Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No 156)

Discussion Paper on Adults with Incapacity

discussion paper

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July 2012

DISCUSSION PAPER No 156

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The Commission would be grateful if comments on this Discussion Paper were submitted by 31 October 2012.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

Contents

	Paragraph	*Page*
Chapter 1 Introduction		
Background to the project	1.1	1
Nature of the problem	1.2	1
Measures introduced in England and Wales following the *Bournewood* decision	1.3	1
Number of people affected	1.4	1
Scope of the project	1.5	2
Structure of the Discussion Paper	1.8	2
Legislative competence and human rights	1.13	3
Impact Assessment	1.15	3
Advisory Group	1.20	4
Chapter 2 Article 5 and *Bournewood*		
Introduction	2.1	5
Bournewood – domestic decisions	2.4	6
Bournewood in Strasbourg	2.17	8
Earlier Strasbourg decisions	2.25	10
Strasbourg decisions since *Bournewood*	2.37	13
Discussion	2.70	21
Objective element	2.70	21
Subjective element	2.76	23
State responsibility	2.77	23
Procedure	2.79	24
Article 5(4)	2.84	26
Conclusion	2.86	26
Chapter 3 Scotland		
Introduction	3.1	28
Background to the 2000 Act	3.2	28
Adults covered by the 2000 Act	3.4	28
Principles underpinning interventions under the 2000 Act	3.6	29
Codes of practice	3.8	30
Powers of attorney	3.9	30
Supervision of welfare and continuing attorneys	3.13	31
Termination of a power of attorney	3.16	31
Part 5 of the 2000 Act	3.17	32
Part 6 of the 2000 Act – general overview	3.19	32
Intervention orders	3.20	32

Contents (cont'd)

	Paragraph	*Page*
Guardianship orders	3.24	33
Application for a guardianship order	3.26	33
Appointment of an interim guardian	3.28	34
Who may be appointed as guardian?	3.29	34
Effect of a guardianship order	3.30	34
The powers and functions of a guardian	3.33	35
Limits to powers of a guardian	3.35	35
Enforcement powers	3.36	35
Discharge of functions and duties by a guardian	3.39	36
Joint guardians	3.42	36
Supervision of guardians and people authorised under intervention orders	3.44	37
Supervisory provisions relating to guardians	3.44	37
Supervisory provisions relating to people authorised under intervention orders	3.47	38
Important differences between guardianship and intervention orders	3.50	38
Important differences between powers of attorney and orders under Part 6 of the 2000 Act	3.53	39
The Social Work (Scotland) Act 1968	3.56	39
Interaction of the 2000 Act with the Social Work (Scotland) Act 1968	3.60	40
The interaction between the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003	3.68	42
Emergency detention certificates	3.73	42
Short-term detention certificates	3.81	44
Compulsory treatment orders	3.85	45
Case-law on deprivation of liberty	3.93	47
Statistics on welfare guardianship orders	3.101	50

Chapter 4 England and Wales

Introduction	4.1	51
Authorisation of deprivation of liberty under the Mental Capacity Act 2005	4.2	51
Circumstances in which deprivation of liberty may be authorised	4.3	51
What is meant by a "deprivation of liberty" under the 2005 Act?	4.4	51
Where might a deprivation of liberty take place?	4.8	53
The meaning of "capacity" for the purposes of the Mental Capacity Act 2005	4.10	53
Standard authorisation	4.11	54
Urgent authorisation	4.14	54
What might competently be done under a standard or urgent authorisation?	4.15	55

Contents (cont'd)

	Paragraph	*Page*
Representatives and independent mental capacity advocates	4.16	55
The overall effect of Schedule A1 to the 2005 Act	4.17	55
The role of a lasting power of attorney in relation to authorisation	4.18	56
The interaction between the Mental Capacity Act 2005 and the Mental Health Act 1983 in relation to the Deprivation of Liberty Safeguards	4.19	56
Case A (patients detained under the Mental Health Act 1983)	4.21	56
Case D (patients subject to guardianship)	4.23	57
Case E (patients falling within the scope of the Mental Health Act 1983)	4.24	57
Problems with the Deprivation of Liberty Safeguards	4.26	58
Case-law since *Bournewood*	4.31	59

Chapter 5 Comparative law

Introduction	5.1	71
Other comparative material	5.2	71
Germany	5.4	73
Constitutional protection of the right to liberty	5.4	73
Custodianship; placement in accommodation involving a deprivation of liberty	5.6	73
The Netherlands	5.14	75
Ontario	5.16	75
Types of substitute decision-makers	5.16	75
Health care decision-making	5.17	76
The meaning of capacity	5.18	76
Assessing capacity	5.23	77
Consequences of a finding of incapacity	5.24	77
Substitute decision-making regarding admission to care	5.26	78
Potential involvement of the Office of the Public Guardian and Trustee	5.28	79
Long Term Care Homes Act, 2007	5.29	79
Secure facilities	5.30	80
Victoria	5.33	81
Law reform project	5.33	81
Current law of Victoria	5.36	81
The Victorian Law Reform Commission recommendations	5.38	82
New process of collaborative authorisation	5.46	84
Identifying a restriction on liberty for the purposes of the collaborative authorisation process	5.48	84
How is the process of collaborative authorisation to operate?	5.50	85

Contents (cont'd)

	Paragraph	*Page*
Safeguards	5.52	85
Duration of collaborative authorisation and review of arrangements amounting to a restriction on liberty	5.54	86
Observations on comparative law	5.55	86
Chapter 6 Options for reform		
Introduction	6.1	88
Current Scots Law	6.4	88
Legislative provisions	6.4	88
Powers of attorney	6.10	90
Scots case-law	6.12	91
Involvement of the State	6.13	91
Difficulties arising in this area of law	6.15	92
Problems of definition	6.15	92
The role of purpose	6.18	92
The role of normality	6.36	98
Comparison with the position of those under 16	6.37	98
The need for reform	6.38	99
Identifying the objective element in deprivation of liberty	6.40	99
The subjective element in deprivation of liberty: the role of consent	6.72	106
Consent as the basis of a lawful process	6.75	107
Consent under power of attorney	6.76	107
Authorisation by guardian	6.77	108
Judicial authorisation for those who have neither attorney nor guardian	6.78	108
Chapter 7 List of questions		110

Chapter 1 Introduction

Background to the project

1.1 Following suggestions by the Mental Welfare Commission for Scotland, Enable Scotland and the Mental Health and Disability Sub-Committee of the Law Society of Scotland, a project to review aspects of the Adults with Incapacity (Scotland) Act 2000 is included in the Commission's Eighth Programme of Law Reform.[1] The focus of concern was on the provisions of the 2000 Act relating to welfare guardianship and possible deprivation of liberty of those lacking capacity, in the light of the decision in *HL v United Kingdom* (also known as the "*Bournewood*" case).[2] The Mental Welfare Commission took the view that it would be appropriate for the Commission to undertake a project on this topic because of its Report on Incapable Adults, which had led to the 2000 Act.

Nature of the problem

1.2 The main issues identified by the Mental Welfare Commission related to possible deprivations of liberty in community settings such as care homes. The view was that the legislation lacked clarity about the use of statutory interventions to authorise moving a person into residential care, in circumstances where the person appeared to be compliant but lacked the legal capacity to make that decision. The problems were identified as a result of the *Bournewood* case, in which the European Court of Human Rights held that a man with autism who was being kept in a psychiatric hospital under the common law doctrine of necessity, was unlawfully deprived of his liberty in breach of Article 5 of the European Convention on Human Rights (the "ECHR"). Prior to this case, it had been assumed that patients who were incapable of consent but compliant with their admission could be regarded as voluntary patients. The decision of the Strasbourg Court changed that: lack of capacity to consent appeared to preclude voluntary or informal admission.

Measures introduced in England and Wales following the *Bournewood* decision

1.3 In England and Wales, the Government responded to the *Bournewood* decision by issuing a Consultation Paper on proposals for legislation to introduce a new approach to govern the admission of persons over the age of 18 to facilities which might involve a deprivation of liberty, and processes for review and appeals. The proposals were given effect by Schedule 7 to the Mental Health Act 2007, which inserted a new Schedule A1 into the Mental Capacity Act 2005. The "deprivation of liberty safeguards" introduced by the new Schedule are discussed in Chapter 4 below.

Number of people affected

1.4 Lack of capacity to make decisions about one's personal life can be due to learning disability, to mental illness or neurological condition, or to acquired brain injury. The largest

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[1] Scot Law Com No 220 (2010), paras 2.22 to 2.24. The suggestions were made as part of public consultation on the Commission's draft programme of law reform.
[2] *HL v UK* (2005) 40 EHRR 32.

group of people who lose capacity do so due to dementia. In Scotland in 2012, there are estimated to be 84,000 adults with dementia, a number projected to increase significantly over the next few decades.[3] There are estimated to be 120,000 people with learning disability in Scotland, most of whom have mild or moderate disability, but around 15,000 to 20,000 have profound or multiple disability.[4] Many people in these groups may lack the capacity to consent to their living arrangements. Where they require care in residential facilities, and the care in those facilities involves some restrictive elements, there may be issues regarding Article 5.

Scope of the project

1.5 The Eighth Programme highlighted as issues for review: (a) the powers which may competently be sought in an application for the appointment of a welfare guardian and (b) the implications of the often lengthy duration of appointments of welfare guardians, and (c) more fundamentally, the implications in Scotland of the decision in *Bournewood*.

1.6 At an early stage of the project, our attention was drawn to a number of issues relating to financial guardianship and property matters. We have also been aware of concerns about some aspects of the operation of powers of attorney. We also recognise that there are people who question the need for guardianship at all in some family situations.

1.7 It was also suggested to us that we might consider the compatibility with Article 5 of the ECHR of practices and procedures that were being followed in care homes. Although consideration was given to widening the scope of the project to include a review of all these matters, we decided that the immediate concern was in relation to issues relating to welfare guardianship and in particular deprivation of liberty.

Structure of the Discussion Paper

1.8 In Chapter 2, we consider first the *Bournewood* case, both at the stage of domestic proceedings and in the European Court of Human Rights. We then explore the previous case-law of the European Court on deprivation of liberty and the significant decisions on Article 5 which the Court has reached since *Bournewood.*

1.9 Chapter 3 sets out current Scots law relevant to this area, beginning with powers of attorney, and guardianship and intervention orders, all as governed by the Adults with Incapacity (Scotland) Act 2000. The provisions of other statutes which may affect adults with incapacity are also examined, as is such case-law as there has been so far in Scotland on the issues raised by the *Bournewood* case.

1.10 In Chapter 4, we look at the reforms introduced in England and Wales, together with some of the principal cases in the English courts which have examined deprivation of liberty since 2005. The operation of the new reforms is also addressed.

1.11 Chapter 5 offers a review of some similar provisions in other jurisdictions, and illustrates the difference between approaches in jurisdictions where the imperative is to

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[3] Alzheimer Scotland website:http://dementiascotland.org/news/statistics-number-of-people-with-dementia-in-scotland-2012/?page=statistics.htm.

[4] Momentum website: http://www.momentumscotland.org/web/News%20Centre/Factsheets/Learning%20Disability.

comply with ECHR, and those where the task is simply to devise an appropriate system to address an increasing social problem.

1.12 In Chapter 6, we look at possible ways forward: how far is Scots law in need of reform and what possible reforms might usefully be made? Chapter 7 contains a list of the questions and points on which we would welcome comments.

Legislative competence and human rights

1.13 The subject matter of this discussion paper is not a topic which is reserved to the United Kingdom Parliament in terms of Schedule 5 to the Scotland Act 1998. Any legislation to amend the 2000 Act arising from this project would be within the legislative competence of the Scottish Parliament.

1.14 The proposals and questions covered by this paper involve issues of human rights and in particular Article 5 of the ECHR. We have endeavoured to assess whether Scots law in relation to incapacity is compatible with Article 5 and to identify any changes which might require to be made.

Impact Assessment

1.15 This project may lead to changes in the arrangements for admission to residential care of people who lack capacity to consent to those arrangements. The changes would concern care which may involve a deprivation of liberty. Any such changes would be likely to involve additional assessments of the nature of a person's disabilities, and his or her need for care of the nature proposed. As part of any such assessments, compliance with the principles in the 2000 Act would need to be verified.

1.16 Additional assessments along these lines would involve the resources of local authorities, in particular social work departments. In practice, social workers are often involved in admissions to residential care at present, especially where some level of funding is provided by the State, so the impact of imposing the need for additional assessment might be less than it would at first appear. But there would be some impact.

1.17 It is likely that any additional assessments would require input from medical professionals, whether general practitioners, psychiatrists or those who specialise in care of elderly people. Care homes, and those who run them, would also be likely to be affected, as would the Mental Welfare Commission who have responsibilities in connection with welfare guardianship.

1.18 Finally, if an additional form of order were to be included in the 2000 Act, there would be an impact on the justice system. Questions would arise as to whether the existing arrangements for guardianship and intervention orders in the sheriff court are adequate or whether a specific jurisdiction should be considered. There might require to be Legal Aid provision for those seeking or opposing the making of the relevant orders by the court, and the provision of advocacy services for people who were the subject of applications for such orders would probably be necessary.

1.19 The assessment of all these impacts in due course will require to make use of estimates of the numbers of people in Scotland who lack capacity and are cared for in residential facilities involving deprivation of liberty. We are not aware of any current

systematic collection of this data, although we are aware that there are sources of information which might contribute to the exercise.[5] The figures we have seen do not include any analysis of the numbers of people subject to any restriction of liberty.

1. **We would welcome views from consultees on the likely impact of any reforms resulting from this Discussion Paper on the groups identified in paragraphs 1.15 to 1.19 above.**

2. **In addition, we would welcome information from consultees which could contribute to an assessment of the numbers of people with incapacity in Scotland who are cared for in residential facilities where they experience some restriction on their liberty.**

Advisory Group

1.20 At an early stage of the project, we established an advisory group of lawyers and other professionals who work in this area. The members of the group are Professor June Andrews, Director of Dementia Services Development Centre, University of Stirling; Simon Collins QC; George Kappler, Deputy Chief Executive of the Mental Welfare Commission for Scotland; Jan Killeen, Policy Consultant Alzheimer Scotland-Action on Dementia; Nicola Smith, Solicitor; Jan Todd, Solicitor, South Lanarkshire Council; Adrian Ward, Solicitor and Convener of the Mental Health and Disability Sub-Committee of the Law Society of Scotland. We have also been able to consult Hilary Patrick, who prepared papers on the issues with which the project is concerned for the Mental Welfare Commission. We are most grateful for the assistance we have received from the members of the group, from Ms Patrick, from the Mental Welfare Commission and from the staff of the Dementia Services Development Centre at Stirling University.

[5] For example, the Care Home Census, published by Information Services Division ("ISD"), part of NHS National Services Scotland. ISD also publish data on the provision of NHS Continuing Health Care. The Mental Welfare Commission collect data on the operation of incapacity law in Scotland.

Chapter 2 Article 5 and *Bournewood*

Introduction

2.1 Article 5 of the European Convention on Human Rights provides:

> "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:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) 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;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 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."

2.2 The European Court of Human Rights has described the importance of Article 5 as paramount; it is, "together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual".[1] The key purpose of the Article "is to prevent arbitrary or unjustified deprivations of liberty".[2] In the context of mental disorder,

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[1] *McKay v UK* (2006) 44 EHRR 41 at para 30.
[2] Ibid.

detention will require to be lawful under domestic law, although such compliance is not necessarily sufficient as domestic law itself must satisfy the requirements of the Convention. To comply with Article 5(1), the European Court has held that, as a minimum, three conditions must be satisfied:

- The individual must have been reliably shown to be of "unsound mind", according to medical evidence from an objective expert.
- The mental disorder must be of a kind or degree warranting compulsory confinement.
- Such a mental disorder must persist throughout the period of confinement.

2.3 These conditions are known as the *Winterwerp* criteria.[3] They apply both to those who are mentally ill and to those who lack capacity.[4] In the latter group of individuals, however, it has been held in England that the criteria do not necessitate psychiatric assessment in every case.[5]

Bournewood – domestic decisions

2.4 The *Bournewood* case[6] crystallised concerns in the UK about possible breaches of Article 5 in "informal" arrangements for admission to residential facilities.

2.5 The person, L, whose detention was the subject of the case, suffered from severe autism and had spent much of his life in hospital. By 1994, however, he had been able to leave the institution to live with community carers. On an occasion in July 1997, he became very agitated at a day centre and was admitted as an emergency to the psychiatric hospital, Bournewood, where he had formerly lived.

2.6 L was described as lacking capacity to consent or object to medical treatment but, despite this, was not detained under mental health legislation. The reason for this decision appeared to have been that he was compliant with the admission.

2.7 Proceedings were taken against his detention at the instigation of his carers and in the name of his cousin and "next friend". It is relevant to note that these proceedings preceded the Human Rights Act 1998; rather than being based on Article 5, they alleged false imprisonment. Nevertheless, the question of whether L was "detained" was central. In short, the High Court determined that he was not, the Court of Appeal that he was, and the House of Lords that he was not. Finally, when L complained of a breach of Article 5, the European Court of Human Rights concluded that he was. Meanwhile, L had been formally detained, that having occurred on the day when it was indicated that his appeal to the Court of Appeal had succeeded, 29 October 1997. Thus, the period of allegedly unlawful detention was limited, being approximately three months.

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[3] See *Winterwerp v Netherlands* (1979-1980) 2 EHRR 387 at paragraph 39.
[4] See, for example, *Trajče Stojanovski v. the former Yugoslav Republic of Macedonia*, Application no.1431/03, 22 October 2009; [2010] MHLR 292.
[5] *G v E* [2010] EWCA Civ 822; [2012] Fam 78; [2010] 4 All ER 579. It was observed by the Court of Appeal that "the European jurisprudence derives exclusively from the fact that in the cases which have reached the European Court of Human Rights, the issue has involved alleged mental illness and detention in a psychiatric hospital." (paragraph 59).
[6] *HL v United Kingdom* (2005) 40 EHRR 32.

2.8 At the outset of the judgement of the Court of Appeal, Lord Woolf observed:

> "This appeal raises difficult issues which could have a far-reaching effect on the present approach to the reception, care and treatment of many mentally disordered patients."[7]

2.9 In the Court of Appeal and the House of Lords, the nature of the question of whether L was detained or not was characterised in different and not always consistent ways. Thus, Lord Woolf noted:

> "On behalf of the trust Mr. Grace accepted that whether a person is detained is a question of objective fact, which does not depend on the presence or absence of consent or knowledge….
>
> …In our judgment a person is detained in law if those who have control over the premises in which he is have the intention that he shall not be permitted to leave those premises and have the ability to prevent him from leaving."[8]

2.10 But, whether resolved as a question of fact or of law,[9] the view of the Court of Appeal was that L was detained; the view of the judge at first instance that L was "free to leave" was rejected. Moreover, the argument of the NHS Trust that such detention could be justified by the common law doctrine of necessity was also rejected, the Court taking the view that the right of the hospital to detain a patient such as L was to be found in, and only in, the Mental Health Act 1983. Because the hospital did not have the consent of L to his detention, it followed that he could not be an informal patient under the Act and was being detained unlawfully. Statements in leading mental health law textbooks to the effect that patients who, albeit lacking capacity to consent or object, did not in fact object to their admission to hospital could be treated as "informal" patients under the legislation were disapproved.[10]

2.11 This judgement caused serious concern. The Secretary of State for Health, the Mental Health Act Commission and the Registered Nursing Homes Association all sought and were granted permission to intervene in the House of Lords. The Commission suggested that the effect of the judgement of the Court of Appeal was that a large number of patients who would previously have avoided being formally detained would now require to be so detained. Another 48,000 formal admissions per annum would therefore occur. The average number of patients detained on any one day was then around 13,000; the effect of the Court of Appeal's judgement was that this figure would rise to 35,000.[11]

2.12 In the House of Lords, the unanimous view was that the appeal should be allowed, with Lords Lloyd and Hope agreeing with Lord Goff that L had not been detained. But, of the three judges issuing reasoned speeches, two concluded that L had been detained. Lord Steyn described the argument that L was free to leave as "stretch(ing) credulity to breaking point".[12]

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[7] *R v Bournewood Community and Mental Health NHS Trust ex parte L* [1999] 1 AC 458 at 461G.
[8] At 465B – H.
[9] It may be that detention as a matter of fact mandates the conclusion that there is detention as a matter of law, but not vice versa.
[10] At 474E. The textbooks concerned were Hoggett, *Mental Health Law* and Jones, *Mental Health Act Manual.*
[11] These figures are at 481E – 482D. See para 4.28 below concerning actual figures for use of the Deprivation of Liberty Safeguards.
[12] At 495D.

2.13 On the question of whether the issue was one of fact or of law, Lord Goff emphasised that, for the tort of false imprisonment, "there must *in fact* be a complete deprivation of, or restraint upon, the plaintiff's liberty".[13] In the present case, that had not occurred. For Lords Nolan and Steyn, L **had** been detained, with Lord Steyn affirming that this was a question of fact,[14] but such detention was justified by the common law doctrine of necessity.

2.14 It is interesting to note the treatment of the question of resources by their Lordships. The issue had clearly been raised both orally by Counsel for the Registered Nursing Homes Association and in a written submission on behalf of the Mental Health Act Commission. Lord Goff observed:

> "…it is plain that [the Secretary of State for Health] has to have regard to the resource implications of extension of the statutory safeguards to the very much larger number of patients who are informally admitted. At all events, this is a matter which is entirely for the Secretary of State, and not for your Lordships' House whose task is to construe, and to apply, the Act as it stands."[15]

2.15 Lord Steyn rehearsed in some detail the beneficial effects of extending the statutory safeguards to compliant incapacitated patients. He observed:

> "If considerations of financial resources are put to one side, there can be no justification for not giving to compliant incapacitated patients the same quality and degree of protection as is given to patients admitted under the Act of 1983."[16]

2.16 From this examination of the domestic decisions in the case, it appears that the central issue of detention which arose can be expressed reasonably succinctly. It was not disputed that there were patients in psychiatric hospitals who were described as "informal" or "voluntary", indeed it appeared that they were considerably more numerous than those who were there compulsorily. As far as those who had capacity were concerned, the basis of their hospitalisation was consent. They could be described as "voluntary" patients. For those who were incapacitated, was their lack of capacity, which was fatal to any notion of consent, a matter which therefore precluded anything but formal admission or detention?

Bournewood **in Strasbourg**

2.17 After the decision of the House of Lords, L complained to the European Court of Human Rights of a breach of Article 5. By decision dated 5 October 2004, the Court held that there had been a violation of Article 5(1) and (4): L had been detained but not in accordance with a procedure prescribed by law, as is required by Article 5, and the mandatory requirement of an available process for review had also been breached.[17]

2.18 In its argument, the UK Government submitted that:

> "[a] finding that the present applicant was "detained" would mean that the care of incapacitated but compliant persons elsewhere (even in a private house or nursing home) would be considered detention, a conclusion which would have onerous legal

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[13] At 486C – D. Emphasis as in original.
[14] At page 494C to H.
[15] At 482G.
[16] At 492D.
[17] *HL v United Kingdom* (2005) 40 EHRR 32.

and other implications for such patients and for any person or organisation having responsibility for their care and welfare."[18]

2.19 For his part, the applicant maintained:

> "that the Convention notion of detention was more flexible than that of the House of Lords and included notions of psychological detention, potential detention (perceived threat of restraint) and the removal of the means of escape."[19]

2.20 The Court reasoned as follows:

> "89. It is not disputed that in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete 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 a restriction upon, liberty is merely one of degree or intensity and not one of nature or substance."[20]

2.21 In its conclusion on the matter of detention, the Court was not disposed to rely on L's compliance with his admission to hospital, saying:

> "….the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention …, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action."[21]

2.22 In the particular circumstances which had applied to L's stay in hospital, the key factor was:

> "that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from 22 July 1997, when he presented acute behavioural problems, to 29 October 1997, when he was compulsorily detained."[22]

2.23 The Court agreed with Lord Steyn's firm rejection of the proposition that L had been free to leave. The attempt to use the doctrine of necessity to justify the detention was unsuccessful, largely because of the absence of clearly understood criteria and fixed procedural rules.

2.24 In relation to Article 5(4), the Government had argued that availability of judicial review, combined with a writ of habeas corpus, was sufficient to comply with the applicant's right to have the lawfulness of his detention decided speedily by a Court. The European Court did not agree. The review required must be wide enough to permit examination of those conditions which were essential for the lawful detention of a person on the ground of unsoundness of mind. In the case of *X v United Kingdom*, the review comprised in habeas corpus had already been declared by the European Court not to be sufficient to comply with Article 5(4): with continuing confinement, such a review would not extend to verifying that the

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[18] Para 80.
[19] Para 86.
[20] On the matter of whether this is a question of fact or of law, the Court rather begged the question by saying that, although it had regard to the domestic courts' findings of fact, it was not bound by their legal conclusions as to whether L was detained or not.
[21] Para 90.
[22] Para 91.

conditions initially justifying detention still persisted.[23] Insofar as judicial review was concerned:

> "…the bar of unreasonableness would, at the time of the applicant's domestic proceedings, have been placed so high as effectively to exclude any adequate examination of the merits of the clinical views as to the persistence of mental illness justifying detention".[24]

Earlier Strasbourg decisions

2.25 In 1976, the European Court decided the case of *Engel and Others v The Netherlands*.[25] The application in the case had been made by five nationals of the Netherlands, all of whom were conscripted soldiers in non-commissioned ranks. Each of the applicants had been subjected to one or more of the range of penalties available for breaches of military discipline; these ranged from light arrest to committal to a disciplinary unit. Breaches of Article 5 were alleged. It was therefore necessary for the Court to determine whether the penalties in question amounted to deprivations of liberty.

2.26 In carrying out its assessment, the Court observed:

> "58. In proclaiming the "right to liberty", paragraph 1 of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol no. 4).[26] This is clear both from the use of the terms "deprived of his liberty", "arrest" and "detention", which appear also in paragraphs 2 to 5, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols.
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> 59. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation. Military service, as encountered in the Contracting States, does not on its own in any way constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 para. 3 (b). In addition, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5 either.
>
> Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken

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[23] (1982) 4 EHRR 188 at para 58.
[24] Para 139.
[25] (1979-80) 1 EHRR 647. This was a plenary Court decision. Before an amendment in 1993, if a case raised serious questions concerning the interpretation of the Convention, the Chamber could relinquish jurisdiction in favour of the plenary Court. After the amendment, there was a reduced plenary or Grand Chamber Court with a fixed composition of 19 judges, to deal with such cases. The Grand Chamber, in its turn, could then relinquish jurisdiction in favour of the plenary Court. See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, (1st edn, 1995), p 655.
[26] Article 2 of Protocol No 4 is set out in full in para 2.71 below.

of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question."

2.27 Having considered the details of the respective regimes of light arrest, aggravated arrest, strict arrest and committal to a disciplinary unit, the Court concluded that the former two penalties did not constitute deprivation of liberty whereas the latter two did.

2.28 In *Guzzardi v Italy*,[27] an application alleging breach of Article 5 rights was made by an individual who had been compelled to reside on a small island awaiting trial on serious criminal charges. He had been imprisoned on remand in February 1973. The Italian Code of Criminal Procedure required that such detention could last no longer than two years. Accordingly, on the second anniversary of his arrest, he was moved from prison to Asinara, an island off the coast of Sardinia, where he remained for another 16 months.

2.29 The conditions on Asinara were that he was required to live within an area of 2.5 square kilometres, which was the part of the island reserved for those in compulsory residence. In this hamlet were a school, a chapel and a carabinieri station; he was required to report to the carabinieri twice each day. Mr Guzzardi had no access to the larger zone on the island, that zone being used as a prison, or to the main settlement, Cala d'Oliva, which had a population of around 200. He could be authorised to visit Sardinia or the mainland of Italy, if he had good reason to do so. For some of the time, he lived in a type of hostel, although when he had his family with him, as occurred for more than half the time, he could live in a small flat. He secured employment for about 8 months, working for a company in the hamlet in which he lived. His telephone calls, although not his letters or telegrams, were monitored.

2.30 The Court reiterated the general approach to Article 5:

> "92. The Court recalls that in proclaiming the "right to liberty", paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see the Engel and others judgment of 8 June 1976, Series A no. 22, p 24, para 58-59).
>
> 93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends."

2.31 This was not a classic case of detention in prison or strict arrest.[28] It was necessary for the European Court to consider the manner of implementation of the measure in

[27] (1981) 3 EHRR 333. Plenary Court.
[28] Para 95.

question[29] to determine if there had been a deprivation of liberty within the terms of Article 5. The Court reviewed the physical conditions of residence on the island, the social aspects, the supervision to which the applicant had been subject, the restrictions on his communications and the limited opportunities for trips off the island and concluded, on balance,[30] that the case involved deprivation of liberty.

2.32 In 1985, the Court determined the case of *Ashingdane v United Kingdom*,[31] where the applicant had been detained in Broadmoor awaiting transfer to a local psychiatric hospital. Although it had been determined that he no longer required the conditions of special security that had originally justified his detention in Broadmoor, for administrative reasons it took 19 months to move him. The conditions of detention in the local hospital were more liberal, and the applicant attempted to argue that the deferral of his transfer to such conditions amounted to a deprivation of liberty. The Court rejected this argument, holding that the more liberal conditions amounted also to a deprivation of liberty. Thus, the extended period in the more secure regime did not amount to a breach of Article 5. By contrast, in *Mancini v Italy*,[32] the court determined that a delay of 3 days in transferring the applicant from prison to house arrest did amount to a breach of Article 5, although both regimes amounted to a deprivation of liberty.[33]

2.33 In 1988, in the case of *Nielsen v Denmark*,[34] the Court considered the case of a 12 year old boy who had been placed in the child psychiatry ward of the state hospital for a period of five and a half months. For most of his life, a custody dispute had raged between his parents and, following a period when he had lived with his father, he was not willing to return to live with his mother, who held the exclusive right of custody over him. In these circumstances, at his mother's request, he had been placed in the hospital. The European Court decided that Article 5 had no application because any deprivation of liberty had been on the basis of a decision by his mother, not by the authorities responsible for the state hospital. The Court also considered whether the factual circumstances of the case (for example, locked doors, only supervised outings) disclosed a deprivation of liberty within Article 5. In concluding that they did not, the majority took the view that the restrictions on the applicant's freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital.

> "The Court concludes that the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of Article 5, but was a responsible exercise by his mother of her custodial rights in the interest of the child. Accordingly, Article 5 is not applicable in the case."[35]

2.34 In 2002, the European Court of Human Rights decided a case more similar on its facts to the situations with which this project is concerned. *HM v Switzerland*[36] concerned an elderly lady who was in poor physical health. She had been living in "intolerable conditions

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[29] Said to be the only one of the quartet of considerations (type, duration, effects and manner of implementation) relevant in this case – see para 94.
[30] Eleven votes to seven.
[31] (1985) 7 EHRR 528.
[32] Application no. 44955/98, 2 August 2001.
[33] The decision was by four votes to three, the majority considering that the breach stemmed from "the delay in substituting for detention in prison a more lenient security measure" (para 17) whereas the dissenting judges considered that the case could not be distinguished from *Ashingdane.*
[34] (1989) 11 EHRR 175. Plenary Court.
[35] Para 73.
[36] (2004) 38 EHRR 17.

of hygiene" in an unheated flat. Under Article 397a et seq of the Swiss Civil Code and section 9 of the Deprivation of Liberty on Grounds of Welfare Assistance Act of the Canton of Berne, she was placed in a nursing home for an unlimited period. This was in the face of a statement from her on the day before the making of the order that she did not wish to go to the home.

2.35 HM had appealed to the Cantonal Appeals Commission but her appeal had been rejected on two grounds: firstly that deprivation of liberty on grounds of welfare assistance was justified and secondly the conclusion of the Appeals Commission that she was suffering from senile dementia. A further appeal to the Federal Court was unsuccessful, that court resting its decision on the evidence of serious neglect having occurred. The applicant then complained that Article 5 had been breached, since neglect is not a ground of detention under Article 5.

2.36 In its decision, the Strasbourg court drew a distinction between Article 2 of Protocol 4, which relates to restrictions on freedom of movement, and Article 5, observing that the distinction is however one of degree or intensity, not one of nature or substance. The Court reiterated that in determining if a deprivation of liberty has occurred, account must be taken of the type, duration, effects and manner of implementation of the measure in question. In the present case, placement had occurred at a time when the applicant had been suffering from serious neglect and was in need of the care which the nursing home could provide. She had not been in the secure ward of the home, but had had freedom of movement and was able to maintain social contact with the outside world. At some points, she had been undecided as to her own preference about remaining in the home. The original placement was in her own interests in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene. Thus, there had not been deprivation of liberty but a responsible measure taken by the competent authorities in the applicant's interests.[37]

Strasbourg decisions since *Bournewood*

2.37 In *Storck v Germany*,[38] the European Court considered the case of a young woman who had been detained in the locked ward of a private psychiatric clinic at the request of her father. Although she had attained the age of majority, there was no guardianship order, she had not signed a declaration that she consented to her placement and there had been no judicial decision authorising her detention in a psychiatric hospital. Various proceedings under domestic law had all been determined against the applicant, who now complained to the Court of a breach of her rights under Article 5.

2.38 In assessing whether or not the applicant had been deprived of her liberty, the Court noted that she had been in a locked ward, under the continuous supervision and control of staff, and was not free to leave. When she had attempted to escape, she had been shackled and when she had succeeded in escaping, she had been returned by the police. Accordingly, she had been deprived of her liberty. But for a breach of Article 5 to have occurred, there had to be more than "confinement in a particular restricted space for a not negligible length of time". There must, in addition to that objective element, be a subjective element in the shape of absence of valid consent. In the present case, the Court could not

[37] Para 48.
[38] (2006) 43 EHRR 6.

detect any basis for the view that she had agreed to her continued stay in the clinic. The decisive feature was her repeated attempts to escape. The case was seen as *a fortiori* of *HL* and distinguishable from *HM*, where the applicant had been legally capable of expressing a view and had been undecided as to whether or not she wanted to stay, so could be seen as not objecting to her placement.[39]

2.39 The Court in *Storck* also considered the issue of State responsibility. There were three aspects of the case that could be regarded as engaging the responsibility of Germany under the Convention. Firstly, public authorities could have been directly involved in her detention. Secondly, the State could have violated Article 5(1) by failing to interpret the provisions of German law in accordance with the Convention when the applicant brought proceedings in the domestic courts. Thirdly, the State could have breached its positive obligation to protect the applicant against interferences with her liberty by private persons.

2.40 In relation to the first factor, the premises concerned had been a private clinic. There had been no authorisation by a court or any other State entity, and no system for supervision by State authorities of the lawfulness of and conditions for the detention of persons treated in the clinic. But on a particular date, after the applicant had absconded from the clinic, she had been apprehended and returned by the police. The Court concluded that, at that point, the responsibility of the State authorities was engaged. In relation to the second factor, the Court also found that the responsibility of the State was engaged by the failure of its courts to interpret German law compatibly with the spirit of Article 5.

2.41 Turning finally to the question of the positive obligation on the State, the Court held that the State:

> "…is obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge".

In the present case, the applicant's absconding and forcible return by the police did not provoke any review of the lawfulness of her stay in the clinic. The Court was not persuaded that the complex of measures adopted by Germany (the creation of an offence of deprivation of liberty, the availability of a claim in tort, licensing provisions applicable to the clinic) was sufficient to ensure competent and regular supervisory control concerning a deprivation of liberty in a private clinic.[40]

2.42 In *Stanev v Bulgaria*,[41] the Grand Chamber dealt with a case involving a man in his fifties living in a social care home for people with mental disorders. He had been diagnosed with schizophrenia in 1975. In 2000, a Regional Court had declared him partially incapacitated. He had then been placed under the guardianship of an officer of the local Municipal Council, and his placement in the home effected by a contract between the guardian (who at that point had not met the applicant)[42] and the home. Under Bulgarian law, partial incapacity resulted in the person requiring the consent of his or her guardian to legal transactions and, in turn, the guardian being unable to enter into a contract binding the incapacitated person without his or her consent. As a result of conditions in the home, the

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[39] Paras 73 to 78.
[40] Para 106.
[41] Application no. 36760/06, 17 January 2012.
[42] Para 122.

inability to leave and the absence of procedures to seek release from partial guardianship, the applicant complained to the European Court of breaches of Articles 3, 5, 6 and 8.

2.43 In its judgement, the Court referred first to the United Nations Convention on the Rights of Persons with Disabilities, to Recommendation No. R(99) 4 of the Committee of Ministers adopted on 23 February 1999 and to reports on visits to Bulgaria by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment as "relevant international instruments".[43]

2.44 The Court then included a section on comparative law,[44] referring to a study of the domestic law of twenty Council of Europe member States. It is evident that the study had included the law of England and Wales, described as "the law of the United Kingdom". The features of the study highlighted by the Court related to the ability in each country to take proceedings for the restoration of legal capacity and the procedures for placement of legally incapacitated persons in specialised institutions. In relation to the latter, the Court noted that in some States, placement in a home on a long-term basis against the will of the person concerned took place by means of a decision taken directly or approved by a judge. In others, including the United Kingdom, guardians, close relatives or administrative authorities could place a person in a home without judicial approval, although subject to a number of substantive requirements relating in particular to health, danger or risk and/or the production of medical certificates. Procedural requirements concerning input from the person concerned, time limits for termination or review of the placement and the possibility of legal assistance also existed in several systems.[45] In addition, some countries allowed for challenge of the initial placements before a judicial body and some allowed the person concerned to apply periodically for judicial review of the placement.[46]

2.45 In relation to the applicant's claim for breach of Article 5, the Court reiterated principles already established concerning:

- the relationship with Article 2 of Protocol 4;
- the need to assess the concrete situation of the individual;
- the need to have regard to the type, duration, effects and manner of implementation of the measure in question;
- the objective and subjective elements involved in deprivation of liberty;
- the effect of legal incapacity to consent to the placement; and
- the imposition by the first sentence of Article 5(1) of a positive obligation on the State to protect the liberty of individuals.[47]

2.46 Nevertheless, the Court avoided laying down general rules applicable in similar factual situations:

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[43] Paras 72 to 87.
[44] Set out in full in Chapter 5 below.
[45] Paras 91 and 92.
[46] Paras 93 and 94.
[47] Paras 115 to 120.

> "The Court observes at the outset that it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a "deprivation of liberty" within the meaning of Article 5 § 1. In some cases, the placement is initiated by families who are also involved in the guardianship arrangements and is based on civil-law agreements signed with an appropriate social care institution. Accordingly, any restrictions on liberty in such cases are the result of actions by private individuals and the authorities' role is limited to supervision. The Court is not called upon in the present case to rule on the obligations that may arise under the Convention for the authorities in such situations".[48]

2.47 On the facts of the present case, the requirement to obtain permission on all occasions when leaving the home, the retention by the management of the applicant's papers, the remote location far from the applicant's home town and the manner in which the applicant had been apprehended and taken back to the home when he failed to return from leave of absence all led to the conclusion that the objective element of deprivation of liberty was satisfied.

2.48 As far as the subjective element was concerned, the Court noted that there are situations

> "…where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned".[49]

Given the awareness of his situation which the applicant had demonstrated and his explicit expressions of a desire to leave the home, there was a lack of consent to the placement and the subjective element of deprivation of liberty was accordingly also satisfied.[50] Bulgarian law had not been complied with as far as the contract with the home was concerned and the *Winterwerp* criteria were not satisfied. Accordingly the deprivation could not be justified under Article 5(1).

2.49 Turning to the claim in relation to Article 5(4), the Court noted that the Government had not identified any domestic remedy:

> "capable of affording the applicant the direct opportunity to challenge the lawfulness of his placement in the Pastra social care home and the continued implementation of that measure. It also notes that the Bulgarian courts were not involved at any time or in any way in the placement and that the domestic legislation does not provide for automatic periodic judicial review of placement in a home for people with mental disorders. Furthermore, since the applicant's placement in the home is not recognised as a deprivation of liberty in Bulgarian law… there is no provision for any domestic legal remedies by which to challenge its lawfulness in terms of a deprivation of liberty. In addition, the Court notes that, according to the domestic courts' practice, the validity of the placement agreement could have been challenged on the ground of lack of consent only on the guardian's initiative…".[51]

In these circumstances, there had been a breach of Article 5(4) also.

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[48] Para 121.
[49] Para 130.
[50] Paras 130 and 131.
[51] Para 172.

2.50 In *DD v Lithuania*[52] the European Court considered the case of a woman who had been diagnosed with schizophrenia as a teenager and had undergone many spells of treatment in psychiatric hospitals. She complained of a breach of Article 5 in relation to admission to the Kėdainiai Home, described as "a social care institution for the mentally handicapped". The admission had taken place following assessment by a social worker that she was not able to take care of herself, did not understand the value of money, did not clean her apartment, could not cook and wandered the city alone and hungry.[53] The applicant argued that she had been deprived of liberty on account of the complete confinement and extreme degree of control over her daily life to which she was subject in the home.[54] In its assessment, the Court reiterated that in order to determine whether there has been a deprivation of liberty, the starting point must be the concrete situation of the individual concerned, and the type, duration, effects and manner of implementation of the measure in question must be taken into account.[55]

2.51 In concluding that the applicant had been deprived of her liberty, the court recorded its view:

> "…that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is that the Kėdainiai Home's management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted to that institution, to this day…… Accordingly, the specific situation in the present case is that the applicant is under continuous supervision and control and is not free to leave (see *Storck v. Germany*, no. 61603/00, § 73, ECHR 2005-V). Any suggestion to the contrary would be stretching credulity to breaking point."[56]

2.52 The cases of *HM v Switzerland*[57] and *Nielsen v Denmark*,[58] which had been relied on by the Government, were distinguished. *HM* was said to be distinct on the basis that it was not established that the applicant there was legally incapable of expressing a view, and she had often expressed her agreement to being in the home. In addition, there were safeguards in place to ensure that the placement was justified under domestic and international law.[59] *Nielsen* was distinguished on the basis that the applicant was hospitalised for a strictly limited period of time of only five and a half months, on his mother's request and for therapeutic purposes. The therapy consisted of regular talks and environmental therapy, and did not involve medication. Lastly, the assistance rendered by the authorities in hospitalising the applicant was of a "limited and subsidiary nature".[60]

2.53 The Court in *DD* then proceeded to examine the issue of consent. Notwithstanding the fact that, according to Lithuanian law, the applicant had lacked legal capacity to make relevant decisions, the Court noted that she was able to understand her situation, had perceived her admission to the Home as a deprivation of liberty and had "unequivocally objected to it throughout the entire duration of her stay in the institution."[61] The subjective

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[52] Application no.13469/06, 14 February 2012.
[53] Para 23.
[54] Para 130.
[55] Para 144.
[56] Para 146.
[57] (2004) 38 EHRR 17.
[58] (1989) 11 EHRR 175.
[59] Para 147.
[60] Para 148.
[61] Para 150.

element required for a breach of Article 5, namely that the applicant had not consented to the deprivation of liberty, was therefore satisfied. In addition, the responsibility of the State for the deprivation was established by virtue of the fact that the Kėdainiai Home was a State-run institution.

2.54 Ultimately, however, the Court did not find that Article 5(1) had been breached. Although there was a deprivation of liberty such as to engage Article 5, the deprivation satisfied the terms of Article 5(1)(e). This result followed from the fact that the detention of the applicant had been in accordance with the provisions of Lithuanian law, which required the consent of her father as her guardian as the only condition necessary for her admission to the home, and the *Winterwerp* criteria were also satisfied.[62]

2.55 This part of the decision is not easy to follow. Although the Court reiterates the "broader meaning" of lawfulness in the context of Article 5(1)(e), to include the notion of "fair and proper procedure", said to mean that a measure depriving a person of liberty should "issue from and be executed by an appropriate authority", the conclusion that there was no breach of Article 5(1) must mean that the minimal procedural requirement of consent by the guardian was seen as adequate.

2.56 Breach of Article 5 was, however, found to have occurred when the complaint under Article 5(4) was examined. The Court summarised principles emerging from case-law on Article 5(4) as follows:

> "(a) a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;
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> (b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place;
>
> (c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves".[63]

2.57 Recently, in *Austin v United Kingdom*,[64] the Strasbourg Court has given further guidance on the concept of deprivation of liberty in Article 5, albeit not in the context of care for those with mental disorder.

2.58 The case of *Austin v Commissioner of Police of the Metropolis*,[65] in which the House of Lords considered Article 5, was the precursor to the decision of the Strasbourg Court. The

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[62] Paras 154 to 158.
[63] Para 163.
[64] Application nos. 39692/09, 40713/09 and 41008/09, 15 March 2012 (Grand Chamber).
[65] [2009] UKHL 5; [2009] 1 AC 564. This case is also discussed in Chapter 4 below.

claimant had been a protestor at a demonstration in central London. The police had created a cordon around the demonstrators, ("kettling") and they had not been allowed to leave the cordoned area for several hours. The claimant alleged that her rights under Article 5 of the Convention had been breached. The findings of the judge at first instance showed that the sole purpose of the cordon was to protect people from injury and avoid serious damage to property, that it was proportionate to that need and that those within the cordon were not deprived of their freedom of movement arbitrarily. The House of Lords found that there had been no deprivation of liberty within the meaning of Article 5, largely on the basis of the public interest purpose underlying the imposition of the cordon.

2.59 In its assessment, the European Court observed that "the Convention is a living instrument, which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today".[66] This does not mean, however, that the Court can create a new right or a new exception or justification not expressly recognised in the Convention. Moreover, the Convention must be interpreted so as to promote internal consistency.[67] In this regard, Article 2 of Protocol 4 is relevant in that Article 5, should not, in principle, be interpreted so as "to incorporate the requirements of Protocol 4 in respect of States which have not ratified it".[68]

2.60 The Court also drew attention to cases in which it has held that:

> "…in certain well-defined circumstances, Articles 2 and 3 may imply positive obligations on the authorities to take preventive operational measures to protect individuals at risk of serious harm from the criminal acts of other individuals".

2.61 The Court then referred to the new challenges facing police forces in the Contracting States, challenges "perhaps unforeseen when the Convention was drafted",[69] and observed that Article 5 cannot be interpreted so as to make it impracticable for the police to comply with their duties, provided that the individual continues to be protected against arbitrariness.

2.62 In directly addressing the relevance of the underlying purpose of a measure, the Court emphasised that an underlying public interest motive "has no bearing on the question whether that person has been deprived of his liberty".[70] The Court's consistent approach, however, of examining the type, duration, effects and manner of implementation of the measure in question allows regard to be paid to the specific context and circumstances of restrictions other than the paradigm case of confinement in a cell.[71]

2.63 Whilst it could not be ruled out that containment and crowd control techniques could give rise to deprivation of liberty in certain circumstances, the context in which the measure in this particular case was imposed led to the conclusion that it was, at most, a restriction on freedom of movement and that the applicants were not deprived of their liberty within the meaning of Article 5(1).[72]

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[66] Para 53.
[67] Ibid.
[68] Para 55.
[69] Para 56.
[70] Para 58.
[71] Para 59.
[72] Para 67. This was by 14 votes to 3.

2.64 Many of the decisions discussed in this chapter have concerned action taken to benefit the person who is the subject of the action. In this context, it is relevant to note that breach of another Article of the Convention may be alleged where a State has failed to take action necessitated by a person's condition or situation.

2.65 In *MS v United Kingdom*,[73] the European Court considered the case of a man who had been arrested during the night whilst behaving in a highly agitated manner. At the police station to which he was taken, it was noted that he was clearly suffering from some form of mental illness. He was detained under section 136 of the Mental Health Act 1983, which allows the police to detain a person who appears to be suffering from mental disorder in a place of safety (including a police station) for a period of 48 hours. There then emerged reasonable grounds for believing that he had committed an assault. During the ensuing hours, MS was seen by a forensic medical examiner, two psychiatrists, an approved social worker and a community psychiatric nurse. There was no dispute that he was suffering from mental illness warranting detention in hospital. A medium secure unit, Reaside, was identified as suitable, but there ensued a degree of confusion about whether MS was to be charged with assault and accordingly about whether psychiatric care was immediately required. There were also issues concerning when it might be possible to receive him at Reaside.

2.66 It took until the fourth day of detention for MS to be taken to Reaside. By that point, he was in an extreme state: naked, having smeared his body with food or faeces, highly agitated and refusing food and drink. Once at the unit, he was diagnosed as suffering from a manic episode with psychotic features. He was put into seclusion and given medication, whereupon he showed sustained improvement.

2.67 As a result of the delay in transferring him from the police station to Reaside, MS raised proceedings alleging negligence and breaches of Articles 3 and 8 of the Convention. Domestic proceedings were unsuccessful and he therefore complained to Strasbourg. In his argument in relation to Article 3, he relied on the failure to provide him with psychiatric care, as well as his unhygienic and undignified state and his inadequate intake of food and water.

2.68 In relation to Article 3, the Court reiterated that treatment must reach a minimum level of severity to constitute a breach. It also observed that the absence of any intention to humiliate and debase does not rule out a finding of violation of Article 3.[74] Whilst the initial removal to the police station was not open to criticism, the circumstances which ensued did involve a breach of Article 3:

> "44. The fact remains, however, that the applicant was in a state of great vulnerability throughout the entire time at the police station, as manifested by the abject condition to which he quickly descended inside his cell. He was in dire need of appropriate psychiatric treatment, as each of the medical professionals who examined him indicated. The Court considers that this situation, which persisted until he was at last transferred to Reaside early on the fourth day, diminished excessively his fundamental human dignity. It refers here to the opinion of the Committee for the Prevention of Torture, cited above… It is of some significance that the applicant's situation failed to respect both best medical practice in England as well as the maximum time-limit set by Parliament in the relevant legislation. Throughout the

[73] Application no. 24527/08, 3 May 2012.
[74] Para 38.

relevant time, the applicant was entirely under the authority and control of the State. The authorities were therefore under an obligation to safeguard his dignity, and are responsible under the Convention for the treatment he experienced.

45. In their submissions the Government regretted the incident and explained how it came about. The Court can accept that the efforts made on the applicant's behalf were genuine, and that those who came in contact with him were sensitive to his distress. The situation appears to have arisen essentially out of difficulties of co-ordination between the relevant authorities when suddenly confronted with an urgent mental health case. The Government have indicated that this incident led to an improvement in the standing arrangements between the police and the health authorities to respond more rapidly in such circumstances. While welcoming these improvements, the Court is required to deal with the treatment to which the applicant was subjected. Even though there was no intention to humiliate or debase him, the Court finds that the conditions which the applicant was required to endure were an affront to human dignity and reached the threshold of degrading treatment for the purposes of Article 3".

2.69 It can therefore be seen that there may be situations where to fail to provide treatment (including care) necessitated by mental disorder can amount to a breach of Article 3 of the Convention, if the person endures degrading and undignified conditions as a result. Similarly, in the case of *Dodov v Bulgaria*,[75] it was argued that the failure of the State to protect an elderly person with dementia from self-harm by wandering from premises which were insufficiently secure could found a breach of Article 2, if the person lost their life as a result. Thus, obligations to take positive action under Articles 2 and 3 could be relevant in assessing whether there has been a breach of Article 5.

Discussion

Objective element

2.70 The European Court of Human Rights has stated that Article 5 protects individual liberty "in its classic sense, that is to say the physical liberty of the person".[76] It is "the concrete situation" of the person which matters – in other words, the regime under which they are living must be examined. Account must be taken of a range of factors such as the type, duration, effects and manner of implementation of the measure in question.

2.71 There is an objective element and a subjective element to deprivation of liberty. To take the objective element first, there must be "confinement in a particular restricted space for a not negligible length of time".[77] The paradigm case would be incarceration in a prison cell, but the Court has stated that "deprivation of liberty may take numerous other forms".[78] For example, in *Guzzardi*, the appellant was confined to part of an island. Where there is a dispute about whether what has occurred amounts to a deprivation of liberty, it may be instructive to consider the concept of restriction upon freedom of movement, the latter being protected by Article 2 of Protocol 4, which provides:

"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.

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[75] (2008) 47 EHRR 41. This case is discussed at para 6.61 below.
[76] *Engel* at para 58.
[77] *Storck v Germany* (2006) 43 EHRR 6 at para 74.
[78] *Guzzardi v Italy* (1981) 3 EHRR 333 at para 95.

2. Everyone shall be free to leave any country, including his own.

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.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."[79]

2.72 In several cases, the Court has confirmed that "the difference between deprivation of and restriction upon liberty is...merely one of degree or intensity, and not one of nature or substance".[80] The use of Article 2 of Protocol 4 to assist in identifying what is or is not a deprivation of liberty has been described as "profoundly unconvincing";[81] it is however, well-established. The comparison featured prominently in the House of Lords decision in *Austin v Commissioner of Police of the Metropolis*.[82]

2.73 In referring to the objective element, the Court has not identified any one feature which, when present, will always indicate a deprivation of liberty. In 1993, in relation to the concept of deprivation of liberty, it was commented that "any underlying principle of approach is difficult to extract from the decisions and judgements".[83] Without underlying principle of approach, there is an absence of definition and increased difficulty in protecting citizens against deprivation of liberty. As has been observed more recently:

> "In jurisdictions covered by the ECHR it has become essential for clinical teams and other health and social care decision-makers to be able to recognise a deprivation of liberty and to know when the restrictions imposed on a patient are sufficient to amount to a deprivation of liberty….
>
> …..
>
> If international human rights law is effectively to protect individuals from unauthorised deprivations of liberty, then we need to know with some certainty what a deprivation of liberty is."[84]

2.74 Despite the absence of a touchstone for the existence of deprivation of liberty, cases where the individual has been kept under lock and key have tended to result in a finding that there has been deprivation of liberty.[85] As was observed by Judge Loucaides (dissenting) in *HM*, detainees in prisons and other places of detention may retain certain freedoms within the prison:

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[79] The UK has signed but not ratified Protocol 4.
[80] *Guzzardi* at para 93. *HM* at para 42. *Stanev* at para 115.
[81] Gostin, Bartlett, et al *Principles of Mental Health Law and Policy* at para 11.35.
[82] [2009] UKHL 5; [2009] 1 AC 564.
[83] Murdoch, "Safeguarding the liberty of the person: recent Strasbourg jurisprudence" 1993 ICLQ 42 pp 494 – 522, at 495.
[84] Genevra Richardson in *Rethinking Rights-based Mental Health Laws* (2010) (ed McSherry and Weller) at pp 196, 198.
[85] The exception is *Nielsen v Denmark* (1989) 11 EHRR 175.

> "Yet, so long as they (like the applicant) are not permitted to leave the place where they are detained and go anywhere they like and at any time they want, they are certainly "deprived of their liberty"."[86]

2.75 That the premises concerned are a hospital, particularly a psychiatric hospital, is also more likely to result in such a finding.[87] Deprivation of liberty can, however, occur in settings other than incarceration in a closed prison or psychiatric hospital, as for example in *Guzzardi*. As the degree of physical constraint lessens, factors such as social isolation and the other circumstances of the regime may come into play.[88]

Subjective element

2.76 Turning to the subjective element, it is clear that this concerns the absence of consent. An individual can only be considered to have been deprived of his or her liberty if he or she has not validly consented to the confinement in question.[89] The Court will scrutinise the facts of the case to determine whether or not there has been consent and may infer from the facts that consent was absent if, for example, the person concerned tried to escape from the premises.[90] If the person does not have the capacity to consent, then consent cannot have been given.[91] And in a situation where, legally or in fact, the person lacks capacity, the Court will still take into account an expression of hostility to the placement, as in *Stanev v Bulgaria* and *DD v Lithuania*.

State responsibility

2.77 Before there can be a breach of Article 5, a deprivation of liberty must be imputable to the State. Guidance as to the different ways in which this requirement may be satisfied is found in the case of *Storck v Germany*.[92] Plainly, if the establishment in which a person is detained is run by State authorities, or if the person is placed in an establishment by State authorities, State responsibility for any deprivation of liberty will follow. But even in the absence of such features, the responsibility of the State may be engaged. Firstly if there are proceedings concerning the situation of the person, the Courts will have responsibility to apply domestic law in conformity with the spirit of Article 5. Secondly, if the situation of a person detained in private facilities comes to the attention of the State authorities, the responsibility of the State to take appropriate steps to protect the person against interference with their rights under Article 5 will arise. The Court in *Storck* observed:

> "102…….the Court considers that Article 5 § 1, first sentence, of the Convention must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens. Any conclusion to the effect that this was not the case would not only be inconsistent with the Court's case-law, notably under Articles 2, 3 and 8 of the Convention, it would also leave a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see,

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[86] Para O-II 5 (from EHRR). See also para 73 in *Storck.*
[87] Eg *HL, Storck, Ashingdane.*
[88] Harris, O'Boyle and Warbrick *Law of the European Convention on Human Rights*, (2nd edn 2009,) p 124.
[89] *Stanev v Bulgaria*, Application no. 36760/06, 17 January 2012 at para 117.
[90] As in *Storck.*
[91] *HL v United Kingdom* (2005) 40 EHRR 32.
[92] (2006) 43 EHRR 6. See earlier discussion at paras 2.37 to 2.39 above.

mutatis mutandis, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 332-52 and 464, ECHR 2004-VII).

103. With regard to persons in need of psychiatric treatment in particular, the Court observes that the State is under an obligation to secure to its citizens their right to physical integrity under Article 8 of the Convention. For this purpose, there are hospitals run by the State which coexist with private hospitals. The State cannot completely absolve itself of its responsibility by delegating its obligations in this sphere to private bodies or individuals (see, *mutatis mutandis*, *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, pp 14-15, §§ 28-30, and *Woś*, cited above, § 60). The Court would point out that in *Costello-Roberts* (cited above, p 58, §§ 27-28) the State was held responsible for the act of a headmaster of an independent school on account of its obligation to secure to pupils their rights guaranteed by Articles 3 and 8 of the Convention. The Court finds that, similarly, in the present case the State remained under a duty to exercise supervision and control over private psychiatric institutions. Such institutions, in particular those where persons are held without a court order, need not only a licence, but also competent supervision on a regular basis of whether the confinement and medical treatment is justified."

2.78 The observations at the end of this passage indicate that it is not sufficient to operate reactively, taking steps only if a deprivation of liberty in private facilities comes to the attention of the authorities. There is an additional responsibility to monitor institutions where individuals are held in conditions which may amount to deprivation of their liberty, and take action if there appears to be unjustified confinement.

Procedure

2.79 The case of *DD v Lithuania*[93] revealed a domestic procedure for the deprivation of liberty which was essentially administrative. It derived from delegated legislation, approved by the Minister of Social Security and Labour, and consisted of the following requirements:

"The rules provide that an individual is considered to be eligible for admission to such an institution, *inter alia*, if he or she suffers from mental health problems and therefore is not able to live on his or her own. The need for care is decided by the municipal council of the place of his or her residence in cooperation with the founder of the residential care institution (the county governor). Individuals are admitted to care institutions in the event that the provision of social services at their home or at a non-statutory care establishment is not possible. A guardian who wishes to have a person admitted to a residential care institution must submit a request in writing to the social services department of the relevant municipal council. The reasons for and motives behind admission must be indicated. An administrative panel of the municipal council, comprising at least three persons, is empowered to decide on the proposed admission. Representatives of the institution to which the person is to be admitted as well as the founder (the governor) must participate."[94]

2.80 In *HL v United Kingdom*,[95] the English law of necessity was examined by the European Court to determine whether it satisfied the procedural requirements of Article 5(1). The Court accepted that the detention had been on the basis of the law of necessity and,

[93] Application no. 13469/06, 14 February 2012.
[94] Para 79.
[95] (2005) 40 EHRR 32.

therefore, had been lawful under domestic law. Moreover, application of the law of necessity in the field of mental health met the *Winterwerp* criteria.[96]

2.81 Conformity with domestic law, however, was a necessary but not sufficient criterion for compliance with Article 5. The domestic law itself must satisfy wider Convention requirements of "lawfulness":

> "114. The Court reiterates that the lawfulness of detention depends on conformity with the procedural and the substantive aspects of domestic law, the term "lawful" overlapping to a certain extent with the general requirement in Article 5 § 1 to observe a "procedure prescribed by law" (see *Winterwerp*, cited above, pp 17-18, § 39). Further, given the importance of personal liberty, the relevant national law must meet the standard of "lawfulness" set by the Convention which requires that all law be sufficiently precise to allow the citizen – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail…...
>
> 115. Lastly, the Court reiterates that it must be established that the detention was in conformity with the essential objective of Article 5 § 1 of the Convention, which is to prevent individuals being deprived of their liberty in an arbitrary fashion….. This objective, and the broader condition that detention be "in accordance with a procedure prescribed by law", require the existence in domestic law of adequate legal protections and "fair and proper procedures". …..

2.82 Examination of the law of necessity and its application in English law led the Court to conclude that "the further element of lawfulness, the aim of avoiding arbitrariness" had not been satisfied.[97] In particular:

> "……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 appointment of a representative of a patient who could make certain objections and applications on his or her behalf is a procedural protection accorded to those committed involuntarily under the 1983 Act and which would be of equal importance for patients who are legally incapacitated and have, as in the present case, extremely limited communication abilities."[98]

2.83 It is not easy to reconcile these dicta about the content required of domestic law before it can be said to comply with Article 5 with the less critical approach in *DD v Lithuania.*[99] The then absence in English law of procedural safeguards to protect against deprivation of liberty appears to be replicated in a domestic legal process which required only an application by a guardian before admission to a home could take place.

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[96] *Winterwerp v Netherlands* (1979-1980) 2 EHRR 387. See discussion at paras 2.2 and 2.3 above.
[97] Para 119.
[98] Para 120.
[99] Application no. 13469/06, 14 February 2012.

Article 5(4)

2.84 It is of course the case that even though domestic law was found to comply with Article 5(1) in *DD v Lithuania,* the Court found there to have been a breach of Article 5(4). A relatively informal administrative process therefore required to be supported by a right of swift access to a Court to challenge the detention, a feature absent from Lithuanian law, which offered neither automatic review nor a right of access to Court by the applicant, due to her loss of legal capacity.

2.85 The principle that deprivation of liberty by administrative process requires to be buttressed by prompt access to a court is clear, whereas deprivation of liberty by judicial process effectively in itself satisfies the requirements of Article 5(4) as far as initial access is concerned, as was made clear by the European Court in a case concerning vagrancy:

> "76. At first sight, the wording of Article 5 (4) (art 5-4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. The two official texts do not however use the same terms, since the English text speaks of "proceedings" and not of "appeal", "recourse" or "remedy" (compare Articles 13 and 26 (art 13, art 26)). Besides, it is clear that the purpose of Article 5 (4) (art 5-4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected; the word "court" ("tribunal") is there found in the singular and not in the plural. Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5 (4) (art 5-4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Article 5 (4) (art 5-4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Article 5 (1) (a) of the Convention) (art 5-1-a). It may therefore be concluded that Article 5 (4) (art 5-4) is observed if the arrest or detention of a vagrant, provided for in paragraph (1) (e) (art 5-1-e), is ordered by a "court" within the meaning of paragraph (4) (art 5-4).
>
> It results, however, from the purpose and object of Article 5 (art 5), as well as from the very terms of paragraph (4) (art 5-4) ("proceedings", "recours"), that in order to constitute such a "court" an authority must provide the fundamental guarantees of procedure applied in matters of deprivation of liberty. If the procedure of the competent authority does not provide them, the State could not be dispensed from making available to the person concerned a second authority which does provide all the guarantees of judicial procedure.
>
> In sum, the Court considers that the intervention of one organ satisfies Article 5(4) (art 5-4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question".[100]

Conclusion

2.86 This discussion has attempted to focus on the leading decisions of the European Court of Human Rights concerning Article 5 of the Convention. We referred earlier to the observation made in 1993 that there is difficulty in extracting from the decisions and

[100] *De Wilde, Ooms and Versyp v Belgium* (1979-80) 1 EHRR 438 (decided in 1972).

judgements any underlying principle of approach to identifying deprivation of liberty.[101] Such difficulty appears to us to remain: a clear set of principles which could be extracted from the decisions of the Strasbourg Court and implemented in domestic law is absent, and the Court has emphasised that its approach is largely case by case. The task for member States may therefore be better seen as the development and maintenance of a system which meets the needs and respects the rights of those with incapacity in their own jurisdiction. Against this background, we now turn to look at current Scots law.

3. Do consultees have any observations on our summary of case-law from the European Court of Human Rights?

[101] See para 2.73 above.

Chapter 3 Scotland

Introduction

3.1 The Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") introduced a new system for regulating how decisions are made for people who lack capacity to make decisions about their financial affairs and property, their welfare, and their medical treatment. This chapter outlines the provisions relating to powers of attorney, and the system of intervention and guardianship orders introduced under Part 6 of the 2000 Act. It also considers how that system interacts with certain provisions of the Social Work (Scotland) Act 1968, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007. Finally, such case-law as there is in Scotland concerning the issues raised in the *Bournewood* case is examined. First we consider the principles and key definitions applying to actions and decisions under the 2000 Act.

Background to the 2000 Act

3.2 The 2000 Act was based on a draft Bill annexed to this Commission's Report on Incapable Adults.[1] The Act was introduced to protect adults with incapacity and provide support to their families and carers in connection with "managing and safeguarding the individuals' welfare and finances".[2]

3.3 The Act introduced new arrangements for making decisions about personal welfare and managing the property and finances of adults with incapacity. It enables carers and others to be given authority to act and make decisions on their behalf.

Adults covered by the 2000 Act

3.4 The 2000 Act applies to anyone who has attained the age of 16 years who lacks the capacity to make some or all decisions about their lives. The Act defines "incapable" as incapable of:

> "(a) acting; or
>
> (b) making decisions; or
>
> (c) communicating decisions; or
>
> (d) understanding decisions; or
>
> (e) retaining the memory of decisions,
>
> as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that

[1] Report on Incapable Adults, Scot Law Com No 151 (1995).
[2] See the introduction to the Code of Practice for persons authorised under intervention orders and guardians under the Adults with Incapacity (Scotland) Act 2000; revised version published by the Scottish Government in 2008, reprinted with minor amendments in 2011: http://www.scotland.gov.uk/Publications/2011/03/24114616/14.

lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and

"incapacity" shall be construed accordingly."[3]

3.5 "Mental disorder" has the meaning provided for in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003.[4] That definition refers to "any mental illness; personality disorder or learning disability, however caused or manifested". It appears to be accepted that this definition applies to people whose incapacity is caused by dementia, learning disability, acquired brain injury, or mental illness.

Principles underpinning interventions under the 2000 Act

3.6 Section 1 also provides for certain general principles to be given effect to in arriving at any decisions and actions under the Act:

"(2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

(3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

(4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of–

(a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;[5]

(b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so;

(c) the views of—

(i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and

(ii) any person whom the sheriff has directed to be consulted,

in so far as it is reasonable and practicable to do so; and

(d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so."

3.7 The principles were recommended by this Commission's Report on Incapable Adults and were aimed at empowering adults with incapacity, respecting their rights and recognising that many have been managing their own affairs in the past and some will be able to do so again in the future.

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[3] 2000 Act, s 1(6).
[4] 2000 Act, s 87(1).
[5] The duty to take account of the wishes and feelings of the adult includes taking into account wishes and feelings expressed via a person providing independent advocacy services (s 3(5A)).

Codes of practice

3.8 The 2000 Act is supplemented by Codes of Practice issued under section 13 of the Act by the Scottish Government.[6] Although the codes are not legally binding, failure to have regard to the guidance in the codes could be a relevant factor in any complaint or legal challenge relating to the exercise of functions under the Act. There are Codes relating to each of Parts 2 to 6, as well as a general Code of Practice for Local Authorities exercising functions under the 2000 Act.

Powers of attorney

3.9 A power of attorney is a legal document used by a person to authorise another individual to take financial, medical or welfare decisions on his or her behalf.[7] A power of attorney enables a person to plan for future decision-making in the event of the person becoming unable to make decisions as a result of injury or illness. The 2000 Act makes provision for the granting of continuing powers of attorney and welfare powers of attorney.

3.10 In terms of the 2000 Act, a power of attorney relating to property or financial affairs granted in accordance with section 15 will survive any later incapacity of the granter. Such a power of attorney is known as a continuing power of attorney.[8]

3.11 By contrast, welfare powers of attorney only come into force when the granter has lost capacity, or the attorney reasonably believes that to be so. In terms of section 16 of the 2000 Act, a welfare power of attorney must comply with certain formalities of execution. These include that the document incorporates a statement that the granter intends the document to be a welfare power of attorney, that he has considered how a determination as to his incapacity is to be made and that the document incorporates a certificate by a solicitor or other prescribed professional that he has interviewed the granter, who understands the nature and effect of the deed.

3.12 In practice, welfare powers of attorney often grant full powers to the attorney and, without prejudice to that generality, also list the powers conferred. These might include the power to make decisions about the granter's future care arrangements (in residential care, hospital or at home); access confidential or personal information about the granter's welfare, such as health or social work records; and consent to or refuse medical treatment on behalf of the granter.[9] The granter of a welfare power of attorney may appoint any individual as his or her welfare attorney other than any person acting in his or her capacity as an officer of a local authority or other statutory body.[10] Such a person may, however, be appointed in his or her personal capacity.

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[6] The Codes are listed at: http://www.scotland.gov.uk/Topics/Justice/law/awi/010408awiwebpubs/cop. Those most relevant to the present project are the Adults with Incapacity (Scotland) Act 2000: Revised Code of Practice for persons authorised under intervention orders and guardians (2011) and the Adults with Incapacity (Scotland) Act 2000: Code of Practice for Local Authorities Exercising Functions under the 2000 Act (2008).
[7] Hilary Patrick and Nicola Smith, *Adult Protection and the Law in Scotland*, (2009) para 9.24.
[8] 2000 Act, s 15(2).
[9] Hilary Patrick, *Mental Health, Incapacity and the Law in Scotland,* (2006) para 25.06.
[10] 2000 Act, s 16(5).

Supervision of welfare and continuing attorneys

3.13 There is no provision for routine supervision of attorneys by local authorities, the Public Guardian[11] or the Mental Welfare Commission. Where, however, there is a complaint relating to the exercise of functions by an attorney, section 20 of the 2000 Act empowers the sheriff to order that the Public Guardian (in the case of a continuing attorney) or the relevant local authority (in the case of a welfare attorney) should supervise the attorney. As regards continuing attorneys, the sheriff may also make orders requiring them to submit accounts to the court, in respect of any period specified in the order. As regards welfare attorneys, the sheriff may order that they submit to the court a report outlining how they have exercised their powers during any period specified in the order. In terms of regulation 2(1) of the Adults with Incapacity (Supervision of Welfare Attorneys by Local Authorities) (Scotland) (Regulations) 2001,[12] where a welfare attorney is subject to supervision, the relevant local authority will then visit both the attorney and the granter of the power of attorney at least on a monthly basis.

3.14 The Mental Welfare Commission may visit the granter of a power of attorney if it is concerned about his or her welfare. Section 9(2) of the 2000 Act requires the attorney to facilitate access to the granter by the Commission visitor.

3.15 Additional guidance for solicitors preparing powers of attorney is currently being prepared in collaboration between the Law Society of Scotland and the Mental Welfare Commission. This follows publication of a report in January 2012 by the Mental Welfare Commission entitled "Powers of Attorney and their Safeguards." The report highlighted a case of abuse of a couple with learning disabilities by a relative to whom they had granted continuing and welfare powers of attorney. The report suggested that the case illustrated difficulties faced by practitioners of all disciplines in understanding what exactly was meant by "incapable of acting" for the purposes of section 1 of the Adults with Incapacity (Scotland) Act 2000. This seemed to arise from a combination of lack of guidance and lack of clarity of the law. Accordingly, the guidance will cover issues of incapacity and also of undue influence.[13]

Termination of a power of attorney

3.16 The granter of a welfare or continuing power of attorney may revoke the power of attorney at any time, providing they have capacity to do so. Moreover, a power of attorney automatically comes to an end on the grant of a decree of divorce or separation, or a decree of nullity, where the granter and the attorney are married to one another or, where the granter and attorney are in a civil partnership, the obtaining of a decree of separation, dissolution or nullity.[14] A power of attorney also ends automatically upon the appointment of a guardian who is empowered to exercise the functions provided for in the power of attorney,[15] upon the resignation of the attorney, or upon the death of the granter or attorney.

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[11] Section 6 of the 2000 Act creates the office of Public Guardian, to be held by the Accountant of Court.
[12] SSI 2001/77.
[13] http://www.lawscot.org.uk/news/press-releases/2012/february/news_1302201_mental_welfare_commission.
[14] See 2000 Act, s 24(1) and (1A).
[15] See 2000 Act, s 24(2).

Part 5 of the 2000 Act

3.17 Part 5 of the 2000 Act governs medical treatment of adults who lack capacity to consent to decisions about the treatment. A mechanism is provided whereby medical practitioners, and dentists, opticians, nurses and such other persons as the Scottish Ministers may by regulations prescribe, have authority to do what is reasonable in the circumstances in relation to the treatment in question to safeguard or promote the physical or mental health of the adult. The mechanism consists simply of a certificate by the relevant professional that he is of the opinion that the adult is incapable in relation to a decision about the treatment in question. Certification can be for up to a year at a time. It does not authorise the use of force or detention, unless that is immediately necessary, or the placing of the adult in a hospital for the treatment of mental disorder against his will.[16]

3.18 The provisions do not apply if an application for an intervention order or guardianship order with power in relation to the treatment has been made,[17] or if a guardian, a welfare attorney or a person authorised under an intervention order has power in relation to medical treatment and it is reasonable and practicable to obtain the consent of that person.[18]

Part 6 of the 2000 Act – general overview

3.19 Part 6 of the 2000 Act introduced a new[19] system of intervention and guardianship orders granted by the court authorising the making of decisions for those who lack capacity either in part or in whole. Although the procedures relating to application for both types of order are similar, the purposes of each type of order are different.

Intervention orders

3.20 Intervention orders can deal with both financial and/or welfare matters of the adult concerned. The orders are granted by the sheriff,[20] and are intended to deal with specific situations that do not require continuous management of the adult's affairs through the appointment of a guardian. The Scottish Government Code of Practice for Local Authorities suggests that, for example, an intervention order might be appropriate to require an adult with incapacity to attend hospital for specific medical treatment (other than for mental disorder) or assessment; or for the signing of a tenancy agreement on behalf of the adult; or for buying or selling the adult's home.

3.21 Any person (including the adult concerned) claiming an interest in the property, financial affairs or personal welfare of an adult may apply to the sheriff for an intervention order.[21] In circumstances where it appears that an order is necessary in respect of an adult with incapacity and nobody else is applying for one, section 53(3) of the 2000 Act imposes a duty on the local authority to apply for an intervention order relating to a particular decision.

3.22 In considering any application for an intervention order, the sheriff must have regard to any intervention order or guardianship order which may have been previously made in

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[16] 2000 Act, s 47.
[17] 2000 Act, s 49.
[18] 2000 Act, s 50.
[19] The new system replaced guardianship under the Mental Health (Scotland) Act 1984, tutors and curators bonis.
[20] Section 53 of the 2000 Act gives the sheriff the power to grant intervention orders.
[21] 2000 Act, s 53(1).

relation to the adult.[22] One of the functions of the Public Guardian is to maintain a public register of all intervention orders granted by the court.[23]

3.23 More than one intervention order may be granted at any one time in respect of the same person. An order must be granted for a finite period or have a clear termination point, even if it simply provides that it is to remain in existence until completion of the event or transaction for the purpose of which it was granted. An intervention order ceases to have effect on the death of the adult to whom it relates.[24]

Guardianship orders

3.24 Part 6 of the 2000 Act also provides for guardianship orders. By contrast with an intervention order, a guardianship order enables a person to act and make decisions on a long-term basis on behalf of an adult who is unable to do so. Guardianship orders can apply to one or more of property matters, financial affairs and personal welfare, tailored to the needs of the adult concerned, but with regard to the principle of the least restrictive intervention. Other less restrictive options should be used if they would offer the same benefits to the adult.[25] Guardianship orders can be used to move an adult into residential care or from one care home to another. Alternatively, a guardianship order can be used to authorise community care arrangements for an adult. This may be a less restrictive option than a move into a residential care home. Obtaining a guardianship order may be appropriate where in practice a relative or other person or the local authority is already exercising some degree of informal control of the adult's life.

3.25 Although the standard term for an order is three years, the sheriff has discretion to grant an order for a longer or shorter period or indeed indefinitely.[26] However, in broad terms guardianship orders can be contrasted with intervention orders on the basis that they are granted for a more prolonged period than intervention orders and generally involve a greater overall role in the management of the affairs of the adult.

Application for a guardianship order

3.26 An application for a guardianship order may be made by any person (including the adult him or herself) claiming an interest in relation to the adult's property, financial affairs or personal welfare.[27] By way of illustration, a guardianship order may be more appropriate than an intervention order where more than one key issue is to be dealt with, where there is likely to be a need for continuing intervention in the adult's affairs or where there is a need for flexibility to allow new situations to be dealt with without the need to go repeatedly back to court.

3.27 By section 57(2) of the 2000 Act, local authorities have a duty to apply for a guardianship order where three conditions are met, namely:

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[22] 2000 Act, s 53(2).
[23] The Public Guardian charges a fee for registration of an intervention order. The current fee is £70.
[24] 2000 Act, s 77(1).
[25] 2000 Act, ss 57 and 58.
[26] 2000 Act, s 58(4).
[27] 2000 Act, s 57.

"(a) the conditions mentioned in section 58(1)(a) and (b) apply to the adult.[28]

(b) no application has been made or is likely to be made for an order under this section; and

(c) a guardianship order is necessary for the protection of the property, financial affairs or personal welfare of the adult."

Appointment of interim guardian

3.28 Section 57(5) and (6) makes provision for the appointment of an interim guardian at any time before the disposal of an application made under section 57.

Who may be appointed as guardian?

3.29 The question of who may be appointed as a guardian is dealt with in section 59. Section 59(1)(a) provides that the sheriff may appoint as guardian any individual whom he considers to be suitable for the appointment and who has consented to being appointed. In addition, by virtue of section 59(1)(b), the chief social work officer of the local authority can be appointed as an adult's guardian with respect to the adult's welfare. In other words, local authority guardianship cannot extend to financial affairs or property. The Act also makes provision in section 62 for joint guardianship, as discussed further below. Section 59(2) clarifies that where a guardianship order is to relate to property, financial affairs and welfare in combination, the chief social work officer may be appointed as a joint guardian, with his or her powers relating only to the adult's welfare.

Effect of a guardianship order

3.30 In general terms a guardianship order lasts for three years.[29] However, the sheriff can grant an order for a shorter or longer period (including an indefinite period) if satisfied that there is a case for this. In terms of section 60(4)(b), the sheriff may renew an order for periods of 5 years at a time, or indefinitely. Section 60(2) places a duty on the relevant local authority to apply for renewal of a guardianship order where they consider that this is necessary and no such application has been made or is likely to be made.

3.31 In terms of section 67(1) of the 2000 Act an adult cannot enter into any transaction relating to a matter within the scope of the guardian's authority, unless the guardian authorises this. This does not affect the adult's ability to deal with matters not specified in the guardianship order. These could be welfare, medical or financial matters.

3.32 The Public Guardian receives a copy of the interlocutor in relation to any guardianship order that is made. The Public Guardian registers the order and issues a certificate of appointment to the guardian. The Public Guardian also notifies the adult and the local authority of the appointment and, where the incapacity is due to mental disorder and the guardianship order relates to welfare matters, the Mental Welfare Commission.[30]

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[28] In short these are (i) that the adult is incapable as regards making decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare; (ii) that the adult is likely to continue to be so incapable and (iii) that no other means provided by or under the Act would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted.
[29] 2000 Act, s 58(4).
[30] 2000 Act, s 58(7).

The powers and functions of a guardian

3.33 Section 64(1)(a) to (e) sets out a wide range of powers which may be conferred on a guardian by a guardianship order. Its effect is that a guardianship order may confer power on the guardian to deal with all matters relating to the welfare and/or property and financial affairs of the adult, or merely certain specified aspects of either or both. Section 64(1)(e) makes clear that an order may allow a guardian to authorise the adult to carry out certain transactions or types of transactions. This may mean giving the adult the opportunity to control small amounts of money, for example. It encourages the adult to use their existing skills, and so accords with the principle set out in section 1 of the 2000 Act that any intervention should restrict the adult's freedom to the minimum extent possible.

3.34 In terms of section 64(3) of the 2000 Act, the guardian is authorised to act as the adult's legal representative in relation to any matter within the scope of the guardianship order, unless the guardianship order states otherwise. A guardian may be authorised to raise or defend an action for divorce, separation or nullity of marriage on behalf of the adult.[31]

Limits to powers of a guardian

3.35 Section 64(2) specifies certain powers which may not competently be provided for in a guardianship order. Section 64(2)(a) makes clear that a guardian may not place an adult in a hospital for treatment of a mental disorder against his or her will. Moreover, the guardian may not consent to or request on behalf of the adult certain other forms of treatment and procedure specified in section 64(2)(b) to (e), including making a request under section 4(1) of the Anatomy Act 1984. (This is a request by a person over the age of 12 that his or her body be used after death for anatomical examination). Section 64(11) confers a power on the Scottish Ministers to make regulations to define further the scope of the powers which may be conferred on a guardian under subsection (1), and the conditions under which those powers may be exercised. However, no such regulations have been made to date.

Enforcement powers

3.36 Section 70 makes provision for a guardian with powers relating to the personal welfare of an adult to seek to compel compliance in the event that an adult does not comply with the decision of a guardian. Section 70(1)(a) empowers a sheriff, on application by the guardian, to make an order ordaining the adult to implement the decision of the guardian, if the decision is one with which the adult might reasonably be expected to comply.

3.37 Section 70(1)(b) makes provision for the situation in which the guardian has the power to decide where the adult should live. The guardian may apply to the sheriff for a warrant authorising a police officer to enter any place where the adult is or is reasonably supposed to be and to apprehend and remove him or her to such place as the guardian may direct. Section 70(5) provides that the police officer can exercise reasonable force if necessary. It also makes clear that the guardian or someone authorised by the guardian must be present when the police officer executes the warrant. The revised Code of Practice for persons authorised under intervention orders and guardians does not envisage the use of force or detention by guardians alone. It suggests that a guardian may on occasions have to

[31] 2000 Act, s 64(1)(c).

'insist' on having his or her way but it links the use of compulsion with the employment of enforcement procedures under the Act.[32] Alternatively, it suggests that a guardian may wish to seek directions from the sheriff. Section 64(1)(b) of the 2000 Act provides that a sheriff may confer power to deal with 'all aspects' of the personal welfare of the adult. This clearly includes the power to arrange for the adult to live in a certain place and receive certain services.

3.38 The adult has 21 days to object to the application by the guardian.[33] Section 70(4A) allows the sheriff to disapply or modify the notification requirement if considered appropriate.

Discharge of functions and duties by a guardian

3.39 In terms of section 64(6) a guardian may arrange for some or all of his or her functions to be exercised by others but cannot surrender or transfer any part of them.

3.40 A guardian is required, in so far as is reasonable and practicable, to encourage the adult to exercise whatever skills he or she has and to develop new skills.[34] This gives effect to the principle that any intervention should be to the minimum possible extent. In more general terms, a guardian has a duty to discharge his or her functions in such a way that all of the principles laid down in section 1 of the 2000 Act are given effect to. Section 69 expressly provides that if a guardian is in breach of any duty of care, fiduciary duty or obligation imposed by the Act, he or she may lose the whole or part of any remuneration to which he or she would otherwise be entitled. It seems clear that this would catch a failure to take account of the principles laid down in section 1.

3.41 A guardian owes a duty of care to the adult and could be liable in damages if he or she fails to act to protect the interests of the adult or is negligent in determining what those interests are.[35] Under section 83 of the Act, it is a criminal offence for a guardian to ill-treat or wilfully neglect the adult in his or her guardianship. Section 65(1) of the 2000 Act requires the guardian to keep records of the exercise of his or her powers.[36]

Joint guardians

3.42 Section 62 of the Act makes provision for the appointment of joint guardians in circumstances where the individuals to be appointed are parents, children or siblings of the adult or, where they are not so related to the adult, the sheriff is satisfied that it is nonetheless appropriate to appoint them as joint guardians. Section 62(1) provides that joint guardians may be appointed either by an initial application by two or more individuals, or by adding a further individual to act jointly with the existing guardian or guardians.

3.43 Whilst joint guardians may act individually, they are liable not just for any breach of their own duty of care, but also have a duty to take reasonable steps to ensure that the other guardian does not breach his or her statutory duty of care to the adult.[37] Section 62(7)

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[32] Paras 5.49, 5.70 to 5.71 and 5.85 to 5.86.
[33] See s 70(3) of the 2000 Act, as read with regulation 3 of the Adults with Incapacity (Non-compliance with Decisions of Welfare Guardians) (Scotland) Regulations 2002 (SSI 2002/98).
[34] 2000 Act, s 1(5).
[35] Hilary Patrick, *Mental Health, Incapacity and the Law in Scotland*, (2006), p 414.
[36] Further guidance on record-keeping can be found in the Code of Practice for persons authorised under intervention orders and guardians, paras 5.64 and 6.43.
[37] 2000 Act, s 62(6).

makes clear that, where practicable, a joint guardian should consult the other guardian(s) before acting under guardianship powers, unless the joint guardians agree that this is not necessary. If joint guardians disagree on how to act, either or both/all of them may apply to the sheriff for directions.[38]

Supervision of guardians and people authorised under intervention orders

Supervisory provisions relating to guardians

3.44 Section 6(1) of the 2000 Act provides that the Accountant of Court is to be the Public Guardian. In terms of section 6(2)(a) of the 2000 Act, the Public Guardian is responsible for the supervision of any person who has powers in relation to the property or financial affairs of an adult, be that under a guardianship order or an intervention order. The Public Guardian has wide powers, including the power in section 73(1) to recall the powers of the guardian, where he or she believes that the grounds for appointment of a guardian with such powers are no longer fulfilled, or that the interests of the adult in his property and financial affairs can be satisfactorily safeguarded or promoted otherwise than by guardianship.

3.45 Supervision of the exercise of functions in relation to welfare is a matter for the relevant local authority and (where the incapacity is caused wholly or partly by mental disorder) the Mental Welfare Commission for Scotland. The frequency of visits to the guardian/adult by the local authority is governed by regulation 2 of the Adults with Incapacity (Supervision of Welfare Guardians etc. by Local Authorities) (Scotland) Regulations 2002.[39] If the guardianship is for a year or more, the adult must be visited within three months of the appointment of the guardian and thereafter at intervals of no more than six months. The guardian must also be visited in accordance with these timescales. If the guardianship is for less than a year, the relevant periods are within 14 days before or after the midpoint of the period of appointment and within 14 days before the end of the period of appointment. Regulation 3(a) imposes on welfare guardians a duty to provide reports or such other information as the local authority may reasonably require about the welfare of the adult or the exercise by the guardian of his or her powers. Section 73(3) of the 2000 Act confers on the relevant local authority and, where appropriate, the Mental Welfare Commission, the power to recall the powers of a welfare guardian, on grounds equivalent to those set out above in relation to guardians with an interest in property or financial affairs.

3.46 A sheriff can replace or remove a guardian on an application by the adult in relation to whom the guardian has been appointed or any other person with an interest in his or her property, financial affairs or personal welfare. The sheriff will not remove a guardian unless satisfied that there is a suitable substitute or that, where there is joint guardianship, the remaining joint guardian is prepared to act. The sheriff can also recall a guardianship order, or otherwise terminate a guardianship in certain circumstances.[40]

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[38] 2000 Act, s 62(8).
[39] SSI 2002/95, as amended by SSI 2005/630. The frequency of visits required in all cases render these provisions difficult for local authorities to meet. Consequently, the Scottish Government and the Mental Welfare Commission have begun a joint review of the regulations.
[40] 2000 Act, s 71.

Supervisory provisions relating to people authorised under intervention orders

3.47 Section 54 of the 2000 Act places an obligation on any person authorised under an intervention order to keep a record of the exercise of his or her powers. This duty applies regardless of whether the intervention order relates to the personal welfare or financial affairs of the adult, or both. Where an intervention order is in respect of the personal welfare of an adult, regulation 3(b) of the 2002 Regulations places a duty on the person authorised to provide the relevant local authority with reports or such other information as the local authority may reasonably require about the welfare of the adult, or the discharge by the intervener of his or her functions. On an application by any person (including the adult himself) claiming an interest in the property, financial affairs or welfare of an adult, section 3(3) of the 2000 Act confers power on a sheriff to give such directions as he or she considers appropriate in relation to the exercise of functions conferred by the 2000 Act and the taking of decisions or action in relation to the adult.

3.48 The powers of the sheriff under section 3(2)(a) appear to enable a sheriff to attach to an intervention order a condition requiring supervision by the local authority of the person authorised under the order. If the local authority is so required, regulation 2(3) of the 2002 Regulations applies, so that a representative of the local authority will visit the adult and, where appropriate, the person authorised by the order as often as required by the sheriff in making the order. Alternatively, where no requirement as to frequency of visits has been specified by the sheriff, a representative of the local authority will visit at intervals of not more than one month for the period of time fixed by the sheriff for supervision by the local authority.

3.49 In terms of section 13(2)(c) of the Mental Health (Care and Treatment) (Scotland) Act 2003, where an intervention order has been notified to them under section 53(10)(b) of the 2000 Act, the Mental Welfare Commission must also arrange visiting of the adult concerned. Section 9(2) of the 2000 Act requires a person authorised under an intervention order to afford the Commission all facilities necessary to enable them to carry out their functions in respect of the adult.

Important differences between guardianship and intervention orders

3.50 The revised Code of Practice for persons authorised under intervention orders and guardians indicates that where a person's affairs are moderately complex or uncertain, intervention orders might prove to be insufficient to secure the necessary benefits; a guardianship order might be more suitable.[41] By way of illustration, a guardianship order might be more suitable in circumstances where there is one or more major welfare or financial matters to be dealt with and decision-making is likely to be necessary over a prolonged period. A guardianship order can also provide flexibility so that the guardian can respond quickly to new situations without having to go back to court.

3.51 The revised Code of Practice also makes clear that the question of whether an intervention order or a guardianship order is more appropriate in any given case will depend on the circumstances of the particular adult concerned; it is not possible to draw up any

[41] Adults with Incapacity (Scotland) Act 2000: Revised Code of Practice for Persons Authorised under Intervention Orders and Guardians, available on the Scottish Government website http://www.scotland.gov.uk/Resource/Doc/347717/0115820.pdf at para 2.3.

definitive rules. In arriving at such a decision, careful consideration should be given to identifying decision-making powers that may appropriately be exercised on behalf of the adult. The nature and extent of those powers will be fundamental to the determination of what is more appropriate as between application for guardianship and an application for intervention. As noted above, it is open to a sheriff, on receipt of an application for guardianship, to treat the application as an application for an intervention order, on the basis that an intervention order will suffice.

3.52 The processes for obtaining guardianship and intervention orders are essentially identical. A person who already has welfare and/or financial powers in relation to another person as a guardian may apply for an intervention order to cover a particular decision or course of action, on the basis that the scope of the guardianship powers does not extend to taking that action or making that decision.[42]

Important differences between powers of attorney and orders under Part 6 of the 2000 Act

3.53 A key difference between powers of attorney and intervention or guardianship orders relates to the basis of the authorisation. A power of attorney is granted by the adult him or herself, whereas an order under Part 6 of the 2000 Act is made by the sheriff. A power of attorney can only be granted by a person with capacity to grant it; Part 6 orders can only be made if incapacity can be demonstrated. In short, therefore, whereas powers of attorney will be anticipatory measures, guardianship or intervention orders will be responsive measures.

3.54 Guardianship, and the authorisation of intervention under intervention orders, are judicial processes, to which regulatory requirements automatically apply. The formal requirements on an attorney acting under a power of attorney are fewer; although there is a duty on an attorney to keep records,[43] he or she will not be subject to formal requirements in relation to reporting or supervision unless an application for such measures is made under section 20 of the 2000 Act.

3.55 In a similar vein to a guardian, a person with a power of attorney may apply for an intervention order for the purposes of performing a particular act or making a particular decision on behalf of a person.

The Social Work (Scotland) Act 1968

3.56 We now turn to consider the obligations on local authorities to render assistance to those whose capacity is impaired.

3.57 Local authorities have a general duty to provide social welfare services under section 12(1) of the 1968 Act. In essence, the duty incumbent on local authorities under section 12 is to provide advice, guidance and assistance as appropriate, and to provide such facilities as they consider suitable and adequate, all of which they may give to any relevant person. A "relevant person" is a person who, not being less than 18 years of age, is in need requiring assistance. "Facilities" includes residential and other establishments.

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[42] Code of Practice, para 2.8.
[43] 2000 Act, s 21.

3.58 By section 94 of the 1968 Act, a "person in need" includes those who:

> "(a) are in need of care and attention arising out of infirmity, youth or age; or
>
> (b) suffer from illness or mental disorder or are substantially handicapped by any deformity or disability".

3.59 By section 12A of the 1968 Act, local authorities have a duty to make an assessment of needs of any person for whom they are under a duty or have a power to provide community care services if it appears to them that the person may be in need of such services.

Interaction of the 2000 Act with the Social Work (Scotland) Act 1968

3.60 The Adult Support and Protection (Scotland) Act 2007 amended the Social Work (Scotland) Act 1968 Act to insert a new section 13ZA. This allows a local authority to provide services which an adult with incapacity has been assessed as needing, including residential care, and to move the adult to such accommodation if necessary. In exercising the power under section 13ZA, local authorities must apply the first four principles set out in section 1 of the Adults with Incapacity (Scotland) Act 2000.

3.61 Local authorities are not authorised to take steps under section 13ZA if they are aware that:

> "(a) there is a guardian or welfare attorney with powers relating to the proposed steps;
>
> (b) an intervention order has been granted relating to the proposed steps; or
>
> (c) an application has been made (but not yet determined) for an intervention order or guardianship order under Part 6 of the 2000 Act relating to the proposed steps."[44]

3.62 Under the 2000 Act non-medical welfare interventions for an adult with incapacity can only be dealt with by means of an intervention order or a guardianship order. Section 13ZA was introduced in response to questions raised by local authority social work departments as to whether they required to obtain guardianship or intervention orders every time it was proposed to move an adult from one residential setting to another, in circumstances where no-one was in disagreement and the adult was compliant but not capable of consenting.[45]

3.63 There is at least a strong argument that section 13ZA could not be relied upon where the arrangements being provided for could be said to constitute a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights. The 1968 Act does not contain a procedure for detention or provide for rights of appeal. To secure ECHR compliance, more formal arrangements under the 2000 Act may be required. In more general terms, it has been suggested that where a local authority's community care duties require it to make arrangements for an adult who lacks the capacity to agree, the local authority should consider whether there would be benefit to the adult in applying for an order under Part 6 of the 2000 Act.[46]

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[44] 1968 Act, s 13ZA(4).
[45] See Adrian Ward, "Adult Incapacity and the Social Work (Scotland) Act 1968, s 13ZA", 2008 SLT (News) 197.
[46] See Hilary Patrick, *Authorising significant interventions for adults who lack capacity* (Mental Welfare Commission for Scotland, 2004) p 17, para 8 ("Powers under Social Work (Scotland) Act").

3.64 Further analysis of the interaction between section 13ZA of the 1968 Act and orders under Part 6 of the 2000 Act can be found in a guidance note for local authorities on the provision of community care services to adults with incapacity, annexed to a letter to all Directors of Social Work in Scotland by the Scottish Executive in March 2007.[47]

3.65 While acknowledging that which power a local authority decides to use is in each case a matter for judgement and decision of the authority, the guidance note identifies certain features that would typically be present in a case where the powers and duties under the 1968 Act were sufficient to allow a local authority to move an adult to a care home or make other significant alterations to the adult's care arrangements. These features are as follows:

> (1) there is no proxy (eg welfare guardian, person authorised by an intervention order etc) who has relevant authority, and no application for an order under the 2000 Act giving rise to relevant powers is in the process of being determined;
>
> (2) a risk assessment has indicated that there are no issues that would warrant an order under the 2000 Act;
>
> (3) it is considered that the adult will not be deprived of his or her liberty in terms of Article 5 as a result of the intervention;
>
> (4) there would be no other benefit to the adult in applying for an order.
>
> In addition to these considerations, the guidance suggests that recourse to the 1968 Act may be appropriate where:
>
> (1) the person with incapacity does not disagree with the proposed action; it appears that he/she is unlikely to indicate an unwillingness to remain in the care arrangements; and
>
> (2) all interested parties agree with the care intervention proposed.[48]

3.66 By contrast, the guidance indicates that a local authority should obtain an order under Part 6 of the 2000 Act where:

> (1) the circumstances in section 53(3) or 57(2) of the 2000 Act arise (in other words, while it appears to the local authority that the adult has incapacity, no application has been made for an order in relation to the decision in question, and a [guardianship or intervention] order appears to be necessary for the protection of the property, financial affairs or personal welfare of the adult; and/or
>
> (2) the circumstances of the care intervention amount to a deprivation of liberty.

3.67 Further indicators that a care intervention under the 2000 Act may be appropriate would include the following:

> (1) as far as can be ascertained the person with impaired capacity (the "adult" for the purposes of the 2000 Act) is opposed to the proposed course of action;

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[47] In terms of s 5 of the 1968 Act, local authorities are obliged to perform their functions under the Act under the general guidance of the Scottish Ministers. The guidance now appears as Annex 1 to the Adults with Incapacity (Scotland) Act 2000: Code of Practice for Local Authorities Exercising Functions under the 2000 Act, published on 1 April 2008. http://www.scotland.gov.uk/Resource/Doc/216923/0058136.pdf.

[48] Para 23 of the Guidance.

(2) the carer/family members have expressed a different view to that of the adult and/or the health and social work professionals involved with the needs assessment and care plan, or there is disagreement amongst professionals. In the event that no agreement can be reached in such cases, local authorities may conclude that the only way to protect the personal welfare of the individual would be through an application for an order, giving rise to a hearing in front of a sheriff. This is so even where there is doubt about how convincing the evidence would be in court.[49]

The interaction between the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003

3.68 The purpose of the Mental Health (Care and Treatment) (Scotland) Act 2003 was to restate and amend the law relating to persons suffering from mental disorder,[50] as previously contained primarily in the Mental Health (Scotland) Act 1984.

3.69 The Act imposes on local authorities duties in relation to the provision of services to those with mental disorder which are additional to the duties under the Social Work (Scotland) Act 1968. In terms of section 25 of the 2003 Act, local authorities are obliged to provide care and support services to persons who are not in hospital and who have, or have had, a mental disorder. They also have a power to provide such services for people who have or have had a mental disorder and who are in hospital. In relation to the same groups of people, section 26 imposes duties and powers on local authorities to provide services designed to promote well-being and social development.

3.70 Medical treatments provided for in the 2003 Act are outwith the scope of the Adults with Incapacity (Scotland) Act 2000. The treatments so provided for include surgical operations for destroying brain tissue and the functioning of brain tissue, and electro-convulsive therapy.[51] By virtue of section 239 of the 2003 Act, "medical treatment" means treatment for mental disorder and includes care.

3.71 Where a person who is capable of making decisions in relation to treatment agrees to treatment for a mental disorder, the 2003 Act does not come into play. If, however, a person does not agree to treatment for mental disorder, the provisions of the 2003 Act may be utilised. If a person falling within the scope of the 2000 Act is likely to resist or object to treatment for mental disorder, and if a doctor envisages that force or detention might be necessary in order to administer the treatment, it is suggested that the doctor should consider using the 2003 Act procedures.[52]

3.72 In brief, and as far as "civil" patients are concerned,[53] the 2003 Act provides for emergency detention, short-term detention and compulsory treatment orders.

Emergency detention certificates

3.73 Emergency detention is provided for in Part 5 of the 2003 Act. A person may be taken to hospital and detained there for up to 72 hours on the basis of a certificate by a

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[49] Para 24 of the Guidance.
[50] "Mental disorder" refers to any (a) mental illness; (b) personality disorder; or (c) learning disability, however caused or manifested (section 328(1) of the 2003 Act). It appears to be accepted that this includes dementia.
[51] See 2003 Act, ss 234 and 237.
[52] Hilary Patrick, *Mental Health, Incapacity and the Law in Scotland*, (2006), p 384.
[53] That is, excluding those who come under mental health legislation via the Criminal Justice system.

medical practitioner.[54] The procedure can also be used where the person concerned is already a patient in hospital and needs to be kept there for emergency treatment. Any person who is a registered medical practitioner may sign an "emergency detention certificate", under section 36(1) of the 2003 Act, where he or she has carried out a medical examination of the patient, the patient does not fall within section 36(2) of the Act (that is, already detained in hospital under another statutory provision), and section 36(3) applies.

3.74 Section 36(3), as read with subsection (6), sets out a number of conditions, the first of which is that there is no conflict of interest in relation to the medical examination. Regulations may be made by the Scottish Ministers specifying circumstances in which a conflict of interest is to be taken to arise, and is not to be taken to arise.[55] This power has not been exercised as yet. However, it has been suggested that likely examples of conflict of interest situations might include being related to the patient and having a pecuniary interest in the patient's admission to hospital.[56]

3.75 The second condition is that the medical practitioner considers it likely that the patient has a mental disorder, and that his or her ability to make decisions about medical treatment is significantly impaired as a result. No definitive diagnosis of a mental disorder need have been made by this point.

3.76 The third condition is that the medical practitioner must be satisfied that it is necessary as a matter of urgency to detain the patient in hospital to determine what medical treatment is needed. Moreover, there must be considered to be a significant risk to the health, safety or welfare of the patient or to the safety of any other person if the patient were not detained in hospital. In addition, the medical practitioner must be of the view that making arrangements to obtain a short-term detention certificate would cause undesirable delay.

3.77 The final condition is that the medical practitioner has consulted a mental health officer and the officer has consented to the granting of an emergency detention certificate, unless it is impracticable to consult/obtain such consent. The effect of this requirement is that, where a mental health officer is consulted and refuses to give consent, no emergency detention certificate may be granted. This is intended as a safeguard against arbitrary detention.[57]

3.78 Where a patient is admitted to hospital following the granting of an emergency detention certificate, the patient may be detained for up to 72 hours from admission, on the condition that the emergency detention certificate is passed to the managers of the hospital prior to the admission. Where a patient is already in hospital at the point the certificate is granted, the 72 hour period will start to run upon the granting of the certificate.[58]

3.79 As soon as practicable after a patient is detained in hospital under the authority of an emergency detention certificate, the managers of the hospital must arrange for him or her to be examined by an approved medical practitioner, namely a medical practitioner with

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[54] 2003 Act, s 36.
[55] 2003 Act, s 36(9).
[56] Greens Annotated Acts Mental Health (Care and Treatment) (Scotland) Act 2003 (2005), p 53.
[57] Ibid.
[58] 2003 Act, s 36(8).

specialist experience in the diagnosis and treatment of mental disorder, approved by the relevant local health board or the State Hospitals Board for Scotland.[59]

3.80 A person is protected from being detained longer than is necessary. Section 39 of the 2003 Act provides that where the approved medical practitioner who carries out the examination under section 38 is not satisfied that the grounds for detention continue to be met or the emergency detention certificate continues to be necessary, the approved medical practitioner must revoke the certificate.

Short-term detention certificates

3.81 Provision for short-term detention is made by section 44 of the 2003 Act. A certificate for short-term detention may be signed only by an approved medical practitioner. A short-term detention certificate can be granted in respect of a person living in the community, a person who is in hospital already as a voluntary patient or a person who is in hospital under authority of an emergency detention certificate.

3.82 A short-term detention certificate may be issued only where an approved practitioner is satisfied, on the basis of a medical examination of a given patient, that the conditions in section 44(1) are met. These conditions are that the patient does not fall within section 44(2), and that section 44(3) applies.

3.83 The effect of section 44(2) is that a person may not be made subject to short-term detention where he or she is already subject to detention on a temporary basis, by one of the routes listed in section 44(2). Section 44(3), read with section 44(4), sets out a number of conditions. These conditions essentially mirror those for the issuing of a certificate for emergency detention, subject to a few variations.[60] Moreover, the detention need only be necessary; it need not be necessary *as a matter of urgency.* Detention may be considered necessary for the purpose of actually administering treatment, rather than simply assessing what treatment is required. It is also to be noted that the requirement to consult with and obtain the consent of a mental health officer is unqualified; it is not subject to the practicability condition which applies in relation to emergency detention. There is also an additional requirement, set out in 44(10), to consult the patient's "named person",[61] though this need not take place if such consultation is impracticable. The effect of this requirement is simply that the views of the named person must be sought and taken into account; the granting of a short-term detention certificate is not contingent upon the consent of the named person. Finally, it is expressly provided in section 44(4)(e) that the approved medical practitioner carrying out the examination must be satisfied that the granting of a short-term detention certificate is necessary.

3.84 Where a patient is admitted to hospital following the granting of a short-term detention certificate, the patient may be detained for a maximum period of 28 days from the beginning of the day on which the patient is admitted, providing that the short-term detention certificate is passed to the managers of the hospital prior to the admission. Where a patient

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[59] "Approved medical practitioner" is defined in s 22 of the 2003 Act.
[60] There is, of course, no consideration within the third condition of whether the obtaining of a certificate for short-term detention would cause unreasonable delay.
[61] "Named person" is defined in s 329(1) of the 2003 Act with reference to sections 250 to 254 and 257 of the Act. S 251, read with s 254, establishes a hierarchy according to which persons are to assume the role of named person, in circumstances where the patient has not nominated a named person.

is already in hospital at the time of the granting of a certificate, detention runs for 28 days from the beginning of the day on which the certificate is granted.[62]

Compulsory treatment orders

3.85 Part 7 of the 2003 Act makes provision in relation to the long-term care, treatment and detention of people suffering from mental disorder. It deals with long-term detention in hospital, together with compulsory measures in the community.

3.86 Section 57 of the 2003 Act places mental health officers under a duty to apply to the Mental Health Tribunal for Scotland for compulsory treatment orders under certain circumstances. In essence, section 57(1) provides that an application for a compulsory treatment order must be submitted to the Tribunal in terms of section 63, in all cases where the conditions set out in section 57(2) to (5) are satisfied. The duty to apply subsists even where the mental health officer does not support or agree with the application. Section 63, in conjunction with section 57, is the only route to application to the Mental Health Tribunal for Scotland for a compulsory treatment order.

3.87 Section 57(2) makes clear that before an application may be submitted to the Tribunal, separate medical examinations of the patient must be carried out by two medical practitioners, leading to the production of two independent medical reports, referred to in the Act as "mental health reports". Following on from the examination, each medical practitioner must be satisfied that a number of conditions are met. The conditions are set out in section 57(3). As a starting point, the patient must be thought to have a mental disorder within the meaning of section 328 of the 2003 Act, with medical treatment being available which would be likely to prevent the condition from worsening or alleviate its symptoms or effects. In addition, the medical practitioners must be satisfied that if such treatment were not provided, a significant risk to the health, safety or welfare of the patient, or to the safety of any other person, would arise. It must also be considered that the patient's ability to make decisions about medical treatment is significantly impaired because of the mental disorder. The final requirement is that the making of a compulsory treatment order is necessary. "Necessity" in this context effectively means that the treatment cannot be achieved any other way for example, with the patient being treated informally.[63]

3.88 Section 57(4) specifies the matters to be covered by a mental health report. These include justification for the medical practitioner's view that each of the conditions set out in section 57(3) is met, a description of the mental disorder from which the patient is thought to be suffering and the manner in which that manifests itself in the patient, and details of the measures which should, in the view of the medical practitioner, be authorised by any compulsory treatment order which is granted. Section 57(5) deals with the correlation between the two different reports produced by the two medical practitioners. In order for the duty for submission of an application under section 63 to arise, the two reports must identify at least one mental disorder in common as being a disorder suffered by the patient. Moreover, the two reports must identify the same measures as being appropriate for authorisation in a compulsory treatment order.

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[62] See 2003 Act, s 44(5)(b).
[63] Greens Annotated Acts Mental Health (Care and Treatment) (Scotland) Act 2003 (2005), p 78.

3.89 Where an application for a compulsory treatment order is made to the Tribunal in terms of section 63, the Tribunal must follow the procedures set out in section 64.[64] Having done so, and if satisfied that all of the conditions in sections 64(5) are met, the Tribunal may then make a compulsory treatment order. The conditions in section 64(5) are:

> "(a) that the patient has a mental disorder;
>
> (b) that medical treatment which would be likely to–
>
> (i) prevent the mental disorder worsening; or
>
> (ii) alleviate any of the symptoms, or effects, of the disorder,
>
> is available for the patient;
>
> (c) that if the patient were not provided with such medical treatment there would be a significant risk–
>
> (i) to the health, safety or welfare of the patient; or
>
> (ii) to the safety of any other person;
>
> (d) that because of the mental disorder the patient's ability to make decisions about the provision of such medical treatment is significantly impaired;
>
> (e) that the making of a compulsory treatment order in respect of the patient is necessary; and
>
> (f) where the Tribunal does not consider it necessary for the patient to be detained in hospital, such other conditions as may be specified in regulations."

3.90 Included among the measures which may be authorised by a compulsory treatment order are the detention of the patient in hospital, the giving of medical treatment and the imposition of a requirement to reside at a specified place.[65] The order will last for six months,[66] with related provisions concerning the circumstances in which it may fall to be reviewed or even revoked within that period.[67] If the order is not revoked, it may be extended by the responsible medical officer, after review, for a period of six months. After the next and following reviews, extensions of 12 months may be granted.[68] If the responsible medical officer considers that variation is required as well as extension, an application to the Tribunal must be made.[69] If the order has simply been extended by the responsible medical officer, the patient or his named person may apply to the Tribunal for revocation of that determination.[70] In certain circumstances, it is mandatory for the Tribunal to review the extension.[71] There are other specified situations in which revocation of the order, or application or reference to the Tribunal regarding its revocation, may take place.[72]

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[64] These concern the opportunity for specified interested parties to make representations and lead evidence.
[65] 2003 Act, s 66(1)(a) and (e).
[66] 2003 Act, s 64(4)(a)(i).
[67] Chapter 4 of Part 7 of the 2003 Act.
[68] The duty to extend and the periods for which extension is to be made are set out in section 86 of the 2003 Act.
[69] 2003 Act, s 90.
[70] 2003 Act, s 99.
[71] 2003 Act, s 101.
[72] 2003 Act, ss 79 and 81 (revocation by RMO or Mental Welfare Commission); s 96 (reference by RMO where recorded matters not being provided); s 98 (reference to Tribunal by Mental Welfare Commission); s 100 (application by patient or named person for revocation or variation).

3.91 The other provision of the Mental Health (Care and Treatment) (Scotland) Act 2003 which should be noted is section 291. Under that section, an application may be made to the Tribunal by or in respect of a patient being treated informally for mental disorder. If the Tribunal is satisfied that the patient is being unlawfully detained, it may make an order requiring the managers of the hospital to cease to detain the patient. Such a provision would have availed the patient in the *Bournewood* case; the background to the provision appears to have been concern about the "informal" treatment of patients lacking capacity.[73]

3.92 The 2003 Act cannot be used to authorise treatment for physical disorders. Where a person who is subject to measures under that Act requires treatment for a physical disorder, the health professionals involved must establish whether the person is able to consent. If the person has legal capacity to consent, his or her views in relation to treatment must be respected. If the person does not have such capacity, any treatment will have to be authorised in terms of section 47 of the 2000 Act, unless it is administered in an emergency.[74]

Case-law on deprivation of liberty

3.93 As Professor Elspeth Reid observes, remedies for unjustified infringement of personal liberty were well-established in the common law of Scotland centuries before the incorporation of the European Convention.[75] Stair described the right to liberty as "the most precious right", albeit one which was "not absolute", referring to situations in which people might be restrained, such as where they were "furious", or were threatening violence to themselves in their lives or limbs.[76]

3.94 As far as hospital authorities are concerned, however, any previous entitlement at common law to detain those with mental disorder against their will has been superseded; compulsory detention by hospital authorities can only be effected on the basis of the statutory provisions now contained in the 2003 Act.[77]

3.95 There is some basis for the view that there remains a common law power on others to detain those with mental disorder in a situation of necessity. In *B v Forsey*, Lord Keith of Kinkel observed:

> "In my opinion the common law does indeed confer upon a private individual power lawfully to detain, in a situation of necessity, a person of unsound mind who is a danger to himself or others. There appears to be no case law on the subject in Scotland. However, in Glegg on Reparation (4th edn 1955), p 199. it is stated:—"Any one is justified, without any warrant, in confining a lunatic likely to do harm to himself or others, but only until a warrant can be obtained." There is a statement to similar effect in Green's Encyclopaedia of the Laws of Scotland, vol 12 (1931), p 238, which has the authority of Lord Wark as general editor, and also in Walker on Delict (2nd

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[73] Greens Annotated Acts, Mental Health (Care and Treatment) (Scotland) Act 2003 (2005) p 331. There is no equivalent in the Adults with Incapacity (Scotland) Act 2000, that is there is no provision which would assist a person detained other than in a hospital. See para 6.82 below.

[74] See again Hilary Patrick, *Mental Health, Incapacity and the Law in Scotland,* (2006) p 384, together with the Mental Health (Care and Treatment) (Scotland) Act 2003 Code of Practice volume 2, paras 7.27 – 7.29.

[75] Professor Reid deals with protection of liberty in Scots law in Ch 5 of *Personality, Confidentiality and Privacy in Scots Law* (2010).

[76] Stair, *Inst* I,2,5. We have taken these words from More's edition of Stair, where the definite article is used ("the most precious right") under reference to the first edition and to manuscripts.

[77] *B v Forsey* 1988 SC (HL) 28.

edn 1981), p 682. Common sense and the protection of the public demand that such a power should exist, but a person exercising the power must be able to justify his action, if challenged, by proving the mental disorder of the detainee and the necessity of detention".[78]

Were the State to be involved in any such detention, the applicability of Article 5 would now require to be considered. Detention by or on behalf of the State will require to be justified in accordance with Article 5.

3.96 The decision of the European Court in the *Bournewood* case[79] was considered by Sheriff Baird in *Muldoon*, *Applicant*.[80] There, the applicant sought appointment as guardian to his mother, aged 77, who suffered from severe vascular dementia and was no longer capable of independent living or of managing her own affairs. She was living in a nursing home where she appeared to be content. The mental health officer opposed the appointment as not being the least restrictive option, as was required by the 2000 Act. The Sheriff appointed a safeguarder to report on the interests of the adult; in passing the Sheriff commented on the difficulty for such persons of obtaining proper remuneration and the need sometimes to ordain that the relative costs be borne either by the adult's estate or, if the local authority is the applicant, by the local authority.[81] The safeguarder instructed a report by an independent social worker, who concluded that the least restrictive option would be an informal framework of care, which the adult was already enjoying. The Sheriff described the conclusion of the independent social worker as "significant" and referred to it at length:

> "While noting her severely impaired capacity to make decisions, [the adult] was, [the safeguarder] said, "compliant" with the care provided and to remaining where she was. Although recognising the noble motivation of the applicant, he noted recent guidance from the Mental Welfare Commission for Scotland (*Authorising Significant Interventions for Adults Who Lack Capacity* August 2004), which suggests a selective approach towards incapable adults. He said he agreed with that in the case of the adult who was incapable and "compliant" (that word again — I will return to it) and believed that welfare guardianship was not necessary to ensure her health, care and welfare".[82]

3.97 The Sheriff was not, however, persuaded that this was the correct approach. Standing the decision in *Bournewood*, he considered that he had no alternative but to grant the guardianship application. He observed:

> "In other words, where the adult is compliant with the regime, but is legally incapable of consenting to or disagreeing with it, then that person is deprived of his or her liberty in breach of art 5 of the Convention, and that step should not be taken without express statutory (*presumably '*authority*'*) governing it. …..
>
> In the present case, the appropriate statutory intervention is a guardianship order under Pt 6 of the Act. I believe it will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.
>
> …

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[78] *Ibid* at p 63.
[79] *HL v UK* (2005) 40 EHRR 32.
[80] 2005 SLT (Sh Ct) 52.
[81] At 54B - F.
[82] At 54J.

> I believe that the effect of my ruling in this case will be that in every case where a court is dealing with an adult who is incapable but compliant, the least restrictive option will be the granting of a guardianship order under the Act (assuming of course that all the other statutory requirements are satisfied), for that way only will the necessary safeguards and statutory and regulatory framework to protect the adult (and the guardian), come into play".[83]

3.98 In the case of *Docherty*, in 2005,[84] Sheriff Baird required to determine an application by the Chief Social Work Officer for Glasgow City Council for the appointment of a welfare guardian to a lady aged 91. There was a dispute among her three sons.[85] In rehearsing the recent history of the care of the adult, the Sheriff said:

> "I have ruled in [*Muldoon*] that no patient who is incapable but compliant should remain resident in an institution such as Leverndale[86] on an informal basis. That kind of residence must be regulated by a statutory warrant, which in these circumstances would have been a guardianship order…
>
> I am more than ever convinced that the view I came to in *Muldoon* (*supra*) was the correct one.....
>
> I believe that the position of the place of residence of all adults, (and I do mean *all* adults), who are incapable but compliant, and where that is currently managed on an informal basis, will have to be reviewed and guardianship orders contemplated (that being an explicit recognition of the potential outcome which was put forward (as a kind of "floodgates" argument) by Counsel for the UK Government in his presentation before the ECHR [sic] in HL."

3.99 *Muldoon* and *Docherty* were followed in the case of *RMcC, Applicant*, decided at Kilmarnock Sheriff Court on 26 February 2009 by Sheriff I S McDonald.[87] The Sheriff said:

> "I agree with Sheriff Baird's conclusion in [*Muldoon*] that where an Adult is compliant with a regime but legally incapable of consenting to or disagreeing with it, as is the case here, then the Adult is deprived of their liberty in contravention of Article 5(1) of the European Convention on Human Rights and that therefore that step should not be taken without express authority governing it. I agree with Sheriff Baird's conclusion that in such a situation, the appropriate statutory intervention is a Guardianship Order which is, in my view, the least restrictive option under the Act in the particular circumstances of this case.
>
> It is my view that as in the case of *Muldoon*, the Adult in the instant case is legally incapable of consenting to or disagreeing with the regime and this therefore must result in the deprivation of her liberty. She cannot leave and this is a permanent situation."[88]

3.100 As already noted,[89] in 2007, the Scottish Parliament passed the Adult Support and Protection (Scotland) Act, intended to clarify the powers of local authorities providing

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[83] At 58K - 59B.
[84] Unreported, Glasgow Sheriff Court, 8 February 2005. http://www.scotcourts.gov.uk/opinions/aw56.html.
[85] The Sheriff in this case refers to the Court's becoming embroiled in bitter and sometimes unseemly family disputes. This would appear to be likely to increase if the route of appointing guardians to all those who are incapacitated (discussed below) is followed. The Sheriff is also critical of the intimation provisions in relation to section 70, which deals with difficulty in implementing a guardian's decisions.
[86] A psychiatric hospital.
[87] http://www.scotcourts.gov.uk/opinions/AW1608.html.
[88] The adult in this case was living in a residential home. The apparent elision of the questions of the adult's incapacity and the issue of whether her concrete situation amounted to a deprivation of liberty is discussed at para 6.12 below.
[89] See discussion at paras 3.60 to 3.68 above.

services to adults with incapacity. The Scottish Executive published guidance concerning the scope of the Act.[90] This guidance stated that the Scottish Executive did not take the view that a guardian should be appointed in all cases where a move to residential accommodation was contemplated and the adult was incapax but compliant. Noting that there were no rigidly defined criteria stating what amounted to a deprivation of liberty, the guidance was careful to point out that section 13ZA did not authorise such deprivation, but also attempted to provide a checklist of factors to help to identify when it was occurring. The Scottish Executive did not agree with Sheriff Baird's interpretation of the Strasbourg jurisprudence. The guidance is now contained as Annex A within Annex 1 to the Adults with Incapacity (Scotland) Act 2000: Code of Practice for Local Authorities Exercising Functions under the 2000 Act (2008).[91]

Statistics on welfare guardianship orders

3.101 As part of its monitoring functions under the Adults with Incapacity (Scotland) Act 2000, the Mental Welfare Commission for Scotland publishes annual reports on the use of welfare guardianship in Scotland. The reports include an analysis of the statistics and comments on trends.

3.102 According to the Commission a total of 1766 welfare guardianship orders were granted in the year from 1 April 2011 to 31 March 2012 (compared to 1521 in the year 1 April 2010 to 31 March 2011). The Commission has indicated that the rise in the granting of welfare guardianship orders has been the result, primarily, of the increase in private applications which have more than doubled in the last five years – from 629 to 1317. Local authority applications, in contrast, rose by only 8% during this period with most of the increase (5%) occurring in 2011 – 2012.

[90] See para 3.64 above.
[91] The decision in *Muldoon*, s 13ZA and issues regarding deprivation of liberty are discussed in an article by Adrian Ward: "Adults with incapacity: freedom and liberty, rights and status" 2011 SLT (News) 21.

Chapter 4 England and Wales

Introduction

4.1 In this chapter, we explore the new statutory regime in England applicable to people deprived of their liberty by measures to which they cannot consent, introduced in response to the decision of the European Court of Human Rights in the *Bournewood* case.[1] English cases since 2005 considering deprivation of liberty and involving the new regime are also examined.

Authorisation of deprivation of liberty under the Mental Capacity Act 2005

4.2 The Deprivation of Liberty Safeguards for England and Wales were introduced by means of amendments to the Mental Capacity Act 2005 made by the Mental Health Act 2007.[2]

Circumstances in which deprivation of liberty may be authorised

4.3 In terms of section 4A of the 2005 Act it is lawful to deprive a person of their liberty in a hospital or care home only if one or other of the following conditions is met:

> (1) A standard or urgent authorisation under Schedule A1 to the Mental Capacity Act 2005 has been obtained; or
>
> (2) The deprivation of liberty is a consequence of giving effect to an order of the Court of Protection on a personal welfare matter, in accordance with the provisions of the Mental Capacity Act 2005.

What is meant by a "deprivation of liberty" under the 2005 Act?

4.4 Deprivation of liberty is defined in section 64(5) of the 2005 Act as having the same meaning as in Article 5(1) ECHR. Thus, the assessment of whether there is a deprivation of liberty in any case will require to reflect the jurisprudence of the European Court. As can be seen from Chapter 2 above, the decisions of the Court have largely adopted a case-by-case approach, rather than laying down general principles delineating the content of "deprivation of liberty". Accordingly, in any individual case, a domestic court will require to have regard to factors which have been highlighted in particular decisions of the Strasbourg court.

4.5 In terms of section 42 of the 2005 Act, the Lord Chancellor must issue one or more Codes of Practice for the Guidance of Persons Exercising Functions under Schedule A1 to the Act. The Deprivation of Liberty Safeguards – Code of Practice to supplement the main

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[1] *HL v United Kingdom* (2005) 40 EHRR 32, discussed in Chapter 2 above.

[2] The 2007 Act inserted sections 4A, 4B and 16A and a new Sch A1 into the Mental Capacity Act 2005. Sch A1 runs to 188 paras. Sch 8 to the 2007 Act inserted Sch 1A (Persons ineligible to be deprived of liberty by this Act) into the 2005 Act, specifying people who are ineligible to be deprived of their liberty for the purposes of s 16A of the 2005 Act and para 17 of Sch A1 to the Act (Hospital and care home residents: deprivation of liberty). See the discussion of this aspect at para 4.19 et seq below.

Mental Capacity Act 2005 Code of Practice[3] emphasises that it is impossible to lay down a rigid formula for determining whether there is a deprivation of liberty. This supplementary Code suggests that it might be useful to imagine a scale that moves from a restraint or restriction to a deprivation of liberty. The position of an individual on the scale will depend on the concrete circumstances of the individual and might change over time.[4]

4.6 The supplementary Code of Practice lists seven factors, emerging from a combination of European and domestic case-law, which might be relevant in determining whether particular steps taken amount to a deprivation of liberty. These are:

> "(1) Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission.
>
> (2) Staff exercise complete and effective control over the care and movement of a person for a significant period.
>
> (3) Staff exercise control over assessments, treatment, contacts and residence.
>
> (4) A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate.
>
> (5) A request by carers for a person to be discharged to their care is refused.
>
> (6) The person is unable to maintain social contacts because of restrictions placed on their access to other people.
>
> (7) The person loses autonomy because they are under continuous supervision and control."[5]

4.7 The Code goes on to suggest questions which the decision-maker should consider in assessing whether deprivation of liberty is taking place, observing that "it is probable that no single factor will, in itself, determine whether the overall set of steps being taken in relation to the relevant person amount to a deprivation of liberty".[6] The list is as follows:

- All the circumstances of each and every case.
- What measures are being taken in relation to the individual? When are they required? For what period do they endure? What are the effects of any restraints or restrictions on the individual? Why are they necessary? What aim do they seek to meet?
- What are the views of the relevant person, their family or carers? Do any of them object to the measures?
- How are any restraints or restrictions implemented? Do any of the constraints on the individual's personal freedom go beyond 'restraint' or 'restriction' to the extent that they constitute a deprivation of liberty?

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[3] Mental Capacity Act 2005: Deprivation of liberty safeguards - Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice. http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476.
[4] Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice, para 2.3.
[5] See para 2.5 of the Supplementary Code.
[6] Supplementary Code para 2.6.

- Are there any less restrictive options for delivering care or treatment that avoid deprivation of liberty altogether?

- Does the cumulative effect of all the restrictions imposed on the person amount to a deprivation of liberty, even if individually they would not?[7]

Where might a deprivation of liberty take place?

4.8 The provisions in Schedule A1 regarding authorisation of deprivation of liberty relate only to deprivation of liberty in hospitals and care homes. This is on the basis that the view taken by the UK Government is that it would only rarely be justifiable to deprive a person of liberty in their best interests in any other setting.[8] However, applying section 4A(3) of the Mental Capacity Act 2005, deprivation of liberty in other settings would be lawful if it were a consequence of giving effect to an order of the Court of Protection on a personal welfare matter, in accordance with the provisions of the Mental Capacity Act 2005.

4.9 In relation to both hospitals and care homes, the concepts of "the managing authority" and "the supervisory body" are created. For an NHS hospital, the managing authority is generally the Trust, Health Authority or Health Board in which the hospital is vested or, if it is vested in a national authority, the Trust, Health Authority or Health Board responsible for the administration of the hospital.[9] For a care home, the managing authority is the person registered or requiring to be registered under the legislation relating to registration of care homes.[10] For a hospital, the supervisory body will generally be the Primary Care Trust which commissions the care or treatment or, if that does not apply, the Primary Care Trust for the area in which the hospital is situated.[11] For a care home, the supervisory body will be the local authority for the area in which the relevant person is ordinarily resident or, if there is no ordinary residence, the local authority for the area in which the care home is situated.[12]

The meaning of "capacity" for the purposes of the Mental Capacity Act 2005

4.10 The Deprivation of Liberty Safeguards under Schedule A1 to the 2005 Act may only be relied upon where a person lacks capacity for the purposes of the Act. The fundamental principle underpinning the 2005 Act is set out in section 1(2), namely that 'A person must be assumed to have capacity unless it is established that he lacks capacity.' However, where there is considered to be cause to doubt a person's capacity, the statutory criteria provided by the Act must be applied in order to assess the person's decision-making capability. Section 2(1) provides that a person lacks capacity in relation to a matter if he is unable to make a decision for himself because of 'an impairment of, or disturbance in the functioning of, the mind or brain.' Section 3(1) makes clear that a person is unable to make a decision for himself if he is unable to (a) understand the information relevant to the decision, (b) retain

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[7] In *Rethinking Rights-based Mental Health Laws* (2010) (ed McSherry and Weller) at page 197, Genevra Richardson observes that some of these are more circular than explanatory, and that there is no clear indication of the priority to be accorded to each.
[8] See para 195 of the explanatory notes to the Mental Health Act 2007, dealing with s 50 of the 2007 Act.
[9] Para 176 of Sch A1.
[10] Para 179 of Sch A1.
[11] Para 180. Primary care trusts are to be abolished in 2013, whereupon local authorities will assume these functions.
[12] Para 182 of Sch A1.

that information, (c) use or weigh the information as part of the process of making the decision, or (d) communicate the decision.

Standard authorisation

4.11 Part 4 of Schedule A1 to the 2005 Act provides for standard authorisations. A standard authorisation may authorise detention for a maximum of one year.[13] The procedure leading to the granting of a standard authorisation usually begins with a request by the managing authority of the hospital or care home in which the person is, or may be, deprived of his or her liberty to the relevant supervisory body. The managing authority may be required to make a request for such an authorisation in certain circumstances.[14] There are complex provisions regarding further authorisations after a standard authorisation has been given.[15]

4.12 The supervisory body must secure that there is assessment of whether the person meets the six 'qualifying requirements' for detention, as set out in Part 3 of Schedule A1 to the 2005 Act. The qualifying requirements are:

(1) The age requirement (the person is 18 or over).

(2) The mental health requirement (the person is suffering from mental disorder).

(3) The mental capacity requirement (the person lacks capacity to decide if he should be accommodated as proposed).

(4) The best interests requirement (involving four sub-requirements, essentially relating to best interests, necessity and proportionality).

(5) The eligibility requirement (the person is not ineligible under Schedule 1A).

(6) The no refusals requirement (there is no refusal within the meaning of paragraphs 19 and 20).[16]

Assessments are carried out in relation to each of the qualifying requirements.

4.13 If the conclusion of the assessments is that each of the qualifying requirements is met, the supervisory body is under an obligation to grant the authorisation, for a period of up to one year, and subject to such conditions as it considers necessary. In terms of section 21A of the 2005 Act, the Court of Protection has jurisdiction to determine questions relating to certain specified matters where a standard authorisation has been given. These include questions as to whether all of the qualifying requirements are met and whether conditions to which an authorisation is subject are appropriate. This might lead to the Court making an order varying or terminating the authorisation, or requiring the supervisory body to do so.

Urgent authorisation

4.14 Part 5 of Schedule A1 to the 2005 Act provides for urgent authorisations. Urgent authorisations are given by what is the appropriate managing authority in any given

[13] Para 51 of Sch A1.
[14] Where the conditions in para 24 or 25 (as read with the relevant provisions of paras 26, 27 and 28) are met – essentially that the person is or is about to be a detained resident and the qualifying requirements are met.
[15] Para 29 of Sch A1.
[16] These are each set out in the six paras 13 to 18 inclusive.

scenario. Paragraph 76 of Schedule A1 specifies two scenarios in which a managing authority is required to give such an authorisation. The first scenario is where the managing authority is required to make a request for a standard authorisation in terms of paragraph 24 or 25 of the Schedule and believes that the need for the person to be detained is so urgent that it is appropriate for detention to begin before the request *is made*. The second is where the managing authority has made a request under paragraph 24 or 25 and believes that the need for the person to be a detained resident is so urgent that it is appropriate for the detention to begin before the request *is disposed of*. In general an urgent authorisation may be given for a maximum of seven days.[17] However where there are exceptional circumstances detention for up to 14 days may be authorised.[18] As with standard authorisations, section 21A of the 2005 Act empowers the Court of Protection to determine questions relating to certain specified matters where an urgent authorisation has been given.

What might competently be done under a standard or urgent authorisation?

4.15 A standard or urgent authorisation does not entitle the hospital or care home to do anything other than what is specifically within the authorisation. The reason for this is that the purpose of the authorisation procedure is to ensure lawfulness of the deprivation of liberty; it is not directly concerned with the provision of care or treatment to people who lack capacity to consent. This was already covered by provisions of the Mental Capacity Act 2005 pre-dating the 2007 Act amendments.

Representatives and independent mental capacity advocates

4.16 Paragraph 139(1) of Schedule A1 requires the relevant supervisory body to appoint a person to be the representative of a person deprived of their liberty, as soon as possible after a standard authorisation is given. The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008[19] make provision for the selection and appointment of representatives. These Regulations apply to England only; in relation to Wales, similar provision is made by the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009.[20] Section 39A of the 2005 Act requires the managing authority to notify the supervisory body where it is satisfied that there is no person (other than a person involved in providing care or treatment for the person who may be deprived of their liberty, in a professional capacity or for remuneration), whom it would be appropriate to consult in determining what would be in the person's best interests. The supervisory body must then instruct an independent mental capacity advocate to act as the person's representative.

The overall effect of Schedule A1 to the 2005 Act

4.17 In short, it would seem that Schedule A1 can be said to provide a statutory basis for authorisation of deprivation of liberty in a care home or hospital other than by order of the Court of Protection or reliance on the Mental Health Act 1983, albeit that the Court may be involved in carrying out a review of an authorisation that has been made.

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[17] Para 78 of Sch A1.
[18] Para 77 of Sch A1, read with paras 84-86.
[19] SI 2008/1315.
[20] SI 2009/266.

The role of a lasting power of attorney in relation to authorisation

4.18 The conditions set down in section 4A of the Mental Capacity Act 2005 as to when a deprivation of liberty might take place in a hospital or care home apply equally where the person the deprivation of whose liberty is proposed is the donor of a lasting power of attorney.[21] In other words, where it is thought appropriate, the process of seeking a standard authorisation under Schedule A1 to the 2005 Act must still be followed; the donee of a lasting power of attorney does not himself have power to authorise such a deprivation. Nevertheless, the attorney does have a role in the decision-making process. One of the qualifying requirements for the making of a standard authorisation is the "no refusals" requirement, as set out in paragraphs 18 to 20 of Schedule A1. In terms of paragraph 20 there is a refusal if deprivation of liberty in a hospital or care home for the purposes of receiving treatment would conflict with a valid decision made by a donee of a power of attorney or a deputy appointed by the Court of Protection, on behalf of the person the deprivation of whose liberty is sought. Equally, the donee of a lasting power of attorney may initiate the process of seeking authorisation under Schedule A1 by approaching the relevant managing authority.

The interaction between the Mental Capacity Act 2005 and the Mental Health Act 1983 in relation to the Deprivation of Liberty Safeguards

4.19 The question of the interaction between the 2005 and 1983 Acts arises as an issue only where a person lacks capacity for the purposes of the 2005 Act. Paragraph 12(e) of Schedule A1 to the 2005 Act identifies the eligibility requirement as one of the qualifying requirements for the making of an authorisation of deprivation of liberty under Schedule A1. Paragraph 17(1) of the Schedule makes clear that a person who is the subject of an application for an authorisation meets the eligibility requirement unless he or she is ineligible to be deprived of his or her liberty under the 2005 Act. Paragraph 17(2) goes on to provide that the question of whether or not a person is ineligible to be deprived of his or her liberty is to be determined according to Schedule 1A to the 2005 Act. Schedule 1A sets out five cases in which people are ineligible to be deprived of their liberty in terms of Schedule A1.

4.20 For the purposes of the current discussion cases A, D and E are the main ones of relevance. It can be seen that these cases, in common with the other cases, reflect the principle underlying the interaction between the Mental Capacity Act and the Mental Health Act that where detention of a person lacking capacity is necessary, it should be effected if possible under the 2005 Act. The 1983 Act is to be used as a detaining mechanism only as something of a last resort, where the reasonably stringent conditions set out in Schedule 1A apply, leading to ineligibility for detention under Schedule A1.

Case A (patients detained under the Mental Health Act 1983)

4.21 Case A concerns people who are subject to a hospital treatment regime *and* are detained under the Mental Health Act 1983 in terms of that regime.[22] In terms of paragraph 8 of Schedule 1A a person is subject to a hospital treatment regime if he or she is subject to

[21] Section 9(1) of the 2005 Act makes clear that a lasting power of attorney is a power of attorney by which the donor confers on the donee the authority to make decisions concerning his or her personal welfare or property and affairs. This includes authority to make decisions in circumstances where the donee no longer has capacity to do so. In the context of Sch A1 it is only decisions in relation to personal welfare that are of relevance.
[22] 2005 Act, Sch 1A, para 2, case A.

a hospital treatment obligation under certain specified provisions of the 1983 Act, or any other enactment which has the same effect. A hospital treatment obligation is an obligation, order or direction of a kind listed in the table in paragraph 8. This includes applications for admission for assessment or treatment and orders for remand to hospital. The latter are made for the purposes of carrying out an assessment of the mental condition of a person who has been accused of a crime.

4.22 In short, the result of the interface between the 1983 and 2005 Acts in relation to a person to whom case A applies, is that that person cannot be detained for treatment for mental disorder *both* under the 1983 Act and the 2005 Act, whether the detention under the 2005 Act is the result of an order of the Court of Protection under section 16 or an urgent or standard authorisation under Schedule A1. If the 1983 Act applies as described above, it must be relied upon for *detention* for treatment for any physical disorder. The *treatment* for the physical disorder would be authorised under the 2005 Act.[23]

Case D (patients subject to guardianship)

4.23 Case D concerns people who are subject to guardianship.[24] Deprivation of liberty in terms of the 2005 Act is excluded if it is either not in accordance with a requirement imposed by the guardianship order (including any requirement as to where a person is to reside) or it would authorise the person to be a Mental Health Act patient. The exclusion in relation to authorisation as a Mental Health Act patient applies only where the person objects to being a Mental Health Act patient or to being given some or all of the mental health treatment proposed, and no valid consent has been given by a donee of a lasting power of attorney or a deputy appointed by the Court of Protection.

Case E (patients falling within the scope of the Mental Health Act 1983)

4.24 Case E concerns people in respect of whom an application for admission to hospital for assessment or treatment could competently be made under section 2 or 3 of the Mental Health Act 1983.[25] In terms of this category a person is ineligible for detention under Schedule A1 to the 2005 Act if the course of action proposed authorises him or her to be a Mental Health Act patient, the person objects to being given some or all of the mental health treatment proposed, and no valid consent to the action proposed has been given by a person who is the donee of a lasting power of attorney or a deputy appointed by the Court of Protection.

4.25 Case E was of relevance in *GJ v The Foundation Trust*.[26] The judgement provides points of guidance on the application of Case E. It makes clear that it is not lawful for the appropriate decision-maker simply to choose between the statutory regimes provided for by the Mental Health Act 1983 and the Mental Capacity Act 2005, on the basis of general considerations that they believe make one regime preferable to the other. Rather, the

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[23] "The interface between the two Acts for this category of patient is relatively straightforward. P [patient] cannot be detained for treatment for mental disorder both under the 1983 Act and under the 2005 Act, whether as the result of a Court order made under s 16 of the 2005 Act or an urgent or standard authorisation under Sch A1 [2005 Act]. Even if P requires medical treatment for a physical disorder he will be ineligible for *detention* under the 2005 Act for that purpose, although as regards any *treatment* for that physical disorder the 2005 Act applies." See Paul Bowen *Blackstone's Guide to the Mental Health Act* (2007), Oxford University Press, p 277.

[24] 2005 Act, Sch 1A, para 2, Case D, read with para 5 of Sch 1A.

[25] 2005 Act, Sch 1A, para 2, Case E, read with para 5 of Sch 1A.

[26] [2010] Fam 70; 3 WLR 840.

Mental Health Act 1983 must automatically be given primacy over the 2005 Act in any situation where it would be competent to make an application under the 1983 Act and the other conditions attached to case E are met.[27] This might be seen to reinforce the intention of the UK Government at the time of the introduction of the deprivation of liberty safeguards that they should have no impact upon the existing criteria for detention under the Mental Health Act 1983. Instead, the purpose of the safeguards was to fill the apparent lacuna highlighted by the *Bournewood* case.

Problems with the Deprivation of Liberty Safeguards

4.26 The Deprivation of Liberty Safeguards were implemented with effect from 1 April 2009. Their use has been monitored and there are several reports on early experience. Much of the comment has been critical.

4.27 The Mental Health Alliance[28] published its first report on implementation in July 2010.[29] Included in their findings were that there were much lower than predicted rates of applications and authorisations, and wide disparities in activity rates between comparable supervisory bodies; lack of knowledge and understanding, among care providers and staff in particular, as to the meaning of "deprivation of liberty"; and a high level of legal and procedural errors caused by the complexity of the scheme coupled with inadequate training. A further report is to be published by the Alliance in 2012; a "pre-publication draft" of part of this report is available and confirms that difficulties continue to be experienced.[30] The flaws identified in 2010 are "endemic", with one such flaw highlighted by the Alliance being the potential for conflict of interest, where managers in a local authority are responsible both for taking action to remove a person from a family home to a care placement and for the application of the Deprivation of Liberty Safeguards, intended to prevent the unlawful use of professional authority in such situations. The view of the Alliance is that the Deprivation of Liberty Safeguards scheme is "not fit for purpose in its present form – implementation has been extremely uneven with the result that the intended protections are effectively unavailable in large parts of the country". They also report that the scheme is "incredibly bureaucratic and wasteful of scarce professional resources". They do concede, however, that where agencies have managed to make the scheme work reasonably well, the scheme does perform a valuable protective function and has achieved at least some of the objectives set for it.

4.28 On 27 March 2012, the Care Quality Commission published its second annual report on the Deprivation of Liberty Safeguards.[31] They found that there was "still significant complexity in understanding what constitutes a deprivation of liberty and when to apply the safeguards". There were challenges for managing authorities and supervisory bodies in keeping abreast of the latest judgements. Further, there were concerns about processes, centring on administrative procedures, costs and accessibility and the consequent impact of these factors on effectiveness of the protection. There continued to be large variations in

[27] See para 45 of the judgement.
[28] The Mental Health Alliance is a coalition of 75 organisations which seeks to secure better mental health legislation through the implementation of reform proposals that are considered to be fair and workable. Representatives from member organisations include psychiatrists, psychologists, social workers and representatives of user groups, voluntary organisations and carers' associations.
[29] Available at http://www.mentalhealthalliance.org.uk/resources/DoLS_report_July2010.pdf.
[30] Available at http://www.mentalhealthalliance.org.uk/resources/DoLS_report_pre_publication_draft.pdf.
[31] Available at http://www.cqc.org.uk/sites/default/files/media/documents/dols.pdf.

rates of use of the scheme by region. In total, between April 2010 and March 2011 a total of 8,982 applications for assessment were made, of which 55% resulted in authorisation of deprivation of liberty. These figures were still much lower that the annual number anticipated by the Department of Health for England and Wales in its planning (18,600). As far as training was concerned, there was still a "significant rump of providers who had not fully trained their staff in the safeguards". In its conclusions, the Commission observed:

> "Whether the current system is the best way to organise and administer protections for people who lack capacity and may be deprived of liberty, continues to be a subject of debate".

4.29 Others have been more direct. The Mental Health Lawyers Association (quoted in the Mental Health Alliance paper) described the Deprivation of Liberty Safeguards as "cumbersome and unpopular with nearly all those who have to deal with them".[32] In the Mental Capacity Act Manual, Richard Jones described the Deprivation of Liberty Safeguards as "complex, voluminous, overly bureaucratic and difficult to understand". The Government might have made "a significant and costly error" in introducing them, rather than making relatively straightforward amendments to the Mental Health Act.[33]

4.30 It is certainly evident on an examination of the Deprivation of Liberty Safeguards that they are complex and that the statutory material and supplementary code are voluminous. It is less evident how a simple scheme which meets the needs of those it is designed to safeguard and is easy to administer could be devised. Common to all comment on the scheme has been frustration at the lack of definition of deprivation of liberty – a problem stemming from the lack of definition in the Strasbourg case-law. That this is a significant practical problem is illustrated by research conducted by the South London and Maudsley NHS Foundation Trust, in which a series of real-life case examples was given to lawyers, psychiatrists, Independent Mental Capacity Advocates and Best-Interests Assessors.[34] There was little agreement in decision-making:

> "Even the lawyers could not agree among themselves, although they were selected for their in-depth knowledge of the subject".[35]

The question of what is actually meant by "deprivation of liberty" in the context of adults with incapacity recurs throughout all discussions, whether in reports, academic publications or case-law.

4. Do consultees have any comments on the structure and/or operation of the Deprivation of Liberty Safeguards in England and Wales?

Case-law since *Bournewood*

4.31 In *JE v DE and Surrey County Council*,[36] Munby J (now Munby LJ) had to determine whether an adult (DE) was, or had been at any time since his move to a residential home, deprived of his liberty by the local authority which had placed him there. The local authority

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[32] August 2011 response of MHLA to the Legal Aid, Sentencing and Punishment of Offenders Bill.
[33] *Mental Capacity Act Manual* (4th ed 2010), p v.
[34] This research was published: Cairns et al, "Judgements about deprivation of liberty made by various professionals: comparison study" The Psychiatrist, September 2011.
[35] Mental Health Alliance pre-publication draft at para 2.2.1.
[36] [2006] EWHC 3459 (Fam).

relied on *HM v Switzerland*[37] and on dicta of Keene LJ in *Secretary of State for the Home Department v Mental Health Review Tribunal*.[38] According to a summary of relevant principles in the latter case, "the purpose of any measures of restriction is a relevant consideration",[39] so that if measures were taken in the interests of the person accommodated, they might not amount to deprivation of liberty.

4.32 Munby J did not consider either authority to provide "the firmest of foundations" for the local authority's position; the determining factor in *HM* was, he thought, HM's apparent consent and the dicta of Keene LJ regarding purpose had to be read in the light of the subsequent decisions of the Strasbourg court in *HL* and *Storck*. On the facts of the present case, there was evidence that DE had a considerable amount of freedom in the care home and few restrictions on his contact with the outside world. But Munby J accepted the submissions made on behalf of DE and his wife that his concrete situation was that he was not free to leave "in the sense of being able to remove himself permanently in order to live where and with whom he chooses".[40] Accordingly, he was deprived of his liberty within the meaning of Article 5 of the Convention.

4.33 In a different context, Article 5 was considered by the House of Lords in *Austin v Commissioner of Police of the Metropolis*.[41] As outlined in Chapter 2, in that case, the claimant had been a protestor at a demonstration in central London. The police had created a cordon around the demonstrators, ("kettling") and they had not been allowed to leave the cordoned area for several hours. The claimant alleged that her rights under Article 5 of the Convention had been breached. The findings of the judge at first instance showed that the sole purpose of the cordon was to maintain public order, that it was proportionate to that need and that those within the cordon were not deprived of their freedom of movement arbitrarily. Lord Hope observed[42] that the case raised a fundamental issue of principle:

> "Is it relevant, when considering whether a case falls within the ambit of article 5(1), to have regard to the purpose for which a person's freedom of movement has been restricted?"

4.34 In a section headed "Is purpose relevant?", his Lordship referred, inter alia, to *HM v Switzerland*[43] *and Nielsen v Denmark*.[44] He inferred from references in some of the cases to the purpose of the measure in question that purpose may be a circumstance to be taken into account when assessing whether Article 5 has been breached, particularly where the measure in question was aimed at protecting another Convention right, such as the right to life under Article 2.

4.35 Lord Scott of Foscote considered that in such an assessment,

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[37] (2004) 38 EHRR 17.
[38] [2002] EWCA Civ 1868; [2003] MHLR 202.
[39] Ibid, at para [16].
[40] Para 115. Cf the dicta in *Austin v UK,* Application nos. 39692/09, 40713/09 and 41008/09, 15 March 2012 at para 55 regarding the importance of not interpreting Article 5 to effect the incorporation of Protocol 4 for those countries which have not incorporated it. Article 2 of Protocol 4 protects the freedom to choose one's residence.
[41] [2009] UKHL 5; [2009] 1 AC 564.
[42] At para 22.
[43] (2004) 38 EHRR 17.
[44] (1989) 11 EHRR 175.

> "(t)he purpose of the confinement or restriction and the intentions of the persons responsible for imposing it rank very high in the circumstances to be taken in to account in reaching the decision."[45]

4.36 Lord Walker was more reserved about purpose:

> "If …deprivation of liberty is established, good intentions cannot make up for any deficiencies in justification of the confinement…"[46]

He concluded, however, that the question of whether deprivation of liberty was established in this particular case was answered by determining what the police "were about". In effect, they were engaged in a difficult exercise in crowd control, to avoid personal injuries and damage to property. Accordingly, he reached the same view as Lord Hope.

4.37 Lord Neuberger of Abbotsbury also agreed that, where the purpose of the measure was the prevention of serious public disorder and violence, and the actions of the police were proportionate and reasonable, then Article 5 did not come into play.[47]

4.38 In *Surrey County Council v CA, LA, MIG and MEG*,[48] Parker J was required to determine whether the conditions under which two young women who lacked capacity were living amounted to deprivation of liberty. MIG was 18 and was living with a foster carer in the carer's home. MEG was 17 and living in a residential home for those under the age of 19; the home was small, with only four residents. The Official Solicitor contended that both MIG and MEG were deprived of their liberty. *Austin* was referred to, and considered in some detail by the judge. She found it of limited assistance, taking the view that "the decision in *Austin* cannot be divorced from its context".[49]

4.39 In reaching her conclusion that there was no deprivation of liberty in the present case, Parker J ruled that it was possible for a person to be deprived of liberty in a domestic setting. She also expressed the view that lack of capacity to consent did not of itself create confinement. Nonetheless, her conclusion, having reviewed the circumstances in which each young woman was living, was that neither MIG nor MEG was deprived of her liberty:

> "105. The "concrete situation" is that each lives exactly the kind of life that she would be capable of living in the home of her own family or a relative: their respective lives being dictated by their own cognitive limitations. Each is subject to limitations on her own autonomy and freedom of movement and ability to enjoy activities by being guided or accompanied in order to provide for her own immediate protection.
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> 106. I agree that it is impermissible for me to consider whether, if either is objectively detained or confined, this is with good or benign intentions or in their best interests. But notwithstanding that, as was observed by Lord Walker in Austin , "purpose" does not figure in the list of factors to be evaluated in determining the concrete situation of the person concerned, I am of the view that in this case it is permissible to look at the "reasons" why they are each living where they are. In the case of each there are overwhelming welfare grounds for them not to live in their family of origin. In relation to both girls, the primary intention is to provide them each with a home. Within those homes, they are not objectively deprived of their liberty. In neither of those homes are

[45] At para 39.
[46] At para 44.
[47] At para 60.
[48] [2010] EWHC 785 (Fam).
[49] Para 39.

they there principally for the purpose of being "treated and managed". They are there to receive care."

4.40 Because of the inclusion of a declaration that the arrangements did not amount to a deprivation of liberty, it was possible for there to be an appeal to the Court of Appeal by the Official Solicitor, acting as litigation friend to the two girls.[50] In the Court of Appeal, Wilson LJ observed that a conclusion that arrangements such as those in the present case amounted to a deprivation of liberty would have major resource implications. Such a decision would confer rights to take court proceedings for a decision in relation to the lawfulness of their detention and also to periodic, probably annual, review by the court of the continued necessity for the arrangements:

> "[W] ere this appeal to be allowed, the vast, if unquantifiable, number of necessary reviews of such a character would surely be beyond the present capacity of the Official Solicitor's department and in particular of the Court of Protection. To have an eye to that factor would be to raise it to the wrong end of the telescope. The importance of the right to liberty is paramount ...and the state's positive obligation to provide the facilities necessary for its effective exercise is absolute."[51]

4.41 Notwithstanding his view that questions of resources were irrelevant to the issue of principle, Wilson LJ did question

> "whether the draftsmen of Article 5 were wise to declare that the six cases which they specified therein constituted an exhaustive list of those in which a deprivation of liberty would not amount to a breach of it. A very different situation, namely the "kettling" of demonstrators by the police in Oxford Circus in the interests of public safety, prompts the same reflection: see *Austin v Commission(er) of Police of the Metropolis* [2009] UKHL 5; [2009] AC 564".[52]

4.42 The Court of Appeal agreed with Parker J's "magisterial analysis"[53] of whether P and Q were deprived of their liberty, noting however that her reference to the fact that both girls were happy involved allusion to an irrelevant factor. Wilson LJ considered that relevant factors were that neither girl objected to the arrangements for her care, the use or non-use of medication and the normality of their living arrangements. He took these factors into account in assessing whether the objective element necessary for deprivation of liberty to occur was present and concluded that it was not. Smith LJ and Mummery LJ disagreed with each other on whether the objective element could include a comparison between the arrangements now applying to an individual's care and the arrangements under which they lived prior to any alleged deprivation. Wilson LJ preferred not to express a view on this point.

4.43 In *Re A*,[54] Munby J considered the cases of A, a child born in 2001 and C, an adult. Both individuals suffered from Smith Magenis syndrome, a genetic disorder involving learning disability, sleep disturbance and behavioral problems. Each individual was cared for at home by her family. The combination of sleep disturbance and lack of awareness of

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[50] *P (otherwise known as MIG) and Q (otherwise known as MEG) by the Official Solicitor, their litigation friend v Surrey County Council* [2010] EWCA Civ 190.
[51] Para 5.
[52] Para 18. See also Lord Justice Mummery at para 48.
[53] So described at para 24.
[54] [2010] EWHC 978 (Fam); [2010] 2 FLR 1363, particularly at paras 110 onwards. This case also considers at length the extent to which the local authority could be said to be responsible for any deprivation of liberty occurring, a point discussed in Chapter 2 above and Chapter 6 below.

danger had led to particular measures being adopted within the house. Most notably in the present context, each individual was locked in her bedroom at night. As a preliminary issue, the court was required to determine whether each of A and C was being deprived of her liberty within the meaning of Article 5(1).[55]

4.44 Because each individual lacked the capacity to consent to the restrictions to which they were subject, the Court concluded that the subjective element expounded by the European Court was present. That left only the issue of whether the circumstances in each case satisfied the objective test for deprivation of liberty. The judge concluded that the objective element was not present here:

> "..the loving caring regime in each of these family homes – a reasonable, proportionate and entirely appropriate regime implemented by devoted parents in the context of a loving family relationship and with the single view to the welfare, happiness and best interests of A and C respectively - falls significantly short of anything that would engage Article 5."[56]

4.45 In reaching his view, Munby J adopted the analysis of Parker J in *Surrey County Council*, particularly in relation to the circumstances of MIG. He considered that the only significant factor which differed between the case of MIG, on the one hand, and the cases of A and C on the other, was that A and C were locked in their bedrooms at night. In holding that this factor did not alter the view to be taken of the care regime, he said:

> "150 But for the fact that they are each locked in their bedrooms at night, Parker J's analysis and conclusions in relation to MIG would lead me, and for essentially the same reasons, unhesitatingly to the conclusion that neither A nor C is being deprived of her liberty. Their happy family life, in the heart of a caring and loving family, can hardly be further removed from the paradigm case of the prisoner or, indeed the immensely different case of someone subject to control order and curfew. Does the fact that, during the night time, they are locked in their bedrooms, alone make the difference? In my judgment it does not.
>
> 151 Having regard to the context, to the "concrete situation" in which A and C find themselves, in the setting of their family life, with their parents in the family home, neither of them is being deprived of her liberty, even during the period during the night time when she is locked in her bedroom.
>
> 152 Ms Freeborn, on behalf of A, urges me to have regard to the context – a caring and loving regime which enables A to continue to live within a loving child-centred family home surrounded by people who have her best interests as their motivation, where she is the centre of the family life and where she is untroubled by the measures to keep her and the rest of the family safe from her behaviour at night by locking her bedroom door.
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> 153 Mr O'Brien, on behalf of B,[57] says much the same. He points out that the restriction is to protect A from harm and that, as recognised by all the expert evidence, it is in her interests. And – an important point – he emphasises that A is not confined for the purposes of punishment but to safeguard her welfare.
>
> 154 Ms Ball makes the same submission in relation to C. She says that the universally praised care provided to C by her devoted parents partly takes the form of restrictions. But, she says, such restrictions are needed because of specific features

[55] This is a synopsis of the issue, which is set out fully at para 37 of the decision.
[56] Para 115.
[57] A's mother.

> of C's genetic condition, to help her lead the best life she can. C's parents, she say, are looking after her, not punishing her; *promoting* and *improving* her autonomy and dignity, not restricting them; and in supporting her as they do they are giving to her, not taking away. Such arrangements, she submits, are not even on the borderline between a deprivation and a mere restriction of liberty; the caring restrictions imposed by C's parents in the context of their home and family life together clearly fall, she says, outside the category of cases which Article 5 is intended to regulate. The restrictions upon C, imposed in the context of her family life, are, says Ms Ball, as 'normal' as they could conceivably be for someone with C's condition. They are not arbitrary at all but, rather, tailored to her needs, proportionate and imposed in good faith. Moreover, she says, it has to be remembered that A and C are inherently restricted by the manifestations of their genetic condition. The 'restrictions' imposed upon them do not in fact, she says, restrict their liberty in any meaningful sense of the word. Rather, in the context of their restrictive condition, they maximise their opportunities and help them to live their lives to the full.
>
> 155 I agree with these powerful submissions, just as I agree with the more specific submission that, taking account of what is referred to in Guzzardi as the "type, duration, effects and manner of implementation" of the night time regimes, what we have here is merely a restriction upon liberty – and, I should add, an entirely appropriate and proportionate restriction upon liberty – rather than a deprivation of liberty. Not the least important and telling of the factors which have to be evaluated, and which in my judgment point towards the conclusion that there is no deprivation of liberty here, are the facts (a) that the regime in question applies only at night time and at a time when, but for their disabling condition, A and C would otherwise be expected to be asleep and (b) that although locked in their bedrooms both A and C are checked at night by their parents who, moreover, respond if their daughter wants to come out."

4.46 By contrast, in the case of *London Borough of Hillingdon v Steven Neary*,[58] where a young man, S, with childhood autism and severe learning disability was maintained in a behaviour support unit by a local authority against his own wishes and those of his father, it was held that deprivation of liberty had occurred.[59] The deprivation of liberty procedures had been utilised after S had been in care for about four months, but the Court of Protection held that the situation prior to that had also amounted to deprivation of liberty. Features of the arrangement during that earlier period which the Court described as "key" in reaching the view that there was a deprivation of liberty were "[S's] objection to being at the support unit, the objection of his father and the total effective control of S's every waking moment in an environment that was not his home". Insofar as the physical conditions at the Unit were concerned, the doors were kept locked with normal household locks, but this was not highlighted by Peter Jackson J as a key feature.

4.47 It is important to note that, for the second period of S's residence in local authority care, authorisation under the deprivation of liberty safeguards was in place. Nevertheless, the Court of Protection held that S had been deprived of his liberty without lawful authority contrary to Article 5. This was because of flaws in the process leading to the urgent authorisation and the standard authorisation: rather than simply following recommendations in the assessments, the supervisory body is obliged to scrutinise them, to remedy any inadequacy and, if necessary, bring the deprivation of liberty to an end.[60]

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[58] [2011] EWHC 1377 (Fam); [2011] 4 All ER 584.
[59] The initial admission had been by agreement, for short-term respite care.
[60] Para 180.

4.48 It is also important to note that, although the parties to the case presented the arguments under Article 5 first, Peter Jackson J took the view that "the nub of the matter" was a further argument that there had also been a breach of Article 8. Article 8, which protects the right to private and family life, and to a person's home, had been breached in the months following S's admission to care, during which period there appeared to have been no proper regard to the general principle that, other things being equal, S should have been with his family.[61] Viewing the case primarily through the prism of Article 5 risked conflating the secondary question of whether a person was lawfully deprived of his liberty with the primary question of where he should be living.[62]

4.49 In our view, among the recent cases on deprivation of liberty of those who lack capacity, the decisions at first instance and on appeal in *Cheshire West and Chester Council v P* [63] offer the clearest illustration of the difficulties in this area of law. P, a 39 year old man with cerebral palsy and Down's Syndrome, was being cared for in a small group facility, Z House. The principal issue in the case was whether he was being deprived of his liberty.

4.50 There was no dispute that P lacked the capacity to make decisions as to his care and residence. His daily routine involved one-to-one supervision whilst in Z house, and attendance at a day centre on five days per week. He had a long history of challenging behaviour. He required prompting and assistance with all activities of daily living and, relevantly, was at increased risk of choking. Incontinence presented the greatest difficulties in that P had developed a habit of shredding his incontinence pads and attempting to ingest the pads and, on occasions, their contents. During the currency of the proceedings in the Court of Protection, a new scheme had been adopted whereby P was dressed in an all-in-one suit, which fastened at the back, in an attempt to address these particular problems. It became clear that restraint was used in connection with this and other difficult behaviour. The Official Solicitor, who had been appointed to act as P's litigation friend, took the view that he was being deprived of his liberty. The local authority disagreed, maintaining instead that the measures to which he was subject amounted merely to restriction of liberty.

4.51 In a passage which was subsequently approved by the Court of Appeal, Baker J set out relevant legal principles:

> "(1) Section 64(5) of the 2005 Act provides that references to "deprivation of liberty" in the Act have the same meaning as in Article 5(1) of ECHR. Any analysis of whether P has been in fact deprived of his liberty must therefore have close regard to the jurisprudence of both the English courts and the European Court on the interpretation of that Article.
>
> (2) That jurisprudence makes clear that, when determining whether there is a "deprivation of liberty" within the meaning of Article 5, three conditions must be satisfied, namely (a) an objective element of a person's confinement in a particular restricted space for a not negligible time; (b) a subjective element, namely that the person has not validly consented to the confinement in question, and (c) the deprivation of liberty must be one for which the State is responsible: see *Storck v Germany* (2005) 43 EHRR 96 and *JE v DE and Surrey CC*, supra.[64]

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[61] Para 155.
[62] Para 152.
[63] [2011] EWHC 1330 (Fam); EWCA Civ 1257.
[64] It is potentially confusing to see the question of whether the State is responsible as relevant to the issue of whether there is a deprivation of liberty.

(3) When considering the objective element, the starting point is to examine the concrete situation of the individual concerned, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

(4) The distinction between a deprivation of, and a restriction of, liberty is merely one of degree or intensity and not one of nature or substance: *Guzzardi v Italy* (1980) 3 EHRR 333, *Storck v Germany*, supra.

(5) A key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the patient exercise complete and effective control of the person's care and movements: *HL v United Kingdom*, supra.

(6) So far as the subjective element is concerned, whilst there is no deprivation of liberty if a person gives a valid consent to their confinement, such consent can only be valid if the person has capacity to give it: *Storck v Germany* supra.

(7) So far as the third element is concerned, regardless of whether the confinement is effected by a private individual or institution, it is necessary to show that it is imputable to the State. This may happen by the direct involvement of public authorities or by order of the court."[65]

4.52 The local authority argued that P's liberty was being restricted but not deprived, relying on the following matters:

"(1) P's move to Z House was planned carefully and conscientiously. No force, threats, sedation or subterfuge were involved.

(2) Z House is a large and spacious bungalow.

(3) P has his own room, which has been personalised and is equipped with his possessions such as his own music system. Occupational therapy ensures that P's accommodation is as homely as possible.

(4) P has shared use of communal space and free access to the entire building. P and the three other residents often sit and eat together. There is a garden which P can use whenever he likes.

(5) Z House is situated close to P's family so they can visit regularly. Contact with his family is encouraged.

(6) P is sociable and has the opportunity to mix with staff and other residents.

(7) The external doors of the property are unlocked during the day but locked at night for security reasons.

(8) P has never attempted to leave the property.

(9) P needs prompting and assistance with all activities of daily living, including nutrition, mobility, personal hygiene and continence. He requires one-to-one close personal supervision with self-care and sometimes 2:1 care to help with his continence problems.

(10) The 98 hours of extra care and support provided to him promote his freedom of movement.

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[65] Para 46.

(11) He attends a day centre Monday to Friday, leaving Z House at about 9.30 and returning about 5 pm.

(12) He takes part in other activities such as pub lunches, visits to the park and garden centres. He enjoys going out into the community. On these occasions, 1:1 support is provided because P has no concept of danger.

(13) His behaviour is not controlled by medication."[66]

4.53 On behalf of P, the Official Solicitor argued to the contrary and submitted that P's circumstances did amount to a deprivation of liberty, this argument being supported by P's mother. Their reasons can be summarised as follows:

"(1) Every aspect of P's life is monitored and supervised by those working for the local authority. There is complete and effective control over his care and movements.

(2) P is obliged to live at Z House. He cannot return to M's care, nor move anywhere else.

(3) He is unable to leave the premises unescorted.

(4) He has little privacy within Z House. Every aspect of his personal care is supported by staff.

(5) Z House records show that his behaviour is challenging and requires management. A wide range of measures is used for that purpose.

(6) Some of his behaviour is extremely challenging and needs urgent intervention, including on occasions physical restraint.

(7) In particular, his tendency to self-harm may require physical intervention. On occasions he can assault others unless restrained. In the community, he is often restrained in a wheelchair by a strap.

(8) Furthermore, his tendency to tear off his incontinence pads and ingest bits of padding and the contents requires a range of measures, including the wearing of a bodysuit that restricts his freedom, and on occasions, in his own interests, intrusive physical interventions, which can include having his arms held by one member of staff whilst a second inserts a gloved finger into his mouth to forcibly remove any retained material.

(9) The use of restraint is part of his care package. The local authority has been prompted in the course of this case to introduce a new policy which clarifies and articulates the circumstances in which restraint may be used."[67]

4.54 In reaching his conclusion, Baker J took into account that P was living in accommodation of a type not designed for compulsory detention; that he had regular contact with his family; that he attended a day centre and that he enjoyed a good social life. But his life was completely under the control of members of staff, and a range of measures was employed to deal with his behaviour, some of which amounted to restraint. These led "to a clear conclusion that, looked at overall, P is being deprived of his liberty".[68]

4.55 The approach of Baker J relied to a considerable extent on the characteristics of the regime to which P was subject. The reasons for the regime were of less significance. Such

[66] Para 54.
[67] Para 56.
[68] Para 60.

an approach views deprivation of liberty as a state of affairs which necessarily occurs in the care of some of those with multiple disabilities if they are to be provided with acceptable standards of physical care. Baker J was careful to emphasise the lack of negative connotation when deprivation of liberty is identified in such a context:

> "61 …I make it clear that, in reaching that finding, I am not being critical of the local authority or the staff at Z House. In my judgment, it is almost inevitable that, even after he has been supplied with a bodysuit, P will on occasions gain access to his pads and seek to ingest pieces of padding and faeces in a manner that will call for urgent and firm intervention. Those actions will be in his best interests and therefore justifiable, but they will, as a matter of concrete fact and legal principle, involve a deprivation of his liberty. The reason for attaching that label to those actions is not to stigmatise either P or his hard-working and dedicated carers, but so that all involved with his care recognise the implications of what is happening."

4.56 The Court of Appeal took the opposite view.[69] Their view that P was not being deprived of his liberty centred on two main aspects: firstly, reason, purpose and motive and, secondly, normality.

4.57 Addressing the issue of purpose, Munby LJ approved his own previous statement in *JE v DE and Surrey County Council*:

> "And if beneficent purpose cannot deprive what is manifestly a deprivation of liberty of its character as such, why should a beneficent purpose be of assistance in determining whether some more marginal state of affairs does or does not amount to a deprivation of liberty?"[70]

4.58 Later he observed, in relation to an example of a husband confining his wife within the family home because of her dementia, where the purpose is to safeguard and protect the wife against some of the adverse consequences of her illness:

> "…both the reason and the purpose are relevant to the question of whether there is any deprivation of liberty".[71]

4.59 In so saying, he emphasised that including "reason" and "purpose" in the factors to be examined did not represent a move away from an objective test; these concepts were themselves to be seen as objective. Thus, there was still the "objective test" required by the Convention as the first step in assessing whether deprivation of liberty was occurring – it was simply that more elements were relevant to that assessment.

4.60 As for the question of normality, here Munby LJ introduced the concept of the comparator, that is the person who:

> "is 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".[72]

4.61 Thus the normality concerned was "the normality of the life of someone with the relevant condition, not the normality of the life of the able bodied man or woman on the

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[69] [2011] EWCA Civ 1257.
[70] [2006] EWHC 3459 (Fam) at para 47.
[71] Para 77.
[72] Para 86.

Clapham omnibus".[73] But any comparison was to be with another person with the same disabilities, not with the person themselves in any earlier regime under which they may have lived.[74]

4.62 In articulating his view that P was not being deprived of his liberty, Munby LJ set out some principles in this area as follows:

> "102. At this point it may be helpful to draw some of the threads together. My purpose, I stress, is limited. It is merely to draw attention to some aspects of the jurisprudence which are likely to be of significance in the kind of cases that come before the Court of Protection.
>
> i) The starting point is the "concrete situation", taking account of a whole range of criteria such as the "type, duration, effects and manner of implementation" of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, not nature or substance.
>
> ii) Deprivation of liberty must be distinguished from restraint. Restraint by itself is not deprivation of liberty.
>
> iii) Account must be taken of the individual's whole situation.
>
> iv) The context is crucial.
>
> v) Mere lack of capacity to consent to living arrangements cannot in itself create a deprivation of liberty.
>
> vi) In determining whether or not there is a deprivation of liberty, it is legitimate to have regard both to the objective "reason" why someone is placed and treated as they are and also to the objective "purpose" (or "aim") of the placement.
>
> vii) Subjective motives or intentions, on the other hand, have only limited relevance. An improper motive or intention may have the effect that what would otherwise not be a deprivation of liberty is in fact, and for that very reason, a deprivation. But a good motive or intention cannot render innocuous what would otherwise be a deprivation of liberty. Good intentions are essentially neutral. At most they merely negative the existence of any improper purpose or of any malign, base or improper motive that might, if present, turn what would otherwise be innocuous into a deprivation of liberty. Thus the test is essentially an objective one.
>
> viii) In determining whether or not there is a deprivation of liberty, it is always relevant to evaluate and assess the 'relative normality' (or otherwise) of the concrete situation.
>
> ix) But the assessment must take account of the particular capabilities of the person concerned. What may be a deprivation of liberty for one person may not be for another.
>
> x) In most contexts (as, for example, in the control order cases) the relevant comparator is the ordinary adult going about the kind of life which the able-bodied man or woman on the Clapham omnibus would normally expect to lead.
>
> xi) But not in the kind of cases that come before the Family Division or the Court of Protection. A child is not an adult. Some adults are inherently restricted by their circumstances. The Court of Protection is dealing with adults with disabilities, often, as in the present case, adults with significant physical and learning disabilities, whose lives are dictated by their own cognitive and other limitations.

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[73] Para 87.
[74] Para 97.

> xii) In such cases the contrast is not with the previous life led by X (nor with some future life that X might lead), nor with the life of the able-bodied man or woman on the Clapham omnibus. The contrast is with the kind of lives that people like X would normally expect to lead. The comparator is an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations as X. Likewise, in the case of a child the comparator is a child of the same age and development as X."

4.63 Thus, the basis of differing from the conclusion of Baker J was the lack of any comparison with the kind of life P would have been leading as someone with his disabilities and difficulties in what for such a person would be a normal family setting. The limitations and restrictions on his life were no more than the inevitable corollary of his various disabilities. And the measures used to deal with his behaviour were the kinds of occasional restraints that anyone caring for P in whatever setting would from time to time have to adopt.[75] This degree of restraint was "far removed indeed from anything that begins to approach a deprivation of liberty".[76]

4.64 When the question of costs came to be determined, the importance of the case in attempting to provide guidance on deprivation of liberty in the context of residential care was acknowledged:

> "Among the primary reasons for making no order is that the reason for and the importance of the appeal was not really at all about how P will be dealt with. The point of major importance for the local authority, and indeed local authorities generally, was how often they have to come back to court in this and other like cases".[77]

5. Do consultees have any comments on our summary of English case-law?

[75] Para 113.
[76] Para 114.
[77] [2011] EWCA Civ 1333; Munby LJ at para 8.

Chapter 5 Comparative law

Introduction

5.1 We have attempted to establish how the making of residential arrangements for adults who lack capacity is addressed in other countries. In this chapter, we begin by referring to other sources of comparative material: a review by the European Court of Human Rights in a recent Grand Chamber decision concerning admission of people lacking capacity to specialised institutions, and a series of guides on substitute decision-making in other jurisdictions. We then look in greater detail at provisions in some other jurisdictions. In light of the significance of Article 5 in this context, we look first at other Council of Europe countries. Following that, we consider the position in the province of Ontario in Canada, where there has been a series of reforms since 1992. Finally, we look at the position in the state of Victoria, Australia. In April 2012, the Victorian Law Reform Commission published the Final Report in its project on Guardianship. We have learned much from studying this thoughtful and comprehensive review.

Other comparative material

5.2 As we observed in Chapter 2,[1] the decision of the Grand Chamber in the case of *Stanev v Bulgaria*[2] includes a section entitled "Comparative law". As it provides a useful summary of the position across Europe, we reproduce it here:

> "A. Access to a court for restoration of legal capacity
>
> 88. A comparative study of the domestic law of twenty Council of Europe member States indicates that in the vast majority of cases (Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg, Monaco, Poland, Portugal, Romania, Slovakia, Sweden, Switzerland and Turkey) the law entitles anyone who has been deprived of legal capacity to apply directly to the courts for discontinuation of the measure.
>
> 89. In Ukraine, people who have been partially deprived of legal capacity may themselves apply for the measure to be lifted; this does not apply to those who have been declared fully incapable, who may nevertheless challenge before a court any measures taken by their guardian.
>
> 90. Judicial proceedings for the discontinuation of an order depriving a person of legal capacity cannot be instituted directly by the person concerned in Latvia (where an application may be made by the public prosecutor or the guardianship council) or Ireland.
>
> B. Placement of legally incapacitated persons in a specialised institution
>
> 91. A comparative-law study of the legislation of twenty States Parties to the Convention shows that there is no uniform approach in Europe to the question of placement of legally incapacitated persons in specialised institutions, particularly as regards the authority competent to order the placement and the guarantees afforded

[1] Para 2.44 above.
[2] Application no. 36760/06, 17 January 2012.

to the person concerned. It may nevertheless be observed that in some countries (Austria, Estonia, Finland, France, Germany, Greece, Poland, Portugal and Turkey) the decision to place a person in a home on a long-term basis against his or her will is taken directly or approved by a judge.

92. Other legal systems (Belgium, Denmark, Hungary, Ireland, Latvia, Luxembourg, Monaco and the United Kingdom) authorise the guardian, close relatives or the administrative authorities to decide on placement in a specialised institution without a judge's approval being necessary. It also appears that in all the above-mentioned countries, the placement is subject to a number of substantive requirements, relating in particular to the person's health, the existence of a danger or risk and/or the production of medical certificates. In addition, the obligation to interview or consult the person concerned on the subject of the placement, the setting of a time-limit by law or by the courts for the termination or review of the placement, and the possibility of legal assistance are among the safeguards provided in several national legal systems.

93. In certain countries (Denmark, Estonia, Germany, Greece, Hungary, Ireland, Latvia, Poland, Slovakia, Switzerland and Turkey) the possibility of challenging the initial placement order before a judicial body is available to the person concerned without requiring the guardian's consent.

94. Lastly, several States (Denmark, Estonia, Finland, Germany, Greece, Ireland, Latvia, Poland, Switzerland and Turkey) directly empower the person concerned to apply periodically for judicial review of the lawfulness of the continued placement.

95. It should also be noted that many countries' laws on legal capacity or placement in specialised institutions have recently been amended (Austria: 2007; Denmark: 2007; Estonia: 2005; Finland: 1999; France: 2007; Germany: 1992; Greece: 1992; Hungary: 2004; Latvia: 2006; Poland: 2007; Ukraine: 2000; United Kingdom: 2005[3]) or are in the process of amendment (Ireland). These legislative reforms are designed to increase the legal protection of persons lacking legal capacity by affording them either the right of direct access to court for a review of their status or additional safeguards when they are placed in specialised institutions against their will."[4]

5.3 The concept of substitute decision-making, by a person automatically having that status or by a person chosen by the now-incapacitated adult or authorised by a court, is plainly relevant to the matter of admission to a specialist facility. In this regard, the work of STEP, the Society of Trust and Estate Practitioners, to compare certain aspects of the law governing powers of attorney in different jurisdictions, is of interest. Members of the Special Interest Group on Mental Capacity have produced Jurisdictional Reference Guides on a number of jurisdictions in Europe, North America and Asia/Australasia. Each Guide answers questions regarding: whether there are specialist courts; whether a power of attorney survives the incapacity of its granter; the situation if there is no power of attorney when incapacity occurs; how capacity is assessed and the recognition of powers of attorney granted under the law of another country.[5] The concept of an enduring power of attorney appears well-established; of those 21 States or territories for which Guides exist, only Guernsey, Malta and Switzerland do not yet appear to recognise powers of attorney which survive the incapacity of the granter, although the law of Switzerland is to change with effect from 1 January 2013 to make provision for advance directives.

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[3] This is assumed to refer to the law of England and Wales, as set out in the Mental Capacity Act 2005.
[4] It is noteworthy that this review is of provisions applying where the placement is **against the will** of the person.
[5] http://www.step.org/communities/special_interest_groups_sigs/mental_capacity_special_intere/locations.aspx?link=sidenavigation.

Germany

Constitutional protection of the right to liberty

5.4 Article 104 of the Basic Law for the Federal Republic of Germany (*Grundgesetz*)[6] provides as follows:

> "Article 104 [Deprivation of liberty]
>
> (1) Liberty of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment.
>
> (2) Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.
>
> (3) Any person provisionally detained on suspicion of having committed a criminal offence shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest, examine him, and give him an opportunity to raise objections. The judge shall, without delay, either issue a written arrest warrant setting forth the reasons therefor or order his release.
>
> (4) A relative or a person enjoying the confidence of the person in custody shall be notified without delay of any judicial decision imposing or continuing a deprivation of liberty."

5.5 Article 104 therefore provides that the freedom of a person may be restricted only in accordance with the procedures set out in that article. This covers all environments in which such a restriction might take place, and so includes a residential care environment. In essence the effect of article 104 is that any admission to a care home which involves a deprivation of liberty must be sanctioned by a judge. Where it is not possible to obtain judicial sanction prior to the admission, this must be obtained as soon as possible afterwards.

Custodianship; placement in accommodation involving a deprivation of liberty

5.6 Sections 1896 to 1908i of the German Civil Code (*Bürgerliches Gesetzbuch, or BGB*) make provision for a form of protection of adults with incapacity known as legal custodianship (*Betreuung*). This protection was introduced by the Act to reform Guardianship (*Betreuungsgesetz*) of 1990, with effect from 1 January 1992.

5.7 Section 1896 of the Civil Code provides for the appointment of a custodian (*Betreuer*) in respect of a person who has reached the age of majority but is unable in whole or in part to manage his or her own affairs, as a result of mental illness or a physical, mental or psychological handicap. (Following the introduction of custodianship, guardianship applies only in relation to people who have not yet reached the age of majority). A person who is subject to care and control is referred to as a "protected person" (*Betreute*). A custodian is

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[6] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p 944). Also available at http://www.gesetze-im-internet.de/englisch_gg/index.html. The Basic Law came into effect in 1949. Since 1990, it has been the constitution for the unified State.

appointed by the custodianship court, either of its own motion or on the basis of an application by the person seeking protection. Application may also be made by a person incapable of contracting. In terms of section 104(2) of the German Civil Code a person does not have legal capacity to contract "if he is in a state of pathological mental disturbance, which prevents the free exercise of his will, unless the state by its nature is a temporary one."

5.8 Section 1896 makes clear that a custodian should be appointed in terms of that section only where such appointment is necessary. It is not necessary where the affairs of the person in question could be taken care of just as effectively by another person, with powers of attorney or other assistants.[7] Moreover, the custodian may only be appointed to take care of the interests of a person in relation to those areas in which the person does not have capacity. It has been suggested, therefore, that it is likely to be relatively uncommon for a custodian to have an all-encompassing power to safeguard a person's interests in all areas. The more likely scenario is that certain discrete areas will be specified – examples may include health matters and management of finances.[8]

5.9 Section 1906 of the Civil Code provides that the custodian may only place the protected person in a form of accommodation in which a deprivation of liberty is deemed to take place in specified circumstances. Such placement is authorised only where it is necessary for the best interests of the protected person. It will only be viewed as such where, by reason of a mental illness or mental or psychological handicap of the person under custodianship there is a danger that he will kill himself or cause substantial damage to his own health, or there is a need for examination of his state of health. Moreover, the placement is not authorised unless the approval of the custodianship court has been obtained. This is subject to an exception only where it is thought that delay for the purposes of seeking approval could give rise to risk to the welfare of the protected person. In that event approval of the court must be sought as soon as possible after the person is placed in the accommodation.

5.10 It is to be noted that a significant increase in the number of adults with incapacity subject to compulsory residential care arrangements was recorded following the coming into force of the new legislation in 1992. However it has been suggested that this is largely attributable to the increased average life expectancy of the German population, with a corresponding rise in the number of dementia sufferers.[9]

5.11 The overall approach of the German courts can be summarised on the basis that, where a person has been appointed to safeguard the interests of a person with incapacity, the court will not generally interfere with the decision or proposed course of action of the person so appointed. This approach is followed in so far as there is no prejudice to the adult's welfare or interests, nor grounds for terminating the appointment.[10]

5.12 Where, however, no custodian has been appointed, the court may appoint an interim custodian, pending the appointment of a permanent one. This is done in exercise of the power in section 300 of the provisions governing court procedure in, amongst other matters,

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[7] Peter Gottwald, Dieter Schwab and Eva Buttner *Family and Succession Law in Germany* (2001), para 244.
[8] Ibid, paras 243 to 244.
[9] Peter Lepping, Rajvinder Singh Sambhi and Karen Williams-Jones, *Deprivation of liberty safeguards: how prepared are we?* 36 Journal of Medical Ethics 170 (2010).
[10] Adrian D Ward *Adult Incapacity* 2003, p 75, para 225.

family actions (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*). Applying section 300 it would seem that appointment of an interim custodian would be competent only where certification had been issued by a doctor to the effect that a person's admission to residential care was required as a matter of urgency.

5.13 Section 1906(5) of the German Civil Code provides that the section 1906 power is also exercisable by a person in whose favour a power of attorney has been granted. It appears that the placement in such accommodation by a person holding a power of attorney also requires the approval of the custodianship court. Moreover, the power so to admit a person exists only where the power of attorney is drafted expressly to provide that it covers the placement of a person in accommodation where there is a deprivation of liberty.

The Netherlands

5.14 The current mental health law is contained in a statute, BOPZ.[11] Chapter VIII deals with "admission to homes for the mentally handicapped and nursing homes without the intervention of the courts". Essentially, as far as adults are concerned, detention can only occur in three situations. Firstly, on the application of the public prosecutor, a court may grant an interim order to have a person detained in a psychiatric hospital if the mental disorder from which he or she is suffering constitutes a danger to the person and the danger cannot be otherwise averted. Such an order is required if the person is aged 12 or over and gives no indication of "the necessary willingness".[12] Secondly, an order is required for admission and detention of a person in an institution for the mentally handicapped if the person indicates that he objects to admission or detention.[13] Thirdly, if a person aged 12 or over gives no indication of the necessary willingness, admission and detention in an institution for the mentally handicapped can only take place if an independent committee judges this necessary. One situation in which it will be judged necessary is if the person is unable to maintain him or herself outside the institution.[14]

5.15 Dutch law in this area is, however, undergoing major reform. The policy aims of the reform are summarised in Press Releases dated 23 April[15] and 13 June 2010.[16] It appears that compulsion is to be reserved for situations in which it is absolutely necessary; there is no mention of lack of capacity constituting such necessity.

Ontario

Types of substitute decision-makers

5.16 In Ontario, the legislation underpinning substitute decision-making is the Substitute Decisions Act, 1992. Part I of the Substitute Decisions Act provides for a continuing power of attorney for property. There is also the statutory guardian of property, an appointment in

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[11] Wet bijzondere opnemingen in psychiatrische ziekenhuizen – "Rules of law for special admissions to psychiatric hospitals".
[12] Section 2 of BOPZ.
[13] Section 3 of BOPZ.
[14] Section 60 of BOPZ.
[15] http://www.government.nl/documents-and-publications/press-releases/2010/04/23/customised-care-for-people-with-psychological-disorders.html.
[16] http://www.government.nl/documents-and-publications/press-releases/2010/06/13/bill-on-compulsory-mental-health-treatment-introduced.html.

relation to patients in psychiatric facilities; the Public Guardian and Trustee[17] is the appointee in the first instance although she can be replaced by an applicant who has a connection to the patient. Part I of the Act also provides for court-appointed guardians of property; should there be no other suitable person, the Public Guardian and Trustee will be appointed. Part II of the Act provides for decision-making in relation to personal matters. There are powers of attorney for personal care, which survive the incapacity of the granter. Alternatively, there is the possibility of a court-appointed guardian of the person for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf.[18] Such guardianship can be full or partial.[19] In May 2012, the Law Commission of Ontario announced the commencement of a new project on the law surrounding capacity and guardianship.

Health care decision-making

5.17 For those who lack capacity, health care decision-making is dealt with in the Health Care Consent Act 1996. The Health Care Consent Act, 1996 applies to health care decisions generally, covering people who are not incapable as well as those who are, and substitute decision-makers. It also applies to care facility admission (excluding hospitals and mental health facilities) in addition to the administration of medical treatment and the provision of personal assistance.[20] The Substitute Decisions Act 1992 and the Health Care Consent Act 1996 provide a comprehensive framework for substitute decision-making in Ontario. Both Acts set out principles and procedures to be followed, which are intended to maximise personal autonomy and involvement in decision-making. This is achieved by requiring that wishes expressed by the person while he or she was still capable are taken into account, as well as the wishes of the person once incapable, where relevant.[21]

The meaning of capacity

5.18 Section 4(1) of the Health Care Consent Act 1996 provides that a person is capable of giving or withholding consent to admission to a care facility if the person is able to:

> "(a) understand the information that is relevant to making a decision about the admission, and
>
> (b) appreciate the reasonably foreseeable consequences of a decision or lack of decision."

5.19 Guidance on the meaning of "understand" and "appreciate" is found in the Guidelines for Assessment of Capacity, issued by the Capacity Assessment Office of the Ontario

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[17] The Public Guardian and Trustee has responsibility for the protection of those who are incapable, as well as certain other duties in relation to charities, intestate estates and dissolved corporations.
[18] Section 55.
[19] Sections 59 and 60.
[20] "Personal Assistance Services" are defined in s 2 to mean "assistance with or supervision of hygiene, washing, dressing, grooming, eating, drinking, elimination, ambulation, positioning or any other routine activity of living, and includes a group of personal assistance services or a plan setting out personal assistance services to be provided to a person, but does not include anything prescribed by the regulations as not constituting a personal assistance service."
[21] This information comes from section IV of a Law Commission of Ontario Research Paper by Margaret Hall, funded as part of the LCO's project on Older Adults. http://www.lco-cdo.org/en/older-adults-lco-funded-papers-margaret-hall-sectionIV.

Ministry of the Attorney General.[22] As regards the "understand" part of the test, the Guidelines suggest that this be subdivided into two parts, the first part concerning what is referred to as factual knowledge base, and the second concerning understanding of options.

5.20 The Guidelines also suggest the division of the "appreciate" part of the test into two parts, namely realistic appraisal of outcome and justification of choice. The first part essentially requires that the person be capable of identifying the major risks associated with his or her actions, and of showing that he or she has considered the consequences of choosing to manage or ignore the risks. Justification of choice requires that the person should have reached a reasoned decision, based upon reality.

5.21 In terms of section 4(2) and (3) of the 1996 Act a person is presumed to be capable of giving or withholding consent to admission to a care facility unless "reasonable grounds" to suspect incapacity exist.

5.22 Section 2(1) provides that a "care facility" means a long-term care home as defined in the Long-Term Care Homes Act, 2007, or any facility prescribed as a care facility by regulations made under the Health Care Consent Act, 1996. In turn, section 2(1) of the 2007 Act defines a long-term care home as a place that is licensed as a long- term care home under that Act. Section 95(1) of that Act makes clear that a licence is required for the operation of residential premises for persons requiring nursing care or in which nursing care is provided to two or more unrelated persons. Section 95(2) goes on to provide that section 95(1) does not apply to premises falling under the Retirement Homes Act, 2010. From this it seems clear that a care facility includes a nursing home but not a retirement home, although the definition of "retirement home" under the 2010 Act appears closer to what would in the United Kingdom be termed "sheltered housing".

Assessing capacity

5.23 If a person's consent to admission to a care facility is required by law and that person is found by an evaluator to be incapable with respect to the admission, consent may be given or refused by his or her substitute decision-maker.[23] Section 2(1) provides that an evaluator might be a member of one of certain specified colleges (including the College of Physicians and Surgeons of Ontario and the College of Psychologists of Ontario) or any other person falling under a category prescribed in Regulations made under the Act.

Consequences of a finding of incapacity

5.24 Where the conclusion of the assessment undertaken by an evaluator is that a person does not have capacity to give or withhold consent to admission to a long-term care facility, the person has a right in certain circumstances to contest the outcome of the assessment by requesting a review by the Consent and Capacity Board of Ontario.[24]

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[22] These are available at http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf.

[23] Section 40(1) of the Health Care Consent Act 1996. By s 44(11)d of the Long Term Care Homes Act 2007, consent is required for the admission of a person to a long term care home.

[24] A review is not available where the adult concerned has "a guardian of the person" who has the power to consent or an attorney for personal care and the power of attorney document contains an effective waiver of this right.

5.25 Where a request either for a review of a decision or a change of substitute decision-maker is submitted, the person responsible for authorising admissions to the relevant care facility is required by section 46 to take reasonable steps to ensure that the person's admission is not authorised and the person is not admitted until one of the conditions laid down in section 46(3) is satisfied. Those conditions are that no application is submitted to the Consent and Capacity Board within 48 hours of the person who is responsible for authorising admissions being informed that such an application is to be made, that a decision has been given by the Board and no appeal against it is commenced before the end of the period for instigating an appeal, or that an appeal against the decision has been disposed of. An exception to this is made only where the person responsible for authorising admissions to the care facility is of the opinion that immediate admission of a person lacking capacity is required as a result of a crisis.[25] The 1996 Act does not define the term "crisis" itself. However it does state in section 39 that crisis means a crisis in relation to the condition or circumstances of the person who is to be admitted to the care facility. Reasonable efforts must then be made to contact a substitute decision-maker. Following such a crisis admission the person found to be suffering incapacity is entitled to contest that finding by applying to the Consent and Capacity Board.[26]

Substitute decision-making regarding admission to care

5.26 Section 20(1) of the 1996 Act sets out a hierarchy in which people are to be called upon to act as substitute decision-maker, in relation to decisions concerning treatment. Section 41 provides that the same hierarchy applies, subject to necessary modifications, in respect of decisions relating to admission to care facilities. The list is as follows:

> 1. The incapable person's guardian of the person, if the guardian has authority to give or refuse consent to the treatment.
>
> 2. The incapable person's attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment.
>
> 3. The incapable person's representative appointed by the Board under section 33, if the representative has authority to give or refuse consent to the treatment.
>
> 4. The incapable person's spouse or partner.
>
> 5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.
>
> 6. A parent of the incapable person who has only a right of access.
>
> 7. A brother or sister of the incapable person.
>
> 8. Any other relative of the incapable person.

In terms of section 20(3) consent must be given or refused by the person who is the highest ranked eligible individual on the list. In order to be eligible a person must be capable with

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[25] Such exception is provided for in s 46(4) of the 1996 Act.
[26] *A Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease,* p 12.

respect to giving or withholding consent to the admission, at least 16 years of age, available and willing to assume the responsibility of giving or refusing consent and not otherwise prohibited from doing so. These requirements are set out in section 20(2). If two persons of the same rank disagree, the decision will be taken by the Public Guardian and Trustee.[27]

5.27 The principles to be followed by the substitute decision-maker in arriving at a decision relating to the giving or withholding of consent are set out in section 42(1) of the 1996 Act. If the substitute decision-maker knows of a wish expressed by the person who now lacks capacity at a time when he or she was capable, that wish being relevant to the question of admission to a care facility, the substitute decision-maker is required to give or refuse consent in accordance with that wish. If the substitute decision-maker does not know of such a wish, or if it is impossible to comply with the wish, the decision-maker is required to act in the best interests of the person. Section 42(2) provides guidance as to how the person's best interests are to be assessed. It sets out a number of factors to be taken into consideration. These are:

> The values and beliefs that the incapable person held when capable and which the decision-maker believes they would still act on if capable;
>
> any wishes expressed by the person with incapacity that are not required to be followed under paragraph 1 of subsection (1);
>
> the likely effect on the person's quality of life of admission to the care facility;
>
> the likely effect on the person's quality of life of non-admission to the care facility;
>
> whether the benefit the incapable person is expected to obtain from admission outweighs the risk of negative consequences; and
>
> whether a less restrictive measure than admission to a care facility is available and appropriate in the circumstances.

Potential involvement of the Office of the Public Guardian and Trustee

5.28 Where there is no person who meets the requirements to act as a substitute decision-maker in respect of a person who is considered not to be capable of giving or withholding consent to admission to a care home, the Public Guardian and Trustee shall make the decision to give or refuse consent.

Long Term Care Homes Act, 2007

5.29 This Act provides extensive and detailed regulation of the operation of care homes, the rights of residents, conditions of admission, licensing and other ancillary matters. Consent by or on behalf of a person to admission is not sufficient: the "placement co-ordinator", a designated person for the geographical area in which the home is situated, must both have authorised admission to long term care in general and to that home in particular.[28] There are detailed provisions governing how and on what criteria these decisions are to be made.

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[27] Section 20(6).
[28] Sections 42 to 44 of the 2007 Act.

Secure facilities

5.30 The Long-Term Care Homes Act, 2007 imposes additional requirements which must be fulfilled before a person can be admitted to a secure unit.[29] First, a new subsection is added to section 42 of the Health Care Consent Act 1996, to provide that the person giving consent to an admission on behalf of an incapable person shall not give consent to his or her admission to a secure unit of a care facility, unless the admission is essential to prevent serious bodily harm to the incapable person or to others, or allows the incapable person greater freedom or enjoyment.[30]

5.31 In addition, the placement co-ordinator for the area in which the home is located will authorise the admission of a person to a secure unit only if all of the following are satisfied:

> 1. There is a significant risk that the person or another person would suffer serious bodily harm if the person were not admitted to a secure unit.
>
> 2. Alternatives to admitting the person to a secure unit have been considered but would not be effective to address the risk referred to in paragraph 1.
>
> 3. Admitting the person to a secure unit is reasonable, in light of the person's physical and mental condition and personal history.
>
> 4. A physician, registered nurse in the extended class or other person provided for in the regulations has recommended the admission to a secure unit.
>
> 5. The admission of the person to a secure unit has been consented to by the person or, if the person is incapable, a substitute decision-maker of the person with authority to give that consent.[31]

5.32 There is extensive regulation on the use of restraint, designed to minimise such use. By section 32 of the 2007 Act, a provision not yet in force, the use of barriers, locks or other devices or controls to restrain a resident is only permissible if such measures are in the resident's care plan. They may only be in a care plan if all of the following are satisfied:

> 1. There is a significant risk that the resident or another person would suffer serious bodily harm if the resident were not restrained.
>
> 2. Alternatives to restraining the resident have been considered, and tried where appropriate, but would not be, or have not been, effective to address the risk referred to in paragraph 1.
>
> 3. The method of restraining is reasonable, in light of the resident's physical and mental condition and personal history, and is the least restrictive of such reasonable methods that would be effective to address the risk referred to in paragraph 1.
>
> 4. A physician, registered nurse in the extended class or the Director of Nursing and Personal Care or a registered nurse or other person provided for in the regulations has recommended the restraining.

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[29] "Secure unit" means an area within a home designated as such – s 2(1).
[30] This provision will come into force on a day to be appointed.
[31] Section 45 of the Act – also to come into force on a day to be appointed.

5. The restraining of the resident has been consented to by the resident or, if the resident is incapable, a substitute decision-maker of the resident with authority to give that consent.

6. The plan of care provides for everything required under subsection (3).

Victoria

Law reform project

5.33 In May 2009, the Law Reform Commission of Victoria, Australia, was asked to review the Guardianship and Administration Act 1986, and to report on whether changes were needed in that area of law. By this point, there were six different types of substitute decision-making appointments, in three different Acts. The legislation itself had become complex and inaccessible.

5.34 As well as these difficulties with the existing regime, altered circumstances contributed to the need for reform. There had been a change in the range of people using guardianship laws, with the largest increase seen in people with dementia. Social attitudes had changed: people with disabilities were seen as active citizens rather than passive recipients of services. Finally, the legal climate had changed; there had been the UN Convention on the Rights of Persons with Disabilities (ratified by Australia in 2008) and the Victorian Charter of Human Rights and Responsibilities Act 2006, establishing a legislative framework for the protection and promotion of human rights in Victoria.

5.35 In April 2012, the Final Report of the Commission, which makes 440 recommendations, was tabled in the Victorian Parliament by the Attorney General. The Report is a comprehensive review of the law of guardianship and substitute decision-making and contains much that affords assistance to those studying these areas of law. It is available on the Commission's website.[32]

Current law of Victoria

5.36 Under the current law of Victoria, Australia, appointment of a substitute decision-maker can be made by the person him or herself; automatically; or by the Victorian Civil and Administrative Tribunal ("VCAT")[33] VCAT has the power to appoint a guardian or administrator for a person whose disability impairs their judgement and who needs a substitute decision-maker.[34] "Disability" is defined in section 3 of the Guardianship and Administration Act 1986 as follows:

> "disability, in relation to a person, means intellectual impairment, mental disorder, brain injury, physical disability or dementia;…"

Substitute decision-makers can deal with personal or lifestyle decisions, financial decisions or medical decisions. Personal or lifestyle decisions may be made by personally appointed enduring guardians or VCAT appointed guardians. Financial decisions can be made by

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[32] http://www.lawreform.vic.gov.au/projects/guardianship-final-report.
[33] Chapter 3, paras 3.5 to 3.10. The Victorian Civil and Administrative Tribunal is a large tribunal with a large remit. It has a number of different lists, specialising in particular types of case. The Guardianship List deals with guardianship, administration, powers of attorney and relative matters (para 3.22).
[34] Para 3.10.

personally appointed enduring attorneys[35] or VCAT appointed administrators. Medical decisions can be made by VCAT appointed guardians with medical decision-making powers, by personally appointed enduring guardians with healthcare powers, personally appointed medical treatment agents or automatic appointees.[36]

5.37 The Report also recognises that informal arrangements often operate. Many people – family members, friends, neighbours – offer informal assistance to those who experience difficulty in making decisions. This can involve requesting services on behalf of those needing help. The 1986 Act requires VCAT to consider whether less restrictive options are available than appointment of a guardian or administrator. In many cases, this means recognising informal arrangements and allowing them to continue when they are working well.[37]

The Victorian Law Reform Commission recommendations

5.38 The Commission recommends a simpler statutory basis than currently exists; there should be a single Act covering, amongst other things, all the matters currently provided for in the Guardianship and Administration Act 1986.

5.39 Recognising both that capacity is a complex issue and that the needs of individuals are very varied, the Commission recommends that there should be new, additional mechanisms of supported decision-making and co-decision making. Substitute decision-making should continue, with appointments possible by the person him or herself whilst they have capacity, or by VCAT. Automatic appointments of medical treatment decision makers in some instances should also continue.[38]

5.40 In making these recommendations, the Commission records its agreement with those who express a preference for personal appointments:

> "5.24 The Commission agrees with the Public Advocate that personal appointments provide greater autonomy for many people whose capacity is impaired, because a trusted person is well placed to know and implement the wishes of the person when it becomes necessary for someone else to make decisions.
>
> 5.25 The Commission believes that new guardianship laws should encourage people to make their own personal appointments of supported and substitute decision makers whenever possible. To encourage greater use, the Commission recommends reform to the personal appointments scheme to ensure that it is as simple and accessible as possible, accompanied by more community education about the benefits of making these appointments".[39]

5.41 In its project, the Commission also specifically addressed the issues raised by the *Bournewood* case. A similar case could arise in Victoria, given that the Charter of Human Rights and Responsibilities Act 2006 has a section in terms similar to Article 5 of the European Convention:

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[35] A general power of attorney ceases to have effect on the loss of capacity.
[36] Para 3.4.
[37] Paras 3.18 to 3.19.
[38] Para 5.18.
[39] See also paras 10.7 and 10.8 regarding the benefits of autonomy, future planning and self-determination.

"21. Right to liberty and security of person

(1) Every person has the right to liberty and security.

(2) A person must not be subjected to arbitrary arrest or detention.

(3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law".

The Report highlights that there has been no equivalent of the *Bournewood* case in Victoria. In contrast to the situation under ECHR, however, there is no independent cause of action under the Charter.[40] Moreover, the Government is not obliged to take remedial action to secure compliance with the rights set out in the Charter.[41]

5.42 The Commission notes that some of those living in residential care are unable to make their own accommodation decisions because they have impaired decision-making ability due to disability. Often, these decisions are taken by relatives and carers. Sometimes, there will be a VCAT appointed guardian who makes a place of residence decision. Although the Report does suggest that the Attorney-General should keep under review the practice of relying largely upon informal arrangements for admission to residential care, owing to the increasing number of people with impaired decision-making capacity who move to residential care, the Commission does not propose any change to these practices, relying principally on the different legal environment in Victoria (the lack of local equivalent to the *Bournewood* decision and the absence of a duty on Government to take action to secure rights).[42]

5.43 Where a person in residential care who lacks capacity to consent to the regime is subjected to substantial restraints upon their movements, however, the Commission does consider that mechanisms are necessary to regulate such deprivations of liberty. The Commission did not identify any systems in other jurisdictions that it recommended for adoption in Victoria. The English and Welsh Deprivation of Liberty Safeguards, in particular, were "not supportable".[43]

5.44 The Commission recommends that people should be encouraged to appoint enduring personal guardians to make decisions about living arrangements, with the power to authorise restrictions upon their liberty that promote their health or safety if living in a residential care setting. Legislation should make it clear that this is competent.[44]

5.45 The Commission also recommends that, where VCAT appoints a personal guardian with the power to make decisions about admission to residential care, it should consider whether to include in the order an express power to authorise deprivation of liberty within that residential care setting. Legislation should expressly permit the tribunal to confer such a power of authorisation.[45]

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[40] Para 15.11, 15.76.
[41] Para 15.77.
[42] Paras 15.117 to 15.120.
[43] Para 15.123. The main problems with DoLS are said to be their complexity and the demands the system makes in terms of time and resources. Annual assessments are said to take between 10 and 18 hours and can cause great stress. There are also considerable geographical variations in numbers of applications.
[44] Para 15.130.
[45] Para 15.131.

New process of collaborative authorisation

5.46 The Report goes on to suggest that, whilst it is important to ensure that personal guardians have a clear power to authorise restrictions of liberty for a person's health or safety as part of residential care arrangements, it is unlikely that use of guardianship will be feasible in relation to most restrictions which occur, due to the numbers of people involved.[46] On that basis, the Commission has recommended the introduction of a new process of collaborative authorisation.[47] It is intended that the process should complement the existing provisions on guardianship. It should therefore still be possible for measures restricting liberty to be authorised by a personal guardian appointed prior to the time at which the restrictive arrangements appear to have become necessary, or when there is disagreement about the need for such measures. Rather, the intention is that the new mechanism would replace the informal arrangements that currently apply in many cases. It would also obviate the need to apply to VCAT for the appointment of a personal guardian when measures affecting liberty appear necessary.

5.47 As far as the scope of the new provisions is concerned, the intention is that the collaborative process should be available for use only in supported residential facilities that are fully and effectively regulated. It is not to be available in facilities which operate under limited regulation.[48]

Identifying a restriction on liberty for the purposes of the collaborative authorisation process

5.48 The Commission recommends that the restrictions upon liberty that should be capable of being authorised by the proposed collective authorisation mechanism are those which would otherwise be unlawful, but for the authorisation process. It suggests that there might be merit in approaching the new guardianship legislation in such a way that it does not seek to define 'restrictions upon liberty' in detail, but rather permits the use of practices that would be unlawful unless authorised.[49]

5.49 But it is recognised that such an approach does not provide sufficient guidance to those who work in residential facilities. Thus, it is suggested that an attempt should be made to provide guidance as to what amounts to a restriction of liberty requiring authorisation. Legislation might usefully highlight some common practices that *do not* amount to a restriction upon liberty which requires authorisation.[50] As regards measures that *do* require authorisation, the Public Advocate[51] should be required to develop, in consultation with other professional groups, guidelines that identify practices commonly undertaken in supported residential facilities which amount to a restriction of liberty and that should be authorised before being imposed without consent. Moreover, any person with a genuine interest in the

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[46] Para 15.132.
[47] As discussed at paras 15.133 to 15.135.
[48] Paras 15.136 to 15.138.
[49] Paras 15.139 to 15.140.
[50] By way of illustration, para 15.142 of the Report suggests that no restriction of liberty would arise where a person was restricted to a particular location within a residential setting because of his or her own physical limitations, rather than because of measures taken by the residential facility in which he or she was living.
[51] The role and powers of the Public Advocate in Victoria are set out in s 15 of the Guardianship and Administration Act 1986. In essence the role of the Public Advocate is to support services and actions that promote the rights of people with disabilities and to protect people with disabilities from exploitation and abuse. The Public Advocate may be appointed by the Victorian Civil and Administrative Tribunal as an independent statutory guardian, in respect of a person who lacks capacity to make decisions for him or herself, owing to a disability.

personal and social wellbeing of a person living in supported residential facilities should be permitted to apply to VCAT for advice as to whether a particular practice amounts to a restriction upon liberty requiring authorisation.[52]

How is the process of collaborative authorisation to operate?

5.50 The Commission recommends that, in relation to any given person with impaired decision-making capacity, the collaborative authorisation process should involve three persons: the person in charge of the residential facility, a medical practitioner or other health practitioner approved by regulations, and the person's health decision maker.[53] Such shared decision making would help to address concerns about conflict of interest, of which there is a likelihood in the sense that restrictions on liberty are likely to operate to the practical benefit of those providing care, or of the relative who is the health decision maker. No individual should act in more than one of the roles.[54]

5.51 The person in charge of the facility would be responsible for arranging the assessments by the medical practitioner and for providing information to the health decision maker.[55] The role of the medical practitioner or approved health practitioner would be to carry out two assessments. The first is an assessment of whether the person has capacity to make their own decision about the restrictive living arrangements in question. The second is an assessment of whether the restriction upon liberty is necessary for the health or safety of the person. The Commission recommends that, when determining whether the restriction upon liberty is necessary for the health or safety of the person, the medical practitioner or approved health practitioner should be required to consider whether:

> 1) the relevant restrictive practices that amount to a restriction of liberty are necessary to prevent harm to the person;
>
> 2) the restrictions are proportionate, reasonable and justified in the circumstances;
>
> 3) the benefits of the restrictions outweigh the risk of negative consequences to the person; and
>
> 4) there are less restrictive options available.[56]

Safeguards

5.52 The Commission recognises that there will be circumstances in which the use of the collaborative authorisation process is not appropriate, or where the outcome of the process should be subject to external review. The collaborative authorisation process should not be used where the person concerned consistently resists and opposes restrictions upon their liberty. In this scenario an application should be made to VCAT to consider whether it is necessary to appoint a guardian to make decisions about restrictive living arrangements. Reference should also be made to the tribunal where measures restricting liberty have

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[52] Para 15.143.
[53] The health decision maker will be the same person as the "person responsible" under the Guardianship and Administration Act 1986, that is the automatic appointee for medical treatment decisions. The Commission has, however, suggested in the Report that the term 'health decision maker' should replace the term 'person responsible.' Under the current law, s 37 of the 1986 Act sets out a hierarchy of people with decision-making entitlement, similarly to the provisions of the Ontario legislation (see para 5.26 above).
[54] Paras 15.145 to 15.147.
[55] Para 15.148.
[56] Paras 15.151 to 15.153.

already been authorised by collaborative authorisation but the person concerned consistently resists and opposes the restriction. The duty to refer the case is to fall in this situation on the three people who participated in the collaborative authorisation process.[57]

5.53 It is further suggested that it should be open to the person subject to restrictions on liberty in residential accommodation, or any person with an interest in his or her welfare, to apply to the Tribunal for consideration of the matter – including consideration of the use of the collaborative process to authorise the restrictions. Alternatively, the person or anyone else with an interest in his or her welfare may refer the matter to the Public Advocate, requesting that he or she investigate the matter and decide whether to apply to the Tribunal for the appointment of a guardian.[58]

Duration of collaborative authorisation and review of arrangements amounting to a restriction on liberty

5.54 The Commission recommends that any initial authorisation should be reviewed within 12 months of the date on which it is made. Thereafter, it should be possible to make authorisations running for a period of up to five years, depending upon the circumstances of the particular case. The Commission also suggests that the Public Advocate should issue guidelines to assist those involved in the collaborative authorisation process to determine the appropriate period for any authorisation of a restriction upon liberty.[59]

Observations on comparative law

5.55 It is apparent that there is widespread recognition of the concept of powers of attorney (or other personal appointments to deal with welfare matters) which survive the incapacity of their granter. In other words, the notion of making advance provision for loss of capacity, and as part of so doing, selecting the person who will make substitute decisions, is widely accepted. The benefits of this approach appear to us to be well summarised in the Report of the Victorian Law Reform Commission:

> "10.8 The Commission believes that future planning should be encouraged because it promotes self-determination. A well-functioning system of personal appointments of people with enduring powers has the following advantages:
>
> • It enhances autonomy by allowing a person to choose who will manage their affairs.
>
> • It avoids the potential stress and embarrassment of a tribunal hearing to determine whether a person lacks capacity.
>
> • It provides a private, simple and cheap alternative to VCAT proceedings.
>
> • It reduces the burden on VCAT and bodies such as the Public Advocate and State Trustees".

5.56 The acceptance of substitute decision-making and the existence of procedures to govern its use do not necessarily mean that this will be seen as sufficient, however, for the reaching of decisions about accommodation. In Ontario, when a person lacking capacity is

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[57] Para 15.158.
[58] Para 15.159.
[59] Paras 15.160 to 15.162.

to enter a long term care home, both consent by a substitute decision-maker and authorisation on behalf of the State is to be necessary. In contrast, the proposals in Victoria envisage "collaborative decision-making" as a process to avail those who have no guardian (either personally appointed or appointed by the Tribunal).

5.57 Another aspect to emerge from this comparative review is that of the reach of existing or proposed legislation. It is possible to regulate all admissions to long term care (as in Ontario) or merely those in which a person's liberty is to some extent curtailed. Insofar as the latter category is concerned, those countries within the membership of the Council of Europe focus on whether liberty is "restricted" or "deprived", with the additional difficulties of interpretation and application this poses. Without such focus, it is possible to devise schemes which apply to all facilities in which liberty is to some extent curtailed; to do so plainly avoids the difficulties of deciding when a "deprivation of liberty" is occurring, but greatly increases the potential applicability of the relevant provisions.

5.58 Finally, there is the involvement of the healthcare decision-maker. Both in Ontario and Victoria, use is made of the existence of the automatically appointed medical treatment decision-maker as part of the process of authorisation.[60] The advantage of this is the existence of an identified person in almost all cases; the disadvantage may be difficulty in tracing such a person in any individual case.

6. Do consultees have any comments on our discussion of comparative law?

[60] This is also the position in Queensland, where admission to some types of residential facility is characterised as a healthcare decision and the automatically appointed "statutory health attorney" can authorise the admission for a person who lacks capacity. But the extent of power to authorise deprivations of liberty is not clear: Victorian Law Reform Commission Background Paper on Deprivation of Liberty Safeguards at paras 1.31 to 1.34 http://www.lawreform.vic.gov.au/projects/guardianship/guardianship-background-paper-deprivation-liberty-safeguards

Chapter 6 Options for reform

Introduction

6.1 In previous chapters, we have examined decisions on Article 5 from the European Court of Human Rights as well as English cases in this area. We have set out the current provisions of Scots law regarding decision-making in connection with adults with incapacity, as well as the provisions governing the detention of those with mental health problems. The English statutory scheme, conceived largely in response to developments in the Strasbourg case-law, has also been examined. Some provisions from other jurisdictions have been considered.

6.2 It is now necessary to try to draw this material together. How well do the current provisions of Scots law comply with Article 5? If reform is required, what issues need to be addressed in that reform? What guidance can we derive from experience elsewhere, particularly from English law, where detailed provisions now exist to cater for the potential deprivation of liberty of those whose capacity is impaired?

6.3 In this chapter, we will begin by looking at the current Scots law and how well it meets the requirements of people with incapacity and safeguards their Article 5 rights. We will then look at the difficulties encountered in this area of law as experienced in other jurisdictions, principally England and Wales. Finally, we will consider what changes could be made to Scots law.

Current Scots Law

Legislative provisions

6.4 As outlined in Chapter 3, the statutory scheme in place in Scotland to provide for decision-making on behalf of people whose cognitive abilities are impaired is currently contained in the Adults with Incapacity (Scotland) Act 2000. The main provisions of the scheme were discussed in Chapter 3 above. Currently, if a measure which might involve a deprivation of liberty is contemplated for such a person, the only formal processes available for authorisation are the obtaining of an intervention order or the appointment of a guardian under the incapacity legislation or, if admission to hospital is sought, detention under the Mental Health (Care and Treatment) (Scotland) Act 2003. As far as the 2000 Act processes are concerned, the Scottish Government guidance to local authorities states that intervention orders appear more suited to one-off or time-limited actions or decisions, rather than a continuing regime.[1] It is also suggested that the welfare aspects of moving an adult to different accommodation are better dealt with through welfare guardianship.[2] These observations would apply with greater force were that accommodation to involve a deprivation of liberty. Moreover, a process capable of resulting in authorised deprivation of liberty should, as a minimum, make explicit mention of deprivation of liberty. Reliance on an

[1] *Adults with Incapacity (Scotland) Act 2000: Code of Practice: For Local Authorities Exercising Functions under the 2000 Act* (2008) at para 5.2. http://www.scotland.gov.uk/Resource/Doc/216923/0058136.pdf.
[2] Ibid.

implication that intervention orders may be used in this way would not meet the requirement of precision: the Convention:

> "…requires that all law be sufficiently precise to allow the citizen – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail….."[3]

This appears to have been recognised in practice, as there does not appear to be any example of use of an intervention order to authorise arrangements which involve deprivation of liberty.

6.5 Some of the same observations apply to the use of guardianship. There is no specific reference in the guardianship provisions of the 2000 Act to deprivation of liberty. As Hilary Patrick comments:

> "It seems generally accepted that the Adults with Incapacity Act guardianship can constitute the lawful procedure required by ECHR law if an adult is to be deprived of his or her liberty on the grounds of mental disorder."[4]

Whether this acceptance is justified is open to question, as far as the current guardianship process is concerned.

6.6 As there is no reference to deprivation of liberty in the 2000 Act, it is not clear how as a matter of practicality such a power may be sought and obtained. In *Muldoon*,[5] the applicant sought welfare powers (a) to decide where the adult should live, (b) to have access to confidential documents, and (c) to consent to, or withhold consent to, medical treatment. The application was granted as sought, with the welfare powers apparently being "particular matters" specified under section 64(1)(a).[6] The Sheriff took the view that deprivation of liberty was involved; it therefore appears that in the result, power to deprive the adult of her liberty was included, although not specified in the order granted. It would be possible in an application to seek power to deprive an adult of liberty as a specified power under section 64(1)(a). Alternatively, general powers under section 64(1)(b) to deal with all aspects of the personal welfare of the adult could be sought. Whether such an order without further specification would include sanctioning arrangements depriving that adult of liberty has not been judicially considered.

6.7 In relation to these different statutory routes, the question arises as to whether depriving an adult of liberty is properly characterised as relating to, or an aspect of, the personal welfare of the adult. In comparing the very specific powers granted to guardians where the adult does not comply with his or her guardian's instructions, Hilary Patrick observes that that degree of specification in relation to other, more short-term powers, makes it more difficult to argue that the Scottish Parliament intended to confer powers to detain or authorise others to detain the adult in the general provisions in section 64.[7] On the other hand, the 2000 Act provides that welfare attorneys, guardians and those authorised under intervention orders may not "place the adult in a hospital for the treatment of mental

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[3] *HL v UK* (2005) 40 EHRR 32 at para 114.
[4] "Autonomy, Benefit and Protection" 2008 Discussion Paper for the Mental Welfare Commission for Scotland ("2008 Discussion Paper") p 32.
[5] *Muldoon*, *Applicant* 2005 SLT (Sh Ct) 52. See discussion at para 3.97 above.
[6] See discussion of s 64 at para 3.33 above.
[7] 2008 Discussion Paper p 33.

disorder against his will".[8] That these are the only specified statutory exceptions to the powers which a decision-maker may exercise in relation to placing the adult in particular accommodation suggests that placement in other circumstances (in hospital where the adult is not manifesting objections, or elsewhere even if he is) is permitted by the legislation. It also suggests that general welfare powers are wide enough to cover deprivation of liberty in the adult's interests.

6.8 There was no reference to Article 5 in this Commission's Report on Incapable Adults.[9] In summary, therefore, there are problems concerning the absence of mention of deprivation of liberty in the statute and the lack of clarity as to whether, such absence notwithstanding, a guardianship order can explicitly authorise or impliedly permit, deprivation of liberty of the person to whom it relates.

6.9 The position regarding review is clearer. In terms of section 58(3) of the 2000 Act, the Sheriff who grants the application for guardianship "shall" appoint the guardian for a period of three years or, if cause is shown, any other period, including an indefinite period. There is no provision for review by the court, either automatically or on application. If the guardian then uses his or her powers to deprive the adult of their liberty, the absence of provisions entitling the adult to take proceedings to challenge their detention appears to us to raise issues under Article 5(4). Even if the guardian were to be appointed for three years, thus generating review after that time, that period could be seen as too long.[10]

Powers of attorney

6.10 The 2000 Act also provides for powers of attorney which deal with welfare matters. By section 16, a person may grant a power of attorney which relates to his or her personal welfare and which will become exercisable if that person becomes incapable of making decisions in relation to the matter covered by the power of attorney, or if the attorney reasonably believes that such incapacity exists. Could an attorney acting under such a power take a decision which caused the adult to be deprived of his or her liberty?[11]

6.11 If the Power of Attorney document does not refer to the possibility of deprivation of liberty should the adult lose capacity, it is difficult to accept that entitlement to consent to arrangements amounting to detention should be implied. If the document were to refer explicitly to such entitlement, the position would be stronger. Insofar as review is concerned, observations similar to those we made in relation to guardianship would apply: the absence of provisions entitling the adult to take proceedings to challenge their detention appears to us to raise an issue under Article 5(4).[12]

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[8] Section 16(6)(a) for attorneys, s 64(2)(a) for guardians and s 53(14), applying the guardianship prohibition to intervention orders. The provisions in Part 5 of the Act also exclude placing the adult in a hospital for the treatment of mental disorder against his will from the scope of "medical treatment" which may be authorised by s 47 (s 47(7)(c)).

[9] Scot Law Com No 151 (1995). The preceding Discussion Paper refers to the Convention, but to Art 6 rather than Art 5.

[10] *Herczegfalvy v Austria* (1993) 15 EHRR 437 - period of 15 months between reviews breached Art 5(4).

[11] It has been suggested that he or she might – see "Adults with Incapacity Act: when to invoke the Act" (2005) Mental Welfare Commission for Scotland, at p 14.

[12] See discussion at para 2.84 et seq above.

Scots case-law

6.12 Since *Bournewood*, there has been, as yet, no detailed discussion in any Scottish case of what sort of living arrangements for a person whose capacity is impaired will amount to deprivation of liberty. In *Muldoon*,[13] the Court appears to have taken the view that there was a deprivation of liberty simply because the adult lacked capacity and residential provision was being made on her behalf. This does not seem to accord with Strasbourg case-law, which clarifies that Article 5 is contemplating the physical liberty of the person.[14] Assessment of whether that physical liberty has been removed requires that there be taken into account a range of criteria including the type, duration, effects and manner of implementation of the measure in question. Such an assessment does not appear to have been carried out in *Muldoon* nor in *Docherty*[15] or *RMcC*,[16] other cases in which *Muldoon* has been followed.[17]

Involvement of the State

6.13 In Chapter 2,[18] we examined the Strasbourg jurisprudence concerning when a deprivation of liberty may be imputable to the State. In Scotland, much social welfare is provided by the State. Almost all psychiatric hospitals are State institutions. Plainly, if a person is placed in an establishment run by the State, or is placed in a private establishment by the State, State responsibility for the conditions under which they live would follow. Scots law also has detailed provisions requiring the registration and inspection of care facilities by administrative bodies which are part of the social care network. Further, many of those in care homes are entirely funded by the State. The majority of those who are privately funded qualify for free personal care which, in the case of a person in a residential facility, is provided as a cash contribution to the charges made by the home, after the placement has been approved by the relevant social work department.[19]

6.14 In these circumstances, it is very unlikely that there could be a deprivation of liberty in any residential establishment in Scotland which could not be imputable to the State. In any event, there is a responsibility to maintain legal provisions which protect citizens against unjustified deprivations of liberty.

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[13] 2005 SLT (Sh Ct) 52.
[14] *Engel and Others v The Netherlands* (1979-1980) 1 EHRR 647.
[15] Glasgow Sheriff Court, 8 February 2005. http://www.scotcourts.gov.uk/opinions/aw56.html.
[16] Kilmarnock Sheriff Court, 26 February 2009. http://www.scotcourts.gov.uk/opinions/AW1608.html.
[17] See also comments of Parker J in *Surrey County Council v CA, LA, MIG and MEG* [2010] EWHC 785 (subsequently upheld at [2011] EWCA Civ 190) that she did not accept that "mere placement in a residential or domestic setting can be construed as creating confinement of itself just because the person cannot legally decide whether to remain there or not" (para 79). See also Munby LJ in *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257 at para 102(v): "Mere lack of capacity to consent to living arrangements cannot in itself create a deprivation of liberty". But cf. *Stanev v Bulgaria* Application no. 36760/06 Grand Chamber 17 January 2012 at para 121, which appears to imply that such a proposition might be sustainable.
[18] Paras 2.77 and 2.78.
[19] See Community Care and Health (Scotland) Act 2002, together with Community Care (Personal Care and Nursing Care) (Scotland) Regulations 2002 (SSI/303).

Difficulties arising in this area of law

Problems of definition

6.15 Chief among the difficulties in this area of law is the absence of a clear definition of what constitutes "deprivation of liberty". This difficulty has already been mentioned in Chapter 2, where academic comment thereon was also referred to.[20] Without clear definition, it is more difficult for carers to take all possible steps to avoid deprivation of liberty. Without clear definition, carers risk failing to recognise when deprivation of liberty is occurring and the consequent need to invoke the procedures prescribed by law. Without clear definition, those who are in supervisory or monitoring roles may fail to detect cases where process is required.

6.16 There is a tension between the need to tailor solutions to an individual's situation and the need to set out some general rules for the guidance of those who work with adults whose capacity is impaired. Those who adjudicate upon the concrete situations of individuals are acutely aware of the drawbacks caused by lack of general principles:

> "……the call to examine the facts can too easily lead to the worrying and ultimately stultifying conclusion that the decision in every case can safely be arrived at only after a minute examination of all the facts in enormous detail.
>
> This cannot be right. There must be something more which enables us to pursue a more focussed and less time-consuming enquiry."[21]

6.17 A large volume of case-law has now built up in England concerning when an adult with incapacity can be said to be deprived of his or her liberty. What has emerged are differences between an approach focused mainly on the physical conditions in which the individual lives and an approach which takes into account more of the context in which care is delivered. On the latter approach, such matters as the life the person might lead without the care regime in question and the underlying purpose of that regime are also relevant to the question of whether a deprivation of liberty is occurring. But in the context of Article 5, the role of purpose has proved controversial.

The role of purpose

6.18 The structure of Article 5 is that there is an absolute prohibition on deprivation of liberty, save in six specified situations:

> "(a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[20] See para 2.72 above.
[21] *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257, Munby LJ at paras 38 and 39.

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) 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;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

6.19 Several of these situations justify detention on the basis of the purpose for which it is effected (for example, lawful arrest of a person for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence,[22] or the lawful detention of persons for the prevention of the spreading of infectious diseases[23]). There is nothing to suggest that purpose is relevant at an earlier stage, namely the point at which it is being considered whether there is a deprivation of liberty at all. This point was made in a powerful dissenting judgement by Judge Loucaides in the case of *HM v Switzerland*:

> "It is my opinion that the question whether a measure amounts to a deprivation of liberty does not depend on whether it is intended to serve or actually serves the interests of the person concerned. This is illustrated by ……the examples of minors and persons of unsound mind requiring educational supervision, whose detention is expressly justified under the provisions of Article 5 § 1 (d) and (e) on the premise that their case concerns "deprivation of liberty", even though such detention may be exclusively in the detainees' interests."[24]

In other words, if a measure which was purely in the interests of the person detained was not a deprivation of liberty, it would not have been necessary to provide specifically for the type of detention covered by Article 5(1)(d) and (parts of) 5(1)(e).

6.20 That Article 5(1)(d) in particular provides for detention solely in the interests of the person detained is confirmed by an examination of the drafting of the provision. The second part of 5(1)(d) refers to detention of a minor for the purpose of bringing him before the competent legal authority. This latter provision was an amendment proposed by the UK government at the drafting stage.[25] The rationale for the proposed amendment was as follows:

> "Many children brought before the courts have committed no offence at all and the purpose of their detention is to secure their removal from harmful surroundings…..At the same time, the circumstances of the case usually demand that the child should be removed from harmful surroundings before he can be brought before the court."[26]

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[22] Art 5(1)(c).
[23] Art 5(1)(e).
[24] (2004) 38 EHRR 17 at O- II 11.
[25] The first part of Art 5(1)(d) stemmed from a British amendment proposed to the Committee of Experts in March 1950.
[26] Amendments proposed by the United Kingdom delegation at the meeting of the Committee of Governmental Experts held on 4 August 1950; *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* Vol V p 66. After deliberation at the sitting on 4 August, these words were included in the text of Art 5 (ibid, p 74).

6.21 At the stage of justification, purpose is only relevant insofar as specifically identified. There is no general provision that detention may be justified if it is in the interests of the person detained or, indeed, if it is in the public interest. As Judge Loucaides observed:

> "I believe that physical freedom is of unique importance and that the exceptions to the prohibition of deprivation of liberty are exhaustively limited to those set out expressly in the sub-paragraphs of Article 5 § 1. If an individual's deprivation of liberty does not fall within any of these categories then it must be prohibited by Article 5. Indeed, if it were true that those responsible for the application or interpretation of the Convention were free to establish other categories of "deprivation of liberty" in respect of which the prohibition of Article 5 would be inapplicable, either because the compulsory restriction of a person's physical freedom is a "responsible measure" for his own good (as in the present case) or for any other "useful" purpose, this would render the prohibition in question meaningless and make a mockery of its objectives. Even worse, it would open the door to uncontrolled arbitrariness and real and unwarranted dangers to the freedom of the individual which the Convention aims to avert."[27]

6.22 Notwithstanding these persuasive views, the Court in *HM* did not find a breach of Article 5, concluding that:

> "in particular the fact that the Cantonal Appeals Commission had ordered the applicant's placement in the nursing home **in her own interests** in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene, and also taking into consideration the comparable circumstances in *Nielsen…* the Court concludes that in the circumstances of the present case the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5 § 1, but was a responsible measure taken by the competent authorities **in the applicant's interests".**[28] (emphasis added)

6.23 The dicta of Judge Loucaides have, however, been referred to on a number of occasions since *HM*, primarily because of the controversy that inclusion of purpose at the stage of determining whether there is deprivation of liberty at all has caused.

6.24 In *JE v DE*, after quoting the views of Judge Loucaides set out above Munby J said:

> "And if beneficent purpose cannot deprive what is manifestly a deprivation of liberty of its character as such, why should a beneficent purpose be of assistance in determining whether some more marginal state of affairs does or does not amount to a deprivation of liberty? No doubt it is some imperfection in my understanding or reasoning, but I confess to having great difficulty in identifying any satisfactory answer to the point made so convincingly by Judge Loucaides."[29]

6.25 In *Austin v Commissioner of Police of the Metropolis* Lord Hope posed the question:

> "Is it relevant when considering whether a case falls within the ambit of article 5(1), to have regard to the purpose for which a person's freedom of movement has been restricted?"[30]

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[27] (2004) 38 EHRR 17 at para O-II 12.
[28] Para 48. Harris O'Boyle and Warbrick observe "Happily this phraseology has not been repeated in subsequent case-law" (*Law of the European Convention on Human Rights*, 2nd edn, 2009, at p 128).
[29] [2006] EWHC 3459 (Fam), para 47.
[30] [2009] UKHL 5; [2009] 1 AC 564 at para 22. See discussion of this case at para 4.33 et seq.

6.26 In a section headed "Is purpose relevant?" he then discussed the issue of balance between what the restriction seeks to achieve and the interests of the individual. He concluded that, even with fundamental rights whose application is unqualified by the Convention, there is room:

> "…for a pragmatic approach to be taken which takes full account of all the circumstances".[31]

In applying such an approach, authorities must act in good faith and the measures they adopt must be proportionate to the situation which necessitates the measure.

6.27 Three of the other four judges in *Austin* addressed the issue of "purpose". For Lord Scott, in the determination of whether a measure imposed on an individual represents a deprivation of liberty,

> "the purpose of the confinement or restriction and the intentions of the persons responsible for imposing it rank very high in the circumstances to be taken into account in reaching the decision".[32]

6.28 Lord Walker considered that "it is right to be cautious on this point". As he observed:

> "The purpose of confinement which may arguably amount to deprivation of liberty is in general relevant, not to whether the threshold is crossed, but to whether that confinement can be justified under article 5(1)(a) to (f)…"[33]

But, after recording his reservations on the relevance of purpose, he concluded that it was essential:

> "to pose the simple question: what were the police doing…what were they about? The answer is…that they were engaged in an unusually difficult exercise in crowd control, in order to avoid personal injuries and damage to property."[34]

6.29 Lord Neuberger discussed the range of situations in which the police are expected or even required to take steps to minimise disorder and violence and concluded that:

> "In such cases, it seems to me unrealistic to contend that article 5 can come into play at all, provided, and it is a very important proviso, that the actions of the police are proportionate and reasonable, and any confinement is restricted to a reasonable minimum, as to discomfort and as to time, **as is necessary for the relevant purpose**, namely the prevention of serious public disorder and violence".[35] (emphasis added)

6.30 In *Surrey County Council v CA, LA, MIG and MEG*,[36] Parker J conducted a detailed examination of recent authorities, including *JE* and *Austin*, and identified a distinction between, on the one hand, "intention" and on the other "purpose" or "motive". She noted that it was necessary to treat with extreme caution the suggestion that purpose is relevant in cases dealing with care homes and other similar facilities, but that it was realistic to take into account that the girls in that case were in their respective placements "as children in need,

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[31] Para 34.
[32] Para 39.
[33] Para 44.
[34] Para 47.
[35] Para 60.
[36] [2010] EWHC 785 (Fam).

because they need homes, rather than because they require restraint, or treatment".[37] In her conclusion that there was no deprivation of liberty, she said:

> "106 I agree that it is impermissible for me to consider whether, if either is objectively detained or confined, this is with good or benign intentions or in their best interests. But notwithstanding that, as was observed by Lord Walker in Austin , "purpose" does not figure in the list of factors to be evaluated in determining the concrete situation of the person concerned, I am of the view that in this case it is permissible to look at the "reasons" why they are each living where they are. In the case of each there are overwhelming welfare grounds for them not to live in their family of origin. In relation to both girls, the primary intention is to provide them each with a home. Within those homes, they are not objectively deprived of their liberty. In neither of those homes are they there principally for the purpose of being "treated and managed". They are there to receive care."

6.31 When this case reached the Court of Appeal, Wilson LJ described Parker J's analysis as "magisterial".[38] Nevertheless, he opined that, in the passage quoted above, to the extent that she was attaching significance to the fact that the purpose of the arrangements for the girls was to further their best interests, she was wrong to do so. She had, however, alighted on a relevant feature which he termed "normality":[39]

> "If the person is living with her parents or other members of his natural family in their home, she is living—in that respect—the most normal life possible. Typically—but sadly not always—there will be no deprivation of liberty in such circumstances: *A Re*, cited above, at [131], per Munby J. Not much less normal for this purpose is the life of a child in the home of foster parents or of an adult, such as Mr HL, in the home of carers; such Mr Gordon is constrained to accept. But, even when the person lives in an institution rather than in a family home, there is a wide spectrum between the small children's home or nursing home, on the one hand, and a hospital designed for compulsory detentions like Bournewood; and it is in my view necessary to place each case along it."[40]

6.32 As previously observed,[41] the case of *Cheshire West and Chester Council v P*[42] illustrates the different approaches to deprivation of liberty in relation to adults with incapacity. The view of Baker J at first instance was that an examination of the regime under which P was cared for led "to a clear conclusion that, looked at overall, P is being deprived of his liberty".[43] When the case reached the Court of Appeal, the idea of purpose featured prominently in the reasoning of Munby LJ, who gave the main judgement. After approving his own previous statement in *JE v DE*[44] to the effect that a beneficent purpose cannot be of assistance in determining whether a marginal state of affairs does or does not amount to a deprivation of liberty, he distinguished "reason", "purpose" and "motive". Taking the example of an elderly husband implementing a regime of caring for his wife suffering from dementia by, amongst other measures, keeping the front door locked to prevent her from leaving the house, he commented:

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[37] At para 40.
[38] [2011] EWCA Civ 190 at para 24.
[39] Para 27.
[40] Para 28.
[41] See discussion at para 4.49 et seq.
[42] [2011] EWHC 1330 (Fam); [2011] EWCA Civ 1257.
[43] Para 60.
[44] [2006] EWHC 3459 (Fam).

> "I can illustrate the point by returning to the example of the wife suffering from dementia. I suggested that the *reason* why our hypothetical husband was implementing the regime I described was because his wife has dementia, that his *purpose* was to safeguard and protect his wife against some of the adverse consequences of her dementia, and that his *motive* was to further his wife's best interests, acting out of love and, it may be, his sense of obligation as a husband. Applying the foregoing analysis, both the reason and the purpose are relevant to the question of whether there is any deprivation of liberty. The husband's beneficent motive, on the other hand, is relevant only because it negatives the existence of any improper purpose or any malign, base or improper motive – for example, a desire to punish or humiliate or to avoid shame or embarrassment – that might, if present, turn what would otherwise be innocuous into a deprivation of liberty."[45]

In other words, the actual attitude (the motive) of the person responsible for the measure in question is irrelevant, unless it is improper. But the objective explanation for why the measure is necessary (the reason) and what it is designed to achieve (the purpose) are both relevant.

6.33 Resort to purpose at the stage of determining if deprivation of liberty is occurring has attracted academic criticism. Professor Richard Stone of Lincoln University has expressed the view that:

> "("(T)he purpose of detention is relevant to the question of whether the deprivation of liberty is justified rather than whether there is such a deprivation in the first place".[46]

6.34 Writing about the decision of the House of Lords in *Austin v Commissioner of Police of the Metropolis*,[47] David Mead of the University of East Anglia comments:

> "Considering detention as not being a deprivation of liberty if its purpose is to benefit the detainee is flawed at a deeper and more philosophical level: it smacks of benevolent authoritarianism which most would consider to be inimical to a system of human rights premised on individuality, on autonomy and on dignity".[48]

6.35 The case of *Austin v United Kingdom* was taken to the European Court of Human Rights and the decision of the Grand Chamber was issued on 15 March 2012. The Court quoted extensively from the speeches of Lord Hope, Lord Neuberger and Lord Walker in the House of Lords,[49] and observed:

> "58. As Lord Walker pointed out… the purpose behind the measure in question is not mentioned in the above judgments as a factor to be taken into account when deciding whether there has been a deprivation of liberty. Indeed, it is clear from the Court's case-law that an underlying public interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty, although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of Article 5 § 1 ….. The same is true where the object is to protect, treat or care in some way for the person taken into

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[45] [2011] EWCA Civ 1257, para 77.
[46] "Deprivation of Liberty: the scope of Art 5 of the European Convention on Human Rights" [2012] EHRLR 46 at 57.
[47] [2009] UKHL 5; [2009] 1 AC 564.
[48] "Of Kettles, Cordons and Crowd Control – Austin v Commissioner of Police for the Metropolis and the Meaning of 'Deprivation of Liberty'", [2009] EHRLR 376 at 390.
[49] *Austin v Commissioner of Police for the Metropolis* [2009] UKHL 5; [2009] 1 AC 564.

> confinement, unless that person has validly consented to what would otherwise be a deprivation of liberty….".[50]

The Court also observed, however, that the requirement to consider the "type" and "manner of implementation" of the measure in question enabled regard to be had to the specific context and circumstances of types of restriction other than the paradigm case of confinement in a cell.[51]

The role of normality

6.36 In *Cheshire West and Chester Council v P*,[52] Munby LJ also developed the notion of "normality" as discussed by Wilson LJ in *P and Q v Surrey County Council*.[53] This allows the question of whether a deprivation of liberty is occurring to be judged by reference to a benchmark or yardstick, a comparator who "typically, perhaps in most cases… will… be the ordinary adult going about his normal life."[54] The comparator in a case such as *P*, however,

> "cannot be the ordinary adult going about his normal life……. In the case of an adult with disabilities, the relevant comparator is 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".[55]

Comparison with the position of those under 16

6.37 There is no case-law in Scotland concerning the effect of consent by an adult as guardian to the detention of a child. Does this prevent a deprivation of liberty in breach of Article 5? There has been some consideration of this issue in England, in connection with a young person entering local authority care. In the case of *RK v BCC*, *YB and AK*, the view of Counsel on deprivation of liberty in relation to children was supported and accepted by the Court of Appeal:

> "Deprivation of liberty engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the deprivation of liberty of a child."[56]

This accords with observations of the European Court in *Nielsen v Denmark.*[57] The Danish government had suggested that there was no deprivation of liberty because the child was subject to parental authority. But the Court accepted, as contended by the European Commission of Human Rights, "that the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the State to provide safeguards against abuse".[58] If a parent, who is the guardian of his or her child, cannot lawfully consent to the deprivation of liberty of that child, it is not easy to see why other types of guardian to those who lack capacity should be presumed to have this right, particularly under a regime derived entirely from a statute which makes no mention of that right.

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[50] Application nos. 39692/09, 40713/09 and 41008/09, 15 March 2012.
[51] See para 59.
[52] [2011] EWCA Civ 1257.
[53] [2011] EWCA Civ 190. See para 4.42.
[54] Para 83 of *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257.
[55] Ibid, Para 86.
[56] [2011] EWCA Civ 1305, para 14; See also paras 48 and 49 of *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257.
[57] (1989) 11 EHRR 175.
[58] Para 72.

The need for reform

6.38 Currently in Scotland there are people who lack capacity to decide on their living arrangements being cared for in situations which may amount to a deprivation of liberty. At present, the only judicial process available for such situations is guardianship under the Adults with Incapacity (Scotland) Act 2000, which makes no reference to deprivation of liberty and contains no provisions concerning review. It is our preliminary view that Scots law is insufficiently clear as to the relationship between guardianship appointments and deprivation of liberty, and as to what mechanism is available to enable challenge of any deprivation of liberty before a court.

6.39 Further, it is not clear whether a welfare power of attorney could confer power to consent to deprivation of liberty in the event of incapacity and, if so, whether there would require to be explicit reference to this in the document. Even if it is possible for a power of attorney to confer such power, it is not clear what the legal effect of such consent would be. Would it prevent deprivation of liberty from occurring at all, or merely represent the lawful process required by Article 5(1) of ECHR?

7. Do consultees agree that the present lack of clarity on deprivation of liberty in Scots incapacity law is unsatisfactory?

Identifying the objective element in deprivation of liberty

6.40 Any attempt to clarify Scots law on the processes whereby adults with incapacity can be deprived of their liberty requires to define – at least to some extent – the scope of its operation. We have previously examined the constituent elements in deprivation of liberty – the objective element and the subjective element.[59] It is evident that the difficulties of definition lie with the objective element, since the subjective element consists in there being no valid consent to the regime under which the person is living. For the moment, therefore, we concentrate on the objective element.

6.41 It would be possible to follow the same approach as in the English legislation of anchoring the statutory definition to the Strasbourg concept of deprivation of liberty.[60] There are two major difficulties in doing that. First, the result is a lack of guidance to those working in the area and, secondly, individual case-by-case assessment appears necessary, with lengthy hearings of evidence and consequent demands on resources. In England, development of guidance has occurred thus far in case-law, with judges perceiving the need for practical principles and endeavouring to articulate what those principles are. We suggest that, in Scotland, it would be preferable to provide more than a general statement that deprivation of liberty has the same meaning as in the Convention.

8. Would it be desirable for there to be greater specification in Scotland on what is to be regarded as deprivation of liberty, beyond a cross reference to Article 5?

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[59] At para 2.70 et seq above.

[60] Section 64(5) of the Mental Capacity Act 2005 provides that deprivation of liberty shall have the same meaning as in Art 5(1) of the Convention.

6.42 On the assumption that it would be preferable, if possible, for any statutory definition to have greater content than simply to incorporate the Convention meaning, there are several potential approaches to definition.

6.43 First, it may be that certain types of regime should be seen as always involving deprivation of liberty for a person with incapacity. The most obvious such situation is in relation to adults with incapacity who are admitted for a significant period to psychiatric hospitals in Scotland because of their mental disorder. It is likely (although not inevitable) that they will be looked after in a locked facility. They may be admitted without any formal process on the basis that they do not resist hospitalisation. This is the same situation as happened in England in the *Bournewood* case itself. We have already observed that there is no litmus test for the presence or absence of deprivation of liberty but, if incarceration in a prison cell is a paradigm for those within the justice system, then placement in a locked psychiatric hospital may be a paradigm of deprivation of liberty for those with mental disorder.[61] In the case of *Muldoon*,[62] Sheriff Baird appears to have accepted as a given that care in Leverndale psychiatric hospital represented a deprivation of liberty for the adult concerned. Recent observations from commentators in England are to the same effect:

> "With hindsight it is plain that the regime of informal admission for those unable to give valid consent by reason of lack of capacity amounts to an infringement of Article 5".[63]

There may therefore be justification for having a general provision in relation to the character of long-stay admissions to hospital.

6.44 But making any such provision would require both to cater for those with incapacity who require to be admitted to hospital for a significant period on account of their mental disorder and to address the issue of the individuals who are currently in hospital long-term on an informal basis.

9. Should Scots law provide that there cannot be informal admission to a hospital for the treatment of mental disorder of people who lack the capacity to consent to that admission?

10. If so,

(a) should people who lack capacity be admitted to hospitals for the treatment of mental disorder using the mechanisms set out in the 2003 Act, or should their admission to hospital be authorised under incapacity legislation?

(b) what approach should be adopted to those who are already in hospitals on a long-term basis?

6.45 Secondly, there are many contexts other than that of a hospital in which a person who lacks capacity to consent may be subjected to measures having a restrictive effect. It is evident that to focus primarily on the physical conditions in which a person lives (including

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[61] Care in an unlocked ward may reflect lack of mobility rather than freedom to come and go.
[62] 2005 SLT (Sh Ct) 52.
[63] Pearce and Jackson, "The Deprivation of Liberty Safeguards Part 1: has the Mental Capacity Act 2005 bridged 'the Bournewood Gap'?" March 2012 Fam Law 319.

restraint, supervision and freedom to leave premises) is more likely to lead to a conclusion that there is a deprivation of liberty than if additional matters, such as the purpose of the measures adopted and the difference, if any, from lives led by other individuals with similar disabilities, are included. Indeed, on the latter approach, where measures:

- are adopted because of the disability suffered by an individual;
- have the purpose of protecting that individual from adverse consequences of the disability; and
- are measures generally adopted in relation to all those with similar disability,

it is difficult to see how deprivation of liberty would arise at all. On this more contextual approach, what amounts to a deprivation of liberty for one person will not necessarily do so for another.

6.46 By contrast, if the focus is on physical conditions, a given regime will always result in deprivation of liberty of the person to whom it is applied, regardless of any disability from which that person suffers. The difference can be illustrated by contrasting the outcomes at first instance and on appeal in the case of *Cheshire West and Chester Council v P.*[64] At first instance, Baker J, focusing on the degree of control exercised over P by staff, and the nature of the measures applied to him, reached the "clear conclusion" that P was being deprived of his liberty.[65] Lest this more objective approach might be thought to reflect negatively on the care given to P or on the carers themselves, Baker J added:

> "..I make it clear that, in reaching that finding, I am not being critical of the local authority or the staff at Z House. In my judgment, it is almost inevitable that, even after he has been supplied with a bodysuit, P will on occasions gain access to his pads and seek to ingest pieces of padding and faeces in a manner that will call for urgent and firm intervention. Those actions will be in his best interests and therefore justifiable, but they will, as a matter of concrete fact and legal principle, involve a deprivation of his liberty. The reason for attaching that label to those actions is not to stigmatise either P or his hard-working and dedicated carers, but so that all involved with his care recognise the implications of what is happening".[66]

6.47 The Court of Appeal reached the opposite view. The idea that a given set of measures may amount to a deprivation of liberty for a person without disabilities yet not be so for a person with disabilities was expressly acknowledged by Munby LJ.[67]

6.48 Widening the inquiry to include the context in which measures are taken can lead to variations between cases that are at first sight surprising. Steven Neary was found to have been deprived of his liberty during periods when the measures to which he was subject were certainly no more restrictive, and arguably less so, than those applied to P, who was declared not to have suffered deprivation of liberty.[68] Moreover, if P (who was under one-to-

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[64] [2011] EWHC 1330 (Fam); [2011] EWCA Civ 1257. We have already discussed this case at para 4.49 et seq.
[65] [2011] EWHC 1330 (Fam) at para 60.
[66] Para 61.
[67] [2011] EWCA Civ 1257 at para 102(ix). The same observation was made by Smith LJ in *P and Q v Surrey County Council* [2011] EWCA Civ 190 at para 40.
[68] *London Borough of Hillingdon v Neary* [2011] EWHC 1377 (Fam); [2011] 4 All ER 584. *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257.

one staff observation, wore a special garment and was occasionally tied to his wheelchair) was not deprived of his liberty, of what did his (retained) liberty consist?

6.49 One feature which distinguishes these cases is that Steven Neary's father was keen to have him home, whereas in the *P* case, P's mother was not able to care for her son. Peter Jackson J in the *Neary* case considered that the nub of the case was Article 8. Focusing on Article 5 risked conflating the question of deprivation of liberty with the primary issue of where Steven should be living.[69]

6.50 Indeed, in the *Bournewood* case itself, L continued to be detained in hospital during a period when his carers were seeking his return home. Similarly, in *JE v DE and Surrey County Council* [70] DE could not leave the home where he was living in order to live where and with whom he chose.[71]

6.51 Each of these cases involved the over-riding of the wishes of the person concerned, or of their family or carers. It may be that Scots law would benefit from a provision to the effect that, when a family is willing and able to provide a home for a person with incapacity, they should not be prevented from doing so by the person's being placed in residential facilities elsewhere.

11. Would there be benefit in a statutory provision to the effect that the family or carers of a person with incapacity who are willing and able to provide a home for that person should not be prevented from doing so?

12. If so, should that provision be an additional principle in section 1 of the Act?

6.52 Reverting to the question of how to identify a deprivation of liberty, central to any consideration of possible reform must be the need to reflect the Strasbourg jurisprudence on how far the reasons for the measure may be taken into account at the stage of determining whether deprivation of liberty is occurring.

6.53 Undoubtedly, some of the European Court cases on Article 5 contain statements that imply that the provision of care and the deprivation of liberty are mutually exclusive concepts. For example, in *HM v Switzerland*, the Court concluded:

> "that the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5 § 1, but was a responsible measure taken by the competent authorities in the applicant's interests".[72]

6.54 In *Nielsen*, the Court concluded:

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[69] See discussion at para 4.48 above.
[70] [2006] EWHC 3459 (Fam).
[71] Contrast *LLBC v TG* [2006] EWHC 2640 (Fam), concerning care of an elderly person with dementia in "an ordinary care home where only ordinary restrictions of liberty applied" (para 105). The Official Solicitor argued that opposition by family members was not sufficient to change the character of a placement which did not otherwise amount to a deprivation of liberty. McFarlane J held that placement in the home did not amount to a deprivation of liberty.
[72] (2004) 38 EHRR 17 at para 48. As we have already observed (note 28) this formula has attracted academic criticism.

> "that the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of Article 5 but was a responsible exercise by his mother of her custodial rights in the interest of the child".[73]

6.55 In *DD v Lithuania*,[74] the Lithuanian government did rely in its argument on the fact that the Kėdainiai Home was an institution for providing social services and not compulsory psychiatric treatment. The limited restrictions placed on the applicant:

> "had all been necessary due to the severity of her mental illness, had been in her interests and had been no more than the normal requirements associated with the responsibilities of a social care institution taking care of inhabitants suffering from mental health problems".[75]

6.56 In its assessment, however, the Court did not place reliance on the reason for the restrictions (the illness), their purpose (the provision of social care) or the motive for their imposition (in the applicant's interests). No comparison was made with the situations of other individuals with analogous mental health difficulties. Rather, the determination of the question of deprivation of liberty focused more on the characteristics of the regime to which the applicant was subject. This resembles the approach of Baker J at first instance in *Cheshire West and Chester Council v P*.[76]

6.57 Furthermore, inclusion of reason or purpose as a determining characteristic in the assessment of whether deprivation of liberty exists may conflict with the application of the second *Winterwerp* criterion.[77] As we have noted,[78] the *Winterwerp* criteria were developed in furtherance of the key purpose of Article 5: to prevent arbitrary or unjustified deprivations of liberty. Thus, conformity with domestic law rules permitting detention is not enough; there must also be compliance with the *Winterwerp* criteria as a measure of whether detention is justified under Article 5(1)(e). The second criterion requires that the individual's mental disorder be of a kind or degree warranting compulsory confinement. The Court observed in *Reid v United Kingdom*[79] that compulsory confinement of a person on the basis of mental disorder:

> "….may be necessary not only where a person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons (see, for example, *Witold Litwa v. Poland*, no. 26629/95, § 60, ECHR 2000 III)".

6.58 Thus, confinement of a person to prevent his causing harm to himself or others is taken into account in the consideration of whether it is justified under Article 5(1)(e). For that factor to operate at the earlier stage in indicating that there is no deprivation of liberty at all may not be consistent with the Article 5 jurisprudence of the Strasbourg court.

6.59 The current position of the European Court concerning purpose is as stated by the Grand Chamber in *Austin:*

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[73] (1989) 11 EHRR 175 at para 73.
[74] Application no. 13469/06, 14 February 2012.
[75] Para 137.
[76] [2011] EWHC 1330 (Fam).
[77] *Winterwerp v Netherlands* (1979-1980) 2 EHRR 387 at para 39.
[78] Para 2.2.
[79] (2003) 37 EHRR 9 at para 51.

> "Indeed, it is clear from the Court's case-law that an underlying public interest motive ….has no bearing on the question whether that person has been deprived of his liberty, although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of Article 5 § 1…… The same is true where the object is to protect, treat or care in some way for the person taken into confinement, unless that person has validly consented to what would otherwise be a deprivation of liberty…"[80]

6.60 Were Scots law to develop provisions concerning deprivation of liberty which relied directly on concepts such as the purpose of a measure and the effect of a comparison with another person with similar disabilities in distinguishing deprivation of liberty from the provision of care, there would be a risk that such measures might not accord with Strasbourg case-law on Article 5.

6.61 On the other hand, the Court has indicated that the context in which a measure is taken *is* relevant. The "type" and "manner of implementation" allow for surrounding circumstances to be examined.[81] In the context of incapacity, the effects of the measure would appear to be important too; if the effects are to secure food, shelter and assistance with bodily functions and to safeguard the person against physical risk, there would appear to be less likelihood of the measure being seen as a deprivation of liberty.

6.62 It would be possible for Scots law either to provide that, in the context of incapacity, certain steps are not to be taken to amount to deprivation of liberty or to try to achieve a statutory definition of deprivation of liberty. Neither is straightforward.

6.63 Taking the former possibility first, it is instructive to examine the potential applicability of any provision in this area. Demographic trends are resulting in increasing numbers of people with dementia, the commonest cause of loss of capacity in Scotland. In 2012, there are estimated to be around 84,000 people in Scotland with dementia, of whom about 81,000 are 65 or over. The number is expected to double within the next 25 years.[82] A proportion of those people will reach the stage of being unable to continue to live in their own homes. It would not be a sustainable proposition to provide that all those individuals who are admitted to residential facilities to secure their wellbeing are to be regarded as being deprived of their liberty and made subject to a judicial process. The view has been taken that the simple fact of a person with incapacity being admitted to care is not of itself a deprivation of liberty,[83] and it appears to us that that position does not necessarily alter merely because the external doors of the premises are kept locked. Accordingly, it would be possible to provide that the provision of "personal care"[84] to an individual who lacks capacity and is unable to provide such care to him or herself is not a deprivation of liberty, even if the individual is not free to leave at will the premises where care is provided.

6.64 Furthermore, there is some basis for the view that the positive obligations to which the State is subject oblige it to provide such care and security to persons who are at risk because of their mental disorder. If the State is obliged under the Convention to provide

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[80] *Austin v United Kingdom*, Application nos. 39692/09, 40713/09 and 41008/09, 15 March 2012 (Grand Chamber) at para 58.
[81] *Austin* at para 59.
[82] http://dementiascotland.org/news/statistics-number-of-people-with-dementia-in-scotland-2012/?page=statistics.htm.
[83] See para 6.12 above.
[84] As defined in the Community Care and Health (Scotland) Act 2002, Schedule 1 – the "free personal care" legislation.

such care and security, it would appear difficult also to conclude that the State is obliged to refrain from taking the necessary measures because of its obligations under Article 5. In *Stanev v Bulgaria*,[85] the Government argued that it had had a positive obligation to care for the applicant, relying on the earlier case of *Dodov v Bulgaria*.[86] In that case, an elderly lady with dementia had disappeared from a nursing home and had never been found. In a complaint by her son, breach of the Article 2 procedural requirement was alleged, as well as breach of the substantive duty insofar as the search for his mother was concerned. The Court said:

> "100. The State duty to take appropriate steps to safeguard the lives of those within its jurisdiction also extends in appropriate circumstances to a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, or from self-harm."[87]

6.65 The Court in *Stanev* did not dismiss this argument, but distinguished the circumstances:

> "With reference to the *Dodov* case, the Government maintained that the restrictions in issue had been necessary in view of the authorities' positive obligations to protect the applicant's life and health. The Court notes that in the above-mentioned case, the applicant's mother suffered from Alzheimer's disease and that, as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb".[88]

6.66 In relation to Article 3, the European Court has held that to fail to protect an individual against the extreme physical effects of his own mental ill-health reached the threshold of degrading treatment required for a breach of the obligations of the State, at least where the individual was under the care of the State at the time. It is possible to envisage circumstances where the State is aware that a person is suffering serious physical effects due to inability to care for him or herself, and is therefore obliged to act to remedy the situation in order to comply with Article 3.[89]

6.67 Moreover, Scots law imposes obligations on local authorities to promote the health and well-being of those who cannot care for themselves, including persons with incapacity.[90]

6.68 We consider that there may be sufficient in the dicta of the Strasbourg Court regarding the importance of context and the positive obligations imposed by Articles 2 and 3, as well as in domestic law requiring the provision of care, to justify a statement that such provision to those who are unable to care for themselves does not in itself amount to deprivation of liberty.

13. Do consultees agree that provision to the effect that certain measures do not constitute deprivation of liberty would be of assistance?

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[85] Application no. 36760/06, 17 January 2012.
[86] (2008) 47 EHRR 41.
[87] On the facts of the case, no violation of the substantive obligation in Article 2 was found.
[88] Para 128.
[89] See discussion at para 2.64 to 2.69 above.
[90] See para 3.56 et seq above, regarding the obligations on local authorities.

14. If so, what should those measures be?

15. Should such provision be in legislation or in guidance?

6.69 It would also be possible, either as an alternative to such a provision or in addition, to provide that certain characteristics of a regime do amount to deprivation of liberty. The Strasbourg Court has, on a number of occasions, identified a "key factor" of similar description when concluding that deprivation of liberty has occurred. For example, in *DD v Lithuania*, the key factor was that management at the home had exercised:

> "complete and effective control by medication and supervision over [the applicant's] assessment, treatment, care, residence and movement"[91]

In *HL*, the key factor was that the health care professionals treating and managing the applicant "exercised complete and effective control over his care and movements".[92]

6.70 If a provision along these lines were to be formulated in addition to provisions identifying scenarios which were not deprivation of liberty, there would plainly be potential for difficulty in determining on which side of the line a particular individual's situation fell. The intention behind having both negative and positive definitions would be to exclude as deprivations of liberty situations, mainly involving those with dementia, where there has been loss of capacity and individuals are no longer able to meet their own needs, but to include situations, mainly involving cases of learning disability, where individuals are under "continuous supervision and control", as in *HL*:

16. Would there be benefit in provision to the effect that deprivation of liberty occurs whenever the management of a facility exercise complete and effective control over the assessment, treatment, care, residence and movement of an adult?

17. If so, should such a provision be in legislation or in guidance?

6.71 The type of provisions suggested above might define more clearly the group of people with incapacity whose care regimes potentially involve deprivation of liberty.

The subjective element in deprivation of liberty: the role of consent

6.72 It will be evident from the study of Strasbourg case-law that consent has potential relevance at two stages. First, the subjective element in deprivation of liberty requires that the conditions under which the person is living are those to which he or she has not consented. Secondly, some States have administrative processes whereby a guardian or other surrogate decision-maker can consent to detention, and the question will then be whether this process can be the "lawful process" required by Article 5.[93]

6.73 The relevance of consent to whether there is a deprivation of liberty at all has not featured to a great extent in any decision of the European Court. But the Court has commented on the possible role of a substitute decision-maker in this context:

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[91] Application no.13469/06, 14 February 2012 at para 146.
[92] *HL v United Kingdom (*2005) 40 EHRR 32 at para 91.
[93] See discussion in paras 2.79 to 2.83 above.

> "The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned".[94] (emphasis added).

It would appear that "valid replacement" of the wishes of the person with incapacity would prevent the regime under which he or she is living from being a deprivation of liberty at all. It may therefore be that Scots law could make specific provision for the giving of consent by substitute decision-makers to care of a person with incapacity in conditions which, absent such consent, would amount to deprivation of liberty.

6.74 We have already referred to the desire to develop a system which meets the needs and respects the rights of those with incapacity.[95] The issue is therefore not simply whether a provision along these lines would represent compliance with Article 5, but also whether it would accord with the aims Scots law sets for itself in meeting the needs of those who lack capacity. Even if there were to be some situations in which consent of a substitute decision-maker was to be regarded as sufficient in itself, these situations would be likely to be limited to those where the person giving the consent was appointed either by the adult him or herself, or by the court, and where the appointment specifically referred to the power to consent to a regime which would otherwise amount to deprivation of liberty. It is also likely that such a process would be unsuitable for situations where the adult concerned, albeit lacking capacity, was evidently unhappy in the place where he or she was living.

18. Should Scots law define circumstances in which the consent of a substitute decision-maker would represent sufficient authorisation for an adult lacking capacity to be accommodated in conditions which would otherwise amount to deprivation of liberty?

19. If so, what should those circumstances be?

20. Should there be circumstances in which such consent would not be sufficient?

Consent as the basis of a lawful process

6.75 If consent of a substitute decision-maker is not to be viewed as sufficient in itself to authorise the accommodation of a person lacking capacity in circumstances which would otherwise amount to deprivation of liberty, then the question arises of whether such consent should be regarded as forming the "lawful process" required by Article 5.

Consent under power of attorney

6.76 Amendment to the 2000 Act would be required to clarify whether an attorney acting under a welfare power of attorney has the power to consent to deprivation of liberty. If it were to be provided that an attorney could validly act in this way, the legislation would require to make clear whether such a power could only be exercised if the power of attorney document explicitly conferred it. A drawback of establishing consent by an attorney as one

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[94] *Stanev v Bulgaria,* Application no. 36760/06, Grand Chamber 17 January 2012 at para 130.
[95] Para 2.86 above.

possible "lawful process" for deprivation of liberty is the need to buttress this by making available prompt access to a court to challenge the detention, as well as regular review.[96] The availability of prompt access to a court would necessitate the appointment of a person who could represent the interests of the adult in a dispute with his or her attorney, which would be likely to be procedurally complex. The reforms to the law in England and Wales preclude the possibility that a donee of a lasting power of attorney can validly authorise deprivation of liberty.[97]

21. Do consultees consider that the Adults with Incapacity (Scotland) Act 2000 should make clear that an attorney acting under a welfare power of attorney has the power to deprive, or authorise others to deprive, an adult with incapacity of his or her liberty?

22. If so, should the existence of such a power depend on whether there is provision to that effect in the power of attorney document?

23. If such a power can be conferred upon and exercised by a person acting under a power of attorney, what steps could be introduced to enable the adult to access prompt review of the deprivation by a Court, and periodic review thereafter?

Authorisation by guardian

6.77 Whatever consent-based processes are or are not introduced as mechanisms for authorising deprivation of liberty, we suggest that the Adults with Incapacity (Scotland) Act 2000 should be amended to provide that a guardian can only deprive an adult of his or her liberty or authorise another person to effect deprivation of liberty if such a power is expressly conferred by the Court. Moreover, any such consent should be specific rather than general, that is it should relate to a particular place of residence, and the duration of the authorisation should be no longer than a year.

24. Do you agree that the Adults with Incapacity (Scotland) Act 2000 should be amended to provide that a guardian with welfare powers may deprive an adult of his or her liberty, or authorise another person to do so, if such a power is expressly conferred by the Court?

Judicial authorisation for those who have neither attorney nor guardian

6.78 Legislation will also require to provide for the situation where deprivation of liberty is proposed for an adult who has no surrogate decision-maker. If the power to authorise detention in those circumstances is related to particular premises, it would be possible to adapt the existing intervention order to allow for such an order explicitly to deal with deprivation of liberty.

25. Do consultees agree that the existing provisions regarding intervention orders should be amended to provide for deprivation of liberty to be authorised by the Court, by a specific type of intervention order?

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[96] See discussion in paras 2.84 and 2.85 above.
[97] See para 4.18 above.

6.79 If there is to be a new form of court order, it will be necessary to determine by whom application should be made. If the conditions under which the adult is to reside involve deprivation of liberty, the managers of the establishment would require to ensure that authorisation was in place, and a statutory duty to apply for an order could be imposed on them. It might also be appropriate to permit any other person involved in the care of the adult to make application.

6.80 It will also be necessary to consider what evidence should be provided to justify the grant of such an order by the Court. To satisfy the *Winterwerp* criteria, there will require to be a medical report[98] on the condition and prognosis of the adult, which report will require to make clear that deprivation of liberty is justified by the adult's disorder and that no lesser measure is sufficient. There will also require to be a report from a social worker or from the management of the care facility, detailing the conditions in the premises where the adult is to live, to enable the Court to conclude that the principles in section 1 of the 2000 Act are being given effect to.

6.81 Any new type of intervention order would also require to be regularly reviewed, at intervals of no more than one year. Provision for this would be required in any amendment of the 2000 Act.

26. What procedures and evidential requirements should apply to any new form of court order authorising deprivation of liberty for a person with incapacity?

6.82 Finally, we have referred to the remedy provided in section 291 of the Mental Health (Care and Treatment) (Scotland) Act 2003, whereby a patient admitted to hospital and being given treatment there primarily for mental disorder may apply to the Mental Health Tribunal for an order requiring the managers of the hospital to cease to detain him.[99] Application may also be made by a range of other individuals acting on behalf of the patient. If the Tribunal is satisfied that the patient is being unlawfully detained, it must make the order sought.

6.83 There is no provision in the 2000 Act which would entitle an adult being unlawfully detained in other premises to make application for an order that the detention should cease. Given the possibility that detention could occur in premises other than a hospital, a provision applying to other premises may be required. In the present legislative scheme, such an application would appear to be most appropriately made to the sheriff court.

27. Would there be benefit in a statutory provision entitling an adult or other persons acting on his or her behalf to apply to the sheriff court for an order requiring the managers of residential premises to cease unlawful detention of the adult?

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[98] Not necessarily from a psychiatrist – see para 2.3 above.
[99] See para 3.91 above.

Chapter 7 List of questions

1. We would welcome views from consultees on the likely impact of any reforms resulting from this Discussion Paper on the groups identified in paragraphs 1.15 to 1.19 above.

(Para 1.19)

2. In addition, we would welcome information from consultees which could contribute to an assessment of the numbers of people with incapacity in Scotland who are cared for in residential facilities where they experience some restriction on their liberty.

(Para 1.19)

3. Do consultees have any observations on our summary of case-law from the European Court of Human Rights?

(Para 2.86)

4. Do consultees have any comments on the structure and/or operation of the Deprivation of Liberty Safeguards in England and Wales?

(Para 4.30)

5. Do consultees have any comments on our summary of English case-law?

(Para 4.64)

6. Do consultees have any comments on our discussion of comparative law?

(Para 5.58)

7. Do consultees agree that the present lack of clarity on deprivation of liberty in Scots incapacity law is unsatisfactory?

(Para 6.39)

8. Would it be desirable for there to be greater specification in Scotland on what is to be regarded as deprivation of liberty, beyond a cross reference to Article 5?

(Para 6.41)

9. Should Scots law provide that there cannot be informal admission to a hospital for the treatment of mental disorder of people who lack the capacity to consent to that admission?

(Para 6.44)

10. If so,

(a) should people who lack capacity be admitted to hospitals for the treatment of mental disorder using the mechanisms set out in the 2003 Act, or should their admission to hospital be authorised under incapacity legislation?

(Para 6.44)

(b) what approach should be adopted to those who are already in hospitals on a long-term basis?

(Para 6.44)

11. Would there be benefit in a statutory provision to the effect that the family or carers of a person with incapacity who are willing and able to provide a home for that person should not be prevented from doing so?

(Para 6.51)

12. If so, should that provision be an additional principle in section 1 of the Act?

(Para 6.51)

13. Do consultees agree that provision to the effect that certain measures do not constitute deprivation of liberty would be of assistance?

(Para 6.68)

14. If so, what should those measures be?

(Para 6.68)

15. Should such provision be in legislation or in guidance?

(Para 6.68)

16. Would there be benefit in provision to the effect that deprivation of liberty occurs whenever the management of a facility exercise complete and effective control over the assessment, treatment, care, residence and movement of an adult?

(Para 6.70)

17. If so, should such a provision be in legislation or in guidance?

(Para 6.70)

18. Should Scots law define circumstances in which the consent of a substitute decision-maker would represent sufficient authorisation for an adult lacking capacity to be accommodated in conditions which would otherwise amount to deprivation of liberty?

(Para 6.74)

19. If so, what should those circumstances be?

(Para 6.74)

20. Should there be circumstances in which such consent would not be sufficient?

(Para 6.74)

21. Do consultees consider that the Adults with Incapacity (Scotland) Act 2000 should make clear that an attorney acting under a welfare power of attorney has the power to deprive, or authorise others to deprive, an adult with incapacity of his or her liberty?

(Para 6.76)

22. If so, should the existence of such a power depend on whether there is provision to that effect in the power of attorney document?

(Para 6.76)

23. If such a power can be conferred upon and exercised by a person acting under a power of attorney, what steps could be introduced to enable the adult to access prompt review of the deprivation by a Court, and periodic review thereafter?

(Para 6.76)

24. Do you agree that the Adults with Incapacity (Scotland) Act 2000 should be amended to provide that a guardian with welfare powers may deprive an adult of his or her liberty, or authorise another person to do so, if such a power is expressly conferred by the Court?

(Para 6.77)

25. Do consultees agree that the existing provisions regarding intervention orders should be amended to provide for deprivation of liberty to be authorised by the Court, by a specific type of intervention order?

(Para 6.78)

26. What procedures and evidential requirements should apply to any new form of court order authorising deprivation of liberty for a person with incapacity?

(Para 6.81)

27. Would there be benefit in a statutory provision entitling an adult or other persons acting on his or her behalf to apply to the sheriff court for an order requiring the managers of residential premises to cease unlawful detention of the adult?

(Para 6.83)

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