

RESPONDING TO MENTAL ILL-HEALTH - DEPRIVATION OF LIBERTY

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There is an obvious tension in a legal framework that both promotes autonomy and self-determination but aims to protect people from harm. Should people be free to refuse care and treatment even if that will lead to certain harm or even death? What about people who are diagnosed as having a mental disorder, or who are thought to be unable to understand the relative risks of different courses of action? What should happen if a decision made by one person places others at risk of harm? How these two potentially competing principles should be addressed is far from straightforward, and continues to be the subject of debate, including within the courts. This talk looks at one aspect of the problem – the deprivation of liberty of people of ‘unsound mind’ under Article 5 ECHR – by outlining recent developments in caselaw and identifying issues that need further consideration.

Article 5 ECHR

Article 5 ECHR provides an exhaustive list of circumstances in which it may be lawful to deprive someone of their liberty. The list includes the detention of suspected and convicted criminals, the detention of minors for the purpose of providing education, and the detention of people of ‘unsound mind’. Provided that the person has a right of access to a court for the review of their detention by an administrative body, the deprivation of their liberty may be lawful, even though they object to it.¹

¹ The full text of Article 5 ECHR:

- (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 fulfillment 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.

Article 5 is therefore premised on an assumption that the interests of an individual or wider society may mean that the individual's freedom of action and right of self-determination can be overridden. There is no test of proportionality expressly stated in the terms of Article 5, but it has been implied by the courts, so that as with Article 8, there is always a question to be asked about whether the intervention in the person's life is truly necessary.

The Council of Europe guide to Article 5 explains the position as it affects people with mental disorders or disabilities as follows:

Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds

Before one gets to questions about what 'unsoundness of mind' means, or what sort of risk to self or others might need to be shown before detention became proportionate, there is a more fundamental problem with Article 5 (as it relates to people of 'unsound mind'). There is an argument that detaining someone of unsound mind is never permissible because it automatically discriminates against people with mental disorders, whose right to liberty can be overridden where that of a person without such a disorder cannot. This is the position of the UN Committee on the Rights of Persons with Disabilities.

Article 14 of the UN Convention on the Rights of Persons with Disabilities says that people with disabilities have a right to liberty that must be enjoyed on an equal basis with people who do not have disabilities, and that the existence of a disability cannot be a reason to justify a deprivation of liberty.²

(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.

² Article 14 UNCPRD:

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.

The dramatic implications of this provision were explained in the 2009 'Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities':

48. A particular challenge in the context of promoting and protecting the right to liberty and security of persons with disabilities is the legislation and practice related to health care and more specifically to institutionalization without the free and informed consent of the person concerned (also often referred to as involuntary or compulsory institutionalization). Prior to the entrance into force of the Convention, the existence of a mental disability represented a lawful ground for deprivation of liberty and detention under international human rights law. The Convention radically departs from this approach by forbidding deprivation of liberty based on the existence of any disability, including mental or intellectual, as discriminatory. Article 14, paragraph 1 (b), of the Convention unambiguously states that "the existence of a disability shall in no case justify a deprivation of liberty". Proposals made during the drafting of the Convention to limit the prohibition of detention to cases "solely" determined by disability were rejected. As a result, unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person's disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by article 14.

49. Legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished. This must include the repeal of provisions authorizing institutionalization of persons with disabilities for their care and treatment without their free and informed consent, as well as provisions authorizing the preventive detention of persons with disabilities on grounds such as the likelihood of them posing a danger to themselves or others, in all cases in which such grounds of care, treatment and public security are linked in legislation to an apparent or diagnosed mental illness. This should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.

In 2015, the UN Committee confirmed this position:

8. The absolute ban of deprivation of liberty on the basis of actual or perceived impairment has strong links with article 12 of the Convention (equal recognition before the law). In its General Comment No. 1, this Committee has clarified that States parties should refrain from the practice of denying legal capacity of persons with disabilities and detaining them in institutions against their will, either without the free and informed consent of the persons concerned or with the consent of a substitute decision-maker, as this practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention

At the most fundamental level, then, there is serious tension, if not outright incompatibility, between Article 5 ECHR and the UNCRPD: according to the UN, while it may be permissible to deprive people of their liberty for their safety or the safety of others, that cannot be on the basis of ‘unsoundness of mind’ since that means only people with mental health problems or mental disabilities are at risk of having their personal liberty removed.

An interesting illustration of this differential treatment concerns people who are known to have paedophilic tendencies. A person without a mental disorder or disability will be at risk of criminal conviction if they act on their sexual preferences, and will subsequently be placed on the Sexual Offenders register, requiring them to check in with the authorities in various circumstances. There is no power to detain the person pre-emptively to prevent the commission of a sexual offence. A person with a learning disability who poses a risk of sexual offending, however, may be detained in a locked environment, escorted at all times when in the community, and subject to personal searches and restrictions on access to a mobile phone or the internet, in their best interests – see for example *J Council v GU & Ors*.³ No doubt it is in the best interests of a potential sexual offender not to be arrested, convicted and sent to prison. It is certainly in the best interests of potential victims to be protected from harm. But is there justification for pre-emptive detention that only applies to people with mental disabilities or disorders who cannot give valid consent to their deprivation of liberty? The UNCRPD says there is not and that such measures must apply equally to all people.

In *Cheshire West*⁴ (of which more below), Baroness Hale said that ‘*what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities.*’⁵ The UN might add ‘*what it means to be deprived of liberty and the grounds on which that deprivation of liberty may be justified must be the same for everyone, whether or not they have physical or mental disabilities.*’

There has been much discussion about merging the Mental Health Act and the Mental Capacity Act, something which might lead to a change in the circumstances in which treatment can be forced on someone who does not want it and perhaps even to an interpretation of Article 5 that is closer to the UNCRPD position. The Conservatives have pledged to put forward a new Mental Health Bill. But in the meantime, how have the courts in England and Wales applied Article 5 in relation to people with mental disorders?

Cheshire West and its fallout

In 2014, the Supreme Court confirmed that Article 5 was engaged where someone was subject to continuous supervision and control and was not free to leave. That relatively

³ [2012] EW COP 3531

⁴⁴ P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor [2014] UKSC 19

⁵ Para 46.

uncontroversial-sounding test had massive ramifications, as the people who were the subject of the litigation were adults with learning disabilities who lived in community settings, not care homes, and who were said to require 24 hour support to keep them safe and meet their social care needs. They had not been removed from their own homes against their will, and there was no dispute that the care and supervision they received was appropriate, in their best interests, and would have been needed wherever they lived. There was no argument as to whether the individuals involved were of unsound mind – they did not have psychiatric disorders, but learning disabilities, but had been assessed as lacking capacity to consent to the arrangements for their care.

The implications of this decision are still being worked out by the courts and by statutory bodies responsible for providing care and support to people with mental disorders or disabilities. The decision caused enormous practical problems for statutory bodies whose resources were barely adequate to fulfil their duties to provide care and support to people, let alone carry out deprivation of liberty assessments and make court applications for a significant proportion of service users.

Earlier this year, four local authorities lost their judicial review claim against the Secretary of State for Health, in which they argued that there was a shortfall of one-third to two-thirds of a billion pounds each year in funding to implement the ‘deprivation of liberty regime’.⁶

In reality, many, many people who are in receipt of care packages and who fall within the *Cheshire West* approach are not subject to DOLS authorisations either under Schedule A1 MCA 2005 or by the Court of Protection. CCGs and local authorities do not have the budgets for thousands of court applications and renewals every year in respect of care packages which are routine and not disputed, and are understandably prioritising their resources on providing care and resolving cases where there is a dispute or a concern. The cases that receive the attention are the ones that were seen as obviously engaging Article 5 prior to *Cheshire West* – those involving significant levels of restraint or physical intervention, or where the individual or family members are disputing the arrangements. Paradoxically, by extending the protections of Article 5 to more people as a matter of law, it seems that the same number or perhaps fewer people are actually benefitting from them in practice.

The Court of Appeal has recently limited the effect of *Cheshire West* by holding that Article 5 has no application in the context of a person receiving treatment in an intensive care unit.⁷ This judgment, though, raises more questions than it answers – what about person not in ITU but receiving life-sustaining treatment in another setting? What about someone whose deprivation of liberty in a care home was to provide potentially life-saving treatment for a less serious physical illness, for example M, who needed treatment for diabetes (*Re M (Best Interests: Deprivation of Liberty)*)⁸.

⁶ *Liverpool City Council, Nottinghamshire County Council, LB of Richmond upon Thames and Shropshire Council v SSH* [2017] EWHC 986 (Admin).

⁷ HM Senior Coroner for Inner South London [2017] EWCA Civ 31.

⁸ [2013] EWCOF 3456.

Outside the hospital and away from treatment for physical illness, however, the tentacles of *Cheshire West* are firmly in place. Perhaps the most well known Court of Protection case concerning deprivation of liberty is that of Steven Neary.⁹ Earlier this year, Steven Neary was assessed as being deprived of his liberty in his own home. His father, Mark Neary, frequently updates his blog and Twitter followers with photos of Steven being ‘deprived of his liberty’ while out at a concert or on holiday, ridiculing a system that treats Steven’s everyday life as equivalent to his detention in a care home which was overturned in 2011 by the Court of Protection.¹⁰

The Court of Appeal has also recently confirmed that court-appointed deputies for property and financial affairs have an obligation to take steps to ensure that a deprivation of liberty is authorised by the Court of Protection even where that deprivation of liberty takes place in a private home without any involvement of statutory authorities.¹¹

An area of continuing uncertainty concerns the application of Article 5 and *Cheshire West* to children and young people. At present, the caselaw suggests that parents can consent to the deprivation of liberty of a child aged under 16,¹² but not for young people aged 16 or 17,¹³ and that local authorities cannot provide consent where a child is in care or the subject of a s.20 Children Act 1989 order with a view to being taken into care.¹⁴ The latter decision was, however, subject to an appeal, and the Court of Appeal’s analysis is awaited. It may be that the Court of Appeal determines that parental consent is appropriate up to the age of 18, as an aspect of parental responsibility. If it does, it is equally possible that the case will go to the Supreme Court, and the tensions between Article 5, the UNCRPD and the UN Convention on the Rights of the Child will be addressed.

Some of these issues may ultimately be dealt with in new legislation – the Law Commission’s draft Mental Capacity (Amendment) Bill was published in March.¹⁵ One cannot help thinking, though, that the plaintive comment on their website saying ‘*We are awaiting a response from the Government*’ will be there for some time to come, given the current political context.

Access to justice

One of the most successful elements of the statutory regime for authorising a deprivation of liberty (Schedule A1 MCA 2005) is the requirement that every person subject to an authorisation must have a representative – either a family member or friend, or an independent advocate – and that ‘lay’ representatives are entitled to ask for support from a professional advocate in accessing the Court of Protection to challenge the authorisation.

⁹ London Borough of Hillingdon v Neary & Anor [2011] EWCOP 1377.

¹⁰ <https://markneary1dotcom1.wordpress.com/>

¹¹ *Secretary of State for Justice v Staffordshire County Council & Ors* [2016] EWCA Civ 1317

¹² *Re D (A Child ; deprivation of liberty)* [2015] EWHC 922 (Fam)

¹³ *Birmingham City Council v D* [2016] EWCOP 8

¹⁴ *Re AB (A Child : deprivation of liberty)* [2015] EWHC 3125 (Fam)

¹⁵ <https://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/>

Advocacy provision combined with the existence of non-means tested public funding where an authorisation is in place has meant that it is comparatively easy for challenges to be brought in the Court of Protection. In contrast, people who are deprived of their liberty outside the statutory scheme, for example in supported living or in their own home, are reliant on means-tested public funding and have to identify for themselves a litigation friend or representative.

In 2016, Mr Justice Charles held that court applications under the statutory scheme could extend to a case where the dispute concerned the continuation of life-sustaining medical treatment (*Briggs v Briggs and ors*).¹⁶ In 2017, the Court of Appeal overturned this decision, and sought to explain the scope of such challenges, saying that issues relating to whether the authorisation should be made could be considered by the court.¹⁷ It therefore seems likely that non-means tested public funding for court applications will remain where, for example, someone wishes to challenge their placement in a particular care home but where the other options for their care also amount to a deprivation of liberty whether in an institution or otherwise.

In another recent decision, *RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS)*¹⁸ the Court of Protection addressed for the first time the duties on a person's representative to bring court proceedings where the person subject to the deprivation of liberty was not clearly and consistently objecting to the arrangements for their care. This is an obviously important issue, since many people subject to deprivation of liberty authorisations will not be able to communicate or explain their views or to ask for a court hearing. The court confirmed that the decision whether to initiate court proceedings is not a best interests decision – that would be to leave the decision as to whether to challenge a deprivation of liberty in the hands of the body authorising the situation. The test to be applied is whether the person wishes to appeal to the court, or whether the person would so wish if he or she was able to formulate or express an opinion on that matter. Only where the person's representative is not facilitating the person's expressed or implied wish to challenge their deprivation of liberty will it be appropriate for the representative to apply a best interests test in deciding whether to issue proceedings.

Concluding thoughts

At the start of the talk, I referred to the suggestion that the MHA and MCA should be merged. There remains a degree of confusion about the interface between the two Acts, and concern that the MCA might be relied on as a substitute for the MHA but with fewer safeguards. In a case in 2016, concern was raised by an independent psychiatrist advising the Court of Protection that an elderly lady living in a care home who was being covertly medicated for long-standing schizophrenia was less well protected by the legal framework

¹⁶ [2016] EW COP 48.

¹⁷ *Director of Legal Aid Casework & Ors v Briggs* [2017] EWCA Civ 1169.

¹⁸ [2016] EW COP 49.

under the MCA than she would have been if detained under the MHA.¹⁹ In particular, there was no requirement under the MCA for an independent second opinion as to the merits of treating her with the anti-psychotic medication, which required regular blood tests for monitoring purposes.

As the powers to deprive people of their liberty for the purpose of providing care and treatment are seen to apply not just to detention in hospital but to a much wider population, the need for equality of treatment becomes apparent. Has the MCA, which has been touted as an Act that empowers people rather than one that interferes with their lives, in fact led to a second-class framework for depriving people of their liberty and treating them without their consent, without the safeguards contained in the MHA? Any why is there such a lack of caselaw concerning Article 5 in the context of pressing issues such as the long-term detention of people with learning disabilities and autism in assessment and treatment units, and the ongoing use of physical restraint in institutional settings? If the MCA is to be looked at again by Parliament, there is no shortage of issues that could usefully be reviewed, in addition to those considered by the Law Commission.

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¹⁹ *BHCC v KD* [2016] EWCOP B2