Deprivation of Liberty: 
the Bournewood proposals, the Mental 
Capacity Act 2005 and the decision in JE v 
DE and Surrey County Council

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Introduction

This article first considers how the concept of “deprivation of liberty” under Article 5(1) of the ECHR should be understood in the light of the jurisprudence of the European Court of Human Rights (‘ECtHR’), domestic legislation and guidance and domestic case law, including, in particular, the recent judgment of Munby J in JE v DE and Surrey County Council.\(^1\) It then considers how the emerging differences of definition of “deprivation of liberty” might be reconciled, and concludes with some practical guidance for those concerned with the care of incapable adults.

‘Deprivation of liberty’: the case-law of the ECtHR

As is well known, Article 5(1) ECHR provides that no one shall be deprived of their liberty save in the cases that it prescribes and in accordance with the law. The ECtHR has consistently emphasised that the concept of “deprivation of liberty” is an autonomous concept. Exactly what the concept entails is a question that the ECtHR has had regular cause to consider. Unfortunately, and as analysed further below, its answers\(^2\) have not been entirely consistent.

As regards the care of incapable adults, the leading Strasbourg case remains HL v United Kingdom,\(^3\) more commonly known as the Bournewood decision.\(^4\) Here:

a. HL was incapable of making decisions about his residence and treatment;
b. he was admitted to hospital for in-patient investigation and treatment;
c. contact between him and his long-term carers was initially prohibited while he remained in hospital, and then subsequently restricted by the hospital to one visit a

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\(^1\) [2006] EWHC 3459 (Fam).
\(^2\) For present purposes, the most relevant decisions are the following: Guzzardi v Italy (1980) 3 EHRR 333; Ashingdane v United Kingdom (1985) 7 EHRR 528; Nielsen v Denmark (1988) 11 EHRR 175; HM v Switzerland (2002) 38 EHRR 314; HL v United Kingdom (2004) 40 EHRR 761 and Storck v Germany (2005) 43 EHRR 96. The decisions are discussed further below in the section dealing with the case of DE.\(^5\) (2004) 40 EHRR 761.
week;

d. he was sedated while in hospital which “ensured that he remain tractable”, although he was not so sedated while in the community;

e. he was kept under continuous observation by nursing staff;

f. those responsible for his care indicated that, if he tried to leave the hospital at all, then they would arrange for him to be assessed with a view to detaining him under the Mental Health Act 1983 (“MHA”).

The ECtHR found that HL was deprived of his liberty within the meaning of Article 5(1), giving the following reasons:

89. It is not disputed that in order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance …

...

91. Turning therefore the concrete situation as required by the Ashingdane judgment, the Court considers the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems … to the date he was compulsorily detained. The correspondence … reflects both the carer’s wish to have the applicant immediately released to their care and, equally, the clear intention of Dr M and the other relevant health care professionals to exercise strict control over his assessment, treatment, contacts, and, notably, movement and residence … the applicant’s contact with his carers was directed and controlled by the hospital … the concrete

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4 After the domestic decision: R(L) Bournewood Community & Mental Health NHS Trust [1999] 1 AC 458.
5 Above, note 3, paragraph 46.
6 Ibid, paragraph 46.
7 Note that Article 2 of Protocol 4 of the ECHR provides that “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence … 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
8 Above, note 2.
situation was the applicant was under continuous supervision and control and was not free to leave.

92. The Court would therefore agree with the applicant that it is not determinative whether the ward was “locked” or “lockable”.

93. ... each case has to be decided on its own particular “range of factors” and, while there may be similarities between the present and the HM\(^9\) case, there are also distinguishing features. In particular ... a regime entirely different to that applied to the present applicant (the foster home was an open institution which allowed freedom of movement and encouraged contacts with the outside world) allows a conclusion that the facts of the HM case were not of a “degree” or “intensity” sufficiently serious to justify the conclusion that she was detained.

The European Court found that the deprivation of liberty HL suffered was not “lawful” within the meaning of Article 5(1), adopting the following analysis:

118. It is true that, at the particular time of the applicant’s detention, the doctrine of necessity and, in particular, the “best interests” test were still developing ... It is therefore true that each element of the doctrine might not have been fully defined in 1997 [the time of HL’s detention] ...

119. Whether or not the above allows the conclusion that the applicant could, with appropriate advice, have reasonably foreseen his detention on the basis of the doctrine of necessity (Sunday Times v UK (1979) 2 EHRR 245 at paras 49 and 52), the court considers that the further element of lawfulness, the aim of avoiding arbitrariness, has not been satisfied.

120. 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 ... In particular and most obviously, the court notes the lack of any formalised admission procedures which indicate who can propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions. There is no requirement to fix the exact purpose of admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach to that admission. Nor is there any specific provision requiring a continuing clinical assessment of the persistence of a disorder warranting detention. The nomination of a representative of a patient who could make certain objections and applications on his or her behalf is procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of

\(^9\) Above, note 2.
equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities.

... 

123. The government’s submission that detention could not be arbitrary within the meaning of art 5(1) because of the possibility of a later review of its lawfulness disregards the distinctive and cumulative protections offered by paras 1 and 4 of art 5 of the Convention: the former strictly regulates the circumstances in which one’s liberty can be taken away whereas the latter requires a review of its legality thereafter.

No damages were awarded to HL because the European Court considered that a declaration afforded him just satisfaction for what was a “procedural” violation.\textsuperscript{10} Importantly, and a point to which we shall return, the European Court did not decide whether or not an application for a declaration in the inherent jurisdiction could meet the requirements of review under Article 5(4), because no example of such an application concerned with deprivation of liberty made at the relevant time was cited to it.\textsuperscript{11}

The Department of Health interim guidance following \textit{Bournewood}

The Department of Health issued interim guidance in December 2004 to advise health and social services authorities on the steps they should take pending the development of a new Mental Health Bill which would provide the safeguards the ECtHR had found were lacking.\textsuperscript{12}

The guidance set out what were considered to be the factors which might render the arrangements made for an incapable person in hospital or a care home a deprivation of liberty within the meaning of Article 5(1). It provided as follows:

\textsuperscript{10} \textit{Ibid} paragraphs 146-150.
\textsuperscript{11} \textit{HL} at paragraph 141.
\textsuperscript{12} Available at \url{http://www.dh.gov.uk/en/Policyandguidance/Healthandsocialcaretopics/Mentalhealth/DH_4077674}. 
14. The European Court’s judgment does not, therefore, mean that incapacitated patients admitted to hospital or care homes are automatically deprived of their liberty, even if staff would prevent them leaving unescorted for their own safety.

15. There must be particular factors which provide the “degree” and “intensity” to render the situation one of deprivation of liberty. The factors might relate, for example, to the type of care being provided, its duration, its effects and the way in which the admission came about.

16. In this case, the European Court said that: “the key factors in the present case [is] that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements” 13: ...

We would suggest that it is clear that the Department of Health’s interpretation of the decision in HL relied upon the distinction of “intensity” and “degree” in the regimes to which individuals were subject when in residential or hospital care, and that it was anticipated that only persons experiencing the degree of restrictions to which HL was subject would require the additional procedural safeguards in order to protect their Article 5(1) rights.

The guidance advised that public authorities were under an obligation to act in a way that was compatible with ECHR rights (paragraph 10). It also stated that the effect of the Bournewood decision was that it would be unlawful to provide care in a way which amounted to a deprivation of liberty under Article 5(1), but that “nonetheless” authorities would need to continue to provide care and treatment for incapacitated patients, and the quality of that care should not be jeopardised in the period before new legislation was introduced (paragraphs 32-33). The implication appeared to be that authorities should carry on making the arrangements that they considered to be appropriate even if a breach of Article 5(1) was feared.

The Department of Health advised authorities to consider what steps they could take to protect vulnerable people against “arbitrary deprivation of liberty”. The suggested steps included:

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13 A reference to HL at paragraph 91.
• ensuring decisions as to capacity and best interests were taken in a structured way
• effective, documented care planning involving family, friends and others
• ensuring that alternatives to hospital or residential care were considered and restrictions minimised
• ensuring appropriate information was given to patients, family, friends and carers
• ensuring the involvement of local advocacy services
• taking proper steps to enable patients to maintain outside contacts
• ensuring the assessment of capacity and care plan were kept under review, and including an independent element in the review e.g. by seeking a second opinion (paragraph 37).

The guidance also warned against using the MHA solely to avoid an unlawful deprivation of liberty when it would not otherwise be appropriate (paragraph 38). There was no suggestion that an application to the Family Division of the High Court would be either necessary or sufficient to render what would otherwise be a breach of Article 5(1) of the ECHR lawful, or that it would be necessary to meet the need for an independent review of the detention under Article 5(4).

**Sections 5 and 6 of the Mental Capacity Act 2005**

Section 5(1) of the Mental Capacity Act 2005 (‘MCA’)\(^\text{14}\) provides protection to those who are caring for or treating an incapable person by authorising their actions when they act reasonably believing that the person lacks capacity and that the act is in their best interests. Section 6 of the MCA\(^\text{15}\) further provides that such actions, which amount to restraint, are only authorised if the carer reasonably believes that the restraint is reasonably necessary to prevent harm to the incapable person, and the restraint is a proportionate response to the likelihood of the incapable person suffering harm and the

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\(^\text{14}\) Which will come into force in October 2007.

\(^\text{15}\) Which will similarly come into force in October 2007.
seriousness of that harm. While section 6(4) of the MCA provides that restraint includes restriction of a person’s liberty of movement, section 6(5) expressly provides that deprivation of liberty within the meaning of Article 5(1) of the ECHR is not included within this definition of restraint.

There will therefore be a point at which a restriction on a person’s liberty of movement, either by way of extent or passage of time, becomes a deprivation of liberty which cannot be authorised under the MCA as it currently stands. Where that point is, however, remains uncertain. Moreover, no consensus is emerging as to how that point should be identified, whether it be in guidance issued by the Government, or by the Court in its judgments.

The Code of Practice accompanying the Mental Capacity Act 2005

The MCA Code of Practice,\(^{16}\) which was laid before Parliament in February 2007, and which came into force in April 2007, addresses the question of how a deprivation of liberty (which cannot be authorised under the MCA as it is currently drafted) and a restriction on liberty (which can be so authorised) should be distinguished. At Chapter 6, where the effects of section 5 and 6 of the MCA are considered, the MCA Code provides:

> It is difficult to define the difference between actions that amount to a restriction of liberty and those that result in a deprivation of liberty. In recent legal cases, the European Court of Human Rights said that the difference was “one of degree or intensity, not one of nature or substance”. There must be particular factors in the specific situation of the person concerned which provide the “degree” or “intensity” to result in a deprivation of liberty. In practice, this can relate to:
> 1. The type of care being provided
> 2. How long the situation lasts
> 3. Its effects, or
> 4. The way a particular situation came about.

The European Court of Human Rights has identified the following as factors contributing to deprivation of liberty in its judgments on cases to date:

> Restraint was used, including sedation, to admit a person who is

resisting

- Professionals exercised complete and effective control over care and movement for a significant period
- Professionals exercised control over assessments, treatment, contacts and residence
- The person would be prevented from leaving if they made a meaningful attempt to do so
- A request by carers for the person to be discharged to their care was refused
- The person was unable to maintain social contacts because of restrictions placed on access to other people
- The person lost autonomy because they were under continuous supervision and control

It is clear that the concept of deprivation of liberty adopted by the Code follows fairly closely that put forward in the interim guidance issued by the Department of Health, itself following the Bournewood judgment, and is similarly focussed on the “intensity” and “degree” of intrusion into the life of HL consequent upon his admission to hospital.

The guidance contained in the MCA Code as to how a deprivation of liberty is to be determined is highly relevant because section 42(4) of the MCA provides that a person acting in relation to a person who lacks capacity must have regard to the Code. The MCA Code itself states in the introduction that:

*The Act does not impose a legal duty on anyone to “comply” with the Code – it should be viewed as guidance rather than instruction. But if they have not followed relevant guidance contained in the Code then they will be expected to give good reasons why they have departed from it.*

As we will suggest in more detail below, where there is a real difference between the approach of the statutory Code and the Courts as to how a deprivation of liberty should be defined, authorities will be placed in an invidious position when seeking to avoid claims for breaches of Article 5(1) on the one hand, and accusations of failure to protect the vulnerable or excessive or inappropriate use of the MHA on the other.

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17 Paragraph 6.52
18 Introduction, p. 1.
The Code of Practice accompanying the Bournewood proposals

At the end of December 2006, the Department of Health issued a Draft Illustrative Code of Practice\(^{19}\) to provide “information” about how the proposed amendments to the MCA contained in the Mental Health Bill should operate. The intention is that the provisions (called the Bournewood safeguards) will apply to people who are, or who are likely to be, deprived of their liberty for the purpose of being given care or treatment in hospitals or care homes.\(^{20}\) A “Bournewood authorisation” would be required where a person is to be deprived of their liberty and the Draft Illustrative Code of Practice provides extensive detail as to the procedure for obtaining such an authorisation.

For present purposes, the relevant parts of the Code are as follows:

19. The meaning of deprivation of liberty is a question for the Courts.

...  

21. ... it is not possible to state that a particular measure would or would not constitute a deprivation of liberty in ECHR terms in every case. It is necessary to consider all the factors involved on an individual basis.

...  

26. Deprivation of liberty may result from restrictions placed on a person by actions or omissions of the professionals providing treatment and care. The physical or psychological effects of illness or disability would not in themselves mean that a person is being deprived of their liberty.

...  

28. When assessing whether a person is or, may be, deprived of their liberty it is necessary to consider the combined impact of all restrictions placed upon them. Based on the case law, the following factors may be

\(^{19}\) Almost simultaneously with the judgment of Munby J considered below. Available from http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_064603, The intention is that the guidance will be included in the MCA Code of Practice.

\(^{20}\) Paragraph 4.
considered by the courts to be relevant when considering whether or not deprivation of liberty arises:

- The person is not allowed to leave the facility
  
  ... restrictions placed for the person’s protection would not necessarily amount to a deprivation of liberty in the absence of other restrictions ...

  ...

- The person has no or very limited choice about their life within the care home or hospital

  ...

- The person is unable to maintain contact with the world outside the care home or hospital

  ...

- Restraint is/was used on admission and the person is not realistically subsequently able to leave

It appears to us that the authors of this guidance are adopting a very similar approach to the definition of deprivation of liberty. Also, significantly, they consider that restrictions imposed in an incapable person’s best interests may not amount to a deprivation of liberty,\(^{21}\) although there is no more detailed guidance on that.

**The decision in JE v DE and Surrey County Council**

At almost exactly the same time as the guidance analysed above was published, judgment was handed down by Munby J in the case of *JE v DE and Surrey County Council*.\(^{22}\) As is set out in more detail below, the decision is in significant ways incompatible with the published guidance. It is also difficult to square in some respects with the decisions of the ECtHR discussed above.

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\(^{21}\) I.e. in line with the decision in *HM v Switzerland* (2002) 38 EHRR 314.

\(^{22}\) [2006] EWHC 3459 (Fam).
In summary, the material facts in JE were as follows:\textsuperscript{23}:

a. DE lacked capacity to make decisions about his residence and the arrangements for his social care;

b. JE and DE had a long-standing relationship;

c. after DE had lost capacity there were many allegations of neglect and abuse of DE by JE when they were residing together, and she had terminated contact between DE and his daughter EW;

d. DE was admitted to a residential care home by Surrey after JE put DE on the street in his pyjamas, and asked for him to be taken away;

e. because of his incapacity, DE had no memory of these incidents;

f. while at the residential care home DE repeatedly asked to live with JE, but Surrey did not allow him to go;

g. Surrey did not consider that it was in DE’s best interests to live with JE, but made it clear that it would facilitate his residence anywhere else apart from with JE; it stated that it was restricting his residence under the doctrine of necessity;

h. Surrey did not restrict contact between DE and JE, save for a brief period when JE was mentally unwell and her telephone calls were abusive and distressing to DE and save that DE was not permitted to go on unsupervised outings with JE;

i. Surrey did not restrict DE’s activities in and around the home, and facilitated trips away from the home as far as DE was able to cope with them;

j. Surrey did not impose any other supervision, restraint or control on DE.

Surrey submitted that DE’s case was closely analogous to that of \textit{HM v Switzerland},\textsuperscript{24} which concerned the detention of an elderly lady under the Swiss Civil Code. She had been compulsorily admitted to a residential care home following a history of neglect and

\textsuperscript{23} See paragraphs 79 to 91.

\textsuperscript{24} (2002) 38 EHRR 314.
lack of co-operation with social services when at home with her son.\textsuperscript{25} The European Court found that she had freedom of movement outside the home and was able to maintain contact with the outside world.\textsuperscript{26} It was material that the admission to the home was in her best interests.\textsuperscript{27} Although HM had initially said that she wanted to leave the home, she eventually agreed, after a domestic court hearing, to stay voluntarily. The Court concluded that she was not deprived of her liberty at any stage.

Munby J doubted the validity of the reasoning of the European Court in \textit{HM} and preferred the analysis of the dissenting Judges, particularly Judge Loucaides who said:

\textit{“The applicant’s placement in the nursing home was against her will. It was implemented by the police under an order explicitly defined by the national law itself and referred to by the national authorities as a measure of deprivation of liberty, and she was not permitted to leave the nursing home … Therefore, the fact referred to by the majority that “the applicant was not placed in the secure ward of the nursing home … Rather, she had freedom of movement and was able to maintain social contact with the outside world” does not in any way change the reality and severity of the restrictive regime in which the applicant was placed”}\textsuperscript{28}

Judge Loucaides further stated that it was an error to confuse the questions of whether there had been a deprivation of liberty and whether it was justified. If they were, in his view properly, kept separate, then the question of whether the arrangement was in someone’s best interests was not relevant to the question of whether he was deprived of his liberty.

Munby J went on to analyse what he considered to be the ECtHR’s “retreat” from the reasoning of the majority in \textit{HM} in subsequent decisions.\textsuperscript{29} First, in \textit{HL}, the European Court distinguished \textit{HM} on the grounds that:

\textit{“… it was not established that HM was legally incapable of expressing a...”}

\begin{footnotes}
\footnotetext[25]{\textit{Ibid}, paragraph 44.}
\footnotetext[26]{\textit{Ibid}, paragraph 45.}
\footnotetext[27]{\textit{Ibid}, paragraph 48.}
\footnotetext[28]{\textit{Ibid}, dissenting judgment of Judge Loucaides.}
\footnotetext[29]{\textit{JE} at paragraph 48 ff.}
\end{footnotes}
view on her position. She had often stated that she was willing to enter the nursing home and, within weeks of being there, she agreed to stay. This, combined with a regime entirely different to that applied to the present applicant (the foster home was an open institution which allowed freedom of movement and encouraged contact with the outside world), leads to the conclusion that the facts in HM v Switzerland were not of a “degree” or “intensity” sufficiently serious to justify the finding that she was detained.\footnote{HL V United Kingdom (2004) 40 EHRR 761 at paragraph 94.}

It thus appears that the ECtHR distinguished HL from HM on two grounds: the presence of “consent” and the nature of the two regimes. Munby J, however, proceeded to focus on the former rather than the latter. In our view, this was an error. First, the judgment in HM does not bear the interpretation that she was consenting. Second, and in part because of the invalidity of the first point of distinction, the substantial differences between the two regimes were the material reason for the differences in the two decisions. This was a significant reason which was unfortunately minimised by Munby J.

Having analysed HL, Munby J turned to the judgment of the European Court in Storck v Germany.\footnote{(2005) 43 EHRR 96.} Again, he found that the ECtHR distinguished HM, on the basis that HM was legally capable and was “undecided” about whether she should stay or not and therefore might be understood to be consenting.\footnote{DE at paragraph 50, referring to Storck at paragraph 77.} However, again, this attempt at distinction does not seem to be consistent with the facts as they were found by the European Court in its judgment in HM. Crucially, it seems to us clear that, at the outset at least, HM was not consenting, whether capably or not: she applied to the local court for release and only later relented and agreed to stay.

We are therefore doubtful, given the poor quality of the reasons advanced by the European Court for distinguishing the decision in HM, whether Munby J was wholly correct either to dismiss the decision as of “very little assistance” in DE’s case, or to reject the distinction advanced by Surrey between the intensity of the regimes in HM’s and HL’s case as the real reason why HM was not deprived of liberty, whereas HL was.
And similarly, we doubt the validity of a rejection of the assertion that the position of DE was closely analogous to that of HM and not HL.

Munby J concluded\(^{33}\) that Strasbourg jurisprudence suggested that the question of whether there was a deprivation of liberty in an individual case should be approached by the identification of three elements:

b. an objective element, namely a person’s confinement in particular restricted space for a not negligible length of time: the key factor being whether the person is “free to leave”, and this being determined by the degree of control exercised over them;

c. a subjective element, namely that the person has not validly consented, and an incapable person cannot be assumed to have validly consented; and

d. that the deprivation of liberty must be imputable to the State.

In our view, a fundamental problem with this formulation, certainly as a guide to how DE’s case might be decided and probably more generally, is that the question of whether someone is “free to leave” simply begs the question of whether he is deprived of his liberty or suffering a restriction on his liberty. DE’s case, in Munby J’s view,\(^{34}\) came down to the fact that he was not permitted to return to live with his wife, although he was “free to leave” to go anywhere else at all. However, in one sense, contended for by Surrey, he was “free to leave”, but in another, contended for by DE and JE, he was not.

Further, Munby J’s formulation appears to make the question of the degree of control exercised subservient to the question of whether the person is “free to leave”. In our submission that is a misstatement of the decision in \(HL\), and improperly reduces the multi-factorial question of “intensity and degree” to one question of whether the person is free to leave. In our view, the question of when, how often and in what circumstances a

\(^{33}\) At paragraph 77. In his conclusion, he placed considerable weight upon \(Storck\). We query whether this was entirely appropriate, given that the facts of this case seem much more closely analogous to those of \(HL\) than \(HM\). Ms Storck was under continuous supervision and control in a psychiatric hospital, she was shackled to ensure her stay, and when she escaped she was brought back by the police. She was incapable of consenting because of the effects on her of the medication given to her for her disorder.

\(^{34}\) Set out further below.
person is “free to leave” is part of an assessment of the “intensity and degree” of the regime to which is subject, which in its wide sense determines whether he is suffering a deprivation of liberty.

Munby J, applying his analysis of the European law set out above, and setting store by DE’s expressions of his wishes (although he was incapable, and, we would suggest, the strength of a wish in an incapable person is not the measure of its degree of relevance, but rather the degree of capacity that underlies it) found that DE had suffered a deprivation of his liberty. He gave the following reasons for his decision:

114. ... I accept that DE had within the X home, and has had and has within the Y home, a very substantial degree of freedom, just as he had and has a very substantial degree of contact with the outside world. And I can agree ... that DE has never been subjected to the same invasive degree of control within the X home and the Y home, let alone the same complete and effective control within the two homes, to which HL ... was apparently subjected. For example, ... DE has never been subjected to either physical or chemical restraint within either institution.

115. But the crucial question in this case, as it seems to me, is not so much whether (and, if so, to what extent) DE’s freedom or liberty was or is curtailed within the institutional setting. The fundamental issue in this case, in my judgment, is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home ... I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses, specifically removing himself to live at home with JE.

The current position: how will a deprivation of liberty now be defined?

The current state of the guidance and the case law (and it is understood that a further judgment from Munby J on the question in another case will be given soon) is most
uncertain for the following reasons:

a. there is a significant divergence of view as to how a deprivation of liberty should be distinguished from a restriction on liberty, in particular:
   • whether restrictions of the scale imposed in HL are the point at which a deprivation is reached, or whether lesser restrictions are sufficient;
   • whether it is whether someone is “free to leave” which is the single determining factor, or whether there should be adherence to the wider concept of the “intensity and degree” of the control exercised over the person;
   • what being “free to leave” should mean where only one, but a nevertheless material, restriction on leaving is imposed;

b. this divergence of view is at least to some extent based upon materially different interpretations of the judgment of the European Court in HL, and of the European jurisprudence more generally, and in a context where the ECtHR’s own judgments lack complete consistency.

The Joint Committee on Human Rights, in its Fourth Report dated 4 February 2007, which included scrutiny of the Mental Health Bill, has stated that the difficulty with definition of deprivation of liberty should be addressed by its being defined in the statute. It considered Munby J’s judgment in DE’s case and suggested the following approach: “if it is known that a person will be taken from their home to a place where they will be prevented from leaving, and complete and effective control will be exercised over their movements, that person is deprived of their liberty from the point of removal from their home”. If this definition were to be adopted, an interesting question arises as to whether DE would be considered to be deprived of his liberty, given that the regime to which he is subject seems to be accepted not to be as complete and effective as that to which HL was subject.

It seems us that there are two possible solutions to this dilemma:

35 Available at http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/40/4005.htm#a10.
36 Ibid at paragraph 89.
a. the Court considers the draft Code Illustrative Code of Practice and decides whether or not it is lawful and should be followed, or should be amended, perhaps as the Joint Committee suggests;

b. central government modifies its guidance, either (1) retaining its commitment in the Draft Illustrative Code of Practice to the question of whether something is a deprivation of liberty being a matter for the Court, so that the criteria to be adopted more closely follow the developments of the domestic if not the European case law; or (2) adopting the Joint Committee’s formulation having reviewed the case law.

What can and should authorities do now when they are contemplating a potential deprivation of liberty?

Although, until the decision in DE’s case, authorities tended to follow the Department of Health’s interim guidance, consideration will now have to be given to whether an application for a declaration, or an admission under the MHA, must be made in every case where there may be a deprivation of liberty in the DE sense in order to avoid a challenge on the basis that there has been a breach of Article 5. As previously, however, authorities will be expected to press on with their care and treatment plans rather than neglect their responsibilities to the vulnerable or to use the MHA improperly (against which they were clearly advised in the 2004 Interim Guidance discussed above).

In the circumstances, our cautious advice would be to invoke guardianship powers under the MHA if possible, or to make applications to the Court, at least in cases where there is any dispute, or any suggestion that the individual is not fully compliant. The consequences of this approach will, however, be costly to individual authorities, and could potentially impose a huge burden on the Family Division (and then the Court of Protection come October 2007) until the new legislation is in place.

In this regard, we note that another recent decision of Munby J is of some assistance to
authorities considering detention. In City of Sunderland v PS and CA\textsuperscript{37}, he had cause to consider whether the court on an application for declaratory relief under the inherent jurisdiction had the jurisdiction to make an order permitting an authority to use appropriate means to deprive a patient\textsuperscript{38} of their liberty. Munby J reviewed the authorities\textsuperscript{39} and concluded that:

“23. if the inherent jurisdiction is to be invoked to justify the detention of someone like PS in somewhere like the T unit, the following minimum requirements must be satisfied in order to comply with Article 5:

i) The detention must be authorised by the court on application made by the local authority and before the detention commences.

ii) Subject to the exigencies of urgency or emergency the evidence must establish unsoundness of mind of a kind or degree warranting compulsory confinement. In other words, there must be evidence establishing at least a prima facie case that the individual lacks capacity and that confinement of the nature proposed is appropriate.

iii) Any order authorising detention must contain provision for an adequate review at reasonable intervals, in particular with a view to ascertaining whether there still persists unsoundness of mind of a kind or degree warranting compulsory confinement.”

In PS, Munby J was content to make an order (on an interim basis) that:

“it is lawful being in PS’s best interests for the [local authority] by its employees or agents to use reasonable and proportionate measures to prevent PS from leaving [the T unit].”\textsuperscript{40}

As noted above, the ECtHR has yet to pronounce as to whether such a declaration does, in fact, comply with Article 5 ECHR. However, for the time being, the decision in PS fortifies us in our advice that local authorities should at the very least give serious

\textsuperscript{37} [2007] EWHC 623 (Fam).

\textsuperscript{38} I.e. a person lacking capacity or, conceivably, a vulnerable adult within the meaning given the phrase by Munby J in A Local Authority v MA & Ors [2005] EWHC 2942 (Fam) at paragraph 77.

\textsuperscript{39} Including, in particular, Re C (Detention: Medical Treatment) [1997] 2 FLR 180, a decision relating to the Court’s jurisdiction in respect of children.
consideration to applying to the Court for a declaration in cases where (potential) deprivations are under consideration.

**What can authorities do retrospectively after a deprivation of liberty has started?**

It seems clear from the judgment in *HL* that a subsequent review of detention under Article 5(4) cannot retrospectively authorise any prior detention which was not lawful under Article 5(1). However, where detention is on-going it should be possible to authorise future detention (as per *PS*). It should also be possible to obtain a declaration that any past detention was in the patient’s best interests, which would render any past breach of Article 5(1) procedural, rather than substantive. It would then be open to the authority to argue that no damages would be due under the ECHR, following the approach of the European Court in *HL*.

Furthermore, once a deprivation of liberty has started, then, as *PS* emphasises, it is incumbent upon the authority to arrange a review of that deprivation on a regular basis. In such a review, the authority will have to consider (and to be seen conscientiously to consider) in particular, whether there are any other less restrictive measures than deprivation that that could be invoked.

**What difference will be made by the coming into force of the Mental Capacity Act 2005?**

Given the exclusion by section 6 of the MCA of any power to authorise a deprivation of liberty, the coming into force of the MCA as it is currently drafted offers no solution. Unless a particular regime can be brought within the definition of a restriction on liberty which may be authorised under sections 5 and 6, it will remain potentially in breach of Article 5. This, of course, throws one back to the question of where the line between a restriction on liberty and a deprivation of liberty should be drawn.

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40 Paragraph 30.
Conclusion: what are the implications for the application of the *Bournewood* proposals of the *DE* decision?

It seems to us that the clear implication of the decision in *DE*’s case is that, if the approach suggested by Munby J is adopted, many more persons will need to be dealt with under the new regime of authorisation than had probably been anticipated. It may be that examining these consequences will lead the government or the courts to take a different view of the definition of deprivation of liberty. Otherwise, the resource implications for those operating the new regime, authorities and the Court of Protection, may be substantial.

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