



26 September 2019

THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

PRESS SUMMARY

In the matter of D (A Child) [2019] UKSC 42
On appeal from [2017] EWCA Civ 1695

JUSTICES: Lady Hale (President), Lord Carnwath, Lady Black, Lord Lloyd-Jones, Lady Arden

BACKGROUND TO THE APPEAL

The issue in this appeal is whether it is within the scope of parental responsibility to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty within the meaning of article 5 of the European Convention of Human Rights (ECHR), in particular where the child lacks the mental capacity to make the decision for himself.

D was born in 1999. He was diagnosed with attention deficit hyperactivity disorder, Asperger's syndrome and Tourette's syndrome, and has a mild learning disability. When he was 14 he was admitted to a hospital providing mental health services, for assessment and treatment. He lived in the hospital grounds and attended a school which was integral to the unit. The external door was locked and D was accompanied whenever he left the site. The hospital trust applied to the High Court for a declaration that it was lawful for the trust to deprive D of his liberty in this way. The judge, Mr Justice Keehan, held that D was so deprived but that it was a proper exercise of parental responsibility to consent to his constant supervision and control while he was under 16.

By then, with his parents' agreement, and with Birmingham City Council ('the Council') accommodating him under s 20 Children Act 1989, D had been discharged from hospital to a residential placement, where he was similarly under constant supervision and not allowed to leave the premises except for a planned activity. On his 16th birthday proceedings were issued in the Court of Protection for a declaration that the consent of D's parents meant that he was not deprived of his liberty at the placement. Keehan J held that his parents could no longer consent to what would otherwise be a deprivation of liberty once D had reached 16, and that the provisions of the Mental Capacity Act 2005 ('MCA') now applied. He authorised the placement, and a subsequent transfer to another similar placement, as being in D's best interests. When D reached the age of 18 his deprivation of liberty could be authorised under the deprivation of liberty safeguards in the MCA.

The Council's appeal to the Court of Appeal was allowed, on the ground that parents could consent to what would otherwise be a deprivation of liberty of a 16 or 17-year-old child who lacked the capacity to decide for himself, and the MCA had no bearing on this.

JUDGMENT

The Supreme Court by a majority of 3 to 2 (Lord Carnwath and Lord Lloyd-Jones dissenting) allows the appeal. Lady Hale gives the main judgment. Lady Black gives an additional judgment, dealing also

with the issue of secure accommodation which arose during the hearing. Lady Arden agrees with Lady Hale on the effect of article 5 in a further judgment. Lord Lloyd-Jones agrees with Lord Carnwath's dissenting judgment.

REASONS FOR THE JUDGMENT

The case turns on the inter-relationship between the concept of parental responsibility, as defined by the Children Act 1989, the common law and other relevant statutory provisions, and the obligation of the State to protect the human rights of children under the ECHR [19].

Historically, parental rights under domestic law were never absolute and became increasingly subject to the overriding consideration of the child's own welfare. The power of physical control was a dwindling right as the child acquired sufficient understanding and intelligence to make his or her own decisions - the age of discretion - which could be before the age of majority (known as 'Gillick competence' after the case of *Gillick v West Norfolk and Wisbech AHA* [1986] 1 AC 112) [21-23]. *Gillick* is not directly relevant to the question of whether parental authority endures beyond the age of discretion, if the child lacks capacity to make decisions [24, 69-72]. The MCA does not override other common law and statutory provisions relating to 16 and 17-year-old children, but it does indicate an appreciation of the different needs of this age group [27, 71]. Lady Black would hold that as a matter of common law, parental responsibility for a child of 16 or 17 does not extend to authorising a confinement of the child in circumstances amounting to a deprivation of liberty [88-90]. Lady Hale prefers not to express a concluded view on this question but agrees that it reinforces the conclusion reached under the ECHR [28].

Article 5 ECHR protects children who lack the capacity to make decisions for themselves from being arbitrarily deprived of their liberty. Clearly the degree of supervision to which D was subject at the placements was not normal for a child of 16 or 17 [39]. D's living arrangements had to be compared with those of children of the same age without disabilities, and the fact that they were made in his best interests did not mean he was not deprived of his liberty [41]. Parental consent could not substitute for the subjective requirement under article 5 for valid consent to the deprivation [42]. The procedural requirements of article 5 applied (and had in fact been complied with by the court authorisations) [44]. Human rights are about the relationship between private persons and the state, and D's deprivation of liberty in the placements was attributable to the state [46]. There is no scope for the operation of parental responsibility to authorise what would otherwise be a violation of a fundamental human right of a child [49].

The question was raised in the hearing of whether the provisions of s 25 Children Act 1989, regarding the placing of children in accommodation provided for the purpose of restricting liberty, apply to D's living arrangements. Lady Black addresses this issue in her judgment, concluding that a narrow construction of s 25 is needed to ensure local authorities can meet the welfare needs and best interests of children who for good reasons need to be kept in confined circumstances, but that s 25 does not play a direct role in D's case [100, 113-115].

Lord Carnwath, dissenting, would have agreed with the Court of Appeal that nothing in the MCA detracts from the common law principle of parental responsibility in respect of 16 and 17-year-olds [145]. He further considers that the case law of the European Court of Human Rights on article 5 recognises that the proper exercise of parental responsibility can include consent to confinement of a child such as D [155].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>