

ARE DEPRIVATION OF LIBERTY SAFEGUARDS PROTECTING VULNERABLE ADULTS? THE CASE FOR REFORM

INTRODUCTION

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.”

Chapter 39 of Magna Carta 1215¹

Individual liberty is a fundamental freedom that has been enshrined in the constitution of the United Kingdom since the Magna Carta and is defined in Article 5 of the European Convention on Human Rights (ECHR)²:

“1. Everyone has the right to liberty and security of a person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

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.”

¹ http://www.bl.uk/treasures/magnacarta/virtual_curator/vcindex.html British Library Translation Accessed 25th September 2012

² European Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe, 1950.

Perhaps nowhere is this protection of liberty more important than for those who lack the mental capacity to communicate their wishes, such as those with a severe learning disability or dementia. Until the introduction of the Deprivation of Liberty Safeguards (DOLS) in April 2009,³ such patients could be detained in a hospital or care home, for their own health and safety, under the common law doctrine of necessity. The best interests judgment was made by the health and care professionals responsible for their care.

The DOLS provide a lawful procedure to deprive patients who lack capacity of their liberty, and a process of review, to comply with Articles 5(1) and 5(4) ECHR. However, I believe that the review process does not go far enough to protect the most vulnerable members of society, as there is no automatic right to an independent review of a Deprivation of Liberty (DOL) authorisation. In this essay I will make the case for a law reform that allows an automatic right of review by an independent tribunal for patients deprived of their liberty under this Act, as these are the very people who may not be able to take such action themselves.

³ Deprivation of Liberty Safeguards Procedure in Schedule A1 Mental Capacity Act 2005

BACKGROUND TO THE CURRENT LAW

Patients with a mental disorder that requires assessment or treatment, who are at risk to themselves or others, and who are refusing treatment, may be compulsorily admitted to hospital under the Mental Health Act (MHA) 1983. The MHA 1983 contains protections for patients, which includes an automatic right of referral to an independent Mental Health Review Tribunal, under section 68, to ascertain the necessity and lawfulness of continued detention in hospital.

Patients who consent to admission and treatment in hospital for a mental disorder, or who are not actively objecting and trying to leave, may be treated as “informal” or “voluntary” patients. This allows for treatment of mental illness without the additional stigma associated with being “sectioned” under the MHA 1983. However, this has resulted in patients who lack mental capacity to consent to admission and treatment, who are not objecting or trying to leave, being *de facto* detained without the protections afforded by the MHA 1983. This lacuna in the law, identified by Lord Steyn and Lord Goff in the “Bournewood” case,⁴ came to be known as the “Bournewood Gap”.

The “Bournewood” case centred on L, a 48 year-old man who had a diagnosis of autism and severe mental retardation. He was unable to speak, had limited understanding, and was incapable of consenting to medical treatment. In 1997, while at a day centre, he became severely agitated, and since his

⁴ *Re v Bournewood Community and Mental Health NHS Trust, Ex parte L* [1999] 1 AC 458 Lord Goff at page 481 and Lord Steyn at page 493

carers could not be contacted, he was admitted to Bournwood Hospital. As he appeared compliant with the admission and did not try to leave, his consultant admitted him as an informal patient, rather than formal detention under section 3 of the Mental Health Act 1983 (MHA 1983). Had L tried to leave, his consultant would have detained him under the MHA 1983. However, during the admission, L was restricted from having contact with his carers in case he tried to leave. L's carers believed that he was being wrongly detained and an application was made on L's behalf to the High Court for judicial review and *habeas corpus* proceedings.

At first instance, Owen J held that L had not been unlawfully detained as the common law principle of necessity had been satisfied. The Court of Appeal (CA) held that informal admission was limited to patients who had the capacity to consent to admission and treatment, and as L did not have the capacity to consent, his detention was declared unlawful. The House of Lords overturned the decision of the CA and held that the admission was lawful under the common law doctrine of necessity, and that informal admission was not limited to patients who had the capacity to consent to admission.

However, the European Court of Human Rights (ECtHR) declared that L was unlawfully detained, in breach of his rights under Article 5(1) and 5(4) of the ECHR.⁵ The Court held:

“the further element of lawfulness, the aim of avoiding arbitrariness, has

⁵ HL v UK (2005) 40 E.H.R.R. 32

not been satisfied...In this latter respect, the Court finds striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated persons is conducted...The Court therefore finds that this absence of procedural safeguards fails to protect against arbitrary deprivations of liberty on grounds of necessity and, consequently, to comply with the essential purpose of Art.5(1) of the Convention. On this basis, the Court finds that there has been a violation of Art.5(1) of the Convention”.⁶

The Court held that Art 5(4) was not satisfied by judicial review and *habeas corpus* proceedings, hence a violation of Art 5(4) was also declared. In light of this judgement, the “Deprivation of Liberty Safeguards” (DOLS) were introduced in April 2009 as an amendment to the Mental Capacity Act 2005 (“the Act”).⁷ The DOLS aimed to “plug the Bournemouth gap” by providing a statutory framework and safeguards for the lawful detention of persons lacking capacity to make decisions about admission to a hospital or care home where a deprivation of liberty exists, thus preventing further breaches of Art. 5(1) and 5(4), ECHR.

⁶ *Ibid.* paras. 119, 120, 124

⁷ *Op. Cit.* n. 3

DEPRIVATION OF LIBERTY AUTHORISATIONS- THE CURRENT LAW

Schedule A1 of the Mental Capacity Act (MCA) 2005 details the process by which a DOL authorisation may take place. Part 1, Para 1(2) states:

“The first condition is that a person (“P”) is detained in a hospital or care home- for the purpose of being given care or treatment- in circumstances which amount to deprivation of the person’s liberty.”

The qualifying requirements for a DOL authorisation are listed in Part 3, Paras 12-20 of Schedule A1 of the Act. These consist of an age requirement that the person is over 18 years, a mental health requirement that the person suffers from a mental disorder including a learning disability, a mental capacity requirement that he lacks capacity to decide as to whether he should be in the hospital or care home for the purpose of care or treatment, an eligibility requirement⁸ to ascertain that the person cannot be detained under the MHA 1983, which has primacy over the MCA 2005,⁹ and a no refusals requirement that there is no valid advance directive or decision of a donee preventing the detention.

Any eligible person can notify the managing authority, which may be the NHS body responsible for an NHS hospital or the registered manager of a care home, if they believe that there is an unauthorised deprivation of liberty.¹⁰

The managing authority then applies to the supervisory body, which may be a

⁸ Mental Capacity Act 2005 Schedule 1A Persons Ineligible to be Deprived of Liberty by this Act.

⁹ *J v The Foundation Trust and others* [2009] EWHC 2972 (Fam)

¹⁰ *Op. Cit.* n.3 paras 68-69 and Part 13 paras 175-179

Primary Care Trust in England or the National Assembly in Wales.¹¹ The supervisory body considers requests for authorisations, commission's assessments for each of the qualifying requirements, and where all assessments agree, authorises the DOL.¹² A standard DOL authorisation is valid for up to one year.¹³

Art 5(4) ECHR allows that anyone deprived of his liberty shall have the "lawfulness of his detention decided speedily by a court".¹⁴ The relevant person or their representative¹⁵ may make an application to the Court of Protection under section 21A MCA 2005 to vary or terminate the authorisation. In addition, Part 8 of Schedule A1 MCA 2005 allows for a review of a standard DOL authorisation, which may be requested by the managing authority, the relevant person or their representative, or the supervisory body itself.¹⁶ In cases where the incapacitated person has no discernible friends or relatives, an independent mental capacity advocate (IMCA) is appointed to act as his or her representative.¹⁷

The supervisory body will determine whether a review is needed, and if so, will request new assessments for any areas where there has been a change in circumstances. The outcome of the review may be a termination of

¹¹ *Ibid.* paras 180-183

¹² *Ibid.* Part 4 paras 21-73

¹³ *Ibid.* Part 4 para 42(2)b

¹⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950.

¹⁵ Mental Capacity Act 2005 s. 50 para 1 and 1A

¹⁶ *Op. Cit.* n. 3 Part 8 paras 101-125

¹⁷ Schedule 39D Mental Capacity Act 2005

authorisation, continue with the DOL authorisation or additional conditions attached to the DOL authorisation.

THE CASE FOR REFORM

*“It is not merely of some importance, but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”*¹⁸

Lord Hewart CJ

Steven Neary, a 21-year old man with autism and a severe learning disability was accepted into respite care, but was detained there for a year against the wishes of his father, his main carer.¹⁹ Although a DOL authorisation was granted for part of this period, the best interests assessment was held to be inadequate, and subject to insufficient scrutiny by the supervisory body, and thus did not constitute a lawful basis for depriving Mr Neary of his liberty, contrary to Art 5(1) ECHR. The assessment had not taken account of Mr Neary’s wishes or his father’s wishes. Peter Jackson J held that his best interests must determine any decision about an incapacitated person, and the starting point is the right to respect for family life. By keeping Mr Neary away from his family home, an unlawful breach of his right to respect for his family life was committed by the local authority, contrary to Art. 8 ECHR.

Furthermore, no effective Part 8 review was carried out by the supervisory body, who was also the managing authority, and the case was not referred to the Court of Protection until October 2010, by which time Mr Neary had been detained against his father’s wishes for 10 months. Taken together, Peter

¹⁸ *R v Sussex Justices, ex p McCarthy* [1924] 1KB 256. Lord Hewart CJ at 259

¹⁹ *The London Borough of Hillingdon v Steven Neary (by his litigation friend, the Official Solicitor), Mark Neary* [2011] EWHC 1377 (COP)

Jackson J held that the supervisory body had deprived Mr Neary of his entitlement to take proceedings for a speedy decision by a court on the lawfulness of his detention, contrary to Art. 5(4) ECHR.

This case highlights a number of concerns about the way in which DOLS have been used in this instance. While the adequacy of assessments is perhaps not so much an issue for law reform but adequate training of assessors, I believe that the role of the supervisory body in the Part 8 review process should be abolished and replaced by an independent Mental Health Review Tribunal, with an automatic right of review, for the following reasons:

First, a single body may act as both a supervisory body and a managing authority.²⁰ This suggests a lack of truly independent scrutiny and review of DOL authorisations, and raises the issue that bias is occurring as the decision maker has an interest in the outcome of the decision, especially as costs are involved in any detention within a care home or hospital. The Care and Social Services Inspectorate Wales (CCSIW) have advised that arrangements need to be made for local authorities to separate their two key roles as a supervisory body and managing authority, due to the potential for conflict of interest and a lack of independent review.²¹ Furthermore, a significant power imbalance may result if the wishes of the person, or their representative are in conflict with the wishes of the supervisory body, as seen in the *Neary* case.²²

²⁰ *Op. Cit.* n. 3 para 184

²¹ Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care 1st April-31st March 2011 Care and Social Services Inspectorate, Wales.

²² *Op. Cit.* n. 19

Secondly, Schedule A1 of the Mental Capacity Act 2005, states at para 59:

“(2) The managing authority of the relevant hospital or care home must take such steps as are practicable to ensure that the relevant person understands all of the following-

(a) the effect of the authorisation;

(b) the right to make an application to the court to exercise its jurisdiction under section 21A;

(c) the right under Part 8 to request a review

(5) Any written information given to the relevant person must also be given to the relevant person’s representative.”

However, despite this provision the review process is infrequently used. In Wales only 22 reviews were requested in the year 2010-11, although 277 standard authorisations were granted.²³ While it may be that the majority of those affected were content with the authorisation, it is possible that there is a lack of information for the relevant person or their representatives about their right to review a DOL authorisation.²⁴ If a person or their representative is not aware of their right to review the DOL authorisation, then this raises grave concerns as to whether the rights of the most vulnerable to a speedy review of their detention under Art. 5(4) ECHR are currently being satisfied.

²³ *Op. Cit.* n. 21 at p. 18

²⁴ *Op. Cit.* n. 21 at p. 19

PROPOSALS FOR REFORM

PROPOSAL 1:

“The term “supervisory body” shall be replaced by the term “Mental Health Review Tribunal” in Part 8 Standard Authorisations: Review, Schedule A1 Mental Capacity Act 2005”

I propose that Part 8 should be amended so that reviews of DOL authorisations are carried out by a Mental Health Review Tribunal (MHRT). As DOLS apply to persons with a mental disorder who lack capacity to consent to treatment, it would be a natural extension of the work of the MHRT. This would allow cases to be heard locally within existing resources and would ensure easy access to justice for patients and their families and remove the long delays that occurred in the *Neary* case.

The review tribunal would be truly independent of the managing authority and supervisory body, and so negate the current potential conflict of interest that exists.

PROPOSAL 2:

“The managing authority must make a request for a Part 8 review of all standard authorisations within 28 days of the authorisation, if the relevant person or their representative has not already done so”.

I propose that all those subject to a DOL authorisation should have an automatic right to review by an independent tribunal. Under section 68 of the MHA 1983 there is an automatic right of review to a MHRT for patients detained under the MHA 1983. I believe that these safeguards should apply to patients detained under a DOL authorisation in order to effectively close the “Bournewood Gap” and ensure compliance with Art 5(4) ECHR.

CONCLUSION

“All mankind... being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.”

John Locke

While all liberty is restricted to some extent by the need to comply with society’s norms and laws, it is only right and just that when depriving another of their freedom, especially one who is unable to actively consent or object, that this should only be done within a lawful procedure with appropriate safeguards for the relevant person.

I believe that these proposals to amend the review process for those detained under a deprivation of liberty authorisation are desirable, practical, and useful reforms that will ensure that the most vulnerable in society are adequately protected. An automatic review by a truly independent tribunal for all those detained who are unable to communicate their wishes will truly embrace the spirit of Article 5 of the European Convention on Human Rights.

Clementine Maddock

October 2012

Word Count: 2866 (including footnotes)