



The Law Society

Identifying a deprivation of liberty: a practical guide

The law

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.

A: Introduction

- 2.1 This chapter will be of use to professionals who need to have a detailed understanding of the legal framework that governs deprivation of liberty. It is likely to contain more detail than is required for professionals who need to decide on a day to day basis whether those to whom they are delivering (or arranging) care and treatment are deprived of their liberty; such professionals are likely to find it more useful to go straight to Chapter 3 which specifically addresses the ‘acid test’ identified in *Cheshire West* and its application.
- 2.2 In this chapter, we outline, first, the central principles of Article 5 ECHR; then summarise the key elements of the *Cheshire West* decision; outline (briefly) the authorisation of deprivation of liberty and the consequences of **not** getting appropriate authorisation; address the somewhat different legal issues that arise in the case of ‘private’ deprivations of liberty; and, finally, conclude with a short note on the status of the Code of Practice accompanying Schedule A1 to the MCA 2005 (often called the ‘DOLS Code’¹).
- 2.3 Since its amendment by the Mental Health Act 2007², the MCA 2005 provides the primary vehicle through which the deprivation of liberty of those lacking capacity to consent to their care and treatment is authorised³. This is done primarily by the introduction of the Deprivation of Liberty Safeguards regime which is contained in Schedule A1 of the MCA 2005 as amended.⁴
- 2.4 At this juncture it is worth referring to ss.5-6 MCA 2005 with which professionals should be familiar. In almost every case, there will be a continuum from:
- 2.4.1 *‘routine’ decisions or interventions in an individual’s life to provide them with care and treatment.* These will be taken on the basis of a reasonable belief that the individual lacks capacity to take the material decision and that the professional is acting in the individual’s best interests: these can be carried out safe in the knowledge that the professional is protected from liability under s.5 MCA 2005;
- moving through to:*
- 2.4.2 *Interventions that constitute restraint.* Restraint does not merely mean the use of force, but can include the threat of the use of force or restriction of the individual’s liberty, whether or not they resist.⁵ By operation of s.6 MCA 2005, a professional restraining an individual will be protected from liability provided the restraint is proportionate to the risk of and likelihood of harm and is only used where the professional reasonably believes it to be necessary to prevent harm to the person;
- moving through to:*
- 2.4.3 *Interventions that go beyond ‘mere’ restraint to a deprivation of liberty.* The professional at that point cannot rely upon the provisions of ss.5-6 MCA 2005, but authority will be required from one of the sources identified at paragraph 2.41 below.

1 Available at http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/en/documents/digitalasset/dh_087309.pdf

2 To respond to the decision of the European Court of Human Rights in *HL v United Kingdom* (the ‘Bournewood case’) *HL v United Kingdom* (2004) 40 EHRR 761.

3 Save where that is for purposes of providing them with treatment for their mental disorder, in which case the Mental Health Act 1983 will be as – if not more – important.

4 Schedule 1A deals with the interface between the MCA DOLS regime and the Mental Health Act 1983.

5 Section 6(4) MCA 2005.

- 2.5 It is identifying precisely where the measures lie on the continuum that can sometimes prove so difficult. This difficulty is not helped by the fact that the MCA 2005 does not contain a detailed statutory definition of what constitutes a deprivation of liberty. Rather, it provides in s.64(5) that “[i]n this Act, references to deprivation of a person’s liberty have the same meaning as in Article 5(1) of the Human Rights Convention.” This means that when the courts are asked to decide whether a particular set of circumstances amounts to a deprivation of liberty, they have had to try to work out what the ECtHR – which has ultimate responsibility for interpreting the Convention - would say.
- 2.6 Authoritative guidance as to the broad approach to adopt has now been given by the Supreme Court in *P v Cheshire West and Chester Council; P & Q v Surrey County Council* [2014] UKSC 19, commonly known as ‘Cheshire West.’ As set out in more detail at paragraphs 2.23 to 2.38 below, the court decided that a person lacking the relevant capacity met the ‘acid test’ of being deprived of their liberty in any setting where they were under continuous (or complete) supervision and control and not free to leave.
- 2.7 This chapter concentrates on Article 5 ECHR because it underpins both Schedule A1 to the MCA 2005 and it creates the requirement for applications to be made to the Court of Protection for judicial authorisation of deprivations of liberty in settings outside care homes and hospitals.⁶
- 2.8 However, as outlined in Chapter 1, it is important to remember that determining the care and treatment arrangements for someone lacking capacity to consent to them may give rise to the need to consider other ECHR rights, most obviously the Article 8 right to respect for private and family life. It may also, in some circumstances, require attention to other legal issues such as criminal liability or liability for false imprisonment. This chapter does not, and cannot, contain a detailed discussion of all the legal issues that might arise; for more reading, see the resources in Chapter 11.

B: Article 5 ECHR

- 2.9 The most relevant parts of Article 5 ECHR are:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

- 2.10 Article 5 also carries with it an express procedural protection, set out in Article 5(4) which provides that:

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 and his release ordered if the detention is not lawful.”

⁶ I.e. in settings for which it is not possible to seek authorisation under Schedule A1 to the MCA 2005.

- 2.11 Alone amongst the provisions of the ECHR, Article 5 also provides a guarantee in Article 5(5) that those who have had their rights under this Article breached have an enforceable right to compensation. As discussed further at paragraph 2.46, this does not necessarily mean that they are entitled to money, but this guarantee emphasises the importance of the rights enshrined in Article 5.
- 2.12 As interpreted by the European Court of Human Rights and by the courts in this country, Article 5(1) has been identified as having three elements, all of which need to be satisfied before a particular set of circumstances will amount to a deprivation of liberty falling within the scope of the Article:
- 2.12.1 The **objective element**: i.e. that the person is confined to a particular restricted place for a non-negligible period of time;
- 2.12.2 The **subjective element**, i.e. that the person does not consent (or cannot, because they do not have the capacity to do so) to that confinement;
- 2.12.3 **State imputability**: i.e. that the deprivation of liberty can be said to be one for which the State is responsible.
- 2.13 Each of these will be examined briefly below, but it is always important to remember that there is a legal difference between a **restriction** upon a person's liberty and a **deprivation** of their liberty. Although the United Kingdom has not ratified Protocol 4 to the ECHR, which enshrines⁷ the right to liberty of movement and freedom to choose one's residence, the ECtHR has made reference to this Protocol on several occasions in seeking to highlight the distinction between restriction and deprivation,⁸ along with the points that:
- 2.13.1 The difference between deprivation of liberty and restrictions on liberty of movement is merely one of degree or intensity, and not one of nature or substance;⁹ and
- 2.13.2 Although the process of classification into whether it is a deprivation or a restriction will sometimes prove to be no easy task, in that some borderline cases are a matter of pure opinion, a decision¹⁰ has to be taken as to which side of the line the circumstances fall.¹¹

C: The objective element

- 2.14 In deciding whether someone has been deprived of their liberty, the ECtHR has decided that the starting point must be their concrete situation and account must be taken of a range of criteria such as the type, duration, effects and manner of implementation of the restrictive measure in question.¹²

7 In Article 2.

8 Perhaps the most relevant decision being [Stanev v Bulgaria](#) (2012) 55 EHRR 22 at paragraph 115. Lady Hale in *Cheshire West* set out the key propositions from *Stanev* at paragraphs 19-25.

9 [Cheshire West](#) at paragraph 20 citing *Stanev* at paragraph 115.

10 Ultimately by the ECtHR.

11 *Cheshire West* at paragraph 20 citing *Stanev* at paragraph 115.

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

- 2.15 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.¹³ Exactly what will constitute a ‘non-negligible’ period of time appears from the case-law to vary according to the particular circumstances under consideration. We discuss this in more detail at paragraphs 3.29-3.32.
- 2.16 The objective element (but not the time element) was considered in detail by the Supreme Court in the decision in *Cheshire West*, and is discussed further in Chapter 3 below.

D: The subjective element

- 2.17 Even if a person is objectively confined, their circumstances will not fall within the scope of Article 5 ECHR if they have validly consented to the confinement.¹⁴ A person can only give valid consent to being subject to circumstances amounting to a deprivation of their liberty if they have the mental capacity to do so.¹⁵
- 2.18 There have been very few decisions identifying what is required to have capacity to consent to what would otherwise be a deprivation of liberty. In *M v Ukraine*,¹⁶ a case concerning deprivation of liberty in a psychiatric facility, the ECtHR held that:
- “ 77. ... [T]he Court takes the view that a person’s consent to admission to a mental health facility for in-patient treatment can be regarded as valid for the purpose of the Convention only where there is sufficient and reliable evidence suggesting that the person’s mental ability to consent and comprehend the consequences thereof has been objectively established in the course of a fair and proper procedure and that all the necessary information concerning placement and intended treatment has been adequately provided to him.”¹⁷*
- 2.19 In the English (and Welsh) setting, in *A PCT v LDV & Ors*¹⁸ – a case concerning deprivation of liberty in a psychiatric hospital – Baker J held that:
- 2.19.1 The relevant question to ask is that set out in the “mental capacity requirement” in paragraph 15 of Schedule A1, i.e. “*whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given relevant care or treatment;*”¹⁹ and
- 2.19.2 The information relevant to that question goes beyond simply the information relating to the placement to include information about the care and treatment and, broadly, the nature of the restrictions that will amount to an objective deprivation of their liberty.²⁰

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

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

15 *Cheshire West* at paragraph 23 citing *Stanev* at paragraph 118 and, in turn, *HL v United Kingdom* (2004) 40 EHRR 761 at paragraph 90.

16 [2012] ECHR 732.

17 On the facts of the case, the Court held that there was no evidence suggesting that M’s “mental ability to consent was established, that the consequences of the consent were explained to her or that the relevant information on placement and treatment was provided to her,” such that she could not be said to have given valid and lawful consent to what was objectively a deprivation of her liberty.

18 [2013] EWHC 272 (Fam).

19 See paragraph 29.

20 See paragraphs 39 and 40 which set out a list of factors that amounted to a deprivation of liberty in LDV’s case.

- 2.20 We suggest that the same broad approach will apply in other settings, i.e. that the material information will include the outlines – even if not the minute detail – of the circumstances (in many cases, the contents of the care plan) which give rise to the deprivation of liberty. Most obviously, the information will include the circumstances establishing that the person is under continuous supervision and control and not free to leave (addressed further below).

E: Imputable to the State

- 2.21 The final requirement contained in Article 5 ECHR is that the deprivation of liberty must be imputable to the State. The ECtHR has held that this can arise in one of three ways,²¹ two of which are relevant for present purposes:²²
- 2.21.1 Direct involvement of public authorities in the individual’s detention, which will be the case in the majority of the scenarios discussed in this guidance;
- 2.21.2 By violating the state’s positive obligation under Article 5(1) to protect individuals against deprivation of their liberty carried out by private persons. This positive obligation is discussed further at paragraphs 2.50-2.58 below.

F: *Cheshire West*

- 2.22 In March 2014, the Supreme Court handed down a judgment holding that three individuals, ‘P’, ‘MIG’ and ‘MEG,’ were deprived of their liberty in three different settings.²³ This case is more commonly known as the “*Cheshire West*” judgment. The general principles established by the majority of the Supreme Court²⁴ are ones that are of wide application in both the social and healthcare settings. Those principles are discussed in this section, after the background to the decision is summarised.
- 2.23 One preliminary point should be made: no one at any stage suggested that the arrangements for each of P, MIG and MEG were not in their best interests. The question was solely whether the arrangements amounted to a deprivation of their liberty. This emphasises the extent to which there is a difference between the **neutral** question of whether a person is deprived of their liberty and the **evaluative** question of whether those arrangements are in their best interests.

Mr P

- 2.24 Mr P was an adult born with cerebral palsy and Down’s syndrome who required 24 hour care. Until he was 37 he lived with his mother but when her health deteriorated the local social services authority obtained orders from the Court of Protection that it was in P’s best interests to live in accommodation arranged by it. Since November 2009 he had lived in a staffed bungalow with two other residents near his mother’s home, in which there were normally two members of staff on duty during the day and one ‘waking’ member of staff overnight. Mr P required prompting and help with all activities of daily living, getting about, eating, personal hygiene and continence. He sometimes required intervention when he exhibited challenging

²¹ *Storck v Germany* (2006) 43 EHRR 6 at paragraph 89.

²² The third way that the ECtHR has held that a deprivation of liberty could be imputable to the State is where the courts have failed to interpret the law governing any claim for compensation for unlawful deprivation of liberty “in the spirit of Art. 5” (*Storck* at paragraph 89).

²³ Parts of this section draw (with permission) upon summaries produced by the 39 Essex Chambers Mental Capacity Law Newsletter editors, available at www.copcasesonline.com

²⁴ The lead judgment was given by Lady Hale, with whom Lord Sumption agreed. Lords Neuberger and Kerr expressly agreed with Lady Hale in their separate concurring judgments. Lords Carnwath and Hodge gave a joint dissenting judgment in the cases of P and Q.

behaviour (including attempting to eat his continence pads), but was not prescribed any tranquilising medication. He was unable to go anywhere or do anything without one to one support; such one to one support was provided at such a level (98 hours a week) as to enable him to leave the home frequently for activities and visits.

- 2.25 Baker J held²⁵ that these arrangements did deprive him of his liberty but that it was in P's best interests for them to continue. On the Council's appeal, the Court of Appeal substituted a declaration that the arrangements did not involve a deprivation of liberty, after comparing his circumstances with another person of the same age and disabilities as P.²⁶ The Official Solicitor appealed to the Supreme Court.

MIG (known also as 'P' before the Court of Appeal) and MEG (known as 'Q')

- 2.26 MIG was an 18 year old girl with a moderate to severe learning disability and problems with her sight and hearing, who required assistance crossing the road because she was unaware of danger, and who was living with a foster mother whom she regarded as 'Mummy.' Her foster mother provided her with intensive support in most aspects of daily living. She was not on any medication. She had never attempted to leave the home by herself and showed no wish to do so, but if she did, her foster mother would restrain her. She attended a further education college daily during term time and was taken on trips and holidays by her foster mother.
- 2.27 MIG's sister, MEG, was a 17 year old with mild learning disabilities living with three others in an NHS residential home for learning disabled adolescents with complex needs. She had occasional outbursts of challenging behaviour towards the other three residents and sometimes required physical restraint. She was prescribed (and administered) tranquilising medication to control her anxiety. She had one to one and sometimes two to one support. Continuous supervision and control was exercised so as to meet her care needs. She was accompanied by staff whenever she left. She attended the same further education college as her sister daily during term time, and had a full social life. She showed no wish to go out on her own, and so there was no need to prevent her from doing so.
- 2.28 When the care proceedings were transferred to the Court of Protection in 2009, Parker J held²⁷ that these living arrangements were in the sisters' best interests and did not amount to a deprivation of liberty. This finding was upheld by the Court of Appeal.²⁸ The Official Solicitor appealed to the Supreme Court.

The decision of the Supreme Court²⁹

- 2.29 The Supreme Court held (unanimously) that Mr P was deprived of his liberty, and (by a majority of 4 to 3) that P and Q were also deprived of their liberty. Despite the unanimity of the decision³⁰ in relation to Mr P, the Supreme Court justices were also divided 4 to 3 as to the governing questions of principle.

25 [\[2011\] EWHC 1330 \(COP\)](#).

26 [\[2011\] EWCA Civ 1257](#).

27 [\[2010\] EWHC 785 \(COP\)](#).

28 [\[2011\] EWCA Civ 190](#).

29 The decision is discussed in more detail in the [April 2014 edition](#) of the 39 Essex Chambers Mental Capacity Law Newsletter.

30 Although the minority made it clear that it was a 'marginal' case, which, had they been considering the question for themselves, they might have concluded differently: paragraph 103.



- 2.30 All the Supreme Court justices agreed that the ECtHR had never considered the precise combination of factors that arose in the context of the cases before them (and which prevail also in many cases involving the DOLS regime). The division between the minority and the majority was whether it was possible to distil a clear test from the principles in decided cases; the minority considered that it was not possible to derive a universal test, and that the approach had to be case-specific. Lady Hale, for the majority, held that there was an ‘acid test’ that could be applied, at least in the circumstances of the cases before them, namely to ask whether the individual in question was subject to continuous (or – elsewhere³¹ – complete) supervision and control and was not free to leave.³² In reaching this conclusion, Lady Hale cited the decision of the ECtHR in *HL v United Kingdom* in which these same phrases had been used.³³
- 2.31 The majority also held that irrelevant to the determination of whether a person is deprived of their liberty is: (1) the person’s compliance or lack of objection; (2) the relative normality of the placement (whatever the comparison made); and (3) the reason or purpose behind a particular placement.
- 2.32 It was uncontroversial before the Supreme Court that, in order for a deprivation of liberty to fall within the scope of Article 5(1) ECHR, it will also be necessary for the person not to have given valid consent to the arrangements, and that the deprivation of liberty must be imputable to the State. As Lady Hale noted in respect of the latter, the positive obligation identified in Article 5(1) to protect the liberty of those within its jurisdiction may make the State on occasions “*accountable even for arrangements which it has not itself made.*”³⁴
- 2.33 Lady Hale was also at pains to emphasise that the fact that the arrangements made for an individual who cannot consent to them may be the best that can be made for them is irrelevant in determining the question of whether they amount to a deprivation of their liberty: in other words “*a gilded cage is still a cage.*”³⁵
- 2.34 Speaking extra-judicially in a speech in October 2014, Lady Hale summarised the judgment of the Supreme Court thus:³⁶

“We all held that the man had been deprived of his liberty, but three members of the court held that the sisters had not been deprived of their liberty, while the majority held that they had. The acid test was whether they were under the complete control and supervision of the staff and not free to leave. Their situation had to be compared, not with the situation of someone with their disabilities, but with the situation of an ordinary, normal person of their age. This is because the right to liberty is the same for everyone. The whole point about human rights is their universal quality, based as they are upon the ringing declaration in article 1 of the Universal Declaration of Human Rights, that ‘All human beings are born free and equal in dignity and rights’.”

31 Paragraph 53.

32 Paragraphs 48-49.

33 At paragraph 49, citing [HL v United Kingdom](#) (2004) 40 EHRR 761 at paragraph 91.

34 Paragraph 26.

35 Paragraph 46.

36 “Psychiatry and the Law: An enduring interest for Lord Rodger”: The Lord Rodger Memorial Lecture 2014, available at <https://www.supremecourt.uk/docs/speech-141031.pdf>

2.35 This statement does not, of course, represent a judicially endorsed summary of the decision, but it does represent a useful insight into the reasoning of the majority. As Lady Hale recognised in the next paragraph in her lecture:

“The decision has alarming practical consequences. It means that a great many elderly and mentally disabled people, wherever they are living, must have the benefit of safeguards and reviews, to ensure that their living arrangements are indeed in their best interests.”

2.36 The practical consequences of the decision are outside the scope of this guidance, but it is important to note that in the lecture, as in the judgment itself,³⁷ that Lady Hale was concerned to emphasise that the **purpose** of the scrutiny is to ensure that the arrangements made for vulnerable individuals such as P, MIG and MEG are in their best interests.

2.37 It is important to note that the local authorities involved in the case could not appeal to the European Court of Human Rights. Until and unless either the Supreme Court holds that a deprivation of liberty in the context of Article 5(1)(e) ECHR means something different to that determined in *Cheshire West* or the European Court of Human Rights holds either expressly or implicitly that the Supreme Court was incorrect, the approach set down by the majority represents the current law of the land in England and Wales and must be respected by professionals and their legal advisers.³⁸

2.38 We address the elements of the ‘acid test’ in more detail in Chapter 3.

G: The need for authority to deprive a person of their liberty

2.39 If the three key elements of the Article 5(1) ‘trinity’ are met – i.e. the person is confined to a particular place for more than a non-negligible period of time, they cannot consent to that confinement, and the deprivation of liberty is imputable to the State – then it is necessary for authorisation to be obtained. The public body depriving the person of their liberty is otherwise acting unlawfully by virtue of s.6(1) Human Rights Act 1998, as they will be breaching their Article 5 ECHR rights.

2.40 It is beyond the scope of this guidance to outline the steps required to authorise the deprivation of liberty of a person unable to consent to the same.³⁹ In broad terms, the person will either have to be the subject of a DOLS authorisation issued under Schedule A1 to the MCA 2005 (if they are in a hospital or care home),⁴⁰ or detained under the Mental Health Act 1983,⁴¹ or made the subject of a court order (most usually the Court of Protection, but in some circumstances potentially an order of the High Court under the inherent jurisdiction). Reference should be made to the Code of Practice accompanying Schedule A1 to the MCA

³⁷ At paragraph 57.

³⁸ And, whilst not formally binding, is at a minimum highly influential in Scotland. Whilst this guidance does not purport to address the legal position in Scotland, we note the extensive reference to the decision in the Scottish Law Commission’s report on Adults with Incapacity (setting out a draft statutory scheme to be the functional equivalent of Schedule A1 to the MCA 2005, available at <http://www.scotlawcom.gov.uk/law-reform-projects/adults-with-incapacity/>).

³⁹ If the person can consent (i.e. they have the capacity to do so) but does not do so, then there may be circumstances under which a deprivation of liberty will be lawful – most obviously where the person can be the subject of compulsory detention (‘sectioning’) under the Mental Health Act 1983. We do not discuss these situations in this guidance.

⁴⁰ The process for doing so will differ whether the person is in England or in Wales because of the different arrangements made for supervisory bodies in the two areas.

⁴¹ Section 4B MCA 2005 also gives authority to deprive a person of their liberty if this is necessary to provide life-sustaining treatment or to prevent a serious deterioration in the person’s condition pending determining of an application relating to that person by the Court of Protection.



2005 (often called the ‘DOLS Code’⁴²), as well as the new Code of Practice accompanying the Mental Health Act 1983.⁴³ Where a person is deprived of their liberty other than in a care home or hospital and an order of the Court of Protection is required, reference should also be made to Practice Direction 10AA,⁴⁴ which provides more detail as to the steps that are required.⁴⁵

H: The effect of authorisation

- 2.41 It is important to understand that the grant of authority to deprive an individual of their liberty under the MCA 2005 (whether by way of a DOLS authorisation or an order of the Court of Protection) does not require the individual to be deprived of their liberty. In other words, it is not an order that the person must be detained. Rather, it means that a person or body can rely upon that authority to deprive the individual of their liberty secure in the knowledge that they are acting lawfully.
- 2.42 This means – for instance – that we consider that there is nothing wrong in having in place a standard authorisation to cover a regular deprivation of liberty in a respite placement⁴⁶ if the individual goes into that respite placement (say) for a week every month. It would not then be necessary for the managing authority of the respite placement to seek (and the relevant supervisory body to grant) a separate authorisation for each respite stay. As a matter of law, the authorisation would – in essence, cover those periods each month when the individual was a detained resident at the respite placement, and could be relied upon for those periods to provide authority to detain them (assuming that all the other conditions are met).
- 2.43 We should emphasise that we consider that this route⁴⁷ will be lawful only if the respite placement is a regular one because it would only be proper to construe the individual as being a ‘detained resident’ at the placement for purposes of paragraph 19(2) of Schedule A1⁴⁸ if there is such a degree of regularity.⁴⁹

I: Consequences of a failure to obtain an authorisation

- 2.44 As noted above, if a public body does not have authority to deprive an individual of their liberty, they will be acting unlawfully contrary to s.6 Human Rights Act 1998.⁵⁰ The individual in question will be entitled to a declaration that their rights have been breached. The question

42 Available at http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf

43 Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396918/Code_of_Practice.pdf: this will come into force in April 2015 subject to Parliamentary approval.

44 <http://www.judiciary.gov.uk/publications/10aa-deprivation-of-liberty/>

45 Following the decision of the President of the Court of Protection in *Re X & Ors (Deprivation of Liberty)* (Nos 1 and 2) [2014] EWCOP 25 and [2014] EWCOP 37. Note that the judgment of the Court of Appeal in appeals made against these decisions was awaited at the time of writing this guidance.

46 If it is a hospital or care home falling within the scope of Schedule A1.

47 Which we accept is not provided for expressly in either Schedule A1 or the DOLS Code, but which we consider is not inconsistent with either (and, most importantly, Schedule A1).

48 I.e. the first condition that must be satisfied for them to meet the best interests requirement under Schedule A1.

49 There is also a question mark as to whether it is necessary that the person be present at the placement at least once every 28 days, or whether the requirement in paragraph 24(2) of Schedule A1 that the person is ‘likely – at some time within the next 28 days – to be a detained resident’ only applies in relation to the initial deprivation of liberty. In the absence of any case-law, we consider that it is legitimate to take the view that the requirement only applies to the initial deprivation of liberty, such that an authorisation can be granted even in the case of more infrequent (but still regular) periods of respite.

50 They may also be liable to a claim for false imprisonment: in other words, a claim at common law that they imprisoned the individual without lawful authority to justify such imprisonment. In practice, claims in this context are usually brought on the basis of the Human Rights Act 1998, in part because the legal framework relating to such claims is rather more straightforward.



that is often asked, however, is whether they will be entitled to more – and, in particular, whether they will be entitled to financial compensation.

2.45 The question of when damages are payable for breaches of rights under Article 5 ECHR is a complicated one that lies outside the scope of this guidance to discuss in detail. However, we think it important to highlight the – limited – number of cases in which judges have considered damages awards in the Court of Protection:⁵¹

2.45.1 In *London Borough of Hillingdon v Neary*⁵², a period of a year’s detention resulted in an award of £35,000 (no judgment being made public to accompany the consent order approved by the High Court);

2.45.2 In *A Local Authority v Mr and Mrs D*,⁵³ District Judge Mainwaring-Taylor approved an award of £15,000 (plus costs) to Mrs D for a period of 4 months unlawful detention (together with £12,500 to her husband and his costs). In *Mr and Mrs D*, District Judge Mainwaring-Taylor had noted that this was towards the lower end of the range if the award in the Neary case was taken as the bench mark;

2.45.3 In *Essex County Council v RF*,⁵⁴ District Judge Mort noted the important difference between ‘procedural’ breaches, where the authority’s failure to secure authorisation for the deprivation of liberty or provide a review of the detention would have made no difference to P’s living or care arrangements and ‘substantive’ breaches occur where P would not have been detained if the authority had acted lawfully. As the judge noted, such breaches have more serious consequences for P. He further noted that two decisions above suggested that the level of damages for the substantive breaches of the right to liberty is between £3000 and £4000 per month. In the case before him, the judge was clear that the Council’s practice was substandard – indeed that their conduct had been reprehensible, with “*very sad and disturbing consequences for P.*” The judge ultimately approved an award of £60,000 to reflect the unlawful deprivation of RF’s liberty in a care home for a period of approximately 13 months.⁵⁵

2.46 By contrast, in *A County Council v MB, JB and a Residential Home*,⁵⁶ Charles J granted a declaration that a woman had been unlawfully deprived of her liberty at a care home from 29 March 2010 to 13 April 2010, but made no award of damages, noting – in his view correctly – that no such award had been sought. It is clear from the judgment in that case that this was a case where the breach was ‘procedural’ rather than ‘substantive,’ and indeed that the local authority had made attempts to ensure that the appropriate authorisation was obtained, albeit unsuccessful.

51 It is perhaps important to note that none of these decisions actually stand formally as a precedent, the first because it was a consent order with no accompanying judgment, and the second and third because they are decisions of District Judges. They nonetheless stand as a useful guide to the approach that may be adopted.

52 [2011] EWCOP 1377.

53 [2013] EWCOP B34.

54 [2015] EWCOP 1.

55 The other elements of the compromise agreement he approved included: a declaration that the Council unlawfully deprived P of his liberty for period of approximately 13 months; the Council would waive any fees payable by P to the care home in which he was detained for the period of his detention (a sum of between £23,000 and £25,000); the Council to exclude P’s damages award from means testing in relation to P being required to pay a contribution to his community care costs; the payment of all P’s costs, to be assessed on the standard basis.

56 [2010] EWHC 2508 (COP).



- 2.47 The distinction between ‘procedural’ and ‘substantive’ breaches has also been highlighted – in the context of detention under the Mental Health Act 1983 – by the decision of the Court of Appeal in *Bostridge v Oxleas Foundation NHS Trust*,⁵⁷ in which the Court of Appeal held that a person unlawfully deprived of their liberty cannot claim any more than nominal damages (usually £1) if they have suffered no loss in consequence.⁵⁸ In other words, if the public body could show⁵⁹ that they would have been detained in any event if they had followed the correct procedures (there, those provided for under the Mental Health Act 1983), the claimant could not claim more than nominal damages. We suggest that a similar approach is likely to be followed in cases involving unlawful deprivation of liberty in the context of the MCA 2005.
- 2.48 The cases discussed above therefore suggest that the courts will take a very different view as to whether damages should be awarded depending on whether:
- 2.48.1 The public authority in question has sought to comply with its statutory obligations and – above all – properly to direct themselves by reference to the best interests of the individual, in which case there is a good argument that only declarations and nominal damages should be awarded;
- 2.48.2 The public authority has in its actions fallen below the standards expected of it, especially where it has failed to have appropriate regard to the impact of its actions upon the individual’s best interests. It is clear in this latter regard that the courts are increasingly unwilling to accept ignorance of the MCA 2005 as an excuse given that the length of time since the Act came into force.
- 2.49 It should, finally, be noted that a failure to obtain an authorisation may expose the relevant body not only to a claim before the courts but also to sanction from regulators⁶⁰ and/or the relevant Ombudsman.⁶¹ Regulatory sanctions will be much more likely to be imposed where the failures are systemic.

J: ‘Private’ deprivations of liberty and the positive obligation under Article 5(1) ECHR

- 2.50 As noted at paragraph 2.39 above, a deprivation of liberty only falls within the scope of Article 5(1) ECHR if it is ‘imputable’ to the State.
- 2.51 There has been a level of concern expressed following the *Cheshire West* judgment as to the extent to which the ‘acid test’ applies to ‘private’ deprivations of liberty – i.e. circumstances under which an individual lacking the relevant capacity is subject to continuous (or complete) supervision and control by a private individual (or body), they are not free to leave, but the arrangements are not made by the State.

57 [2015] EWCA Civ 79.

58 The case was also framed by reference to the common law tort of false imprisonment, but the Court of Appeal appeared to approach the question on the basis that the approach to the assessment of damages was identical.

59 It is for the public body to show this on the balance of probabilities: see, by analogy *R(EO & Ors) v SSHD* [2013] EWHC 1236 (Admin) at paragraph 74.

60 The CQC now includes compliance with the MCA 2005 – including (where relevant) with provisions relating to deprivation of liberty – as one of its Key Lines of Enquiry; details of enforcement actions taken for failures to comply with the requirements of Schedule A1 in 2013/4 are discussed in its most recent report upon DOLS, available at <http://www.cqc.org.uk/content/deprivation-liberty-safeguards-201314>

61 See for a recent example, the investigation of the Local Government Ombudsman into the case of Mr N, available at <http://www.lgo.org.uk/downloads/CO%20Adult%20social%20care/2014-2015/2111-13-016-935-Cambridgeshire-CC-20.1.2015.pdf>, in which the Ombudsman was, in particular, critical of the failure of Cambridgeshire County Council properly to consider the question of Mr N’s capacity and where his best interests lay in the decision-making process leading to his placement at a care home in circumstances that – it is clear – undoubtedly amounted to a deprivation of liberty but where no lawful authority was obtained.



- 2.52 As a starting point, we note that, whilst, strictly, those who are ‘self-funding’ in private care homes and hospitals (i.e. who have had arrangements made for them by family members and who are not reliant on State funding to pay for those arrangements) are outside the scope of Article 5(1) ECHR, they are to be treated **as if** they were within its scope, such that managing authorities of such institutions are required to apply for authorisations if they meet the acid test. The precise rationale for this is not explained in the DOLS Code⁶² but we would suggest that it is because private care home and hospitals are institutions regulated by the State. As such, any notionally ‘private’ deprivations of liberty taking place in such institutions are – or should – be ones of which the State is aware. This, in turn, triggers the State’s positive obligations to secure the Article 5 ECHR rights of the individuals concerned, which are discharged by operation of the authorisation procedure under Schedule A1.
- 2.53 Further, there will be many circumstances in which the person is cared for in their own home (or in some other living arrangement), where they are predominantly cared for privately, but where there is some State involvement. That State involvement can vary from – for instance – the payment of direct payments to an appropriate person on the individual’s behalf for the purposes of arranging their care down to much more limited involvement, such as visits by a nurse on a monthly basis. The precise point on this spectrum at which the arrangements will cease to be the direct responsibility of the State and be a matter for which private individuals are responsible (and hence which trigger the positive, rather than negative obligations of the State bodies concerned) is something that has yet to be decided by the courts. It will tentatively be discussed in the different settings in which it arises in the relevant chapters below.
- 2.54 Where a deprivation of liberty can truly be said to arise out of arrangements that the State has had no part in making, the obligation on the State bodies is to take measures “*providing effective protection*” of the individual.⁶³ In *Re A and Re C*⁶⁴ Munby LJ held that:

“Where the State – here, a local authority – knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of liberty, then its positive obligations under Article 5 will be triggered.

- i *These will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty. In this context the local authority will need to consider all the factors relevant to the objective and subjective elements [of the test for deprivation of liberty discussed above];*
- ii *If, having carried out its investigation, the local authority is satisfied that the objective element is not present, so there is no deprivation of liberty, the local authority will have discharged its immediate obligations. However, its positive obligations may in an appropriate case require the local authority to continue to monitor the situation in the event that circumstances should change.*

62 Self-funders are – surprisingly – touched on only in passing in the DOLS Code at paragraph 5.23. That private care homes and hospitals fall within the scope of Schedule A1 is also supported by the confirmation in s.64(6) MCA 2005 that it does not matter for purposes of references to deprivation of liberty in the Act whether the person is deprived of his liberty by a public authority or not.

63 *Stanev* at paragraph 120.

64 [2010] EWHC 978 (Fam), at paragraph 95.



- iii *If, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation, both under Article 5 alone and taken together with Article 14, to take reasonable and proportionate measures to bring that state of affairs to an end. What is reasonable and proportionate in the circumstances will, of course, depend upon the context, but it might for example, Mr Bowen suggests, require the local authority to exercise its statutory powers and duties so as to provide support services for the carers that will enable inappropriate restrictions to be ended, or at least minimised.*
- iv *If, however, there are no reasonable measures that the local authority can take to bring the deprivation of liberty to an end, or if the measures it proposes are objected to by the individual or his family, then it may be necessary for the local authority to seek the assistance of the court in determining whether there is, in fact, a deprivation of liberty and, if there is, obtaining authorisation for its continuance.”*

- 2.55 It is likely that the precise scope of the obligations on local authorities (and/or NHS bodies) who are – or should be – aware of ‘private’ deprivations of liberty will be the subject of further judicial scrutiny in due course, not least as certain of the Strasbourg cases on the subject have never been the subject of consideration by the English courts.⁶⁵
- 2.56 It is perhaps important also to note that a private individual who is depriving an incapacitated individual of their liberty in a purely private setting may also, depending upon the context, be liable for false imprisonment. This is a common law tort (i.e. ‘wrong’), the key elements of which are that the individual is imprisoned, and the person or body doing the imprisoning does not have authority to justify that imprisonment. A person who has been falsely imprisoned can seek damages from the responsible person or body. They do not need to show that they have suffered loss or damage (such as any form of injury) to be able to sue for damages, but if they cannot show that they have suffered any loss or damage they will not be entitled to more than nominal damages.⁶⁶ False imprisonment is also a common law criminal offence involving the unlawful and intentional or reckless detention of the victim.⁶⁷
- 2.57 The interaction between false imprisonment and unlawful deprivation of liberty contrary to Article 5 ECHR is not straightforward,⁶⁸ in particular because issues arise as to whether the person/body doing the detaining can rely upon the defence of necessity to defend themselves against a claim or charge of false imprisonment (in a way that cannot be done in relation to a claim brought under Article 5 ECHR⁶⁹). These are matters that lie outside the scope of this guidance.

65 Most obviously *Riera Blume v Spain* (2000) 32 EHRR 632 and *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 and *Rantsev v Cyprus and Russia*, as well as the more recent admissibility decision in *Chosta v Ukraine* (Application no. 35807/05, decision of 14 January 2014).

66 See most recently *Bostridge v Oxleas Foundation NHS Trust* [2015] EWCA Civ 79.

67 For a review of the complicated law in this area, see the Law Commission’s project on simplification of the law relating to kidnapping and related offences: <http://lawcommission.justice.gov.uk/areas/kidnapping.htm>

68 And a breach of Article 5 ECHR does not necessarily involve false imprisonment: see *Zenati v (1) Cmr of the Police for the Metropolis; (2) CPS* [2015] EWCA 80 at paragraphs 49-55.

69 This was the clear conclusion of the ECtHR in the *Bournewood* case, but the same court did not have to decide whether necessity could still play any part in relation to the common law.

2.58 It should, finally, be noted that, depending upon the circumstances, a private individual depriving an incapacitated individual in a purely private setting may also potentially be guilty of an offence under s.44 MCA 2005 if the conditions under which the individual was kept amount to ill-treatment or wilful neglect by the person doing the detaining if they had care of them, or were an attorney under a lasting or enduring power of attorney or a court appointed deputy.

K: The DOLS Code

2.59 The DOLS Code is a statutory one, to which all professionals providing care and treatment to individuals lacking capacity must have regard.⁷⁰ The Code itself provides that it must be read subject to subsequent legal developments⁷¹ so it is absolutely clear that Chapter 2 – entitled “*What is deprivation of liberty?*” – must now be read subject to the judgments of the courts handed down since it was written in 2008.

2.60 This means that care must be taken when considering the factors outlined at paragraph 2.5 of the DOLS Code as potentially identifying whether steps taken involve more than restraint and amount to a deprivation of liberty. The factors identified there may well be valuable in indicating whether a particular person is under continuous (or complete) supervision and control and not free to leave, but they go no further than that. In particular, we would advise caution before a conclusion is drawn solely from the basis that a person’s contact with others is restricted that they are deprived of their liberty. Imposing restrictions on contact with others is a significant interference with rights under Article 8 ECHR, but we suggest that they do not, in and of themselves, necessarily give rise to issues under Article 5 ECHR. It is further also extremely important to note that the DOLS regime (and also the procedure for judicial authorisation of deprivation of liberty) cannot be used to authorise restrictions on contact: if such are sought in the best interests of the individual concerned, it is likely that an application to the Court of Protection will be necessary.

2.61 We should emphasise that this guidance does not – and cannot – in any way intend to replace the DOLS Code insofar as it relates to the steps that must be taken if a person is deprived of their liberty.

⁷⁰ Section 42(4) MCA 2005.

⁷¹ Chapter 2, introduction.