Deprivation of liberty and adults with incapacity: a Scottish perspective

Introduction

The Strasbourg *Bournewood* ruling (*HL v UK* (2005) 40 EHRR 32) made it clear that restrictive measures informally adopted in relation to persons lacking capacity to make valid decisions about their care and treatment will violate Article 5 ECHR (the right to liberty) where such measures amount a deprivation of liberty. As in England and Wales, this therefore raised questions as to how Article 5 "watertight" the law in Scotland is concerning the care and treatment of persons with, for example, learning disabilities or dementia.

In order for a measure amounting to a deprivation of liberty to be lawful in terms of Article 5(1)(e) ECHR (justifying detention on ground of "mental disorder") it must, amongst other things, have a legal basis and be a proportionate response to the particular situation, concern a person who has a genuine mental disorder and provide legal safeguards for the person deprived of their liberty (such as the ability to challenge the legality of such deprivation of liberty before a court or tribunal and immediate release where the detention is found to be unlawful or no longer necessary).

For Scotland, two questions, in particular, have arisen as a result of *Bournewood*:-

1. ***What actually constitutes a "deprivation of liberty" engaging Article 5***?

No definition of "deprivation of liberty" engaging Article 5 is given in the ECHR. Case law has provided broad guidance in terms of assessing whether such a deprivation of liberty has occurred (for example, the degree of control exercised over the person by those responsible for their care and treatment, the duration, type and intensity of the measures adopted and the ability of the person to give valid and informed consent to such measures) but the position is not entirely clear.

It has, for instance, been argued that restrictive measures designed to give someone as much freedom as possible in light of a person's particular disability do not actually amount to a deprivation of liberty engaging Article 5 (see *HM v Switzerland* (2002) ECHR 157, in particular the dissenting judgment of Judge Loucaides, and *Nielsen v Denmark* (1989) 11 EHRR 175 (see also *Austin v* UK (2012) 55 EHRR 14 and the English cases of *A Local Authority v A (by her Guardian ad Litem, Judith Bennett-Hernandez), B A Local Authority v C (by her litigation friend the Official Solicitor), D, E* [2010] EWHC 978 (Fam)), *R(Secretary of State for the Home Department) v Mental Health Review Tribunal* [2002] EWCA Civ 1868, *R(G) v Mental Health Review Tribunal* [2004] EWHC 2193 and *Re MIG and MEG, Surrey County Council v CA and* LA [2010] EWHC 785)).

This approach has, however, received some criticism on the basis that "to benefit the person" (in other words, the purpose of the measure) does not form part of the assessment of whether a measure amounts to a deprivation of liberty and is not a specified justification in Article 5(1)(e) to limit the right to liberty. It should perhaps also be noted that the Court considered that in both *HM* and *Nielsen* valid consent to the restrictions had been given (albeit by the boy's mother in the latter case).

AB v BR, Dr DM & Mental Health Tribunal for Scotland

The case of *AB v BR, Dr DM & Mental Health Tribunal for Scotland,* 26 September 2012, unreported (Airdrie Sheriff Court) does, however, give an indication of judicial thinking in Scotland on the issue. Please note, however, that this judgment is currently subject to appeal to the Court of Session.

In this case, the applicant (who suffers from mental disorder caused by alcohol misuse and bipolar disorder) was required, under the terms of a CTO, to reside at a Care Home which was a locked facility where residents can only leave and

return using a keypad. She claimed that she did not know the code for the keypad and had therefore been detained contrary to the Mental Health (Care and Treatment) (Scotland) Act 2003 which only allows detention under a CTO in hospital (in other words, there was no legal basis for her detention). The court determined that, in light of all the circumstances, she had not been detained. The overriding purpose of the 2003 Act is to provide appropriate care and treatment for persons with mental disorder. Medical evidence in this case demonstrated that a hospital-based order was not necessary but there were strong reasons supporting the use of the keypad at the care home. For instance, the applicant was a risk to road users and to herself if she left the home unaccompanied, she had a history of leaving hospital and her own home and placing herself at significant risk and she was known to be liable to exploitation. This was the minimum restriction required for her safety. Moreover, visits to her family were arranged fortnightly and she could go out locally provided she was supervised (and there appeared to be no delays or problem in organising this). She also had free access to the home's gardens during the summer. For these reasons, it was considered that the restrictions imposed on the applicant did not amount to legal detention and were proportionate in the circumstances. The court, on the facts, also rejected the suggestion that guardianship would have been more appropriate way of securing the appellant's welfare (see also comments in the next section about use of the 2003 Act).

What is "normal"?

It has also been suggested that restrictive measures should be assessed by reference to "an adult of similar age with the same capabilities and affected by the same condition or suffering the same inherent mental and physical disabilities and limitations." In other words, what would be considered to be a "normal" measure for an individual in such specific circumstances. This argument was advanced in *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257, *per* Munby LJ at paras 83 and 86. To this end, the UK Supreme Court *Cheshire West* ruling is eagerly anticipated although are mindful that this will be persuasive but not binding on the Scottish courts and, of course, that ultimate and definitive direction may come from Strasbourg in the future.

2. *Are the guardianship provisions in the Adults with Incapacity (Scotland) Act 2000 Article 5 compatible?*

Whilst the Act as it currently stands (see Part 6 of the Act) expressly authorises a welfare guardian to act, or not act, in certain ways (for example, a guardian must not place the adult in hospital for treatment for mental disorder against their will, s.64(2)(a)), it does not specifically empower a guardian to consent to a deprivation of liberty on behalf of the adult with incapacity. Nor does the Act expressly provide for the adult with incapacity to have such deprivation of liberty reviewed by the courts. Post-*Bournewood* the best advice has therefore tended to be that where an individual is unable to give valid consent, even if apparently compliant, to measures that might amount to a deprivation of liberty then there will have to be resort to use of the compulsory provisions in the 2003 Act with its better Article 5 compliant legal and procedural safeguards. However, this would only, of course, be applicable where the individual requires care and treatment for a mental disorder and the 2003 Act's criteria are fulfilled.

Application in respect of R

That being said, there has recently been judicial support for the view that provided the guardianship order permits a welfare guardian to deprive a person with incapacity of their liberty this constitutes the requisite lawful authority for the purposes of Article 5, presumably this being impliedly permitted by the 2000 Act.

In the case of *Application in respect of R* 2013 G.W.D. 13-293 welfare and financial guardianship powers were being sought for a 19 year old man with incapacity to allow him to move to suitable accommodation, a lease to be signed and the care package put in place for him. Essentially, the court held that where an adult is compliant with a care regime but legally incapable of consenting to it then they are deprived of their liberty contrary to Article 5 (1) ECHR unless they are placed under

such regime by virtue of the 2000 Act guardianship arrangements permitting this. Thus, the court considered that this will provide the necessary lawful authority required by Article 5 ECHR although it left unanswered the question of Article 5 procedural safeguards.

Another issue that has arisen following - *Bournewood* is whether s.13ZA of the Social Work (Scotland) Act 1968 –which permits a local authority to move an adult to residential accommodation - allows the local authority to place the adult in care arrangements that amount to a deprivation of their liberty. Again, in *Application in respect of R* the court made it clear that it does not.

For greater discussion of all these issues readers are referred to the Scottish Law Commission *Discussion Paper on Adults with Incapacity*, 2012, which provides an excellent and comprehensive analysis of the law and human rights considerations. For another, more practice focused, analysis, please see the Mental Welfare Commission for Scotland's recent guidance on *Deprivation of Liberty*.

Following its 2012 discussion paper and consultation, the Scottish Law Commission is to publish a draft Bill in 2014 and it is hoped that some clarity will emerge as a result of this.

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