

Law Report

State's duty to prevent arbitrary detention of incapacitated person

Court of Appeal

Published February 9, 2017

Staffordshire County Council v K and Others

Before Sir Terence Etherton, master of the rolls, Lord Justice Elias and Lord Justice Beatson
[2016] EWCA Civ 1317
Judgment December 22, 2016

When a severely disabled person who lacked capacity to consent was accommodated and cared for by private providers, in circumstances which amounted objectively to a deprivation of his liberty, responsibility was attributed to the state to ensure that the deprivation of liberty was not arbitrary and, accordingly, a welfare order was required to provide the necessary regular independent checks on the arrangements made.

The Court of Appeal so held, dismissing the appeal of the secretary of state for justice against the welfare order made by Mr Justice Charles ([2016] Fam 419) on the application of Staffordshire county council, with regard to a severely disabled person, K, who was being cared for by Irwin Mitchell Trust Corporation.

Ms Rachel Kamm for the secretary of state; Ms Nageena Khalique, QC, for the council; Mr Sam Karim for K, by his litigation friend SK; Mr Parishil Patel for the trust corporation.

The master of the rolls said that the issue was whether, in order for the United Kingdom to avoid being in breach of article 5(1) of the European Convention on Human Rights it was necessary for a welfare order to be made by the Court of Protection pursuant to the Mental Capacity Act 2005 in a case where an individual, who lacked the capacity to make decisions about where to live and the regime of care he ought to receive, was to be provided with care entirely by private sector providers in private accommodation in circumstances which, objectively, were a deprivation of his liberty within article 5(1).

K had been the victim of a road traffic accident in 2005 which resulted in him requiring 24-hour care and assistance seven days a week. He had received a substantial award of damages which provided the funds for his accommodation, its adaptation to meet his needs and a care package for the rest of his life. His damages award was managed by a private company appointed by the Court of Protection to be his deputy in 2011.

The deputy informed the local authority that the arrangements for

K's care and accommodation might amount to a deprivation of liberty. The local authority applied for an order that K lacked capacity to make decisions regarding his care and residence, and that it was in his best interests to be deprived of his liberty.

It was common ground before the judge that the first two components of a deprivation of liberty were present, that was, the objective component of confinement in a particular restricted place for a not negligible length of time and the subjective component of lack of valid consent.

All the parties other than the secretary of state contended that the third component, the attribution of responsibility to the state, was also present. The judge held that, absent the making of a welfare order by the Court of Protection, there were insufficient grounds to justify the positive obligation on the state under article 5(1).

The secretary of state's case was that, notwithstanding the absence of a requirement for a welfare order from the Court of Protection, the UK's existing domestic regime of law, supervision and regulation in respect of incapacitated persons who were being treated and supported entirely in private accommodation by private providers was sufficient compliance with the state's positive obligations under article 5(1), at least where the public authorities had no reason to believe that there had been any abuse or mistreatment.

The judge had been both entitled and right to reject that argument. By the Health and Social Care Act 2008 the Care Quality Commission had the principal objective of protecting and promoting the health, safety and welfare of people who used health and social care services. It regulated the providers of private care. It did not, however, go into private homes to check the care being given by individual carers. Under the Care Act 2014 local authorities had an adult safeguarding role. They had a duty to promote an individual's well-being, including protection from physical and mental abuse.

The critical point was that, although local authorities and the Care Quality Commission had responsibilities for the quality of care and the protection of persons in K's position, they would only act if someone had drawn the matter to their attention and there was nothing to trigger a periodic assessment. The same was true of doctors and other health professionals.

Save where there were already proceedings in the Court of Protection, the current domestic regime depended on people reporting something was wrong, and even then it would only be a notification of grounds for concern at that specific moment in time. That could be particularly problematic in cases where no parents or family members were involved in the care and treatment. It did not meet the obligation of the state under article 5(1) to take reasonable steps to prevent arbitrary detention.

For the same reason, criminal and civil law sanctions which operated retrospectively after arbitrary deprivation of liberty had occurred, were insufficient to discharge the state's positive obligation under article 5(1).

His Lordship examined and rejected the secretary of state's further submission that, since each case of an alleged breach of article 5(1) was fact dependent, there was no breach by the state of its positive obligation under article 5(1) in the present case because K's care regime was in his best interests and the least restrictive available option, and there was nothing to suggest to the contrary to the local authority or that there was any abuse.

That argument ran counter to the interpretation and spirit of article 5(1) in *HL v United Kingdom* (*The Times* October 19, 2004; (2004) 40 EHRR 32) and *Cheshire West and Chester Council v P* (*The Times* April 1, 2014; [2014] AC 896), in which the focus had been entirely on the state's duty to prevent arbitrary deprivation of liberty and not on the quality of care and treatment actually being provided, or indeed on whether the best and least restrictive treatment would not have involved deprivation of liberty of the individuals in those cases.

While an application to the Court of Protection was necessary in the present state of law and practice for the state to discharge its positive obligation under article 5(1), such a step might not be necessary if a different legislative and practical regime were to provide for proactive investigation by a suitable independent body and periodic reviews.

Lord Justice Elias and Lord Justice Beatson agreed.

Solicitors: Treasury Solicitor; Legal Department, Staffordshire County Council, Stafford; Stephenson Solicitors LLP; Irwin Mitchell, Sheffield.