

DEPRIVATION OF LIBERTY - THE LEGAL CONTEXT

European Convention on Human Rights (ECHR)

Article 5 ECHR States: Everyone has the right to liberty and security of person

The right to liberty has limits and a person can be deprived of their liberty lawfully in various circumstances. For a person to successfully claim, under Article 5, that they have been deprived of their liberty, three elements must be present.

The objective element

The person is confined in a particular place for an extended (not negligible) period of time. In ECHR case law, this is often referred to as the *concrete situation*.

The subjective element

No consent. Either because the person has not consented to, or lacks the mental capacity to consent to the restrictions placed on them.

The state element

The deprivation of liberty is the responsibility of the state (NHS, local authority, CCG etc) either directly (they did it) or indirectly (they know/ought to know about it).

Guzzardi Assessment

Taken from the case of *Guzzardi v Italy [1980] 3 EHRR* this is a standardised method to assess the objective element. The concrete situation (care plan) of the person is evaluated and the various restrictions are identified. Each type of restriction is considered including how long it lasts, its effect on the person, the way it's imposed on the person and the degree or intensity of the restriction. The cumulative effect of all the restrictions should also be considered.

Supreme Court judgment: *Cheshire West & the Acid Test*

Having analysed the restrictions in the care plan using the Guzzardi assessment, the next question is whether the person is subject to:

'complete supervision and control and is not free to leave'
Sometimes this is known as the acid test.

The deprivation of liberty must be authorised

If the answer to the above is YES, the person is under *'complete supervision and control and not free to leave'* (and they haven't consented to this) they are deprived of their liberty. This must now be authorised.

There are a number of options in the field of health & social care:

- 1. The Mental Health Act 1983** – person on a mental health ward for treatment of their mental disorder
- 2. DoLS** – person aged 18 or over in a care home or hospital
- 3. Court of Protection** – person aged 16 plus in any location

Note: The Children Act can also be applied and less commonly, the High Court can independently authorise a deprivation of liberty by giving a court order under its inherent jurisdiction. In addition, there are rules relating to infectious and contagious diseases such as the Coronavirus Act 2020.