# Court of Protection Issues

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## Introduction

1. This paper provides an overview of the procedure which has been put in place to implement the streamlined process by which the Court of Protection may authorise deprivations of liberty following the Supreme Court decision in *P v Cheshire West and Chester Council and P and Q v Surrey County Council* [2014] UKSC 19.

2. We aim to provide an overview of the background leading to the evolution of this new procedure and an update on the steps taken to implement it. Attached to this document is a Guidance Note summarising the key parts of the procedure produced by the editors of the Thirty Nine Essex Street Court of Protection Newsletter.

## Background

3. Most readers will be familiar with the Supreme Court judgment in *Cheshire West* and more than aware of its ramifications. Nonetheless, its importance is such that we reproduce a brief synopsis of it here.

4. *Cheshire West* was made up of two conjoined appeals. The first concerned two sisters, P and Q, both of whom had learning disabilities and lacked the capacity to consent to any arrangements for their care. The sisters were taken into local authority care by Surrey County Council in their late teens. The older of the two sisters, P, was taken into foster care, attended further education, and appeared entirely happy with her living arrangements. She made no attempt to leave her foster mother's home, but it was conceded that had she attempted to do so, her foster mother would have restrained her.

5. The younger of the two sister, Q, was aged 15 at the relevant time and exhibited more challenging behaviour. She was housed in a group home and attended the

same further education unit as her sister. She similarly showed no wish to leave her accommodation but again, would have been prevented from doing so had she tried.

6. In the Court of Protection Best Interests proceedings, it was determined that the sisters' living arrangements did not amount to a deprivation of liberty. The Court of Appeal upheld this view, holding that although the sisters were not free to leave their accommodation, their living arrangements were relatively normal when compared to other teenagers'; further, that their treatment was no more intrusive than was necessary for their own protection. The sisters appealed to the Supreme Court.

7. The second appeal was that of P, a 39 year-old with cerebral palsy and Down's syndrome. P was housed in local authority accommodation with other residents and carers. He was unable to leave the accommodation alone but was provided with support to attend a day centre and visit his mother. P's sometimes aggressive and problematic behaviour necessitated a care plan which included the occasional requirement for physical restraint plus a particular form of dress.

8. In Best Interests proceedings, the Court of Protection found that it was lawful and in P's best interests to continue to reside in the accommodation under the care plan but also determined that the plan *did* constitute a deprivation of P's liberty for the purposes of Article 5 ECHR. The local authority, Cheshire West, appealed to the Supreme Court.

9. The Supreme Court found that both sets of circumstances constituted a deprivation of liberty. Fundamentally, they confirmed that the extant meaning of Article 5 prevailed: that the difference between a deprivation and a restriction of liberty was a matter of fact and degree depending on the specific factual circumstances involved, but in cases concerning the mentally disturbed in hospitals or care homes,

the test to be applied was whether or not the person was under continuous supervision and control and was not free to leave. This is an objective test.

10. The same test was held to apply regardless of whether the purpose of the confinement was benevolent or beneficial and any lack of objection by the person confined was held to be immaterial. As Baroness Hale suggested: *"we should not let the comparative benevolence of the living arrangements with which we are concerned blind us to their essential character if indeed that constitutes a deprivation of liberty"* (paragraph 35). Mentally incapacitated individuals have the same rights to liberty as everyone else: living arrangements which would amount to a deprivation of liberty for a non-disabled person must amount to a deprivation of liberty in the case of a disabled person too. Ultimately: *"the subjective element in deprivation of liberty is the absence of valid consent to the confinement in question"*. (Lord Kerr, paragraph 81)

11. *Cheshire West* makes clear that courts should err on the side of caution in deciding what constitutes a deprivation of liberty (paragraph 57). Where an individual is deprived of their liberty, there must be periodic independent checks on whether the arrangements made for them are in their best interests; such checks should not, however, be necessarily elaborate or complex.

12. Post *Cheshire West*, a large increase in the number of cases before the Court of Protection was predicted, reflecting the judgment that deprivations should more readily be put before the court and checks should be more frequently conducted, but that said checks should be simplified.

13. The practical and procedural implications of this was considered in the first judgment of *Re X and Others (Deprivation of Liberty* [2014] EWCOP 25 (hereafter, "*Re X (No. 1)"*). The objective of judgment, delivered by the President of the Court of the Protection, Sir James Munby, was to devise a "'streamlined' process, compatible with all the requirements of Article 5, which will enable the Court of Protection to

deal with all DoL cases in a timely but just and fair way." One of the intentions behind this process was to distinguish, where possible, between cases that could be determined on the papers and those that would require an oral hearing.[1]

14. Munby J set himself 25 questions requiring responses.[2] In *Re X (No. 1)*, he provided his preliminary responses. These were:

i. Any authorisation of a DoL by the Court of Protection should be by a judge, not a court officer.

ii. An authorisation for a deprivation of liberty can be determined on the papers alone without recourse to an oral hearing, so long as there is an unimpeded right to request a speedy review at an oral hearing.

iii. In order to determine which cases may be determined on the papers, and which necessitate an oral hearing, the following 'triggers' will be considered: these will indicate the need for an oral hearing. The triggers are:

(a) Any contest, whether by P or anyone else, to any of the issues regarding P's age, unsoundness of mind, the nature of relevant care arrangements, the basis upon which P's lack of capacity is determined, the basis on which the arrangements may or may not attributable to the state, P's best interests (see paragraph 35 (ii)-(vii)).

(b) Any failure to comply with the requirement that P and all other relevant people in P's life should be notified of the application and their wishes, feelings and views canvassed.

[1] At the time of writing, the predicted deluge of cases does not appear to have materialised. Nonetheless, an appropriate process has been devised and training provided to judges in anticipation of an increased caseload.
[2] See the annexe to the judgment in *Re X No.1* for the original 25 questions.

(c) Any concerns arising out of information supplied in accordance with the requirement that the court be notified of

1. P or any other relevant person's wishes and feelings;

2. any reason for particular urgency in determining the application;

3. any factors that ought to be brought specifically to the court's attention.

(d) Any objection by P.

(e) Any potential conflict with any decision such as an advance decision by P, a relevant decision under a lasting power of attorney, or a decision by P's deputy.

(f) Any other reason that the court thinks an oral hearing necessary or appropriate.

iv. Certain matters must be addressed in evidence in order to satisfy the requirement that a deprivation is in accordance with law. Evidence should be succinct and focused. The totality of material in a 'streamlined' application need not exceed 50 pages at most. In order to satisfy these requirements, the following evidence must be brought before the court:

(a) Medical evidence establishing unsoundness of mind of a kind warranting the proposed measures which persists at the time when the decision is taken.

(b) Professional medical opinion establishing unsoundness of mind. Where the facts are clear, this will not involve expert psychiatric opinion: a GP's evidence may suffice in some circumstances.

v. There is no requirement that P be joined to any application to a court for authorisation of a DoL. However, P should always be given the opportunity to be joined if he or she wishes and must be given the necessary support to express views about the application and to participate in proceedings to the extent that they wish. If P is a party to proceedings, he or she must have a litigation friend; if he or she is participating other than as a party, there is no such requirement.

vi. Where a deprivation of liberty has been authorised by the Court of Protection, annual reviews should be conducted, save where circumstances require more frequent reviews[3].

vii. The mandatory annual reviews of DoLs must be judicial.

viii. Annual reviews need not be oral; where appropriate, they can be on the papers. This is regardless of whether the initial DoL application was authorised via on an oral or paper-based assessment.

ix. A litigation friend does not have to act by a solicitor and can conduct litigation on P's behalf. However, a litigation friend who does not otherwise have rights of audience will require the permission of the court to act as advocate on P's behalf.

x. The following elements of COPR 2007 require amendment to enable a streamlined Article 5-compliant process:

(a) Rules 50/51 to remove the requirement for permission to start proceedings in a DoL case.

[3] A shorter period may be required in cases such as *Re GJ, NJ and BJ (Incapacitated Adults)* [2008] EWHC 1097 (Fam), [2008] 2 FLR 1295, *Re BJ (Incapacitated Adult)* [2009] EWHC 3310 (Fam) [2010] 1 FLR 1373, paras 12, 24. In *GJ, NJ and BJ*, for example, an initial review was ordered to be held within four weeks from the initial order, followed by internal reviews every eight to 10 weeks.

(b) Rule 89(3)(a) to remove the 21 day time limit in DoL cases.

(c) Section 53 of the 2005 Act in order to bring it into line with the amended s.46(2).

(d) Rule 89 to provide that any reconsideration in a DoL case of an order given by a judge shall not be heard by that judge but by a district or circuit judge.

(e) Rule 172 to provide that where reconsideration is permissible in accordance with Rule 89, there shall be no appeal from the original order but only from the order made on reconsideration.

(f) Rule 84 to ensure that if an oral hearing is directed, it will be before a district or circuit judge.

xi. PD4A, PD6, PD7, PD8A and PD10AA may also require amendment.

xii. New forms will be required for the 'streamlined' process. Their use will be mandatory.[4]

xiii. 'Bulk' applications will not be lawful. Separate applications must be made for each individual, even if there are a number of people in the same placement. However, material which is applicable to a number of individuals may be contained in a single 'generic' statement which may be attached to each individual application form.

15. Further guidance in relation to a number of the questions posed in *Re X (No.1)* was provided by Munby J

[4] A list of the questions that should be included on the form can be found at paragraph 35 of the judgment.

16. In *Re X and others (Deprivation of Liberty)* [2014] EWCOP 37 (hereafter "*Re X (No 2)*"), Munby J provided further guidance to the questions:

    i. Does P need to be joined to any application seeking authorisation of a DoL in order to meet the requirements of Article 5(1) and/or Article 6 ECHR?

    ii. If so, should there be a requirement that P have a litigation friend?

    iii. If P or the detained resident requires a litigation friend, can that be someone who does not otherwise have the right to conduct litigation?

17. Again, Munby J confirms his earlier finding: that there is no requirement that P be joined as a party. Given that the Court of Protection is an inquisitorial rather than an adversarial process, in which the function of the court is to engage in the process of assessing capacity and determining best interests rather than finding between two disputing parties, Munby J determines that the requirement that P be joined does not arise in domestic law.

18. As regards P's Article 5 rights: he or she has the right to 'take proceedings'; this does not necessitate being joined as a party. Similarly, as to Article 6: P must be able to participate in proceedings in such a way as to enable him or her to present his or her case 'properly and satisfactorily'. He or she must be given the opportunity to be joined if he or she so wishes but being joined is not mandatory. Significantly, however, Munby confirms that *"P will… need some form of representation, professional though not necessarily always legal."*

19. *Re X (No.2)* confirms that there is no obstacle, in principle, to P participating and being represented in proceedings in the Court of Protection without being joined as a party, and in such circumstances, in principle, there is no requirement for P to have a litigation friend. Nonetheless, the Rules as they currently stand (Rule 141(1)) requires P, if a party, to have a litigation friend.

20. As to the final issue, whether or not a litigation friend may conduct litigation or provide advocacy services, again, Munby J confirms that there is no *'fundamental, immutable rule'* that requires a litigation friend act by a solicitor. Rather, he confirms the judgment of Brooke LJ in *Gregory v Turner [2003] EWCA Civ 183, [2003] 1 WLR 1149*. That is: a litigation friend does not have to act by a solicitor and can conduct litigation on behalf of P; a litigation friend who does not otherwise have a right of audience requires the permission of the court to act as an advocate on behalf of P.

**The *Re X* procedure**

21. Following the first judgment in *Re X (No 1)* the Ministry of Justice and HMCTS wrote to Court of Protection users with its proposals for implementing the process outlined by the President or the "*Re X* process" as it has become known.

22. In summary a two phase process is envisaged for implementing the new procedure:

    (a) Phase one: issuing a new practice direction and forms to implement an interim process for dealing with court-authorised deprivations of liberty.

    (b) Phase two: collate feedback from users on the interim process and revise the forms, practice direction and process to take into account further judicial guidance, feedback from users and any changes coming out of the Court of Protection rules committee.

**Phase one: the interim *Re X* procedure**

23. Phase one of the process has now been completed. A new interim procedure came into effect on 17 November 2014.

24. The Court of Protection has issued a new practice direction which replaced practice direction 10AA as of 17 November 2014.[5]

25. The Court of Protection has also developed new forms and guidance for applications for court-authorised deprivations of liberty.[6]

26. A Guidance Note summarising the key parts of the interim *Re X* procedure is attached to this paper.

**When will the *Re X* procedure have to be used?**

27. A key issue not addressed by the President in *Re X (No 1)* and *Re X (No 2)* is when, in light of the Supreme Court's decision in *Cheshire West,* it will be necessary to apply for court-authorised deprivation of liberty under the *Re X* procedure. As recognised by the President in *Re X No (1)* the Supreme Court's decision raises potentially complex issues, including the extent to which purely private care arrangements amount to a deprivation of liberty within the meaning of Article 5 ECHR.

28. The short answer is that an application will have to be made in any circumstance in which an incapacitated adult or child over the age of 16 is being deprived or their liberty in a state-arranged or state-funded placement where a DOLs authorisation cannot be used to authorise a deprivation of liberty - i.e., any setting other than a registered care home or hospital.

29. In practice this would include a deprivation of liberty in the following care settings:

    (a) A supported living placement

    (b) Care at home where care is provided and/or organised and/or funded in part by an organ of the State

[5] Available online at http://www.judiciary.gov.uk/publications/10aa-deprivation-of-liberty/
[6] Available online at http://hmctsformfinder.justice.gov.uk/courtfinder/forms/cop-dol10-eng.pdf

The extent to which the care provided at home comes within the scope of Article 5 because of some involvement of the State was recognised as an area raising potentially complex issues by the Supreme Court in *Cheshire West* and the President in *Re X (No 1)*.

Far from being clarified by subsequent case-law, this issue has been further muddied by Mostyn J's decision in *Rochdale MBC v KW* [2014] EWCOP 45. In that case, Mostyn J had to grapple with the question of whether an adult cared for in her own home with a package of 24 hour care funded jointly by the local authority and the local CCG was deprived of her liberty within the meaning of Article 5. He held, at paragraph 26, that "*In cases such as this, where a person, often elderly, who is both physically and mentally disabled to a severe extent, is being looked after in her own home, and where the arrangements happen to be made, and paid for, by a local authority, rather than by the person's own family and paid for from her own funds, or from funds provided by members of her family, Article 5 is simply not engaged*".

Recognising that the real possibility that the decision was inconsistent with the Supreme Court's decision in *Cheshire West* he expressed the view that the matter should be reconsidered by the Supreme Court and determined that he had the power, sitting in the Court of Protection, to grant a leapfrog certificate for appeal to the Supreme Court. However, as the local authority did not consent to a leapfrog appeal, the matter is now on appeal before the Court of Appeal.

(c) Residential educational establishments

(d) Non-secure children's homes and residential special schools

Until recently, there was a live question as to whether the Court of Protection had the power to authorise a deprivation of liberty at a children's home or residential special school. This issue arose as a result of the wording of Guidance issued jointly by the President of the Court of Protection and Ofsted in February 2014, entitled

"Deprivation of liberty - guidance for providers of children's homes and residential special schools" . Paragraphs 4, 6 and 13 of that Guidance appeared to suggest that the Children's Homes Regulations 2001 and the National Minimum Standards for Children's Homes (which are applied to non-maintained residential special schools by the Education (Non-Maintained Special Schools) (England) Regulations 2011) prevent residential children's homes and residential special schools from depriving a person of his liberty.

This issue has now been clarified by as a result of two decision of Homan J: *Liverpool City Council v SG & Ors* [2014] EWCOP 10 and *Barnsley MBC v GS & Ors* [2014] EWCOP 46. Those cases clarify that the Court of Protection can authorise a person's deprivation of liberty within the setting of a children's home and a residential special school and that, to the extent that the Guidance is suggests otherwise, it is incorrect.[7] On area of uncertainty, identified by the President in *Re X (No 1)* as raising particularly difficult issues is the extent to which otherwise purely private care arrangements - for example, the care at home by the family of an elderly relative or spouse suffering from dementia – come within the ambit of Article 5 because of some involvement by the State, whether a local authority or the court. That question was considered by Mostyn J in a judgment handed down at the end of 2014.

**Watch this space**

30. There are a number of developments in the pipeline:

a. Permission to appeal was granted to Ps and the Law Society in *Re X;*

b. Mostyn J will be handing down a third judgment in *Re X;*

[7] See in particular paragraph 23 of the judgment of Holman J in the *Barnsley v GS* case.

c. Work is being carried out by the ad hoc Rules Committee to review the COP Rules;

d. New guidance is due to be issued from Department of Health.

e. Statutory Guidance laid before parliament as part of the Care Act 2014 will come into force. Unless Parliament passes a resolution providing otherwise, the final affirmative regulations and the final negative regulations come into force on April 1st 2015. The Care Act 2014 will introduce significant changes to the provision of care and support services.

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