



The Law Society

# Identifying a deprivation of liberty: a practical guide

## *Cheshire West*

This guidance does not constitute legal advice, which must be sought - if necessary - on the facts of any specific individual case. While care has been taken to ensure the guidance is accurate, up to date and useful, no legal liability will be accepted in relation to it.

- 3.1 The formulation of the ‘acid test’ in the *Cheshire West* decision has led to an intense focus on the concepts of the practical meaning of ‘**continuous/complete supervision and control**’ and ‘**freedom to leave,**’ as well as of what may be a ‘**non-negligible**’ period of time.
- 3.2 The majority of the rest of this guidance represents an attempt to reflect what these concepts may mean in particular settings. In this chapter some initial and generally applicable observations are given. The obvious caution has to be given that these concepts may ultimately have to be given a judicial definition which will override anything within this guidance.
- 3.3 The approach taken by this guidance is also predicated upon the warning of Lady Hale that: “[b]ecause of the extreme vulnerability of people like P, MIG and MEG, [...] we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case.”<sup>1</sup>

#### A: Continuous / complete supervision and control – what is continuous/complete?

- 3.4 The phrase “continuous supervision and control” was taken by Lady Hale from the European Court of Human Rights’ judgment in *HL v United Kingdom*.<sup>2</sup> This concept or variations of it has been used in the major ECtHR cases subsequently,<sup>3</sup> and in seeking to interpret the phrase, we consider that it is of use to have regard to the ECtHR case-law.
- 3.5 The ECtHR case-law indicates strongly that the requirement for continuous / complete supervision and control cannot and should not be interpreted as requiring 24 hour monitoring and/or that the person is to be physically accompanied over a continuous 24 hour period. In other words, if the individual is subject to such monitoring or such degree of accompaniment,<sup>4</sup> then the necessary degree of continuity or completeness will be satisfied. But it is capable of being satisfied even if the supervision and control is ‘lighter touch.’
- 3.6 Perhaps the two most significant ECtHR cases here are:
  - 3.6.1 *Ashingdane v the United Kingdom*,<sup>5</sup> in which the ECtHR held that a person could be regarded as having been “detained” even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital; and
  - 3.6.2 *Stanev v Bulgaria*,<sup>6</sup> in which Mr Stanev was able to leave the building where he resided and to go to the nearest village (and indeed had been encouraged to work in the restaurant in the village where his care home was located “to the best of his abilities”) and had also been on “leaves of absence.” However, he needed to have permission to leave the care home, and his visits outside were subject to controls and restrictions; his

1 Paragraph 57.

2 [2004] ECHR 471 at paragraph 91.

3 In *Stanev*, the term was “constant supervision” (paragraph 128).

4 As would be the case, for example, in a maternity unit where a woman lacking capacity (i.e. called P before the Court of Protection) to take decisions as to her own medical treatment is imminently to give birth, where

*“It will commonly be the case that when at the acute hospital P:*

*i) will have obstetric and midwifery staff constantly present throughout her labour and delivery;*

*ii) will be under the continuous control of obstetric and midwifery staff who, because she lacks capacity to make decisions about her medical care, will take decisions on her behalf in her best interests” (NHS Trust v FG [2014] EWCOP 30.*

5 (1985) 7 EHRR 528.

6 (2012) 55 EHRR 22



leaves of absence were entirely at the discretion of the home's management, who kept his identity papers and administered his finances. When he did not return from a leave of absence, the home asked the police to search for and return him and he was returned to the home against his wishes. He was, in consequence, the Grand Chamber held, "*under constant supervision and was not free to leave the home whenever he wished,*"<sup>7</sup> and was therefore deprived of his liberty.

- 3.7 These two cases suggest that the ECtHR would take a relatively broad-brush approach to deciding whether supervision and control was sufficiently 'continuous' or 'complete' to satisfy this element of the test.
- 3.8 A pragmatic way of answering the question is to ask whether the person(s) or body responsible for the individual have a plan in place which means that they need always broadly to know:
  - 3.8.1 where the individual is; and
  - 3.8.2 what they are doing at any one time.
- 3.9 If the answer to both questions is 'yes,' then we suggest that this is a strong pointer that the individual is under continuous / complete supervision and control. This is particularly so if the plan sets out what the person(s) or body responsible for the individual will do in the event that they are not satisfied that they know where the individual is and what they are up to.
- 3.10 We also suggest that it is clear that the test for completeness / continuity will also be met without **every** decision being taken for the individual. In other words, the individual may well be able to take quite a number of decisions as to their own activities (for instance what they would like to have for breakfast) but still be subject to complete or continuous supervision and control if the individual is in an overall structure in which aspects of decision-making are being allowed to them at the discretion of those in control of their care.

#### **B: Continuous / complete supervision and control – what is supervision and control?**

- 3.11 What of 'supervision and control'? The terms are likely in due course to be the subject of further scrutiny by the courts. However, in our view, the ECtHR, if asked, would focus primarily on the fact that the arrangements have been made for an individual who lacks the capacity to consent to them. Even if these arrangements are conscientiously considered to be in their best interests, there is in all such situations a power imbalance between those providing the care and treatment and the person to whom it is being provided.
- 3.12 We suggest that caution must be exercised before concluding that arrangements amount to "mere" care, support or enablement rather than shading into supervision and control. MIG's case makes this clear, because she was provided with what was described as "*intensive support*" by a woman she regarded as her mother, and was not subject to overtly controlling measures. She was nonetheless held by the majority in the Supreme Court to be under continuous supervision and control.

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<sup>7</sup> *Stanev* at paragraph 128.

#### C: Freedom to leave

- 3.13 It is vitally important not to conflate “*freedom to leave*” with “*ability to leave*” or “*attempts to leave*.” Doing so would lead to the reduction in the universality of the right to liberty upon which the Supreme Court placed such emphasis. As Lord Kerr noted, liberty is “*predominantly an objective state. It does not depend on one’s disposition to exploit one’s freedom.*” Reflecting this, it was clear that P, MIG or MEG would not – of their own accord – attempt to leave, but all of them were found not to be free to leave.<sup>8</sup>
- 3.14 In this context the focus should be upon the actions (or potential actions) of those around the individual, rather than the individual themselves. In other words, the question may well be a hypothetical one – if the person manifested a desire to leave (or a family member properly interested in their care sought to assist them to leave), what would happen?
- 3.15 If the answer is that steps would be taken to enable them to leave, then that points in one direction; if the answer is that steps would be taken to prevent them leaving that points in the other. Crucially, it would not matter in this regard if the steps to prevent the person leaving were said to be in their best interests.
- 3.16 Approaching matters on that basis helps make clear that, for example, whether not there are locks or keypads on the doors is not the answer.<sup>9</sup> It is what would be done by the staff with the ability to unlock the door if the individual were to seek to open that door that is important. It also helps make clear that compliance or lack of objection is irrelevant to the question of whether a person is deprived of their liberty,<sup>10</sup> and hence does not lead to the understandable but incorrect approach that questions of deprivation of liberty are only raised when the individual is continuously resisting personal care, subject to hands-on restraint or attempting to leave.
- 3.17 One important question that arises here is whether freedom to leave is:
- 3.17.1 ‘Micro’ – i.e. the freedom to come and go from the premises in question temporarily; or
- 3.17.2 ‘Macro’ – i.e. freedom to move from those premises to another one on a permanent basis (or simply to leave those premises permanently, even if they do not have a clear destination<sup>11</sup>).
- 3.18 As at the point of preparing this guidance, the answer to this question is not absolutely clear. Some have suggested that the focus should solely be on the ‘macro’ question, and that questions of whether or not the individual is temporarily able to come and go from the place in question are essentially not relevant.<sup>12</sup> However, we suggest that this is doubtful:

8 In the case of *Rochdale MBC v KW* [2014] EWCOP 45, Mostyn J held that (in the context of a deprivation of liberty at home) a person who is not physically capable of leaving cannot be deprived of their liberty for the purposes of Article 5 ECHR. KW’s appeal against the decision was allowed by consent by the Court of Appeal in February 2015 (without any accompanying judgment; see also Mostyn J’s subsequent judgment [2015] EWCOP 13). We suggest that the decision is so clearly incompatible with the *Cheshire West* decision and with the Strasbourg case law that it should not be followed. We address this further below in Chapter 8.

9 Indeed, this is also clear from the Strasbourg case-law: see *HL* at paragraph 92.

10 Paragraph 50. Their compliance/lack of objection is very relevant to the question of whether the deprivation of liberty can be said to be in their best interests.

11 It is not necessary that a person has somewhere else to go for them to be deprived of their liberty: Mr Stanev had nowhere else to live (see paragraph 153 of the decision in his case).

12 In *Rochdale MBC v KW* [2014] EWCOP 45 Mostyn J held (at paragraph 20) that Lady Hale had in *Cheshire West* “*implicitly approved*” this earlier finding, and that this was the “*required sense*” of the second part of the acid test. The phrase quoted was the conclusion reached by Munby J (as he then was) in *JE v DE & Ors* [2006] EWHC 3459 (*Fam*) (at paragraph 115). However, as noted above, KW’s appeal was allowed by consent in February 2015.



- 3.18.1 In the speech given by Lady Hale referred to at paragraph 2.35 above and in the course of discussing the situations of P, MIG and MEG, she noted that:
- “they were under the complete control of the people looking after them and were certainly not free to go, either for a short time or to go and live somewhere else”* (emphasis added).
- 3.18.2 Even though Lady Hale was not speaking in a judicial capacity, this statement suggests that she does not consider that the majority of the court held that freedom to leave was only relevant in the ‘macro’ sense.
- 3.18.3 The Grand Chamber of the ECtHR placed considerable emphasis in *Stanev* on the fact that Mr Stanev was not able to leave the care home for such purposes as visiting the nearby village “*whenever he wished*” (i.e. not merely for purposes of permanent relocation) in finding that he was deprived of his liberty.<sup>13</sup>
- 3.19 Despite what has been said above, it may be that a higher court looking at the question of “freedom to leave” might conclude that the question of whether a person is able to come and go as they like may more naturally fall to be considered when dealing with the question of whether they are under continuous/complete supervision and control. However, it would be unlikely if no account were to be taken of such restrictions being imposed. Taking a step back, and applying Lady Hale’s approach from *Cheshire West*, it would appear clear that a person of unimpaired health and capacity who was prevented from being able to come and go as they see fit from a particular location would consider themselves to be deprived of an important right even if it was said that they would be able to relocate permanently whenever they wished. Indeed, it is not immediately obvious that there will be many situations in which a person will be prevented from coming and going as they wish but those in charge of the placement would be entirely happy for them simply to ‘up sticks’ and leave altogether.
- 3.20 Until and unless further clarification is given by the Court of Appeal (or Supreme Court), this guidance offers the following as a set of broad propositions:
- 3.20.1 If a person is not free to come and go as they wish (with or without help) from a placement or place of treatment save with the permission of the decision-makers around them, then this is, at a minimum, a pointer to the individual being subject to restrictions upon their liberty. This may – depending upon the other measures imposed upon them – amount to a deprivation of their liberty or it may be that they amount solely to a restriction upon their liberty and the body imposing the restrictions can rely upon the provisions of ss.5-6 MCA 2005;
- 3.20.2 A person will clearly not be ‘free to leave’ if they are able permanently to relocate from the place only with the permission of the person(s) or bodies responsible for their care and treatment; **and** if they do seek to leave that location permanently, and not to return, steps will be taken to locate and bring about their return if they do not do so of their own accord;

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<sup>13</sup> Paragraph 128.

3.20.3 Both aspects of the test set out immediately above will need to be satisfied. If the reality is that **no steps at all** would be taken in the event that the person simply walked out one afternoon from a care home announcing their intention to move elsewhere – or simply to leave permanently - and did not come back, then they would clearly be free to leave.

3.21 Four further broad points should be made here:

3.21.1 There may well be circumstances in which a person is not to free to leave one specific place at the times when they are there, but they are not otherwise subject to restrictions. An obvious example of such a situation is a person who is cared for at home, but then receives regular respite care at a facility, from which they are not allowed to leave, but are not otherwise under similar restrictions when they are at home. It would, in such circumstances, be logically possible for the person to be deprived of their liberty whilst at the facility but not deprived of their liberty whilst at home. However, it is possible to produce absurd results by over-analysing such situations. We suggest that the better approach in such a case is to have regard to the individual’s care plan and to identify whether – **taken as a whole** – it amounts to a plan in which their movements are sufficiently circumscribed and they are under a sufficient degree of supervision and control that it amounts to a deprivation of their liberty. We address the specific question of respite in Chapter 6 (and in relation to children, in Chapter 10);

3.21.2 If those who are making the decisions on the ground (especially if they are public bodies) would be content for the individual to live anywhere that they might be able to choose<sup>14</sup> other than one specific location, then this may indicate that they are not “free to leave” for the purposes of the acid test.<sup>15</sup> It will, in any event, give rise to significant issues in relation to their rights under Article 8 ECHR<sup>16</sup> and would probably require an application to the Court of Protection so as to ensure that the necessity and proportionality of the actions could be subject to proper judicial scrutiny;

3.21.3 We reiterate that it is not necessary that a person has somewhere else to go for them to be deprived of their liberty: this is clear from the decision of the Grand Chamber in Mr Stanev’s case: he had nowhere else to live (see paragraph 153 of the decision in his case) but this did not prevent him being held to be deprived of his liberty;

3.21.4 For the purposes of testing what steps professionals making decisions would take in the event that the person attempted to leave, it is appropriate to take into account that a person properly interested in their welfare<sup>17</sup> may request that they be allowed to leave. So, if a person is unable to express any wishes or feelings and would therefore be unable even to suggest leaving, it would be appropriate to consider what the decision makers would do if such a person (most obviously a family member) said that they wished to move them from the placement. Professionals should note [HL v United](#)

<sup>14</sup> I.e. the place that they chose is actually available.

<sup>15</sup> See *JE v DE & Ors* [2006] EWHC 3459 (Fam) at paragraphs 115-117. Surrey County Council would also have moved MIG to a different foster placement had she wished, but this did not prevent her from being held to be deprived of her liberty.

<sup>16</sup> See also in this regard the decision of Peter Jackson J in *Hillingdon LBC v Neary* [2011] EWHC 1377 (COP) and that of Baker J in *AJ (Deprivation of Liberty Safeguards)* [2015] EWCOP 5.

<sup>17</sup> We deliberately use this broad phrase, and intend it to encompass more than those who would have authority to take decisions regarding the individual’s care and residence under the MCA 2005 (i.e. attorneys under a health and welfare Lasting Power of Attorney or health and welfare deputies).

*Kingdom*, in which the European Court of Human Rights took note of the fact that Mr L would only be released from the hospital to his carers as and when those professionals considered it appropriate.<sup>18</sup> More broadly, taking this approach ensures that the proper distinction between “freedom to leave” and “ability to leave” is maintained in the case of those who are least able to exercise any freedom that would be afforded to those who did not have their level of disability.

#### D: Both elements of the acid test must be satisfied

3.22 Lady Hale in *Cheshire West* was clear that it was necessary that both elements of the acid test needed to be satisfied. The Official Solicitor (on behalf of P, MIG and MEG) had argued that supervision and control was relevant only as it demonstrated that the person was not free to leave. Lady Hale was not prepared to go so far, and held that:

*“A person might be under constant supervision and control but still be free to leave should he express the desire so to do. Conversely, it is possible to imagine situations in which a person is not free to leave but is not under such continuous supervision and control as to lead to the conclusion that he was deprived of his liberty.”*<sup>19</sup>

3.23 However, the second limb causes some difficulty in the case of a person who is locked in a room (or within a facility that is itself locked) but is not subject to continuous supervision and control. We suggest that this is not the situation that Lady Hale had in mind,<sup>20</sup> and it would be unwise to proceed on the basis that this kind of situation would not be capable of amounting to a deprivation of liberty. The situation that Lady Hale had in mind was much closer – we suggest – to the situation where a person is required to live in a particular place but is not subject to any additional controls upon them at that place.

3.24 Therefore, professionals should note that wherever a person is subject to a residence requirement imposed under the Mental Health Act 1983 (‘MHA 1983’),<sup>21</sup> it should not be assumed that such requirement will, itself, give rise to a deprivation of that person’s liberty. That is because: (1) it is strongly arguable that the power to impose such requirements do not, themselves, amount to power to prevent the person leaving; and (2) a requirement that a person does not leave a particular place does not, itself, amount to a deprivation of liberty unless the care and treatment package contains the necessary elements of supervision and control.<sup>22</sup>

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18 Paragraph 91.

19 Paragraph 49.

20 This is clear from the fact that Lady Hale then explained in the next sentence that the possibility of someone not being free to leave but not being subject to sufficient control and supervision as to be deprived of their liberty “*could be the explanation for the doubts expressed in [Haidn v Germany](#),”* (Application no 6587/04), where the court expressed “*serious doubts*” whether instructing the applicant to live in an old people’s home which he was not to leave without his custodian’s permission amounted to a deprivation rather than a restriction of liberty. It is clear that this was not a case relating to physical steps being taken to prevent a person leaving a place.

21 E.g. by a guardian.

22 See the decision of the Upper Tribunal in *NL v Hampshire County Council (Mental health: All)* [2014] UKUT 475 (AAC) at paragraphs 14-19. The Upper Tribunal held that, even if the power that could be exercised by the guardian could have the effect of meaning that Mr L was not free to leave the place where he was required to reside, he could not be considered to be deprived of his liberty because the requisite additional elements of continuous supervision and control were contained within the care plan. As the local authority was not imposing those elements of supervision and control upon Mr L, he was therefore not considered to be deprived of his liberty.

### E: Irrelevant factors

3.25 In *Cheshire West*, Lady Hale acceded to the suggestion of the National Autistic Society and Mind to indicate certain factors that would not be relevant to the assessment of whether a person is objectively deprived of their liberty. These are:

3.25.1 **The person's compliance or lack of objection;**

3.25.2 **The relative normality of the placement (whatever the comparison made); and**

3.25.3 **The reason or purpose behind a particular placement.**<sup>23</sup>

3.26 In relation to the first of these factors, something of a working presumption had been established prior to the *Cheshire West* decision that it was only necessary to consider questions of deprivation of liberty where the individual was non-compliant (or their family were agitating for their departure from the facility). Whilst, as noted below, staff must be on alert if the person is non-compliant, the converse was not, and never has been true. In other words, the mere fact that the person was sitting quietly in the corner of the care home and apparently acquiescing to the arrangements made for them never meant that they could not be deprived of their liberty. Indeed, the irrelevance of compliance had long been acknowledged by the ECtHR.<sup>24</sup> A focus not just on the individual but upon the nature of the arrangements in place around them can assist in avoiding this trap.

3.27 However, whilst compliance is irrelevant, non-compliance, or resistance, is highly relevant. In particular, where a person strongly resists the arrangements (for instance an individual in a hospital setting has to be forcibly restrained to prevent them from absconding), this is highly significant. If they strongly resist, then it is clear that the measures will have a greater effect upon them. Further, the greater the resistance, the more intensive the measures will be. The more intense the measures, the shorter the period of time before the imposition of those measures will stop being 'merely' a restriction upon the person's liberty and become a deprivation of it. See further in this regard paragraphs 3.33-3.40 below.

3.28 The second of these factors is self-explanatory, and makes clear that the decisions of the Court of Appeal in (then) MIG and MEG and in *Cheshire West* were incorrect. If there is to be any comparison drawn, it is not between the nature of the setting but between the arrangements made for the individual in question and those that would be applied to an individual of unimpaired health and capacity.<sup>25</sup> In other words, and recognising the potentially (if inadvertently) pejorative nature of this exercise, if such a person would consider the arrangements in place to amount to a deprivation of their liberty, they will amount to a deprivation of liberty even for a person who, because of their disabilities, is unable either to recognise it as such or take advantage of the liberty of which they are deprived.<sup>26</sup>

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<sup>23</sup> See paragraph 50.

<sup>24</sup> Mr L was compliant, and never tried to leave Bournemouth Hospital.

<sup>25</sup> See Lady Hale in the speech quoted at paragraph 2.34 above.

<sup>26</sup> See *Cheshire West* at paragraph 46.





#### F: Non-negligible period of time

- 3.29 As noted at paragraph 2.15, in order for a person to be deprived of their liberty for the purposes of Article 5 ECHR, it is clear from the ECtHR case law that they must be confined to a particular restricted place for a non-negligible period of time.<sup>27</sup> Exactly what will constitute a ‘non-negligible’ period of time appears from the case-law to vary according to the particular circumstances under consideration, including their nature and consequences.<sup>28</sup>
- 3.30 By way of two examples from English decisions (which consider ECtHR cases):
- 3.30.1 The total and “intense” restraint by police officers of a 16 year old with autism for a period of 40 minutes was held to amount to a deprivation of his liberty;<sup>29</sup>
- 3.30.2 By contrast, it was held that in the ‘ordinary case’ it would be unlikely that a person required to remain in the s.136 MHA 1983 suite of a hospital during the processing of an application for admission under the MHA 1983 would be deprived of their liberty even if they are required to remain there for up to 8 hours.<sup>30</sup>
- 3.31 In the absence of clear guidance from the courts as to the precise period of time that may constitute a non-negligible period, we suggest that it is open for individual public bodies to set down what they consider to be such a period for their own operational purposes where such may be necessary. An obvious example of this is in the hospital setting where a decision will have to be taken as to the length of time that – in general – a patient is in (say) an acute ward before they are considered to be deprived of their liberty. It would clearly make sense in such a setting for the relevant hospital Trust to have a policy as to the length of time considered to be ‘non-negligible’ for these purposes. That policy should allow for calibration to individual circumstances: in other words, to make clear that, the more intense the measures of control the person is subject to, and/or the more the person resents the control to which they are subject, the shorter the period of time that can be considered ‘non-negligible.’
- 3.32 Because the period will vary from setting to setting, we have deliberately avoided in this guidance giving a period of time that can be considered ‘safe.’ Our clear view is that it is unlikely under any of the circumstances considered in this guidance to extend beyond a few (2-3) days and is likely to be substantially less in settings in which particularly intense measures of control are imposed. We would **strongly** suggest that it is not safe to use the rule of thumb that some public bodies have adopted that a deprivation of liberty is unlikely to arise where a person is confined for less than 7 days. We understand that this may have been taken from a reading of certain paragraphs of the DOLS Code as to the circumstances under which it is appropriate to grant an urgent authorisation.<sup>31</sup> However, this is to conflate the question of **whether** there is a deprivation of liberty with the quite separate question of **how** such deprivation of liberty may be authorised.

27 *Cheshire West* at paragraph 20 citing *Stanev* at paragraph 117.

28 See, for instance, *Rantsev v Cyprus and Russia* (App. No. 25965/04) [2010] ECHR 22: “In all, the alleged detention lasted about two hours. Although of short duration, the Court emphasises the serious nature and consequences of the detention and recalls that where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion” (paragraph 317, emphasis added).

29 *ZH v Commissioner of the Police for the Metropolis* [2013] EWCA Civ 69 at paragraph 83.

30 *Sessay v South London & Maudsley NHS Foundation Trust & The Commissioner of Police for the Metropolis* [2011] EWHC 2617 (QB).

31 Most obviously paragraphs 6.3 and 6.4.

#### G: *Cheshire West*: a test of universal application?

3.33 It is clear that the Supreme Court was not expressly addressing the situation of all persons to whom the acid test might apply: for instance, those in hospices or intensive care units in hospitals.

3.34 Understandable concern has been expressed by many professionals and providers that applying the test in some of these contexts will lead to a diversion of clinical and social work professionals from their ‘real’ tasks in favour of the completion of DOLS paperwork that are perceived as serving no useful function for the protection of the rights of the individuals

concerned.<sup>32</sup> Further concern has been expressed that the application of the test (for instance in the context of those in the last days or hours of their lives) leads to undue distress on the part of families and others concerned with the care and treatment of the individual.

3.35 It is proper to acknowledge these concerns. It is also proper to acknowledge the strong concern that many front line professionals feel that, although the Law Commission has been asked to review deprivation of liberty in the health and social care context,<sup>33</sup> the Commission will not produce draft legislation until the summer of 2017, and there is – at present – no plans for any legislative amendments in the meantime.

3.36 However, these wider concerns are beyond the scope of this guidance which focuses upon the question of **when** a deprivation of liberty may arise. Professionals must be careful not to let their concerns as to the consequences of the application of the acid test drive how the test is interpreted. Unless it is possible to identify a legal basis upon which the test does not apply in a particular set of circumstances, we suggest that it is necessary to proceed on the basis that it does. Even if Lord Neuberger’s judgment in *Cheshire West* might be read as indicating that he considered that the test is not necessarily universal,<sup>34</sup> Lord Neuberger nonetheless indicated that it should be adopted “*unless there is good reason not to.*”<sup>35</sup>

3.37 This guidance highlights points at which it might properly be considered that there is good reason (founded upon the case-law) to suggest that the acid test might not apply. Indeed, we highlight points where we consider it is very likely that a judge, asked to decide whether a particular individual was deprived of their liberty, would be very sympathetic to arguments that they were not.

3.38 It is perhaps helpful to highlight one overarching factor. Lady Hale’s judgment can be read as suggesting that context is still a factor that may be of relevance – in line with the decision of the Grand Chamber in *Austin v United Kingdom*.<sup>36</sup> The judgment in *Austin* is a frustratingly

32 Especially where there is no realistic prospect that the necessary assessments can be completed so as to allow, e.g. for a DOLS authorisation to be granted in an Intensive Care Unit prior to the patient’s departure from that unit.

33 <http://lawcommission.justice.gov.uk/areas/capacity-and-detention.htm>. That review may give an opportunity to consider the philosophical objections to the test voiced by those who consider that the Supreme Court placed too much store on an abstract concept of physical liberty: see the judgment of Mostyn J in *Rochdale MBC v KW* [2014] EWCOP 45.

34 At paragraph 61, he held that “*at least in principle, the approach proposed by Lady Hale appears to me to be attractive, and should be adopted unless there is good reason not to do so.*” Whether this actually represents the view of the majority is questionable, given that Lord Sumption expressly agreed with Lady Hale, and Lord Kerr agreed with both Lady Hale and Lord Neuberger.

35 It is questionable whether Lord Neuberger was doing more than setting up his analysis of why the reasons advanced by Lords Carnwath and Hodge were **not** good reasons to adopt the approach. This point and that made in the footnote above will no doubt be the subject of legal argument in due course.

36 *Austin v United Kingdom* (2012) 55 EHRR 14. See paragraph 44 of the judgment in *Cheshire West* in particular, where Lady Hale expressly noted that it may be “*most helpful*” to consider how the question before the Supreme Court “*has been approached in the particular context, in this case the placement of mentally incapacitated people, whose lawful detention in any setting designed for their care is always potentially justifiable under article 5(1)(e)*” (emphasis added).



ambiguous one, but suggests that it remains properly open to those on the ground to consider the context in which the deprivation of liberty is said to arise. The further away that any particular circumstances are from those of P, MIG and MEG, the more that it might be said that the court could properly find grounds upon which to apply the objective element of the Article 5 test in a different fashion to that set down in *Cheshire West*. In other words, the more likely we consider it is that the courts will find principled reasons for saying that the ‘acid test’ does not apply in exactly the same fashion as it did to P, MIG and MEG.

- 3.39 We emphasise, however, that the matters set out above are ultimately legal questions upon which only a court is capable of deciding.
- 3.40 Finally, we reiterate that, until the courts have considered the questions set out above (as well as others that will no doubt emerge), it is important that we should not abandon attempts to identify the dividing line between a restriction upon freedom of movement and a deprivation of liberty.<sup>37</sup> Throughout the ‘setting-specific’ chapters of this guidance, therefore, we outline situations in which we consider it can be properly said that the individuals in question are not deprived of their liberty but ‘merely’ subject to restrictions upon their freedom of movement.

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<sup>37</sup> As Lady Hale noted in *Cheshire West*, the cases before the Supreme Court were “not about the distinction between a restriction on freedom of movement and the deprivation of liberty. P, MIG and MEG are, for perfectly understandable reasons, not free to go anywhere without permission and close supervision.” Paragraph 48.