

Irish Association of Social Workers Assisted Decision-Making (Capacity) Act 2015

Place of Care Decisions Protection of Liberty Safeguards

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Overview

- **Protection of Liberty Safeguards**
 - Human Rights Obligations
 - Constitutional, ECHR and UNCRPD rights
 - AC v Cork University Hospital and HSE [2018] IECA + [2019]IESC
 - Conclusion

Constitution of Ireland

- All citizens shall, as human persons, be held equal before the law
(Article 40.1)
- The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen
(Article 40.3.1)
(includes right to **bodily integrity and right to privacy**)
- No citizen shall be deprived of his personal liberty **save in accordance with law** (Article 40.4.1)

Constitutional Right recognised

- In re Ward of Court (No 2) [1996] 2IR

*The loss by an individual of his or her ... capacity **does not result in any discrimination of his or her personal rights recognised by the Constitution, ... including [right to]self-determination... The ... rights are in no way lessened or diminished by reason of ... incapacity***

European Convention on Human Rights

Article 5

- Everyone has the right to liberty and security of person. No one shall be deprived of his liberty savein accordance with **a procedure prescribed by law** – exceptions (Article 5.1)
- 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 ...(Article 5.4)

Article 8

- Everyone has the right to respect for his private and family life

Lawfulness of Detention – Art 5 ECHR cases

- The key purpose of Article 5 is to **prevent arbitrary or unjustified deprivations of liberty**
- In order to meet the requirement of lawfulness, detention must be **“in accordance with a procedure prescribed by law”** (Notion of ‘lawfulness’ requires a fair and proper procedure offering the person concerned sufficient protection against arbitrary deprivation of liberty (V.K v Russia 2017))
- The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law; **domestic law must itself be in conformity with the Convention**, including the general principles expressed or implied in it (Pleso v Hungary 2012)
- Where deprivation of liberty is concerned it is **particularly important that the general principle of legal certainty be satisfied**. It is therefore essential that the conditions for **deprivation of liberty under domestic law be clearly defined** and that the law itself be foreseeable in its application, so that it **meets the standard of “lawfulness”** set by the Convention (Khlaifia and Others v Italy ECHR 2016)

Deprivation of Liberty

(Council of Europe ECHR Guide on Art 5 – 31 August 2019)

- Article 5 contemplates the physical liberty of the person and ensures that no one is deprived of that liberty **in an arbitrary fashion**
- Deprivation of liberty is **not confined to the classic case of detention** following arrest or conviction, but may take numerous other forms (**i.e. the placement in social care institutions**) (P,PQ – living arrangements for a person who lacks decision making capacity)
- The right of liberty is too important in a democratic society for a person to lose the benefit of Convention protection....**especially when that person is legally incapable of consenting to, or disagreeing with the proposed action.** (Medvedyev v France ECHR 2010)
- The fact that a person **lacks capacity does not necessarily mean** that he/she is unable to understand and consent to a proposed action
- **Even measures intended for protection** or taken in the interest of the person concerned may be regarded as a deprivation of liberty ((Khlaifia and Others v. Italy (2016)

Deprivation of Liberty Principles

European Court of Human Rights

- ECHR set down general principles:
 - **Important not to confuse the question of the benevolent justification for the care arrangements with the concept of deprivation of liberty (AC case)**
 - Human rights have a universal character and physical liberty is the same for everyone, regardless of their disabilities
 - **What would be a deprivation of liberty for a non-disabled person is also a deprivation for a disabled person**
 - The person's compliance or lack of objection, the relative normality of the placement and the purpose behind it are all irrelevant to this objective question

European Convention on Human Rights Act 2003

- ECHR incorporated into Irish law
- Irish Courts must interpret Irish law in a way which gives effect to the State's obligations under the ECHR regardless of whether legislation pre or post 2003
- Every organ of the State must perform its functions in a manner **compatible with the State's obligations under the ECHR**
- Judicial Notice must be taken of:
 - Any declaration, **decision**, advisory opinion or **judgment of the European Court of Human Rights**
 - Any decision or opinion of the European Commission of Human Rights
 - Any decision of the Committee of Minister of the Council of Europe

UN Convention on Rights of Persons with Disabilities (Deprivation of Liberty) (Art 14)

- State Parties shall ensure that persons with disabilities on an equal basis with others
 - (a) Enjoy the right to liberty and security of person
 - (b) **Are not deprived of their liberty unlawfully or arbitrarily**, and that any deprivation of liberty, **is in conformity with the law**, and that the existence of a disability shall in no case justify a deprivation of liberty
- State Parties shall ensure that if persons with disabilities **are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the Convention**, including by provision of reasonable accommodation

UN Committee on Article 14 (September 2015)

- Committee reaffirms that **liberty + security of person is one of the most precious rights** to which everyone is entitled
- States parties should refrain from the practice of denying legal capacity of persons with disabilities and **detaining them in institutions against their will, either without the free and informed consent of the persons concerned or with the consent of a substitute decision-maker, as this practice constitutes arbitrary deprivation of liberty** and violates articles 12 (equal recognition before the law) and 14 of the Convention.

UN General Assembly – Report January 2019

- Article 14 reaffirms the right to liberty and security of all persons with disabilities on an equal basis with others, stipulates that **person with disabilities cannot be deprived of their liberty unlawfully and arbitrarily and clarifies that disability shall in no case justify a deprivation of liberty**
- State Parties have an obligation with immediate effect –
 - To refrain from engaging in any action that unlawfully or arbitrarily interferes with the right to liberty and from authorising such practices
 - Protects this right against practices by private actors such as health professionals, and providers of housing and/or social services and
 - Take positive action to facilitate the exercise of the right of liberty
- States **have an obligation to immediately repeal all legislation** that allows for deprivation of liberty on the basis of actual or perceived impairment whether **in public or private settings**

UN Special Rapporteur – DofL (Report January 2019)

- Institutionalisation is a widespread form of deprivation of liberty
- The need for ‘specialised care’ is often the justification for the type of placement. Sometimes a lack of appropriate community-based support is behind an alleged need for treatment and care, which is used to justify involuntary commitment.
- **Many people are living in institutions without their consent and without the opportunity to challenge their placement**

Defining elements of institutionalism:

- Isolation and segregation from independent life within the community
- Lack of control over day-to-day decisions
- Lack of choice over whom to live with
- Daily schedule and routine irrespective of personal ‘will and preferences’
- Identical activities in the same place for a group of persons
- A paternalistic approach in service provision and living arrangements
- Supervision of living arrangements
- Obligatory sharing of assistants with others and no or limited influence over whom one has to accept assistance from

AC v Cork UH and HSE [2018] IECA

- Application Article 40.4.1 and 40.4.2 of the Constitution
 - *Raises legal and constitutional issues of far reaching importance regarding the personal liberty...not least in so far as the care and welfare of the infirm and elderly are concerned*
 - *Right under the Constitution-cannot be swept away by Victorian wardship legislation*
 - **Legal issue not a medical one** – *(Art 40.4.1 provides that all detention must be in accordance with law. The reasons and motives of the detainer are not relevant to any consideration of this issue of law).*
- Whether detention lawful?
 - *The power [to detain] claimed by the hospital amounts to a **paternalistic entitlement to act in the best interests** of the patients whose capacity is impaired and, in effect, to restrain their personal liberty and freedom of movement and if necessary, to do at the expense of close family members. But ever, before the Constitution the common law has always rejected the claim that personal liberty could be compromised on such a basis.*

AC v Cork UH and HSE [2018] IECA

- Whether detention lawful?
 - *While one can, certainly sympathise with the position of CUH, **their self-created power of detention might, if unchecked, lead to widespread abuse.** For if the power of detention claimed by CUH was to be judicially accepted, the logical consequences would be that tens of thousands of the infirm elderly who are suffering from dementia (or whose capacity is otherwise impaired) and who are presently residing in nursing homes and other similar institutions could equally be restrained from leaving. **In many cases this would doubtless be for good clinical reasons. In other instance, however, this decision could be simply for reasons of convenience and, perhaps in a small minority of cases, for even less noble motives***

AC & others v Cork UH and HSE [2019] IESC 73

- *I consider that the constitutional guarantee of the right to liberty protects mentally impaired persons to the same extent as everyone else – deprivation of liberty must in all cases be in accordance with law.*
- *To hold that persons cannot be found to be ‘detained’ if they are not capable of making a valid decision to leave for themselves, or if they are not aware of or able to object to their situation, would not simply permit restrictions on their freedom of movement for their own protection. **It would also have far-reaching consequences of denying to vulnerable persons...the benefit of the constitutional guarantee that they will not be deprived of their liberty otherwise in accordance with law.** It is possible for a person of full capacity to be detained without necessarily being conscious of that situation, and, equally, it is possible in the case of a person with impaired capacity. Both are entitled to legal protection. (Para 334)*

AC & others v Cork UH and HSE [2019] IESC 73

- *For the same reason, a benevolent or protective motivation or purpose for whatever measures have been taken cannot be considered to alter the legal fact of detention....If benevolent intentions meant that there was no deprivation of liberty, and therefore no grounds for inquiry into the legality of deprivation of liberty, there would be no legal basis upon which the courts could ask whether the measures taken were justified and were in fact in the individual's best interests.*
- *This would, in fact, leave vulnerable people without legal protection against arbitrary or unnecessary detention. The persons or institution that takes charge of them would there appoint themselves as a substitute decision-maker without legal process. Neither the Convention nor the Constitution permit of this result. (Para 335)*

AC & others v Cork UH and HSE [2019] IESC 73

- *The most striking feature of all of the litigation and all of the court-mandated procedures to date – that it proceeded to this point on the basis of arguments between third parties, and decisions of courts, as to what Mrs C wants and what is in her best interests, without her voice being heard.*

What action now?

- *If the hospital is concerned that the patient lacks capacity to make the decision, that issue must be addressed. Persuasion will not necessarily be the appropriate legal solution, since the lack of capacity implies an inability to process the information provided and to make the decision. The hospital is entitled to take some brief period of time to make its assessment of capacity. It may be helpful if some person is found who has not been involved in any dispute concerning the patient and who can act as intermediary or advocate. If it is concluded that the patient has capacity, no further issue arises. **If she lacks capacity, the hospital must bear in mind that --***
 - ***It has no general power of detention and***
 - ***No general right to make itself a substitute decision-maker.***
 - ***It must therefore seek the assistance of the courts, if it is felt that the patient is at risk.***
- *In my view, the doctrine of necessity permits the hospital to detain the patient, in the interests of personal safety, provided that such detention lasts no longer than is necessary to take appropriate legal steps.*

Protection of Liberty: Safeguard Proposals

- Draft heads of Bill published in Dec 2017 by Department of Health
- Consultation Process – Dec 2017 to March 2018
- Advisory Committee set up by Department of Health in April 2018
- AC v UHC – Court of Appeal – July 2018
- Key Findings of Consultation published in June 2019
 - Philosophy and principles in ADMCAct not incorporated in draft Heads
 - Admission decision – should be greater emphasis on ‘will and preference’
 - Support mechanisms not evident – over reliance on court application
 - Need for access to an independent Advocate
- Next steps – Department of Health response
 - DofL Safeguards need to be extended to hospital settings (AC Case)
 - Need to design an approach that is workable and practical
 - Every effort is being made to progress the legislation as quickly as possible

Clear Philosophy and legal process required

- General Principles of 2015 Act clearly must apply
 - Presumption of capacity
 - Support must be given to person to maximise capacity – *a relevant person shall not be considered as unable to make a decision... unless all practicable steps have been taken, without success to help him or her to do so*
 - Functional approach to capacity does not mean that a person has no understanding of what is going on in their lives
 - Independent Advocacy – independent of family, service provider and systems interests
- Fundamental first step – assess care needs, treatment requirements, whether needs can be met given current circumstances, **risks to the person and choice for the person.**

Conclusion

- The right of liberty is too important in a democratic society for a person to lose the benefit of Convention protection....**especially when that person is legally incapable of consenting to, or disagreeing with the proposed action**
- Legislation must be formulated to comply with the Constitution and the State's international human rights obligations – ECHR + UNCRPD
- Given the current practical situation (impact of AC case, where the court or healthcare professionals have no power to detain), there is an urgency for the legislation
- Planning in advance – place of care decision
 - Professionals should communicate and encourage

Thank You

Q and A