 16 or 17 year old cannot avoid a deprivation of liberty, if the other criteria under Article 5 of the European Convention on Human Rights are met. As such any deprivation of liberty for a 16 or 17 year old has to be authorised by the Court of Protection or under the inherent jurisdiction of the High Court.

Case overview

This appeal to the Supreme Court is the latest chapter in a series of judgments concerning 'D', a young person aged 16 at the relevant time. The Supreme Court was asked to decide whether it was within the scope of parental responsibility to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty. The importance of this stems from the fact that in relation to the right to liberty under Article 5 of the European Convention on Human Rights, one of the key elements is the lack of valid consent.

D has diagnoses of ADHD, Asperger's syndrome and Tourette's syndrome. When D was 16 he was moved to a residential unit by the local authority, with his parents' agreement. He was accommodated under section 20 of the Children Act 1989. The external doors were locked and he remained under constant supervision and control. The Court of Protection held that as he had turned 16 D's parents could no longer consent to what would otherwise be a deprivation of liberty. The Court of Appeal disagreed and found that parental consent could, and did in D's case, avoid there being a deprivation of liberty for a 16 or 17 year old. The Official Solicitor appealed on D's behalf to the Supreme Court.

The majority of the Supreme Court focussed on the fact that children who had reached 16 in some respects had a legal status which was different from younger children. In particular, the Supreme Court focussed on the fact that the Mental Capacity Act 2005 was deliberately designed to apply to 16 and 17 year olds, and that the forthcoming Liberty Protection Safeguards would cover this group.

The degree of supervision and control to which D had been subjected was not normal for a child of 16 or 17. D was objectively deprived of his liberty. Moreover it was not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty. Lady Hale held that it would be a it would be a 'startling proposition' for parental responsibility to include 'licens[ing] the

state to violate the most fundamental human rights of a child'. Lady Black reached the same conclusion but by focussing on the limits of the scope of parental responsibility at common law, which did not extend to authorising the confinement of a 16 or 17 year old where this would deprive the child of their liberty.

The Court also held that section 25 of the Children Act 1989, which regulated the circumstances in which children could be placed in secure accommodation, did not apply to living arrangements such as D's.

Lady Hale noted that, logically, her analysis would also apply to a younger child whose liberty was restricted beyond a normal level for a child of his age. However Lady Hale did not decide this question, which will need to be resolved in another case brought in relation to a younger child. At present the earlier judgment in D's case which held that parents of younger children can give consent to avoid a deprivation of liberty remains good law.

What this means for children, young people and families

The Supreme Court has decided that parents of young people aged 16-17 cannot consent to living arrangements for those young people to avoid what would otherwise be a deprivation of liberty. This is an important vindication of the autonomy of 16-17 year olds – or put another way, a limitation on the scope of the parental responsibility of their parents. The Supreme Court's decision should mean that parents and young people are now involved in a process whereby the relevant bodies seek court authorisation for any deprivation of liberty resulting from care arrangements in residential special schools, children's homes or other places where young people are under continuous supervision and control and are not free to leave. Although this should protect the rights and interests of disabled young people, families who are not provided with proper support to engage with the court process may feel that this is another burden being placed upon them.

Where a young person has been deprived of their liberty and this has not been authorised by a court, they may be able to bring a claim for damages for breach of their rights under Article 5 ECHR. Clearly specialist legal advice would need to be taken in every case.

Implications for local authorities and other public bodies

Local authorities, CCGs, residential special schools and other providers of services for disabled young people will no longer be able to rely on parental consent to avoid having to go through the authorisation process where young people aged 16-17 may be deprived of their liberty. As such, all involved in the care of these young people need to identify where a young person may be objectively deprived of their liberty (i.e. they are under continuous supervision and control and are not free to leave) and ensure that the proper application is made to the Court of Protection (or under the inherent jurisdiction of the High Court) to avoid a breach of the young person's rights under Article 5 ECHR.

When the Liberty Protection Safeguards come into force, local authorities will be able to authorise most deprivations of liberty for young people aged 16-17 without recourse to a court. However at present this option is not available, requiring a court application to be made in every case.

Where public bodies fail to identify a potential deprivation of liberty for a young person or fail to ensure that this is authorised by a court, they may find themselves facing a claim for damages for breach of the young person's Article 5 ECHR rights.

Public bodies may also want to keep in mind that it is likely, following Lady Hale's judgment, that the question of whether parental consent can avoid a deprivation of liberty for younger children may be re-opened in a future case. However for now the earlier judgment in D's case clearly establishes that it can.