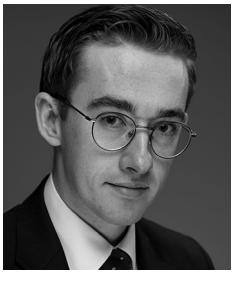
In Practice

Protecting liberty 'in practice': principles and mechanisms for child care lawyers

Kate Round, *5 Pump Court*
Kyle Squire, *5 Pump Court*

Kate Round is a practicing barrister at 5 Pump Court, a common law set known for its family work. She remains a common law practitioner, but leads a specialist court of protection team in Chambers. She developed a specialist interest in mental health, community care cases, and the High Court's jurisdiction for the vulnerable before coming to the bar.



Kyle Squire is a practising barrister at 5 Pump Court. His practice spans children law (particularly public children) and Court of Protection. He is particularly interested in cases which touch on both jurisdictions, including medical treatment and deprivation of liberty. Kyle is currently acting as Trust Barrister and head of the legal team at Great Ormond Street Hospital for Children.

It has been noticeable in recent years how often the issue of children being deprived of their liberty is coming up in cases. Perhaps this is partly the exposure of Family Court judges to the Court of Protection ('COP') and its strong focus on protecting liberty. Whatever the cause, it is to be welcomed, as children and young people – like others vulnerable in our society – need our best protection for the rights they have, but may not be able to assert for themselves. This article looks at the principles of protecting liberty in practice, including mechanisms for authorising them, and hopefully will encourage practitioners to feel at home with the basic ideas underpinning the legal principles, and to be confident in applying them to the young people's cases they encounter.

The principles

To start at the beginning then: protecting liberty is fundamental to our own common law just as it is to our modern human rights law. In one of the oldest (the oldest?) statutes left on the books, the Magna Carta of 1297, we find s XXIX:

> '**Imprisonment &c contrary to Law. Administration of Justice.** No Freeman shall be taken or imprisoned . . . or be disseised of his . . . Liberties . . . but by lawful judgment of his Peers, or by the Law of the Land.'

This gets recognition in the common law tort of false imprisonment, and the only reason the rest of this article is going to focus on the European Convention principles for protecting liberty is because of what happens in a case known as *Bournewood* where our domestic law and the European Convention diverged.

For now, then, we will just say: do not forget about the domestic principle. It has previously been paramount, or co-equivalent, and may well become so again. For now, however, Europe set the test for when someone is arbitrarily imprisoned higher than our own, so the modern case law talks about 'deprivation of liberty' rather than 'false imprisonment' and so will we.

Looking to Europe, the fundamental principle is found in Art 5 of the European

Convention on Human Rights and Fundamental Freedoms. We have an obligation by Art 1 of the Convention to respect the rights therein. Article 5 is the 'Right to Liberty and Security', and it sets out an exhaustive list, a-f, of when that right may be infringed (see, for example, *Ireland v UK* (1978) 2 EHRR 25) and by Art 5(7):

> '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.'

The fundamental principle, like that of the common law, is that no person shall be arbitrarily or unlawfully detained. And so important is the right to liberty that even if a person is properly detained, they should have a right to test whether their detention is lawful, which shall be decided 'speedily by a court', which must also have the power to release him.

What deprivation of liberty is, and how it must not be arbitrary

When is a person deprived of their liberty? Why do we have to be so careful it is not arbitrary? Well, we have four important cases that tell us key principles: *Bournewood* or, as it is known in ECHR case law, *HL v United Kingdom* [2005] 40 EHRR 32, which tells us that the common law test that distinguishes between 'actually imprisoned' (ie has been imprisoned whether or not they know it) and 'potentially imprisoned' (ie would only be imprisoned conditional upon them actually trying to exercise their freedom) is not of central importance in the European test, and what Europe asks is that the situation of the person is looked at objectively.

An example would be an autistic man in an unlocked hospital ward, closely monitored at all times for his own protection, who has made no attempt to leave, but his carers had asked for him to be discharged into their care and the hospital had made it plain that they were not prepared to countenance this or let him leave the hospital at all. The House of Lords said that was a 'potential' rather than actual detention. Europe said, that looked at objectively, the man was detained whether or not the relevant section papers had been signed. These were the facts of *Bournewood/HL*.

Bournewood/HL also looked at the requirement for detention not to be 'arbitrary' if it was to be lawful. It explained that our common law principle of necessity breached Art 5 not because intrinsically it could not justify lawful detention – but because it was procedurally unfair. It did not have fixed procedural rules, formalised admissions procedures, a requirement to fix the exact purpose of admission, time limits on the detention, a requirement for specific clinical assessment of the persistence of the mental disorder that warranted detention or a representative for the patient. The European Court noted, at para 121 that:

> '. . . as a result of the lack of procedural regulation and limits, the Court observes that the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit: as Lord Steyn remarked, this left "effective and unqualified control" in their hands. While the Court does not question the good faith of those professionals or that they acted in what they considered to be the applicant's best interests, the very purpose of procedural safeguards is to protect individuals against any "misjudgements and professional lapses" '.

Furthermore, High Court declaratory relief, tort claims, Judicial Review and Habeas Corpus, were not sufficient to satisfy the requirement for speedy review of detention. In short, we need formal procedures by which we can authorise detention – without that, however benevolent the detention or morally justified, the detention cannot truly be called lawful 'in accordance with a procedure prescribed by law.

The second case is *Storck v Germany* [2006] 43 EHRR 6, which made it explicit that

there are three components that must be present if there is to be a 'deprivation of liberty':

(a) objective confinement to a certain limited space (or particular restricted space in the *Stanev v Bulgaria* version) for a not negligible length of time (*Storck* component (a));

(b) subjective lack of consent (*Storck* component (b));

(c) the attribution of responsibility to the state (*Storck* component (c)).

This is a case worth reading in full, particularly because the facts it is based on give as clear a reason as any why protecting the vulnerable from arbitrary detention is so necessary even in a modern democratic society. When we first gave a version of this article as a seminar, the BBC had recently shown Wilkie Collins' *The Woman in White*. The facts of *Storck* (a young person, locked up in a private mental clinic because of family disagreements rather than mental illness) were uncomfortably close to the gothic novel's plot point. It was a clear demonstration of why speedy review of detention by a court is imperative if the right to liberty is to be a real right the individual can enforce – and furthermore, why there must be a positive obligation on the state to protect an individual's right to liberty even if the state is not the one who is doing the detaining.

The third case is *Surrey County Council v P; Cheshire West v P* [2014] UKSC 19 (commonly known simply as '*Cheshire West*'). It was another case about mentally disabled people, but now considering the Mental Capacity Act 2005 ('MCA'), which had been brought in to better protect the liberty of the mentally impaired (to use the language of the Act), and was amended quickly to 'plug the *Bournewood* gap' when it was realised that there were great swathes of the mentally impaired who were detained in care homes and other settings, with no speedy court review of their detention available to them. It is now the leading case in the UK and is essential reading. It sets out the principles distilled from the European case law and, in particular, explains *Storck* component (a), that is, what is an objective confinement? It is where we find the 'acid test' for an objective confinement, namely 'that the person was under continuous supervision and control and was not free to leave'.

It is important to understand that it was the culmination in a line of authority that had considered whether mentally and physically disabled people objectively confined at home should be considered 'deprived of their liberty'. Being mentally impaired, they could not consent so *Storck* component (a) was not in issue. They were privately detained at home, but local authorities were heavily involved in their care, so *Storck* component (c) wasn't in issue either.

In the High Court and the Court of Appeal, judges had said no, their detention was for their own interest, their conditions must be compared to others who had similar impairments and it was not right to compare them to the fit of the same age. There was not a need to treat them as 'detained'. This time, our own Supreme Court said that this was not right. Baroness Hale powerfully explained why:

> 'In my view, it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else. This flows inexorably from the universal character of human rights, founded on the inherent dignity of all human beings, and is confirmed in the United Nations Convention on the Rights of Persons with Disabilities. Far from disability entitling the state to deny such people human rights: rather it places on the state (and on others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.' (para 45)

And a little later:

> 'But the purpose of article 5 is to ensure that people are not deprived of their

> liberty without proper safeguards, safeguards which will secure that the legal justifications for the constraints which they are under are made out: in these cases, the law requires that they do indeed lack the capacity to decide for themselves where they should live and that the arrangements made for them are in their best interests. It is to set the cart before the horse to decide that because they do indeed lack capacity and the best possible arrangements have been made, they are not in need of those safeguards. If P, MIG and MEG were under the same constraints in the sort of institution in which Mr Stanev was confined, we would have no difficulty in deciding that they had been deprived of their liberty. In the end, it is the constraints that matter.' (para 56)

The fourth case is *Secretary of State for Justice v Staffordshire County Council and others* [2016] EWCA Civ 1317 and explains 'imputable to the state', *Storck* component (c). It is another important case because it must not be thought that the state is responsible for a detention only when they have had a hand in arranging it. *Storck* tells us the state has a positive obligation to protect the liberty of its citizens, and to take reasonable steps to do so. We also know that it is not enough to satisfy Art 5 that a person's detention is objectively justified, it must also be by a procedure prescribed by law and capable of speedy review in a court. *Staffordshire* interpreted that to mean that once the state becomes aware of someone detained by a private individual (in K's case via a care regime to protect him after a brain injury in a road traffic accident, entirely funded by his own damages and arranged by a deputy appointed by the COP to manage his damages), it must ensure the detention is by proper procedure and capable of review in court. What should have happened, said the judge, was for the paid deputy to inform the relevant local authority for K, who should then consider whether the regime deprived K of liberty and, if it did, apply to the COP for the court to authorise the detention (or of course, release the person if the detention was not justified).

Children and young people

The fundamental principles having been set out, you may ask how this applies to children and young people? Article 5, and the fundamental right to liberty, applies to children and young people just as it does to adults. Children and young people are as deserving as incapacitated vulnerable adults to protection from arbitrary detention.

There are a number of mechanisms that enable the courts to authorise a confinement which would otherwise amount to the deprivation of a young person's liberty:

(1) s 25 of the Children Act 1989 ('CA') (secure accommodation);

(2) ss 16 and 4A of the MCA;

(3) the provisions of the Mental Health Act 1983 ('MHA'); and

(4) the inherent jurisdiction of the High Court.

A detailed examination of each of these mechanisms is outside of the scope of this article. We will look at the use of secure accommodation and the inherent jurisdiction in more detail, being those most often used to authorise the detention of children, but practitioners should remember that there are other, statutory, mechanisms which should always be considered before resort is made to the inherent jurisdiction.

In brief, the MCA enables an application to be made to the COP, which can authorise a deprivation of liberty where that deprivation is giving effect to a decision of the court made under s 16 of the MCA. Section 16 of the MCA allows the court to make decisions about personal welfare and property.

Children's practitioners should be aware that whilst the MCA does provide a statutory mechanism to authorise a deprivation of liberty, it is only availablewhen the child is 16 and lacks capacity due to an impairment of the mind.

The MHA allows for patients to be detained for specified purposes where they suffer, or are suspected of suffering, from a mental disorder (being a disorder or disability of

the mind) and their detention is necessary for their own health or safety or with a view to the protection of other persons. The provisions of the MHA apply equally to children as to adults.

Secure accommodation

Detention of a young person in secure accommodation can be authorised by the Family Court where the relevant criteria are established to the satisfaction of the court. It may be asked which of the exceptions to Art 5 does secure accommodation fall under, as it does not obviously fall under subs (a)–(f). However, the Court of Appeal in *Re K (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526 noted that 'education' in exception (d) is to be given a wide interpretation:

> '[t]he court considers that, in the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching. In particular, in the present context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned.'

The relevant provisions that enable the court to authorise detention in secure accommodation will be familiar to practitioners and are contained in s 25 of the CA, which have been considered extensively by the Court of Appeal in *Re B (A Child) (Secure Accommodation Order)* [2019] EWCA Civ 2025.

In *Re B*, the Court of Appeal answered four significant questions that had been unanswered at appellate level and had received ambiguous, and often conflicting, decisions at first instance. In particular:

(1) What is the meaning of secure accommodation?

(2) What are the relevant criteria for making a secure accommodation order?

(3) What part does the evaluation of welfare play in the court's decision?

(4) When considering an application under s 25, is the court obliged to carry out an evaluation of proportionality?

Prior to *Re B*, practitioners had often focused on the regulation of the accommodation in determining whether it amounted to 'secure accommodation', and specifically whether it was designated as such by the Secretary of State. However, the Court of Appeal disagreed with this approach. They determined at [51]:

> 'The focus is on the use of accommodation for restricting liberty. If the accommodation was designed for the restriction of liberty, or the primary purpose of the placement is to restrict liberty, it amounts to "secure accommodation" under the Act. If there is a different primary purpose – for example, treatment – the accommodation will not amount to "secure accommodation" even if there is a restriction on liberty'

and at [59]:

> 'In my judgment, "secure accommodation" is accommodation designed for, or having as its primary purpose, the restriction of liberty. As Wall J acknowledged, however, premises which are not designed as secure accommodation may become secure accommodation because of the use to which they are put in the particular circumstances of the individual case.'

Consequently, the focus in determining whether accommodation is 'secure accommodation' is whether its primary purpose is the restriction of liberty. Section 25(3) then makes it imperative that the court hearing an application under the section should determine whether the relevant criteria are satisfied. How did the courts interpret the 'relevant criteria'? Courts, and practitioners, had generally focused on the s 25(1) criteria (which, you will recall, are that the child (a) has a history of absconding and is likely to abscond from any other description of accommodation; and if he absconds, he is likely to suffer significant harm, or (b) that

if he is kept in any other description of accommodation, he is likely to injure himself or other persons).

The Court of Appeal, however, determined that the 'relevant criteria' were wider than simply those in subsection (1). Additionally, a court should consider whether:

- the child is being 'looked after' by a local authority;
- the accommodation is 'secure accommodation';
- the accommodation has been approved by the Secretary of State for that use; and
- if the child is aged under 13, the placement has been specified by the Secretary of State.

The court also determined the often-asked question of whether welfare and proportionality are relevant criteria to the court's consideration. The answer was an emphatic yes. Welfare is relevant, although the paramountcy principle does not apply. At [72] the court said:

> 'The child's welfare is plainly of great importance in deciding whether or not an order should be made. The local authority and the court must each consider whether the proposed placement would safeguard and promote the child's welfare. . . . However, there may be cases where the court concludes that the child's welfare needs are outweighed by the need to protect the public from serious harm. Welfare is therefore not paramount but is plainly an important element in the court's analysis. It is one of the relevant factors.'

The court noted that proportionality must be a relevant factor because both Arts 5 and 8, which are both engaged by a secure accommodation order, require that any interference must be necessary and proportionate.

Inherent jurisdiction

The inherent jurisdiction, or the 'great safety net' as it has been described, is the inherent power of the High Court derived from the parens patriae prerogative of the Crown, to protect vulnerable people, including children. The inherent jurisdiction has seen a resurgence in recent years as a mechanism used to authorise a deprivation of liberty, largely due to a scarcity of available secure beds for vulnerable young people.

While the circumstances in which the inherent jurisdiction may be used are vast, there are generally two categories of cases where resort will be had to the inherent jurisdiction where: (1) the s 25(1) criteria are met but the rest of the s 25 criteria are not, but other welfare requirements demand deprivation of liberty; and (2) there are disabled children and young people who need to have liberty deprived but they fall outside the statutory regimes.

There have been a number of appellate authorities in recent years that look, in more detail, at the deprivation of liberty of young people, generally through the use of the inherent jurisdiction, and they provide useful examples of how the *Storck* components apply to young people.

Objective confinement

An astute observer may think it is obvious that there are circumstances where children and young people will not be free to leave and are under constant supervision and control. For example, what about a 2-year-old child? Setting aside the criterion that detention must be attributable to the state, the law would be an ass if it suggested that a 2-year-old were deprived of their liberty in the typical care of their parents. This was recognised in *Cheshire West* where Lord Kerr observed:

> '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.'

What, then, are the relevant factors that may take a confinement that is typical to

one that is atypical and requires authorisation? This was considered by Munby P (as he then was) in *Re A-F* [2018] EWHC 138 (Fam). The question before the court was whether a child who was subject to restrictions met the 'acid test'.

The court looked at each part of the acid test independently. In relation to whether a child is 'free to leave', the court recognised that the realities of the modern world mean that a typical child who is not yet 16 years old in reality has no choice but to live at home and thus is not free to leave the place where they live. The focus, when considering whether there is an objective confinement of a child under that age, then must be on whether they are under complete supervision and control.

When one looks at the level of supervision and control the comparator is a child of the same 'age', 'station', 'familial background' and 'relative maturity' who is 'free from disability'. These criteria were identified by Munby P in *Re A-F* but are derived from Lord Kerr's speech in *Cheshire West* (para [77]).

The President gave useful, and practical, guidance to help identify whether the level of supervision and control moved from the permission to that which requires authorisation. While emphasising that cases must be determined on their individual facts, as a rule of thumb:

> '1. A child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of *Storck* component (a).
> 2. 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.
> 3. Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.'

A further question that you may ask, particularly given the frequent context of these cases where the child concerned is subject to a care order, is whether the comparator should be similarly a child subject to a care order? The answer is no. The comparison should be made with a 'typical' child who is not subject to a care order (para [44]).

Useful guidance is also given by the Law Society as to the types of factors that might amount to constant supervision and control, such as to engage Art 5 in its publication 'Identifying a deprivation of liberty: a practical guide', Law Society (2015).

Subjective lack of consent

A number of difficult questions arise when considering *Storck* component (b), subjective consent, in relation to children and young people, such that a flurry of cases has now been decided at the Supreme Court, Court of Appeal and the High Court in recent years.

Perhaps the most difficult is whether a parent (or more specifically, those who have parental responsibility) can consent to a confinement where they agree that the restrictions are in the best interests of the child. This question has been considered in two cases in relation to the same young man, *Re D* [2015] EWHC 922 (Fam) ('*No 1*') and *Re D* [2019] UKSC 42 ('*No 2*'). The young man suffered from attention deficit hyperactivity disorder (ADHD), Asperger's syndrome and Tourette's syndrome. His behaviour was challenging and he was physically and verbally aggressive. He presented with anxiety and paranoid behaviours and his prescribed medications had limited effect. In the first case, D was 15 years old. The local authority applied for an order authorising his deprivation of liberty at a placement, which all recognised was in his best interests. He was not subject to a care order, and his parents consented to the placement. Keehan J at first instance (against whom there was no appeal) determined that D's parents could consent to the confinement on his behalf; the decision to consent fell within the zones of parental responsibility and with their consent the confinement did not amount to a deprivation of liberty.

The case came back before Keehan J sitting in the COP when D had passed the age of 16. Again, all parties agreed that the confinement was in D's best interests and that it continued to be both necessary and proportionate. Keehan J at first instance decided that the parents of a 16-year-old no longer had the authority to consent to a confinement on D's behalf. The Court of Appeal disagreed, and in a detailed judgment Munby P traversed the history of the development of parental responsibility and decided that consenting to a confinement did fall within the zones of parental responsibility.

The case went to the Supreme Court, which decided (and as a note of historical interest, this was the first case ever decided by a female majority of the court) that it is not within the scope of parental responsibility to consent to D's confinement. Note, the second case concerned a child who had passed the age of 16. The law draws a number of distinctions as to rights and responsibilities of a 16-year-old, and this was recognised by the Supreme Court. The case, then, should be taken as authority for those over the age of 16. The court was clear to signal that the question as it relates to those under the age of 16 is for another day, and thus the best authority remains that of Keehan J in *Re D No 1*.

The second difficult question answered by these cases is whether the consent of a *Gillick*-competent child robs the court of its jurisdiction to authorise a confinement that would otherwise amount to a deprivation of liberty. After all, if component (b) is not satisfied because the young person consents, then no deprivation of liberty arises. This was the discrete question that fell to be answered in *Re T* [2021] UKSC 35 (although by the time it reached the Supreme Court the arguments went much further; it was argued that it was not a permissible exercise at all of the inherent jurisdiction to authorise a deprivation of liberty. This argument was rejected by the Supreme Court, which has thus authoritatively determined that the court does have power under the inherent jurisdiction to authorise a confinement which falls outside of the statutory regimes). The court determined that a child's consent does not vitiate its ability to make an order authorising a confinement that would otherwise be an impermissible deprivation of liberty. While the consent of a child will be a relevant factor which the court will consider when making its decision, it is not decisive and does not oust the court of its jurisdiction.

Practical guidance

Uncertainty often arises where the young people are between 16 and 18 and over which regimes apply. In particular, there is often uncertainty between whether an application should be made to the Family Court or the COP.

The first point to note is that the COP only has jurisdiction where P lacks capacity by impairment of mind. A central element of the test of lack of capacity is that the inability to make a decision has to be attributable to a disorder, impairment of or a disturbance in the functioning of the mind or brain. A person will not lack capacity within the meaning of the MCA simply because of immaturity. Thus, if there is no impairment or disturbance in the functioning of the mind or brain, the COP will not have jurisdiction.

In those cases where applications can be made to both the Family Court and the COP, guidance on which court to use has been given in two cases: *B v RM* [2010] EWHC 3802 (Fam) and *Re A-F (No 2)* [2018] EWHC 2129 (Fam). The following factors are relevant:

(1) the age of the child;

(2) whether the disabilities that give rise to lack of capacity are long term;

(3) whether all the issues that require decisions can be resolved during the child's minority;

(4) whether the COP has powers or procedures more appropriate than are available under the Court of Appeal.

Additionally, Munby P has suggested that where a child is subject to a care order, and there is no basis for discharging that, it

would be more appropriate for the case to remain within the jurisdiction of the Family Court. There are a number of benefits to the oversight remaining there, as it ensures that children continue to have protection of the independent reviewing officer, looked-after child reviews, and the involvement of a children's guardian.

Where an application is brought under the court's inherent jurisdiction, for the deprivation of liberty to be lawful it must be subject to sufficient procedural protections for review. In *Re A-F*, Munby J set out the steps that must be taken to ensure that these procedural safeguards are met. The case should be compulsory reading for all practitioners, but the following principles are particularly pertinent:

- If a substantive order (interim or final) is to be made authorising a deprivation of liberty, there must be an oral hearing in the Family Division (though this can be before a s 9 judge).
- The child must be a party to the proceedings and have a guardian.
- Continuing review is crucial to the continued lawfulness of any 'confinement'.
- Regular reviews by the local authority as part of its normal processes in respect of any child in care are necessary.
- A review by a judge at least once every 12 months is necessary.
- The matter must be brought back before the judge without waiting for the next 12-monthly review if there has been any significant change (whether deterioration or improvement) in the child's condition or if it is proposed to move the child to a different placement.

Re A-F was a case concerning children with lifelong disabilities whose confinement was necessary for their protection as a result of those disabilities. We suggest that more frequent reviews will be required where the confinement is authorised in a case akin to s 25, but where the relevant criteria are not specified. Review periods similar to those that could be authorised if a s 25 order were made would be appropriate.

Conclusions

There are a number of mechanisms to authorise a confinement that would otherwise amount to a deprivation of liberty of children and young people, both within care proceedings and by way of freestanding application. Practitioners should be mindful of the various statutory and non-statutory mechanisms that can authorise a confinement, and consideration should be given in each case to the appropriate mechanism.