Purpose alone can no longer determine if there is a deprivation of liberty

Earlier findings by Lord Justice Munby that safeguards do not apply because deprivation of liberty has a benevolent purpose are no longer supported by the more recent approach taken by the European Court of Human Rights, writes David Hewitt

The decision by the European Court of Human Rights in the recent 'kettling' case might have shrunk the right to liberty but there's no reason it should apply to health and social care (*Austin v UK*, application nos 39692/09, 40713/09 and 41008/09, 15 March 2012; and 'Kettling will not always be lawful', *Solicitors Journal* 156/12, 27 March 2012).

Where they lack capacity, people who are admitted to hospitals or care homes in their own best interests are eligible for certain protections, but only if they are thereby deprived of liberty. Anything that limits the circumstances that will amount to deprivation of liberty will also, therefore, restrict both the scope of the protections – contained in the deprivation of liberty safeguards (DoLS) – and the number of people who qualify for them.

"The emphasis on 'normality' in the Cheshire West ruling is objectionable, while its use of purpose and reason, and of motive and intention – along with its suggestion that they mean different things and count to different degrees – is deeply confusing when what is required is absolute clarity"

This is demonstrated by a recent Court of Appeal decision in which Mr P, a man with cerebral palsy and Down's Syndrome, was held not to be deprived of liberty, even though every aspect of his life is controlled by a local authority and he has little privacy (*Cheshire West and Chester Council v P* [2011] EWCA Civ 1257). Mr P must live at a care home and not leave it unescorted, he is often subject to restraint and, in the community, is kept in a wheelchair by means of a strap. The man wears continence pads, which he regularly tears off and ingests. He is therefore also placed in a one-piece 'body suit' and regularly subjected to an intrusive 'finger sweep' of his mouth.

Delivering the lead judgment, Lord Justice Munby said all this is 'normal' for people like Mr P; but he also drew upon *Austin*. There, the House of Lords had held the kettling of Ms Austin (and several thousand others) to be lawful because its 'purpose' was both relevant and benevolent, and because a benevolent purpose will prevent there being deprivation of liberty.

I have already pointed out the absurd consequences of this decision: there will be no one – no matter how lacking in capacity or closely confined – to whom the DoLS apply. The Mental Health Act might even be redundant (see 'Whose liberty?' *Solicitors Journal* 153/6, 17 February 2009).

Reflecting on *Austin*, Munby LJ said 'purpose' is the objective aim of a particular intervention, and that it may indeed be relevant to whether there is deprivation of liberty. He said the 'reason' for any intervention was also an objective factor and relevant, but that things such as 'motive' and 'intention' were neither. He found that Mr P was not deprived of liberty, because what is done to him "is a positive rather than a negative feature"; "it is surely something that fosters rather than hinders" his life.

The decision in the *Cheshire West* case has exasperated practitioners and been criticised by them in equal measure. Its emphasis on 'normality' is objectionable, while its use of purpose and reason, and

of motive and intention – along with its suggestion that they mean different things and count to different degrees – is deeply confusing when what is required is absolute clarity.

Different analysis

Like the Court of Appeal in *Cheshire West*, the Strasbourg court in *Austin* found there had been no deprivation of liberty. The two courts' analyses, however, differ markedly.

True, the European court – or, at least, a majority of that court – said case law obliges it to take account of both the 'type' and the 'manner of implementation' of an intervention, and that this means it can also consider the context. Developing this notion, however, the court said: "Members of the public generally accept that temporary restrictions may be placed on their freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match." It added that, typically, and provided they are unavoidable and necessary, restrictions such as these will not amount to deprivation of liberty.

These are all, of course, public order situations, and the ECtHR appears to have chosen them carefully; they are a long way removed from the stock-in-trade of the DoLS (and from what is done to Mr P). It is plain that the court saw a clear distinction between the two, for it also said that where the purpose of an intervention "is to protect, treat or care in some way for a person taken into confinement", "an underlying public interest motive... has no bearing on the question of whether that person has been deprived of his liberty". This is surely significant.

When all he had was the decision of the House of Lords, Lord Justice Munby can have felt confident in citing *Austin* and holding that 'purpose' may determine whether there is deprivation of liberty. But though, in that case, the outcome in the ECtHR was the same as before the lords, one thing is abundantly clear: the Strasbourg decision simply does not support what he said, or the decision made, in *Cheshire West*.

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