

Alex Ruck Keene: Child Deprivation of Liberty conference 6 March 2023
supporting materials

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[...] these cases lie at the intersection of three different bodies of domestic law – mental health law, mental capacity law and family law – where judicial decision-making is spread over a variety of courts and tribunals which, by and large, are served by different sections of the legal professions too few of whom are familiar with all three bodies of law. The existence of these institutional and professional silos has bedevilled this area of the law at least since the earliest days of the Bournemouth litigation. One day, someone will write a critical, analytical history of all this – and it will not, I fear, present an altogether reassuring picture.

Sir James Munby, [speech](#) to be delivered to LAG Community Care
Conference 12 October 2018

Different stages of D

D age 15

[D \(A Child ; deprivation of liberty\), Re \[2015\] EWHC 922 \(Fam\) \(31 March 2015\)](#)
[\(bailii.org\)](#)

6. *The Applicant Trust submits that the circumstances in which D lives at Hospital B satisfy the first limb of the Cheshire West test namely:*

"the objective component of the confinement in a particular restricted place for a not negligible length of time."

7. *Further the Trust submits that D's parents cannot consent to his placement at Hospital B because such a decision, to consent to what would otherwise amount to a deprivation of liberty, falls outside the 'zone of parental responsibility'.*
8. *Accordingly, the Trust submits the appropriate course is to seek the court's approval of D's placement under the inherent jurisdiction of the High Court.*
9. *The local authority adopts a diametrically opposed stance. It submits that the circumstances of D's placement do not amount to a deprivation of liberty. Further, it submits that the decision of D's parents to consent to his placement at Hospital B falls within the proper exercise of parental responsibility. Accordingly what might otherwise constitute a deprivation of liberty does not do so because the second and third limbs of the test in Cheshire West are not satisfied namely:

" (b) the subjective component of lack of valid consent; and
(c) the attribution of responsibility to the state".*
10. *The children's guardian confined her submissions to observations that D was well placed at Hospital B and was progressing.*

D age 16

[Birmingham City Council v D \[2016\] EWCOP 8 \(21 January 2016\) \(bailii.org\)](#)

7. *The Official Solicitor goes further and contends that;*
 - a) *no parent in any circumstances may consent to the confinement of their child, whatever their age, in circumstances which absent a valid consent would amount to a deprivation of liberty; and*
 - b) *on that basis my decision in Trust A v X was wrong insofar as I held that D's parents could consent to his confinement in Hospital B when he was under 16 years of age: see paragraphs 52-66 of that judgment.*
8. *Whether I accept those submissions or not, I do accept that I should have expressed myself more precisely and felicitously by referring to D's 'confinement' at Hospital B (ie Limb 1 of Storck) rather using the phrase a 'deprivation of liberty' which, of*

course only arises if all three Limbs of Storck are satisfied (eg paragraphs 52 and 65 of *Trust A v X*).

[D \(A Child\) \[2017\] EWCA Civ 1695 \(31 October 2017\) \(bailii.org\)](#)

Sir James Munby

Article 5: the Strasbourg framework – children

30. *At this point, and not least because of the stance adopted by the Official Solicitor (see paragraph 12 above i.e. that at [9] above before Keehan J), I propose to address, head-on, a rather basic question to which, astonishingly, there appears to be no simple and clear-cut answer. It can be formulated in this way. Take a typical child say three or eight years old (the precise age is immaterial). By typical, I mean a child subject to no physical or mental disabilities who is, broadly speaking, at the same developmental stage as most children of the same age and who is living with parents at home, without any local authority involvement, in the kind of circumstances in which, broadly speaking, most children of that age are accustomed to live in contemporary Britain. Now such a child is living in circumstances which plainly satisfy the Cheshire West "acid test" – the child, to use Baroness Hale's words, "is under the complete supervision and control of those caring for her and is not free to leave the place where she lives." But common-sense would plainly indicate that such a child is not, within the meaning of Article 5, deprived of his or her liberty. But – and this is the key question – why not? Is it because (Storck component (a)) there is, nonetheless, no confinement? Is it because (Storck component (b)) there is, in accordance with Nielsen, an effective parental consent? Or is it because (Storck component (c)) there is no involvement by the State? The short but incomplete answer, that whatever may be said in relation to Storck components (a) and (b), there can be no deprivation of liberty because (Storck component (c)) there is no State involvement, although it suffices for the particular case I have postulated does nothing to resolve the more difficult underlying questions, brought into sharp focus if I change the facts slightly.*

[D \(A Child\) \(Rev2\) \[2019\] UKSC 42 \(26 September 2019\) \(bailii.org\)](#)

(Hale)

50. *Logically, this conclusion would also apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age, but that question does not arise in this case. The common law may draw a sharp distinction, in relation to the deprivation of liberty, between those who have reached the age of 16 and those who have not, but the extent to which that affects the analysis under the Human Rights Act is not clear to me and we have heard no argument upon it. I therefore prefer to express no view upon the question. Nor would I express any view on the extent of parental responsibility in relation to other matters, such as serious and irreversible medical treatment, which do not entail a deprivation of liberty. Some reference to this was made in the course of argument, but it does not arise in this case, which is solely concerned with depriving 16 and 17-year-olds of their liberty. It follows that I agree with what Lady Black says about those last two points in para 90 of her judgment.*

Why does it matter what limb detention takes place under?

[AUSTIN AND OTHERS v. THE UNITED KINGDOM - 39692/09 \[2012\] ECHR 459 \(15 March 2012\)](#)
[\(bailii.org\)](#)

60. *Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Subparagraphs (a)-(f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds*

And each of these grounds has a different justification, even if they may overlap:

1. In *Blokhin v Russia* [2016] ECHR 300, the Grand Chamber emphasised that detention for educational supervision pursuant to Article 5(1)(d) “*must take place in an appropriate facility with the resources to meet the necessary educational objectives*

and security requirements;”¹

2. In *DL v Bulgaria* (Application No 7472/14), decision of 19 May 2016), the Strasbourg court held that, “*once the State [has] chosen to introduce a system of educational supervision involving deprivation of liberty, it [is] under an obligation to put in place appropriate institutional facilities which met the demands of security and the relevant educational objectives, in order to be able to satisfy the requirements of Article 5 § 1 (d).*”²
3. In *Rooman v Bulgaria* [2019] ECHR 105, the Grand Chamber, expressly “refining” and “clarifying”³ its previous case-law on detention on the basis of ‘unsoundness of mind’ under Article 5(1)(e), made clear that the administration of suitable therapy in an **appropriate** environment has become an requirement in the context of the wider concept of lawfulness of the deprivation of liberty.⁴

So is it satisfactory that the template order for ‘child DoL’ does not identify which limb?

¹ Paragraph 167.

² *D.L.* at paragraph 74; at paragraph 81, the European Court also recalled that the State has “*positive obligations to protect minors and, where applicable, remove them from an unfavourable environment.*”

³ *Rooman* at paragraph 205

⁴ *Rooman* at paragraph 208, amplified at paragraphs 209 and 210.