

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. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

Re AB (A child: Deprivation of liberty) [2015] EWHC 3125 (Fam)

Case overview

This update follows case law update 3 on *Re D (A Child; deprivation of liberty)* [2015] EWHC 922 (Fam). It concerns a later judgment of the same Judge (Mr Justice Keehan) on another case concerning ‘deprivation of liberty’ for a disabled child. The background to these issues, including the Supreme Court judgment in *Cheshire West*¹, is set out in case law update 3.

Following *Cheshire West*, a disabled person will be deprived of their liberty under Article 5 of the European Convention on Human Rights if:

1. They are subject to continuous supervision and control and are not free to leave the place they live;
2. There is no valid consent; and
3. The state has some responsibility for the deprivation of liberty.

This judgment and the judgment in *Re D* are mainly about how the consent requirement operates in cases concerning children. This judgment concerned a 14 year old child, AB. He was living in a children’s home and the parties agreed that the circumstances gave rise to a deprivation of liberty, unless there was valid consent.

AB is described at para 12 of the judgment as having a learning disability and attention deficit hyperactivity disorder (ADHD). The Judge held that he was happy and settled at the children’s home but was not competent to make decisions about where he wants to live. In June 2015 AB was made the subject of an interim care order.

The local authority sought to have the deprivation of liberty authorised by the court under its ‘inherent jurisdiction’. The Judge held at para 3 that there was four issues to decide:

1. Whether AB was deprived of his liberty at the children’s home
2. If so, were his parents and/or the local authority entitled to consent to this?
3. If not, should the court approve the arrangements and if so under what legal route?
4. What guidance was needed in relation to future cases.

Decision

¹ *Surrey County Council v P and Q; Cheshire West and Chester Council v P* [2014] UKSC 19.

The Judge's answers to the four questions were as follows:

1. Given the level of supervision and control AB experiences at the children's home he is deprived of his liberty, unless there is valid consent. The Judge noted (para 13) that AB is under observation every 15 minutes, is not allowed to leave the unit unaccompanied and while on public transport he is watched at all times. The Judge concluded at para 24 that 'Whilst he may, when he is well behaved, leave the home from time to time for specified periods, overall, he is the subject of continuous supervision and control to a degree which amounts to a deprivation of his liberty'.
2. In *Re D*, the Judge had held that in certain circumstances parents could consent to what would otherwise be a deprivation of liberty.² In this case, the Judge had to consider the extent to which this applies to 'looked after' children³. His conclusions were as follows:
 - a. Where a parent and the local authority are working together and arrange a short term placement for a child, it may be 'an appropriate exercise of parental responsibility' for the parent to give consent and avoid what would otherwise be a deprivation of liberty (para 26).
 - b. Where accommodation is arranged under section 20 of the Children Act 1989 'as a prelude to the issue of care proceedings', in a case where the local authority has reason to believe that the child is suffering or is likely to suffer significant harm that is the responsibility of the parent, then it is very unlikely that the parent will be able to give consent to what would otherwise be a deprivation of liberty (para 27).⁴
 - c. Where a child is in the care of a local authority under a court order, it is even less likely that a parent will be able to consent to what would otherwise be a deprivation of liberty (para 28).
 - d. Importantly, a local authority cannot consent to what would otherwise be a deprivation of liberty for a child in its care. As the Judge held at para 29: 'In taking a child into care and instituting care proceedings, the local authority is acting as an organ of the state. To permit a local authority in such circumstances to consent to the deprivation of liberty of a child would (1) breach Article 5 of the Convention⁵...(2) would not afford the "proper safeguards which will secure the legal justifications for the constraints under which they are made out"⁶, and (3) would not

² The key passages from *Re D* are referred to in this judgment at para 25.

³ Generally children accommodated under section 20 of the Children Act 1989 or those in local authority care under a care order.

⁴ The Judge's reason for this was as follows; 'The parent's past exercise of parental responsibility will...have been seriously called into question and it would not be right or appropriate within the spirit of the conclusion of the Supreme Court in *Cheshire West* to permit such a parent to so consent.'

⁵ The European Convention on Human Rights; Article 5 is the right to liberty.

⁶ This is a quotation from the speech of Lady Hale in *Cheshire West* at para 56.

meet the need for a periodic independent check on whether the arrangements made for them are in their best interests....’

3. The Judge held that the court should use its powers under the inherent jurisdiction. This requires the Judge to be satisfied that the result could not be achieved through making any other kind of order.⁷ The Judge rejected the use in this case of section 25 of the Children Act 1989 (secure accommodation orders), see paras 30-32. The local authority’s suggestion that deprivation of liberty could be authorised under a care order or interim care order was rejected, see paras 35-36. The Judge therefore authorised the deprivation of liberty under the inherent jurisdiction of the court for an initial period of three months on the basis it was in AB’s best interests, see paras 34 and 37.
4. The Judge gave detailed guidance for future cases, see para 38. This included:
 - a. ‘Local authorities are under a duty to consider whether any children in need, or looked-after children, are, especially those in foster care or in a residential placement, subject to restrictions amounting to a deprivation of liberty.’
 - b. If the deprivation of liberty needs to be authorised under the inherent jurisdiction, permission to seek this order is likely to be granted ‘on the basis that any unlawful deprivation of liberty is likely to constitute significant harm’ to the child.
 - c. However the deprivation of liberty is authorised it must be brought to an end if ‘the reasons justifying the deprivation of liberty no longer subsist’.

What this means for children, young people and families

For children, this judgment emphasises that any care arrangements which deprive them of their liberty need to be authorised, if necessary by the court.

Where children are accommodated by public bodies, parents may be asked to consent to any deprivation of liberty that results. Parents may want to get independent legal advice before giving any consent.

Implications for local authorities and other public bodies

Local authorities have a very clear message from this judgment that they are under a duty to consider whether any child in need or looked after child for whom they are responsible – and then to take appropriate steps to get any deprivation of liberty authorised by the court if parents will not or cannot consent.

Local authorities may be able to ask parents to consent to arrangements which would otherwise amount to a deprivation of liberty. However great care needs to be

⁷ See Children Act 1989 section 100(4).

taken with this and legal advice sought. The role of parental consent in this area remains controversial despite the judgment in *Re D*.

Local authorities cannot themselves consent to what would otherwise be a deprivation of liberty for a child in their care.

Other public bodies, including NHS bodies, will also need to consider whether children for whom they are responsible are deprived of their liberty and take legal advice on how to get any deprivation authorised.