ADVOCACY CLINIC

Deprivation of liberty of children and young people

Thursday 21 November 2024, 11am-1pm on Zoom

For members of Children and Young People's Advocates Network

Deprivation of liberty - outline

- Human Rights Act 1998
- The test for whether there is a deprivation of liberty
- The ways the law will authorise a deprivation of liberty
- The case of J

© Article 39

What does deprivation of liberty mean?

- *You are no longer free to do what you want to do.*
- *You are under continuous supervision.*
- *You are denied access to your possessions, such as a mobile phone, jewellery, items of clothing etc.*
- *You are not permitted to come and go.*
- *Use of secure transport.*

© Article 39

European Convention on Human Rights (ECHR)

Article 5 protects our right to liberty and personal security to prevent an unlawful deprivation of liberty.

Article 8 protects our right to respect for private and family life, including psychological and physical integrity.

Section 6 of the Human Rights Act 1998 requires all public authorities (including local authorities and private organisations carrying out a public function) to act compatibly with the rights in the ECHR.

© Article 39

The test for a deprivation of liberty

If all three conditions set out below (*Storck v Germany* [2006] 43 EHRR 6) are met, a child or young person will likely be determined to have been deprived of their liberty (and article 5 and 8 ECHR engaged).

-> They are confined for more than a negligible period.

-> There is no valid consent to the confinement ('Gillick competence' for those under 16 and mental capacity for those aged 16 and 17).

-> The state is involved in the child's confinement (that is, the state is responsible for, aware of, or should be aware of, the confinement).

© Article 39

Condition 1 – is there a confinement?

The child is confined for more than a negligible period (**the 'objective element'**).

Each situation analysed on its own facts, but broadly the restrictions imposed on a child must be more than what is ordinary for a child of their age living within a family setting; and reflecting the fact that as children (disabled and non-disabled) grow older they are able to exercise more autonomy.

© Article 39

Condition 2 – is there valid consent to the confinement?

Does the child have capacity to consent, and if so, do they consent (**the 'subjective element'**).

A child aged 16 or 17 who has either not consented to their confinement or cannot give consent (because they lack the mental capacity to do so) is deprived of their liberty. A parent or others with parental responsibility cannot give consent in respect of a child aged 16 or 17 (*Re D (A Child)* [2019] UKSC 42).

Children **under the age of 16** who are deemed 'Gillick competent' - it is highly likely that confinement in the face of their refusal to give consent could amount to deprivation of liberty.

Re. Parental consent to the child's confinement (children aged 15 and under):

Parents and others with parental responsibility can consent to a child's confinement when the child (aged under 16) is not Gillick competent, **and** it is not disputed that they are acting in the child's best interests (Lincolnshire County Council v TGA & Ors). **NB** this does not apply to secure accommodation orders made under section 25 Children Act 1989. There is a pending appeal before the Court of Appeal concerning a local authority's power to give valid consent to a child's confinement, when the local authority has parental responsibility for a child aged under 16; the case will be heard early in 2025.

© Article 39

Condition 3 – is the state involved in the confinement?

The state is involved in the child's confinement, for instance, a local authority arranged for the child to be confined in a home/placement it runs or pays for.

Important: The state's involvement also includes situations where the local authority may not be arranging or providing the accommodation but is involved in the child's life (because they are a child in need, for example). In these circumstances, the local authority will have **or** should have knowledge about any confinement/restrictions through social workers or others observing confinement/restrictions when they visit a child, have conversations with them and/or receive information from others in the child's life, such as advocates.

© Article 39

What should advocates look out for?

- ✓ Advocates should be alert to any situation where a child appears to be forced to do something or is somehow confined.
- ✓ Advocates should reflect on whether the confinement goes beyond the type of restrictions ordinarily imposed upon a child of the same age, and whether the deprivation of liberty is really necessary and proportionate.

Deprivation of liberty **may include**:

- a locked room or building;
- continuous monitoring and supervision through a high staff to child ratio;
- the use of CCTV cameras or electronic tracking devices;
- restrictions on movement through the use of physical or chemical restraint.

© Article 39

What should advocates look out for?

President of the Family Division of the High Court gave the following 'rule of thumb' guidelines in respect of children, in the case of *Re A-F*:

"A child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of [the objective element]. A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion. Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion [that s/he is subject to deprivation of liberty]." [2018] EWHC 138 (Fam)

It is vital that **advocates** are attuned to whether or not a child is deprived of their liberty.
To be lawful, **any restrictions placed on a child's liberty must be necessary and proportionate** (otherwise they may be unlawful and can be legally challenged).

© Article 39

Potential routes in law leading to a deprivation of liberty

Use of secure accommodation to deprive a child of their liberty

Use of the High Court's inherent jurisdiction to deprive a child of their liberty

Deprivation of liberty under the Mental Capacity Act 2005

Children Act 1989

section 25

Mental Capacity Act 2005
section 4A(3)-(4)

© Article 39

Section 25 of the Children Act 1989

Section 25(1) of the Children Act 1989 permits the family court to place **looked after children** in secure accommodation **IF**

- the child has a history of running away ('absconding') **and** is likely to run away from any other type of accommodation

AND

- if the child runs away, they are likely to suffer significant harm (section 25(1)(a));

OR

- the child remains in any other accommodation, they are likely to injure themselves or other persons (section 25(1)(b))

[Does not apply to children detained under the Mental Health Act 1983 or sentenced under section 250 or 259 of the Sentencing Code.]

© Article 39

Section 25 of the Children Act 1989

Secure accommodation is meant to be a measure of last resort, and **the Children Act 1989 requires local authorities to avoid the need for children in their area to be placed in secure accommodation** (Paragraph 7(c), Schedule 2 of the Children Act 1989:

> *Every local authority shall take reasonable steps designed ... to avoid the need for children within their area to be placed in secure accommodation*.

"*Locking a child up (I make no apology for the bluntness of the language, for that is how these young people see it and, ultimately, that is what is involved) is corrosive of a young person's spirit. It sends a subliminal and unintended message that the child has done wrong which all too often will compound his problems rather than form part of a solution.*"

Re SS [2014] EWHC 4436 (Fam)

© Article 39

Section 25 of the Children Act 1989 – the safeguards

- ✓ The child must be given the opportunity to have **legal representation** (section 25(6) Children Act 1989);
- ✓ Appoint a **'secure accommodation panel'** of at least three persons (regulation 15, The Children (Secure Accommodation) Regulations 1991), one person not employed by the local authority and can include an independent reviewing officer (IRO);
- ✓ Panel to review whether the **criteria for order are met** (regulation 16, The Children (Secure Accommodation) Regulations 1991), taking into account the **wishes and feelings** of the child, parent/s, independent visitor, and if the criteria is no longer met **request an urgent review** to be chaired by the child's IRO (para 1.44, Guide to Children's Homes Regulations);
- ✓ It would be unlawful to continue to detain the child **unless** the criteria is met;
- ✓ Secure accommodation reviews **do not replace** reviews of children's care and wellbeing ('looked after child review').

© Article 39

High Court's inherent jurisdiction

It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of. The court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute. Case law establishes that such proceedings should only be commenced exceptionally where it is clear that the issues concerning the child should not be resolved under the Children Act 1989 …

Practice Direction 12d – Inherent Jurisdiction (Including Wardship) Proceedings, Family Procedure Rules

"…the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole."

Lord Donaldson of Lymington MR in *Re F (Mental Patient: Sterilisation)* [1990] AC 1

© Article 39

High Court's inherent jurisdiction

Local authorities apply to the High Court to exercise its **power** of inherent jurisdiction to deprive children of their liberty **and** to place them in accommodation which is not designed for this purpose (unlike secure children's homes) and therefore not approved by the Secretary of State for Education.

Children detained under this procedure lose the important safeguards (see slide 14) afforded to children deprived of their liberty under section 25 of the Children Act 1989 - but there are other safeguards (to be set out shortly).

Where the High Court authorises a deprivation of liberty, it will set out in an order those restrictions which are permitted, and which should only be imposed as and when required.

© Article 39

High Court's inherent jurisdiction

- Inherent jurisdiction is **only available** where there is no other statutory order available (section 100(4) of the Children Act 1989) and there is reasonable cause to believe that the child is likely to suffer significant harm without the court exercising its inherent jurisdiction.
- The use of the High Court's inherent jurisdiction may apply to a child of any age, including those aged 16 and 17.
- There is no requirement that the child lacks Gillick competence (if aged 15 or below) or mental capacity (if aged 16 or 17) to consent to the proposed confinement.
- Inherent jurisdiction is not available where a child is not looked after, is aged 17 and their parent does not give consent for them to be accommodated by the local authority (*A City Council v LS, RE and KS (A Child)* [2019] EWHC 1384 (Fam)) and section 100(2)(b) of the Children Act 1989.

© Article 39

High Court's inherent jurisdiction – the safeguards

- ✓ The child is separately legally represented
- ✓ A Cafcass guardian is appointed to assist the court
- ✓ Reviews by the court of the child's continuing confinement

A child deprived of their liberty, including those aged 16 or 17, should be living in accommodation where they **receive care** (not supported accommodation) which is registered and inspected by Ofsted or Care Inspectorate Wales (CIW).

In September 2023, the President of the Family Division of the High Court issued guidance which states that Courts, when considering a deprivation of liberty application, should enquire into whether the proposed placement is registered or unregistered. If it is unregistered, it should enquire as to why the local authority considers an unregistered placement to be in the best interests of the child. The Court may order the local authority to inform Ofsted/CIW within 7 days if it is placing a child in an unregistered placement.

© Article 39

The Mental Capacity Act 2005

A 16 or 17 year-old who lacks capacity (temporarily or permanently) to consent to arrangements for their care and treatment which give rise to a confinement may be deprived of their liberty under section 4A(3) and (4) of the Mental Capacity Act 2005, through an order granted by the Court of Protection (section 16(2)(a) Mental Capacity Act 2005).

Section 2(1) of the Mental Capacity Act 2005 defines a lack of capacity as:

> *… a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*

Section 2(3) states :

> *A lack of capacity cannot be established merely by reference to— (a) a person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*

© Article 39

The Mental Capacity Act 2005 – safeguards

An application to the Court of Protection for a deprivation of liberty order may be made by, among others, a person with parental responsibility or a local authority.

The expectation is that the application should be made by a local authority, even if it relates to situations where the child (aged 16 or 17) is not a looked after child.

There must be evidence that the 16- or 17-year-old lacks capacity.

© Article 39

The Mental Capacity Act 2005 – safeguards

Prior to making the application, the applicant must consult the child and inform them:

- that an application is being made to the court;
- that the application is concerned with whether they lack capacity and if the court should authorise their deprivation of liberty;
- about the proposed arrangements under the order sought;
- that they have the right to express their views, wishes and feelings, and that these will be communicated to the court;
- that they have the right to take part in the proceedings by being joined as a party or by some other arrangement;
- about the help that is available if they do not agree with the proposed arrangements in the court application;
- the local authority should identify who can act as the child's representative in the proceedings.

In exceptional circumstances, the Mental Capacity Act 2005 places a duty on local authorities to make arrangements for independent mental capacity advocates (IMCAs) to be available to support 16- and 17-year-olds (and adults).

© Article 39

Depriving children of their liberty – some key points

- A parent does not have the power to authorise the confinement of their child aged 16 or 17 (D *(A Child)*, [2019] UKSC 42).
- For children under 16, be alert to the possibility that a child may be unlawfully deprived of their liberty in circumstances when restrictions have been imposed on the basis of parental consent and the child is approaching their 16th birthday and/or is clearly Gillick competent
- Parental consent for deprivation of liberty in respect of a child under the age of 16 who is not Gillick competent will be lawful only if the deprivation of liberty is in the child's best interests and no reservations have been raised by the local authority or other body.
- The Mental Capacity Act 2005 provides no power to public bodies to authorise deprivation of liberty of children because 'deprivation of liberty safeguards' (known as 'DOLS') do not apply to children.
- The Liberty Protection Safeguards (if and when introduced) will apply to children aged 16 and 17 (and adults) and extend across residential and community settings (NB: NOT YET IN FORCE and may be scrapped).
- The Court of Protection's power to authorise deprivation of liberty under the Mental Capacity Act 2005 applies only to children aged 16 and 17 who lack capacity to consent to the arrangements which will confine them.

© Article 39

Re J: Local Authority consent to deprivation of liberty

- This High Court case, which is the subject of an appeal, concerns a boy (aged 14 at the time of the hearing) who was looked after under section 20 of the Children Act 1989.
- The local authority applied to the High Court for a deprivation of liberty order and a care order.
- J has autism and ADHD and does not communicate with words. J was in a specialist children's home where all agreed he was receiving good care. J was subject to significant supervision and restrictions, including locks on windows, being escorted to the bathroom, a harness when in a car, and 2:1 supervision at nighttime.
- The judged concluded that where a local authority holds parental responsibility for a child (by virtue of a care order) in these kinds of circumstances, it can consent to a deprivation of liberty of a child. In other words, it does not need court authorisation.

Para 35 of the judgment: "Therefore the decision to "deprive him of his liberty" is not in my view a decision of such magnitude as to fall outside the LA's powers, but rather an exercise of their statutory duties to him. In my view the LA have the power to consent to the restrictions and therefore to the deprivation of his liberty, and no [deprivation of liberty] order is needed".

The case is subject to appeal and Article 39 and Mind charities have been granted permission to intervene jointly to assist the Court of Appeal in reviewing the High Court's decision.

Read more about the reasons for Article 39 and Mind intervening in the case here: https://article39.org.uk/2024/11/15/charities-join-forces-to-defend-the-human-rights-of-children-in-care/.

© Article 39

CASE STUDY ANALYSIS

Scenario 1 – WENDY

Wendy is 17 years of age. She has a long history of poor mental health and a challenging presentation. Wendy has been diagnosed with emerging personality disorder and attention deficit hyperactivity disorder. She has criminal convictions for assault against staff.

Wendy was sentenced to prison custody for setting a fire in her bedroom at her children's home while looked after by the local authority (under section 20 Children Act 1989). She will be released from prison next week. While in prison, she has been under constant observation by prison staff due to self-harm and attempts to take her life.

Wendy was assessed in prison as not meeting the criteria for detention under the Mental Health Act 1983. Her parents are unable to care for her, not least because of concerns about safeguarding Wendy's young brother.

The plan for Wendy's release is to place her on her own in a house rented by the local authority. The authority will fund a private care package of staff support with a ratio of 4 to 1 in the day, 2 to 1 at night. Wendy won't be able to leave the home unless accompanied by two members of staff. She will have a curfew of 9pm. Wendy will be allowed access to a mobile phone from 9am to 7pm each day.

Wendy is beside herself with the local authority's plans and wants to be able to go out with her friends. Wendy doesn't want so many staff around her all the time and feels that the intense supervision will make her mental health worse. She is adamant that she will not be without her mobile phone.

© Article 39

Scenario 2 – NICK

Nick is 12 years old. He is the subject of a care order, and the local authority shares parental responsibility for Nick with his mother.

Nick has been very unhappy living with foster carers and in children's homes, and he has run away on many occasions. Nick's current foster carer has recently told children's social care that he can no longer care for Nick.

Nick appears to be making friends with older children and young people and smoking cannabis. The police believe that he is at risk of exploitation by people involved in criminal offending. Nick's school has excluded him and suggested that he should be referred for assessment for autism and attention deficit hyperactivity disorder.

The local authority has prepared a plan to move Nick to a children's home out of the area where there is CCTV monitoring in the communal areas. The local authority has arranged for secure transport to take him there. Nick will not be able to come and go as he pleases, will need to observe a curfew and be in his bedroom by 8pm each night. He will be required to earn TV time. He will not be allowed access to a mobile phone.

Nick is not very forthcoming but is not happy about the plan. Nick's mother does not want this plan to go ahead as she will not be able to visit him at the new home.

© Article 39

Article 39