Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol
clerks@albionchambers.co.uk
www.albionchambers.co.uk

Number 5 December 2018

Albion Chambers COURT OF PROTECTION

Re T (a child) [2018] EWCA Civ 2136

Is it necessary to establish a lack of valid consent before restricting a young person's liberty?

The young person at the centre of the appeal was a 15-year-old girl who was the subject of a full-care order. Her 16th birthday was in May 2018 and she was, therefore, still aged 15 years at the time of the two first instance hearings that are the subject of appeal. The matter came before Mr Justice Mostyn on 23 January 2018 and thereafter followed a change of placement, on 22 March 2018. The judge had been persuaded that, when considering an application to authorise restriction of liberty under the inherent jurisdiction, the court had to be satisfied that the young person was not consenting to the placement.
Having reviewed the available evidence, and whilst accepting that, on the day in court, the young person was fully consenting to the restrictive arrangements, Mostyn J held that any such consent "must be an authentic consent, and must be an enduring consent" meaning that the court was required to evaluate "whether the consent is going to endure in the short to medium term, or whether it is merely evanescent consent." On the facts the judge held that the young person's stated consent fell short of establishing such an "enduring" quality. He therefore, having considered the other circumstances of the case, granted the declaration sought by the local authority.

The focus of the Appellant's pleaded appeal in *Re T* was to challenge the need for an "enduring" quality of consent, given by a minor who was due to be the subject of a s25 CA 1989 secure accommodation order. During the appeal hearing, the appeal court questioned the underlying assumption that it is necessary, as a matter of jurisdiction and as a pre-condition, for the court to establish a lack of valid consent before it may consider making a declaration authorising restriction of liberty in this cohort of cases which would otherwise fall to be dealt with within the CA 1989, s25 statutory scheme.

That appeal court concluded the following four principles:

First, the consent, or otherwise, of the minor was not a relevant factor in the statutory scheme at s.25 of the CA 1989 (see [70] to [74]).

Secondly, there was no domestic authority to the effect that it was necessary to find an absence of valid consent before the court may authorise a local authority to restrict the liberty of a young person (see [75] to [77]). Insofar as Keehan J sought to say otherwise in *Local Authority v D* he had not sufficiently distinguished between the fact that a secure accommodation order (whether under the statutory scheme or the inherent jurisdiction) did not deprive the subject person of their liberty, it merely authorised the local authority to do so.

Thirdly, to hold otherwise would be to confuse the distinct temporal perspectives of Art 5 and an application for authorisation (see [78]). On the one hand, a determination that a person had or had not been deprived of their liberty in breach of Art 5 was a retrospective evaluation by the court of the individual's current and past circumstances. On the other hand, and in contrast, an application for a secure accommodation order involved a "prospective" perspective on behalf of the court to determine whether circumstances existed to justify the restriction of liberty.

Fourthly, it would mistake the purpose of an order under the inherent jurisdiction authorising the placement of a child in the equivalent of secure accommodation (see [79] to [80]). Two factors underlined the need for an order authorising a Local Authority to place a child in the equivalent of secure accommodation:

- To ensure the absence of available secure accommodation did not lead to the structure imposed by s.25 CA being avoided. In other words, neither the Local Authority nor the child could authorise what Parliament had decided only a court could authorise; and
- A connection with Art 5. The court's authorisation would be used to deprive the child of their liberty and so the legal requirements of Art 5 would have been fulfilled such that the court will necessarily have determined that the child's welfare justified, or even required, him/her being deprived of their liberty for the purposes of maintaining the placement in the secure accommodation.

In conclusion, once it was seen that the court's power under s25/s119 was not dependent upon any question of consent, the difficulties that arose in this case, as it was presented to the judge and, initially, to this court, disappeared. The argument that any consent may or may not be 'valid' or 'enduring' on the day the order was sought, or at any subsequent point, or that a 'valid' consent is later withdrawn, was irrelevant to the scope of the court's powers, whether they

were exercised under statute or under the inherent jurisdiction of the High Court. It was considered that the existence or absence of consent may be relevant to whether the circumstances will or will not amount to a deprivation of liberty under Art 5. However that assessment is independent of the decision that the court must make when faced with an application for an order authorising placement in secure accommodation, registered or otherwise.

Yasmine El Nazer

Albion Chambers
Court of Protection

Team Clerk
Stephen Arnold

Kate Brunner QC
Call 1997 QC 2015
Recorder
Upper Tribunal Judge

Tanya Zabihi
Call 1988

Rachael Morton
Call 1995

Hannah Wiltshire
Call 1998

Charlotte Pitts
Call 1999

Tim Baldwin
Call 2001

James Cranfield
Call 2002

Sarah Pope
Call 2006
Team Leader

Jonathan Wilkinson
Call 2006

Stuart Fuller
Call 2007

Emily Brazenall
Call 2009

Philip Smith
Call 2012

Simon Cooper
Call 2012

Alexander Small
Call 2012

Charley Pattison
Call 2013

Yasmine El Nazer
Call 2015

Lucy Taylor
Call 2016

Emily Heggadon
Call 2017