

Deprivation of Liberty: A Handbook

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PREFACE

‘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 ... the lawful detention of persons for the prevention of the spreading of infectious diseases, of *persons of unsound mind*, alcoholics or drug addicts or vagrants ...

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.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.’

(*Art 5, European Convention for the Protection of Human Rights and Fundamental Freedoms*)

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was incorporated into UK law in October 2000. The government of the day was justly proud of the rights it enshrined. However, for those lacking capacity to make decisions for themselves, no framework was available for the right to liberty to be upheld when cared for by the State. As a consequence, the UK government was criticised in the leading case of *R v Bournewood Community Mental Health NHS Trust ex parte L (Secretary of State for Health and others intervening)* [1998] 3 All ER 289 HL cited on appeal to ECtHR as *HL v United Kingdom (Bournewood)* [2004] 40 EHRR 761. The government attempted to bridge the gaps highlighted by ECtHR by amendments to the Mental Capacity Act 2005 which provided an administrative regime of deprivation of liberty safeguards to authorise and review care provided to those in residential/hospital accommodation. The new regime was deficient in two important areas because it failed to give a definition of what might amount to a deprivation of liberty and because it provided no protection for those who were provided with services by the State outside the residential sector, but where the services were such that they amounted to a deprivation of liberty.

In *P v Cheshire West and Chester County Council and Another; P and Q v Surrey County Council* [2013] UKSC 19, [2014] COPLR 313, SC (referred to as *Cheshire West* and *MIG and MEG*) the Supreme Court addressed these

issues by devising a test for when there may be a deprivation of liberty and confirming that a whole range of provision by the State from high-end secure residential care to domiciliary packages of support can operate as a deprivation of liberty for which safeguards need to be in place. In consequence of this decision various attempts have been made to provide a procedure for the wide range of situations that now come within the test suggested by the Supreme Court in the *Cheshire West* case, including rule changes, and the validity of the test has been criticised. Whilst jurists, academician, lawyers, judges and the Law Commission argue about how best to protect the most vulnerable in our society within the framework of the European Convention the reality is that, in the absence of a statutory framework for anything other than residential care, the responsibility for safeguarding liberty lies with the Court of Protection

This Handbook is therefore designed to assist legal, medical and social work practitioners to navigate the law, practice and procedure as it currently stands relating to this sensitive and complex area, so as to provide the best possible protection for some of the most vulnerable in society.

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