



Children, Young People and Deprivation of Liberty

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Three key points...

1. DoL is not the same as DoLS
2. Deprivation of liberty isn't always 'bad'
3. A 'happy DoL' is still a DoL

Article 5 ECHR

Right to liberty & security

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**:
 - ...
 - (d) the detention of a minor by lawful order for the purposes of **educational supervision**
 - ...
 - (e) the lawful detention of ... persons of **unsound mind** ...
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.

Authorising deprivation of liberty

- Inherent jurisdiction of the High Court
- Welfare jurisdiction of the Court of Protection (16/17-year-olds)
- Mental Health Act 1983
- Secure accommodation (s.25 Children Act 1989 or s.119 SSWB(Wales) Act 2014)

N.B. the Deprivation of Liberty Safeguards (DoLS) only apply to adults. They were due to be replaced by the Liberty Protection Safeguards which apply to those aged 16+ but previous Government delayed implementation.



What is Deprivation of Liberty?

The 3 elements of deprivation of liberty

Storck v Germany (2005) 43 EHRR 96 (App no 61603/00)

- 1) **Objective component:** confinement in a particular restricted space for a not negligible length of time
- 2) **Subjective component:** lack of valid consent to the confinement
- 3) **State imputability:** attribution of responsibility to the state

The objective component (“acid test”)

P v Cheshire West & Chester Council & Others [2014] UKSC 19

Constant /
continuous
supervision & control

not free
to leave

Irrelevant considerations

- Compliance or lack of objection
- Agreement of the family/carers
- “Relative normality” of the placement
- Reason or purpose behind the placement

“

Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable – curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because **they can – and must – now be compared to children of their own age and relative maturity who are free from disability and who have access** (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.

”

Lord Kerr at [79]

Meg's concrete situation

- 17-year-old with mild learning disability & 'cognitive ability of a 4-to 5-year-old'
- Lived with 3 others in a residential home
- Occasional challenging behaviour & sometimes needed physical restraint
- Given tranquillising medication
- Not in locked environment but had 1:1 support - sometimes 2:1
- No wish to go out & no need to prevent going out
- Attended college & had full social life

And as a general rule of thumb...

Re A-F (Children) [2018] EWHC 138 Fam

- A child aged 10, even if under pretty constant supervision, is unlikely to be confined
- A child aged 11, if under constant supervision may be confined but the court should be astute to avoid coming too readily to such a conclusion
- Once a child who is under constant supervision becomes 12, the court will more readily come to that conclusion

Valid consent

- A child with competence or young person with capacity can give valid consent
- A parent cannot consent to the deprivation of liberty of a young person aged 16/17 lacking capacity (*Re D (A Child)* [2019] UKSC 42)
- A parent can consent to the deprivation of liberty of a child under 16 who lacks competence (*Lincolnshire CC v TGA* [2022] EWHC 2323 (Fam))
- A local authority cannot consent to the confinement of a child subject to a care order (*J v Bath and North East Somerset Council & Ors* [2025] EWCA Civ 478)

Imputability to the State

A Local Authority v A [2010] EWHC 978 (Fam)

- Child aged 9 & a vulnerable adult (not related) who suffered from Smith Magenis Syndrome
- External doors locked (keys hidden) & locked in bedroom at night
- The local authority was providing care services for the family but not during the night
- Local authority was aware of the night-time arrangements

Decision of the court

- The State has positive obligations under Article 5 to protect a person against interferences with their liberty by private persons
- If a public authority **knows or ought to know** of a potential DoL, the following positive obligations are triggered:
 - a duty to investigate and monitor
 - a duty to provide support services to the person and family members / carers
 - a duty to bring the matter before the court



The Inherent Jurisdiction

DoL in unregistered placements

Re T (A Child) [2021] UKSC 35

- 15-year-old, subject to a care order & living in approved secure accommodation
- Due to her needs, needed an alternative placement but no available accommodation
- Therefore, was moved to a registered children's home not approved for use as secure accommodation
- Her care regime amounted to a deprivation of liberty
- T had capacity to consent to care regime, & purportedly consented
- Longstanding judicial concern about local authorities using the inherent jurisdiction for these purposes

Decision of the Supreme Court

- The inherent jurisdiction can be used in certain cases to authorise the deprivation of liberty of a child in an unregistered setting (“*imperative necessity*”)
- The use of the inherent jurisdiction to authorise deprivation of a child’s liberty is not incompatible with Article 5
- Consent by the child to the arrangements must be enduring & ‘genuinely expressed’

Unregulated placements

MBC v AM & Ors [2021] EWHC 2472 (Fam)

- Care Planning, Placement & Case Review (England) Regulations 2010 amended in 2021 to prohibit local authority placements in unregulated settings
- Judgment concerned 4 cases of looked-after children in unregulated placements & deprived of liberty
- The judge confirmed that the inherent jurisdiction could be used to authorise deprivation of liberty in such cases
- The fact that a local authority may be using an unlawful placement did not relieve the court of its “*positive operational duty*” under the ECHR
- The issue of the lawfulness of the placement remained one solely for the local authority

Children's Wellbeing & Schools Bill

- Section 25 of Children Act amended to expressly refer to deprivation of liberty
- Local authorities in England may authorise the deprivation of liberty of children in alternative placement types, not just secure children's home
- Accommodation provided for the purpose of care and treatment of children ("*relevant accommodation*").
- Secretary of State given regulation making powers to specify maximum period for placement, cohort of children who may be placed & of the relevant accommodation



Children Act 1989

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Deprivation of Liberty & Care Orders

DOL orders & care orders

West Sussex CC v AB & Anor [2025] EWCA Civ 132

- CD was nearly 17 & had complex needs arising from ASD, learning disability, ADHD, foetal alcohol spectrum disorder & developmental trauma
- Over the previous 2 years, she had been detained for periods under the Mental Health Act 1983 & in receipt of section 117 after-care
- Since 2023 CD was subject to a series of DoL orders to protect her & others from harm
- Partly because no alternative placement could be found, CD was placed in her mother's home for the past 11 months, with at least 2 professional carers on duty 24/7
- The local authority initiated care proceedings, & an interim care order granted – CD “*beyond parental control*” & her needs meant she was likely to suffer significant harm
- CD's mother fully supported the local authority's care plan
- However, at the final hearing, the local authority changed its mind & argued no need for a care order (Children's Guardian disagreed)
- But the judge went ahead & granted a care order
- The local authority appealed this decision (supported by the mother)

Why did judge make a care order?

- 1) It would place the local authority under an “*obligation to provide services under the different statutory regimes*”
- 2) If the mother’s position changed & she stopped co-operating with the care plan, the authority would be unable to instigate fresh care proceedings as CD would have turned 17

Court of Appeal decision

- The first judge's decision should be overturned
- A care order should not be used solely to encourage a local authority to do that which it is already statutorily obliged to do
- There must be "*cogent and strong reasons*" for the court to make an order other than that for which a local authority had applied for – none given in this case
- The first judge had failed to refer to the fact that the court does have a continuing role in monitoring the care plan for CD via the ongoing DOL process
- Very limited evidence to suggest CD's mother would stop co-operating
- The fact that CD was nearly 17 did not in itself justify a care order – & any changes could be dealt with under the DOL order process
- When a DoL order is in place "*there will be few circumstances where their position would be enhanced by any additional power that would come from having parental responsibility and the ability to control AB's exercise of parental responsibility under a care order.*"

Postscript

- The lawyers in this case were criticised for not being aware of the decision in *Re JR* [2024] EWHC 564 (Fam)
- Concerned 16-year-old boy under a DoL order & care proceedings were initiated but local authority sought to withdraw its application (with the support of the boy's parents)
- The judge refused the application to withdraw & made a final care order
- This because (1) there was a history of disagreements with the parents & (2) the local authority had previously failed to focus on the boy's needs
- However, it was noted that the facts of *Re JR* case were very different to the present case & thus different outcomes were justified

ANY QUESTIONS

DO YOU HAVE?

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