

CDC case law update 6 – March 2016 ***Birmingham City Council v D* [2016] EWCOP 8**

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.

Case overview

This update follows directly from case law update 3 on *Re D (A Child; deprivation of liberty)* [2015] EWHC 922 (Fam). In this second judgment in the same case, the Court of Protection has decided that parental consent cannot be used to avoid what would otherwise be a deprivation of liberty for 16 and 17 year olds. As such if a 16 or 17 year old is deprived of their liberty this must be authorised by the Court of Protection.

The background to these issues, including the Supreme Court judgment in *Cheshire West*¹, is set out in case law update 3.

D was living in a placement at a residential unit, having been discharged from hospital. All parties agreed that the extent of the restrictions on D in the placement meant that that he was sufficiently 'confined' to be deprived of his liberty. The question was therefore whether D's parents could consent to his confinement to avoid a 'deprivation of liberty' for the purposes of Article 5 of the European Convention on Human Rights. There was also an argument that the placement was not 'imputable to the state' as it was made at the request of D's parents. For both these reasons the local authority said that there was no deprivation of liberty in D's case.

The Official Solicitor, representing D, argued that parents could never consent to what would otherwise be a deprivation of liberty. In the alternative, the Official Solicitor argued that D's parents could not consent because he was now over the age of 16.

Decision

The Judge rejected the submission that parents can never consent to what would otherwise be a deprivation of liberty. However he agreed with the Official Solicitor that parental consent cannot be used to avoid a deprivation of liberty for those aged 16 or 17. The Judge was particularly influenced by the fact that 16 and 17 year olds fall within the scope of the Mental Capacity Act 2005.

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

The Judge held as follows:

'I accept that the various international conventions and statutory provisions referred to, the UNCRC and the Human Rights Act 1998, recognise the need for a greater degree of respect for the autonomy of all young people but most especially for those who have attained the age of 16 and 17 years. Accordingly, I have come to the clear conclusion that however close the parents are to their child and however cooperative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of that young person's liberty.'

The Judge also disagreed with the local authority's case that because D's parents could remove him from the residential unit this meant that the placement was not 'imputable to the state'. The Judge held that 'In no sense at all could this set of circumstances be considered a purely private arrangement with no state involvement. The role of the local authority in establishing and maintaining D's placement is central and pivotal. To reach a contrary conclusion would be perverse.'

The Judge went on to say that in any event 'I accept a public body, as an organ of the state, is under a positive obligation to protect the rights accorded by Article 5(1)'.

Importantly the Judge agreed with the Official Solicitor (and the Court of Appeal in an earlier case) that 'pressure on resources and even considerations of increased delay are not material to a determination of whether there are adequate safeguards to satisfy Article 5'. The Judge held towards the end of his judgment that 'The issue of the resource implications is a matter for the local authority and, ultimately, the Government; it is not, should not and, in my judgment, cannot be a relevant consideration for this court. The protection of the human rights of those with disabilities or the vulnerable members of our society, most especially in respect of the protection afforded by Article 5 (1), is too important and fundamental to be sacrificed on the altar of resources.'

What this means for children, young people and families

This judgment makes clear that parents cannot consent to what would otherwise be a deprivation of liberty for children aged 16 or 17. This is a restriction on the scope of parental responsibility.

In cases where a child of this age is subject to significant restrictions on their liberty then this will need to be authorised by the Court of Protection. This gives older children an additional safeguard as the Court will only authorise arrangements that are in their best interests.

Implications for local authorities and other public bodies

Following this judgment local authorities will need to make applications to the Court of Protection for any child aged 16 or 17 whose care and living arrangements may result in a deprivation of liberty. Local authorities will be aware that the 'Deprivation of Liberty Safeguards' cannot be used where a child is placed in a hospital or care home as they only apply to persons aged 18 or over.

As set out in case law update 4, local authorities cannot themselves give consent to avoid a deprivation of liberty for looked after children.

As a result of these two judgments, local authorities will be expected to bring a significant number of cases involving children to court to have deprivations of liberty authorised. Any local authority which fails to do so may find itself in breach of Article 5 ECHR and potentially exposed to a claim for damages under the Human Rights Act 1998.

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.