

Submission to the call for contributions on older persons deprived of liberty – 2022 HRC report

I welcome the work of the independent expert. My observations are made from the perspective of a practising barrister in England, who has also been involved in law reform proposals relating to deprivation of liberty as a consultant to the Law Commission of England & Wales on the project leading to its 2017 Report on Mental Capacity and Deprivation of Liberty.¹ This has led, in different form, to a new framework for authorising deprivation of liberty in relation to those with impaired decision-making capacity requiring care and treatment, contained in the Mental Capacity (Amendment) Act 2019, due to come into force in due course. This framework is likely to apply to significant numbers of older adults, in a context where (in the United Kingdom) the concept of deprivation of liberty has been extended very widely by a Supreme Court decision: *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19. The expert may wish to consider the extent to which this framework asks the right questions in relation to the necessity and proportionality of restrictions upon the liberty of those with impaired decision-making capacity.

My primary observation is that I would urge the expert to consider with care the potential problems that would arise if she is considering following the approach of the former UN Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas, taken in her report ‘Ending the deprivation of liberty on the basis of disability.’² In Ms Devandas’ report, she identified that:

Deprivation of liberty of persons with disabilities at home is not a practice limited to low-income settings. In most parts of the world, many children with disabilities are systematically locked up at home, with little or no interaction with the community. Many adults with disabilities living in supported housing are also in practice deprived of their liberty, as they are not free to leave the house. Similarly, older persons with dementia are frequently impeded from leaving their own homes purportedly for their own safety (emphasis added)

The Special Rapporteur’s position was that the existence of a disability shall in no case justify the deprivation of liberty. As with the Committee on the Rights of Persons with Disabilities, she took the view that that deprivation of liberty was not justified even where the basis is not the disability per se, but the risk that the person is then said to be at, or to pose, in consequence.

This is not the view of the Human Rights Committee: see General Comment No 35 on Article 9 ICCPR, which takes the position that (at paragraph 19) that:

¹ My observations are made in a personal capacity.

² A/HRC/40/54 (11 January 2019).

[t]he existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.

What concerns me in relation to the position adopted in Ms Devandas' report is that it does not address the totality of the obligations on states towards persons with disabilities that drive towards imposing restrictions in their liberty in some situations. Those moral obligations have been cast into positive obligations in human rights treaties, including, the CRPD. They derive not merely from the right to life (secured in the CPRD) under Article 10), which carries with it positive obligations,³ but also the specific obligation imposed upon states by Article 16 CRPD to secure disabled people from exploitation, violence and abuse.

An argument could certainly be made there are no circumstances under which it is ever legitimate to direct measures against the disabled person which might restrict their liberty to secure them against risks posed by others (in other words, the obligation under Article 16 should be interpreted as only ever extending to taking steps – for instance – to prosecute perpetrators of abuse).

But this argument does not work when it comes to the risk that the person is thought to pose to themselves if not subject to the restrictions in question. It is, with respect, a challenging proposition to advance that under no circumstances is it ever justified to take steps to prevent a person with dementia from leaving their own home to secure them against the risk that they pose to themselves – the position that Ms Devandas must defend given that this is given in her report as a specific example of deprivation of liberty. I would suggest that it is perhaps telling that none of the recommendations set out at the end of the report, in fact, address how such a situation could be prevented. I would also suggest that this is because it is simply not possible, in fact, to advance a proper case to this end – either legally or morally.

In considering the rights of older persons, the independent expert is considering the position of those who may fall within the scope of the CRPD, as well as those who fall outside its scope – but whether or not they fall within its scope, they enjoy the right to liberty under Article 9 ICCPR, and I would urge the independent expert to follow the nuanced approach of the Human Rights Committee to the difficult question of whether deprivation of liberty can ever be justified.

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³ By parity of reasoning with the approach taken under the right to life under Article 6 ICCPR: see, most recently, General Comment 36 adopted by the Human Rights Council on 30 October 2018, especially paragraphs 7, 9, 21 and 24