



## **LEGAL BRIEFING**

### **DEPRIVATION OF LIBERTY**

**June 2015**

This briefing for social housing providers on the legal framework for deprivation of liberty was written by Joanna Burton of Clarke Willmott solicitors on behalf of the National Housing Federation and the Housing Learning and Improvement Network (LIN). It draws on the European Convention on Human Rights, the Mental Capacity Act 2005, the Mental Health Act 1983, Care Act 2014 and Equality Act 2010, as well as the March 2014 Cheshire West Supreme Court judgement on deprivation of liberty, to explain relevant law and the responsibilities of social landlords. It is divided into two parts, the first setting out the law and the second part outlining providers' responsibilities. In the briefing, 'P' is used as shorthand for 'the person'.

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## PART 1

### 1 INTRODUCTION

1.1 The Supreme Court judgment in the case of *P v Cheshire West and Another and P and Q v Surrey County Council [2014] UKSC 19* provided an ‘acid test’ to identify a deprivation of liberty. The judgment also extended the application of Article 5 of the European Convention for Human Rights (ECHR) to those who live in their own homes (owned, rented, supported living, Shared Lives), and who lack the mental capacity to make decisions as to where they should live or the level and type of care they need and are in receipt of publicly funded or publicly arranged care services.

1.2 The Supreme Court judgment has implications for social housing providers and this legal briefing aims to offer some guidance with regard to those implications.

### 2 ARTICLE 5

***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:***

***1(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts***

***5(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***

2.1 The breach of Article 5 rights can only be made by the state (e.g. government, local authority), an agent of the state (e.g. police, army, hospitals etc) or a public body. Social housing associations are deemed to be public bodies because they, like essential utilities like gas and electricity etc, provide an essential social and public service in the provision of housing and accommodation and sometimes care within

that accommodation. A private individual or organisation depriving a person (P) of their liberty would not be in breach of Article 5 but may be committing a criminal offence (e.g. kidnap, unlawful imprisonment etc) and dealt with accordingly.

2.2 **'A procedure prescribed by law'** is a procedure prescribed by legislation or the courts. Examples of legislative procedure compliant with Article 5(1)(e), for 'persons of unsound mind' are sections 2 and 3 of the Mental Health Act 1983 used to detain mentally ill patients in hospital. Another is the Deprivation of Liberty Safeguard (DOLS) Standard Authorisation process set out in Schedules 1A and A1 of the Mental Capacity Act 2005. This is to be used when those who lack the mental capacity to make their own decisions as to where they should live, or the level and type of care they need, are deprived of their liberty in hospital or a residential care home.

2.3 The Mental Health Act 1983 also has clauses s7 (guardianship), s17 (leave from hospital when detained under s2 or 3), and s17A (community treatment order (CTO)) dealing with detaining or restricting a person in their own home. These clauses authorise the hospital and/or local authority under the Mental Health Act 1983 to order where a person should live, who they can mix with, people they must and/or are prohibited from allowing to enter, and appointments and activities they must attend. Community Treatment Orders (s17A MHA 1983) authorise forced treatment in a patient's own home or treatment that may require the restraint of a patient.

2.4 Whilst s5 MCA 2005 allows certain actions to be carried out subject to them being in P's best interests without fear of criminal or civil liability, the MCA 2005 prohibits depriving a person of their liberty. S64(5) states **'In this Act references to deprivation of a person's liberty have the same meaning as Article 5(1) of the Human Rights Convention.'** And at s64(6) it goes on to say **'For the purpose of such references it does not matter whether a person is deprived of his liberty by a public authority or not.'**

2.5 The only **'procedure prescribed by law' (Article 5(4) ECHR)** under the MCA 2005 for those who lack capacity to make decisions as to their residence and care who are deprived of their liberty in their own homes is in accordance with s4B MCA 2005, namely an application to the Court of Protection for authorisation under s16(2) MCA 2005. President of the Court of Protection Lord Justice Munby has prescribed

the procedure to be used following the case of Re X 2013. This is a best interest declaration and the court must first consider whether P is deprived of his or her liberty and then if P is so deprived, before declaring the deprivation to be lawful must consider whether the living and care package arrangements are necessary and proportionate (least restrictive) and in P's best interests.

2.6 Further under Article 5(4) ECHR,

***5(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.***

This means that the person themselves has a right to make an application to the court to challenge the deprivation of liberty irrespective of whether a legislative or other possibly lawful procedure has been used.

### **3 WHY DOES ARTICLE 5 ECHR APPLY?**

3.1 Article 5 is clear '***Everyone has a right to liberty and security of person***'. Lady Hale in her Supreme Court judgment affirms ***the 'universal nature'*** of human rights and she goes on to say at paragraph 45 '***it is axiomatic that people with disabilities, both mental and physical, have the same human rights as the rest of the human race.....the starting point should be the same as that for everyone else.***'

3.2 Very few of us would have any difficulty in accepting that if we were deprived of our liberty by the state (e.g. police, doctors and social workers etc) then we would expect to either to be able to give our consent (e.g. safety, illness) and/or if we did not give our consent (e.g. arrest, illness) for whoever was depriving us of our liberty to do so in accordance with the law. As Lady Hale said at paragraph 46 '***it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and***

***unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person.'***

3.3 A public body has a positive obligation to ensure that a person's human rights under the ECHR are upheld and Lady Hale in her Supreme Court judgment commented at paragraph 45 '***Far from disability entitling the state to deny such people human rights: rather it places upon the state (and others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities.'***

3.4 To justify an interference with a person's ECHR rights the interference must be proportionate and necessary. In respect of those who lack the capacity to make decisions or consent to the interference with their rights, if they are deprived of their liberty it must be in the least restrictive way and in their best interests. Interference with a person's rights under the ECHR that are neither proportionate nor necessary may constitute a breach that could give rise to a damages claim against the relevant public authority.

#### **4 DEPRIVATION OF LIBERTY – THE ACID TEST**

4.1 The 'acid test' provided by Lady Hale, at paragraph 40 of her judgment, when considering whether a person is deprived of his or her liberty is '***whether the 'concrete situation' of the person concerned is under 'continuous supervision and control and not free to leave'***'. The phrases quoted by Lady Hale come from the Strasbourg judgment in *HL v United Kingdom* 40 EHRR at paragraph 91.

4.2 Lady Hale also cites the decision of the Grand Chamber in Strasbourg in the case of *Stanev v Bulgaria* (2012) 55 EHRR 696 which concerned a gentleman in a care home where at paragraph 115 it states: '***In order to determine whether someone has been deprived of their liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as type, duration, effects and manner of implementation of the measures in question'***.

4.3 The European Court of Human Rights judgment in HL gave rise to the amendments to the MCA 2005 , namely s4A which introduced the DOLS Standard Authorisation processes and 4B which allows P to be deprived of his liberty ‘if it is necessary to give life sustaining treatment or to prevent a serious deterioration in P’s condition while a case is pending before the court’.

## **5 ‘Continuous supervision and control’**

5.1 The Supreme Court did not attempt to define ‘**continuous supervision and control**’ or provide a test as to what constitutes ‘**continuous supervision and control**’ . This therefore remains something of a grey area but in trying to explain her understanding of ‘continuous supervision and control’ at paragraph 7 of her judgment Lady Hale refers to ‘**key passages**’ (paragraphs 89 to 91) from the European Court of Human Rights in the case of *HL v United Kingdom (2004)* 40 EHRR 761

- **‘The distinction between a deprivation of, and restriction upon, liberty is one of degree and intensity**
- **‘91.....the key factor in the present case to be the health care professionals treating and managing the applicant (HL) exercised complete and effective control over his care and movements ..... Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave.’**

5.2 Lady Hale also made reference to Baker J’s judgement in the High Court in *Cheshire West v P and Another 2011* where at para 59 he said that P could not ‘**go anywhere, or do anything without their [carers’] support and assistance**’ and ‘**the steps required to deal with his challenging behaviour lead to a clear conclusion that, looked at overall, P is being deprived of his liberty.**’

## **6 'and not free to leave'**

6.1 Lady Justice Hale at paragraph 40 made reference to LJ Munby's decision in *JE v DE* [2007] 2 FLR 1150 as to the meaning of **'not free to leave'**. In that case LJ Munby said at paragraph 115: **'...when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution: I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses.'**

6.2 If P is not free to leave his property whenever s/he wishes and/or without carers even for small trips out, perhaps to go shopping, swimming or access some other community activity this too may fall under the definition of being 'not free to leave' and would go towards satisfying the 'acid test' of P being deprived of his or her liberty.

## **7 'a gilded cage is still a cage'**

7.1 Lady Hale recognises in her judgment that it may be very difficult for those providing care in a regime considered to be in the best interests of P to acknowledge that these very measures may be depriving P of his or her liberty. At paragraph 35 she says **'We should not let the comparative benevolence of the living arrangements blind us to their essential character if indeed that constitutes a deprivation of liberty.'**

7.2 And at paragraph 46 **'The fact that my living arrangements are comfortable and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.'**

## **8. Visitors**

8.1 Landlords may also need to be aware of the possible wider effects of injunctions restricting or prohibiting other individuals from visiting the area or more particularly P

in his or her own home and consider if this increases or possibly decreases the degree to which P may be deprived of his or her liberty.

## **9 CORONER INVESTIGATIONS**

9.1 The Chief Coroner Judge Peter Thornton QC provided guidance in December 2014 advising that a person deprived of his or her liberty in a hospital, care home or in their own home (e.g. supported living accommodation) and subject to a DOLS Urgent or Standard Authorisation (Schedule A1 MCA 2005) or to an order of the court (Court of Protection) authorising that deprivation should be regarded as being 'detained by the state'. As such in accordance with s1 Coroners and Justice Act 2009 a coroner's investigation should be carried out if P dies while so 'detained' even if he or she dies of natural causes.

## **PART 2**

### **RESPONSIBILITIES OF THE SOCIAL HOUSING LANDLORD AND/OR HIS MANAGING AGENT TO LEASEHOLDERS, TENANTS AND LICENSEES WHO LACK CAPACITY TO MAKE RELEVANT DECISIONS**

In this context 'relevant decisions' include being able to make decisions as to where a person might live, the level and type of care they need, contact with others, and consent to any restraint or restrictions.

Social housing associations are public bodies. As such the ECHR Articles including Article 5 and Article 8 are enforceable against social housing landlords.

#### **1.1 Landlord responsibilities to tenants in receipt of care services funded by the local authority or NHS**

1.1.1 Many social landlords have tenants who are in receipt of care services provided in their own homes, often funded by the local authority, occasionally by the NHS under continuing health care funding, and sometimes privately by the individual. Indeed some associations provide 'extra care' housing, supported living and sheltered housing where up to 24/7 1:1 and occasionally 2:1 care is provided to the tenant or tenants sharing accommodation.

1.1.2 As public bodies have a positive obligation to ensure that a person's human rights under the ECHR are respected, the social landlord (amongst others providing care for P) has a positive obligation to ensure that P's Article 5 (and Article 8) rights are not breached. If the purpose of the accommodation is to provide extra care housing, supported living or sheltered housing the social landlord should be particularly alert to his or her obligations to the tenant under the ECHR.

1.1.3 As they are public bodies local authorities and social housing landlords have always had to consider a person's Article 8 rights (right to a private and family life) when providing or restricting services to them. Since the Supreme Court decision in Cheshire West in March 2014, both Article 8 and Article 5 apply to those tenants who

lack capacity to make decisions about their care and where they live, are in receipt of social care funded and/or provided by the local authority or NHS, and are deprived of their liberty. The 'acid test' in relation to a deprivation of liberty is that '*P is under continuous control and supervision....and not free to leave*'.

1.1.4 The Supreme Court decision in *Cheshire West* makes it clear that Article 5 applies only to those who lack capacity to make decisions in respect of their care and where they live and are receiving care provided by, or funded by, a public body. However, as they are public bodies, even when occupants are funding their care package and meeting the costs of their rent or license entirely privately, social housing landlords do have to be alert to whether the level and nature of the care and support they receive may constitute a deprivation of liberty for P. As they are public bodies social housing landlords have always had to consider a person's Article 8 rights (right to a private and family life) when providing or restricting services to them.

1.1.5 It would be very unusual for the terms of any lease, tenancy or license agreement to be the mechanism by which an occupant would be deprived of his or her liberty. In almost all cases, it will be the care package arranged or provided by the local authority or NHS to meet the needs of P that results in the deprivation of liberty. In most cases therefore it may be enough for the social landlord to simply alert the local adult services of his or her concern that a tenant may be deprived of his or her liberty.

1.1.6 Deciding whether or not a person who lacks capacity to make decisions in respect of their care is deprived of their liberty in their own home may be very difficult. A person may not be 'under continuous control and supervision', but may need to be regularly restrained or restricted by carers. If the person lacks the mental capacity to make decisions either in respect of their behaviour which may result in such steps being taken and or to resist such action, the carer may, for **very occasional** use of such restraint or restriction, be able to rely on s5 MCA 2005. However if these were regular steps that were being taken by carers then authorisation from the Court of Protection should be sought. The landlord should in those circumstances make a referral in writing (e.g. e-mail) to the relevant local authority adult services team by way of a safeguarding alert (unauthorised restraint

or restriction may amount to assault, unlawful imprisonment etc) asking the local authority to make that application.

1.1.7 In circumstances where the tenant lacks capacity to decide who should or should not visit him or her, and a third party, e.g. relative, social worker, landlord or the managing agent wishes to restrict visitors to the tenant or the property, this should be raised in the first instance with the local authority as a safeguarding alert. Any restrictions on visitors and/or contact for the tenant may be in breach of his or her or the visitor's Article 8 rights and should therefore only be put in place if necessary and proportionate. If injunctive relief is being sought to restrict visitors to the tenant or the tenant's property, consideration should be given to making an application to the Court of Protection under the Mental Capacity Act 2005 rather than the County Court.

1.1.8 Steps that social landlords, particularly those providing 'extra care' accommodation or supported living, can take to evidence that they have taken due care to identify whether or not P may be deprived of his liberty are any or all of the following:

- Liaise closely with the local authority or NHS body funding, arranging or providing the care for P. The Care Act 2014 which came into force on 1 April 2015 provides that it is a positive obligation for agencies to work together for the wellbeing of P and/or P's unpaid carers (s6 Care Act 2014).
- It may be helpful for the social landlord to have sight of P's care plan to see if steps can be taken by the landlord to ameliorate any potential deprivation of liberty. Sight of P's care plan would be subject to P's consent and would need to be in compliance with the Data Protection Act 1995.
- If the landlord has doubts about the mental capacity of P to consent to or to make decisions about the level or type of care that P will be receiving in the accommodation ask to see mental capacity assessments and if there are none request that they are undertaken.
- Mental capacity assessments should cover at least the following issues: does P have the mental capacity to make decisions as to where s/he should live and the level and type of care s/he needs.

## 2 SAFEGUARDING – CARE ACT 2014

2.1 A local authority's obligations to safeguard a vulnerable adult are set out in sections 42 to 47 Care Act 2014 and these provisions came into force on 1 April 2015. Safeguarding invariably involves a person's Article 8 rights and may also trigger Article 3 (torture and degrading treatment) and Article 5 rights too. Section 42 (1) sets out the criteria for identifying a vulnerable adult at risk:

- (a) P has needs for care and support whether or not those are being met.
- (b) P is experiencing, or is at risk of abuse or neglect,
- (c) **And** as a result of those needs P is unable to protect himself or herself against the abuse or neglect or the risk of it.

2.2 Interference with a person's rights under the ECHR, whether Article 8 or 5 may be a safeguarding issue. In respect of those who lack the capacity to make decisions in respect of interference with their rights, not only must any such interference be proportionate and necessary but if P is deprived of his liberty P must be so deprived in the least restrictive way and in P's best interests.

2.3 Anyone can (and should if they are concerned) make a safeguarding referral to a local authority whether or not the adult is receiving care provided or funded by the local authority. The local authority responsible for P's local area is always the 'lead' in safeguarding.

2.4 From 1 April 2015 when the Care Act 2014 came into force Safeguarding Adults Boards (SABs) will be set up in every local area. It is possible that social housing providers, particularly those offering extra care, supported living and/or sheltered accommodation, or accommodation to those with mental health illnesses, may be invited by the local authority to join their local SAB.

2.5 Sections 6 and 7 of the Care Act 2014 make it a statutory obligation for local authorities to co-operate with 'relevant partners' and for 'relevant partners' to cooperate with local authorities. Although not explicitly defined as 'relevant partners', private registered providers of social housing are explicitly listed in s6 of the Care Act as bodies with whom it may be appropriate for the local authority to co-operate.

2.6 Chapter 14 of the Care Act statutory Guidance replaces No Secrets and includes a number of requirements and recommendations which apply to the housing sector. Providers need to comply with the Guidance unless they have very good reasons to justify not doing so.

2.7 Section 44 of the Care Act 2014 provides that if the Safeguarding Adults Board (SAB) requests information from an organisation in the context of safeguarding a person that organisation must comply with the request and provide that information and if unable to do so must give reasons.

### **3 GENERAL EQUALITY DUTY: EQUALITY ACT 2010**

3.1 Although registered providers of social housing are not listed in Schedule 19 of the Equality Act 2010 the Equality Commission for the general equality duty advises in its answers to frequently asked questions:

***'housing providers who are unsure whether they are carrying out public functions, to safeguard their position by ensuring they comply with the general duty in relation to those functions..... Examples of public functions include: allocation of housing, transfer and exchange of properties, setting rent levels, complaints procedures, tenant participation, consulting and informing tenants, setting terms of tenancy, and the termination of tenancies. It also includes the establishment and application of policies and procedures regarding anti-social behaviour and parenting orders ..... Meeting the general equality duty for a public function requires registered providers to identify and tackle persistent and long standing disadvantage within that function.***

3.2 Protecting and upholding a tenant's human rights including Articles 5 and 8 will fall under the general equality duty.

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