



The Law Society

Identifying a deprivation of liberty: a practical guide

Under 18s

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

- 9.1 In this chapter, the term “child” is used to refer to someone under the age of 16. A “young person” refers to a 16 or 17 year old. “Adult” refers to a person aged 18 or over. We do not venture into the circumstances in which those under 16 might be deprived of liberty: the focus on this chapter is exclusively on young persons. This is **not** because Article 5 ECHR is irrelevant to children; far from it. Indeed, as at the time this guidance is produced (March 2015), we understand there will be case law forthcoming that specifically addresses the impact of the Supreme Court’s decision for those **under 16**.¹ Rather, it is because the jurisdiction of the Court of Protection to authorise deprivation of liberty is available only from the age of 16. For the same reason, this chapter only addresses the relevance of Article 5 ECHR to young persons who **lack** capacity to decide where to reside in order to receive care and treatment.
- 9.2 Care and support is provided to young persons in a very broad range of living arrangements. These include (but are not limited to) the family home, foster homes, adoptive homes, children’s homes (secure, non-secure, and certain special schools), care homes, residential special schools, boarding schools, further education colleges with residential accommodation, and hospitals. Many of these care settings are considered in separate chapters to which reference should be made. Thus, where there is an issue regarding deprivation of liberty occurring in the family home, private fostering² home, or adoptive home, reference should be made to Chapter 8. This is because parental responsibility rests solely with the parent(s) rather than the State and so is analogous to the family home. For respite in care homes, please see the appendix to Chapter 6; for hospitals, Chapters 4-5; and supported living (available from the age of 16) is considered in Chapter 7.
- 9.3 When considering those other chapters please bear in mind the following important provisos. First, the acid test for “deprivation of liberty” appears to be more nuanced for those under 18 (as explained below). So what may constitute a deprivation of liberty of an adult may not necessarily be so for a young person. The relevant extracts of the Supreme Court’s judgment that are unique to those under 18 are set out below to complement Chapter 2. Second, where a young person’s inability to consent to their care arrangements results from immaturity, rather than impaired mental functioning, the MCA 2005 is not applicable. So recourse may be needed to alternatives, such as parental responsibility, the family courts or the inherent jurisdiction of the High Court.³ Finally, a whole raft of legislation, statutory guidance and minimum standards apply to those under 18 and may bear upon the young person’s deprivation of liberty.
- 9.4 This chapter is necessarily modest given the dearth of analogous case law and focuses on those care settings relating to 16 and 17 year olds which are most likely to raise potential deprivation of liberty issues. They are foster homes (in the absence of a residence order), children’s homes, and residential educational establishments.⁴ Neither DOLS nor the MHA

1 See Chapter 11 for details of how to stay abreast of developments.

2 Private fostering is governed by Part 9 of, and Schedule 8 to, the Children Act 1989, and the associated Children (Private Arrangements for Fostering) Regulations 2005. See also the ‘Replacement Children Act 1989 guidance on Private Fostering: Every Child Matters’ (2005). Whilst a private foster carer becomes responsible for providing the day-to-day care, the overarching responsibility for safeguarding and promoting the child (under 16, or 18 if disabled) remains with those with parental responsibility. Although they do not formally approve or register private foster carers, local authorities are duty bound to satisfy themselves that the welfare of privately fostered children within their area is satisfactorily safeguarded and promoted.

3 For guidance on the relevant provisions of the Children Act 1989, see generally Department of Education, ‘Court orders and pre-proceedings: For local authorities’ (2014).

4 Other forms of deprivation of liberty, for example under s.23 Children and Young Persons Act 1969 and secure accommodation orders under s.25 Children Act 1989, fall outside the scope of this chapter.

1983 are available to authorise deprivations of liberty here, so judicial authorisation will be required. The Court of Protection can authorise the deprivation of liberty of young persons lacking the relevant mental capacity: [Barnsley MBC v GS & Ors](#).⁵ The inherent jurisdiction of the High Court is also available, regardless of the person's age.⁶ The chapter is therefore divided into the following areas:

- Parental responsibility and the nuanced acid test
- Universal constraints
- Liberty-restricting measures
- Foster homes
- Children's homes (non-secure)
- Educational establishments (residential special schools, further education colleges)
- Considerations for front-line practitioners

B: Parental responsibility and the nuanced acid test

9.5 In [RK v BCC, YB and AK](#)⁷ it was decided that “[d]etention engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the detention of a child.” Although cited to the Supreme Court in the *Cheshire West* case, this decision was not referred to in any of the judgments. However, in our opinion, the principle remains good law. It follows that if a young person is deprived of their liberty, the consent of those with parental responsibility cannot be relied upon to authorise it: the decision falls outside the scope of parental responsibility. Logically this would apply as equally to local authorities sharing parental responsibility under a care order as it does to parents.

9.6 One of the individuals before the Supreme Court was 17 years of age and some of the judges considered the application of Article 5 to children and young persons. Our impression is that the test for deprivation of liberty is more nuanced when it comes to this age group because children and young persons are compared with those of the same age and maturity. This tends to reflect aspects of the European jurisprudence as identified in *Nielsen v Denmark*:⁸

*“61. It should be observed at the outset that family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorise others to impose, various **restrictions** on the child's liberty. Thus the children in a school or other educational or recreational institution must abide by certain rules which limit their freedom of movement and their liberty in other respects. Likewise a child may have to be hospitalised for medical treatment. Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised*

⁵ [\[2014\] EW COP 46](#), paragraphs 23-24. See also regulation 20(3) of the Children's Homes (England) Regulations 2015 which confirms that the Regulations “do not prevent a child from being deprived of liberty where that deprivation is authorised in accordance with a court order”.

⁶ With regard to those under 18, see also *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180.

⁷ [\[2011\] EWCA Civ 1305](#) at paragraph 14.

⁸ See also [M and RT and F v Austria](#) (Application no. 14013/88) and [Canepa v Italy](#) (Application no. 43572/98).



and protected by the Convention, in particular by Article 8. Indeed the exercise of parental rights constitutes a fundamental element of family life.” (emphasis added)

9.7 With regard to the situation of MIG and MEG, Lady Hale held at paragraph 54:

“If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty. Furthermore, that deprivation is the responsibility of the state. Similar constraints would not necessarily amount to a deprivation of liberty for the purpose of article 5 if imposed by parents in the exercise of their ordinary parental responsibilities and outside the legal framework governing state intervention in the lives of children or people who lack the capacity to make their own decisions.”

9.8 The other critical paragraphs applicable to those aged under 18 are:

“72 In the case of children living at home, what might otherwise be a deprivation of liberty would normally not give rise to an infringement of article 5 because it will have been imposed not by the state, but by virtue of what the Strasbourg court has called “the rights of the holder of parental authority”, which are extensive albeit that they “cannot be unlimited” (see Nielsen v Denmark (1988) 11 EHRR 175, para 72, a decision which, at least on its facts, is controversial, as evidenced by the strength of the dissenting opinions). However, it is fair to say that, while this point would apply to adoptive parents, I doubt that it would include foster parents (unless, perhaps, they had the benefit of a residence order). But in the great majority of cases of people other than young children living in ordinary domestic circumstances, the degree of supervision and control and the freedom to leave would take the situation out of article 5.4. And, where article 5.4 did apply, no doubt the benignly intimate circumstances of a domestic home would frequently help to render any deprivation of liberty easier to justify.⁹

77 The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.

78 All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, ***constraints beyond those which apply to young people of full ability are and have to be applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is and must remain a constant feature of their lives, the restriction amounts to a deprivation of liberty.***

9 Lord Neuberger.



*79 Very young children, of course, because of their youth and dependence on others, have an objectively ascertainable curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. **It is because they can and must now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.**¹⁰ (emphasis added)*

- 9.9 It appears to follow that for young persons, the acid test should be considered in the context of the liberty-restricting measures that are universally applied to those of the same age and maturity who are free from disability. As a general rule, the younger the person is, the greater the level of constraint to which they would typically be subject. A 5 year old, for example, regardless of their disability, would be under continuous or complete supervision and control wherever they are and not free to leave. The fact that they are under such control, whether in the care of their family or the State, does not mean they are deprived of liberty. However, if the level of constraint typically afforded to a non-disabled 5 year old is provided to a disabled 16 year old, then those constraints must be taken into account in determining whether the acid test is satisfied.
- 9.10 In deciding whether someone aged 16 or 17 is deprived of their liberty, in addition to the content discussed in Chapters 2 and 3, it is therefore necessary to consider the extent to which the care arrangements differ to those typically made for someone of the same age and relative maturity who is free from disability. Universal disability-free measures constraining the liberty of all those of that age and maturity who are not physically or mentally disabled should not be taken into account. We also note that the duration of the constraints were a key feature, at least for one of the judges.

C: Universal constraints

- 9.11 It is not altogether easy to gauge what amounts to a universal degree of age-appropriate constraint in a multicultural society. What level of constraint is universally applied to all non-disabled 16 year olds, for example? Moreover, it is important to bear in mind the importance of Article 8 in this context because the exercise of parental rights constitutes a fundamental element of family life. So what follows are merely general comments to provide some context to illustrate the universal constraints required of all young persons by those with parental responsibility.¹¹ Crucially, what is clear is that, as young people approach adulthood, the intensity or degree of such constraint is expected to lessen as they mature and gain independence.
- 9.12 The living arrangements for young persons should provide a positive, supportive and caring environment. Their welfare must be safeguarded and promoted. But, equally, they must have the physical and emotional freedom to develop and make, and learn from, their own mistakes. Strategies for coping with challenges and stress factors need to be nurtured. How to approach

¹⁰ Lord Kerr.

¹¹ For those cared for in children's homes, see Department of Education, '[Guide to the Children's Homes Regulations including the quality standards](#)' (2015).

relationships with learning and respect for others needs to be taught. Privacy and dignity must be respected. Responsible parenting, whether in the care of the family or of the State, is therefore a social norm for those under 18.

- 9.13 Responsible parenting provides a homely environment with a certain degree of freedom exercisable alongside sensible precautions. It protects against avoidable risks but avoids excessive caution. It meets the person's needs, especially their disabled needs, and reasonable preferences for clothing, footwear, personal necessities, and perhaps an age appropriate personal allowance. It facilitates religious observance if the individual belongs to a religious persuasion. Subject to restrictions necessary to safeguard and promote welfare, responsible parenting promotes contact with family and friends, and provides access to the world outside.
- 9.14 Responsible parenting promotes and protects physical, emotional and mental health. It provides the person with some private space. After compulsory school age, it assists with arrangements for further education, training and employment opportunities. It encourages the pursuit of age appropriate leisure interests. It grants permission to engage in normal and acceptable age appropriate activities at home and in the community. It aims to develop important life skills, personal responsibility, and the ability to choose and to be independent. This cannot be imposed from upon high: it is nurtured through explanation, discussion, and negotiation within positive, constructive relationships between those parenting and the parented.
- 9.15 As in every family, we cannot always get what we want. The young person's expressed views or wishes may not accord with those with parental responsibility or, of course, the law. For example, those under 18 cannot buy alcohol, cigarettes, fireworks, vote, watch adult movies, or get tattoos. Responsible parenting therefore takes a reasonable, reasoned view as to the best way forward in the interests of all concerned. It provides safety, with rules that are sensibly implemented, taking into account the person's age, without unnecessarily preventing them from taking part in everyday activities. Indeed, those aged 16 or 17 can drink alcohol in a restaurant if having a meal and accompanied by an adult. They can permanently leave home without their parents' consent, secure full-time employment, claim certain welfare benefits, have sexual intercourse, get married (with parental permission), buy National Lottery tickets, drive mopeds (from 16) or cars (from 17), and travel abroad.

D: Liberty-restricting measures

- 9.16 Mere placement in foster care, a children's home or residential special school of someone lacking the capacity to consent will not in itself constitute a deprivation of liberty. However, the combined effect of more specific measures may do. As explained above, constraints may be universal to a 5 year-old but liberty-restricting when applied to a 16 year-old. Thus, continual supervision would be universally expected of the former but not of the latter.
- 9.17 The following list of measures might be identified in foster care arrangements, children's homes or residential special schools. Some are more relevant to one care setting than another. The list also comes with an important health warning: if the measure would be universal for someone of that age and maturity who is disability-free, it should **not** be taken into account in determining whether the nuanced acid test is met.

- Decision on where to reside being taken by others;
- Decision on contact with others not being taken by the individual;
- Restrictions on developing sexual relations;
- Doors of the property locked, and/or chained, and/or bolted for security reasons or to prevent the children or young persons leaving;
- A member or members of staff accompanying the person to access the community to support and meet their care needs;
- Access to the community being limited by staff availability;
- Mechanical restraint, such as wheelchairs with a lapstrap or specialist harness;
- Varying levels of staffing and frequency of observation by staff;
- Provision of “safe spaces” or “chill out” rooms or spaces during the day or night from which the person cannot leave of their own free will (eg padded tent to sleep in);
- Restricted access to personal allowances;
- Searching of the person and/or their belongings;¹²
- Restricted access to personal belongings to prevent harm;
- Medication with a sedative or tranquilising effect;
- Physical restraint/intervention, such as with personal care tasks, breakaway or block techniques, distraction methods, staff withdrawing, physical touches or holds (e.g. “Team-Teach” methods);¹³
- Restricted access to modes of social communication, such as internet, landline or mobile telephone or correspondence;
- Positive behavioural reward systems to reward “good” behaviour which might thereby involve restrictions on favoured activities or aspects of the curriculum to improve behaviour;
- Disciplinary penalties for poor behaviour;¹⁴
- Restricting excessive pursuance of activities;
- Lack of flexibility, in terms of having activities timetabled, set meal times, expected sleep times;
- Managing food intake and access to it;
- Police called to return the person if they go missing;
- Restricted access to parts of the property, such as the kitchen or certain cupboards therein, to minimise health and safety risks.

¹² For example, see ss. 550ZA to 550ZD of the Education and Inspections Act 1996

¹³ Increasing guidance on the use of restrictive practices is becoming available: see, for example, Department of Health [‘Positive and Proactive Care: reducing the need for restrictive interventions’](#) (2014); Skills for Care and Skills for Health, [‘A positive and proactive workforce. A guide to workforce development for commissioners and employers seeking to minimize the use of restrictive practices in social care and health’](#) (2014). For restraint in children’s homes, see Department of Education, [‘Guide to the Children’s Homes Regulations including the quality standards’](#) (2015), paras 9.48-9.63.

¹⁴ See Department of Education, [‘Behaviour and discipline in schools: Advice for headteachers and school staff’](#) (February 2014).

E: Foster homes for looked after persons¹⁵

9.18 Foster care arrangements range from emergency provision to long-term placements with varying aims. Short breaks¹⁶ also form part of a continuum of services to support young persons in need and their families. Their Foster Care Agreement requires carers to care for any young person placed with them as if that person was a member of the foster carer's own family. Accordingly, they should have delegated to them the maximum appropriate flexibility to make day-to-day caring decisions within the framework of an agreed placement plan and parental responsibility.

Foster home: a deprivation of liberty

9.19 The measures in the following scenario are likely to amount to a deprivation of liberty:

David is 16 years old and has Smith Magenis syndrome. His condition is characterised by self-injurious and destructive behaviour, aggression, hyperactivity, and severe sleep disturbances including frequent and prolonged night waking. He also destroys furniture, eats copious amounts of, sometimes uncooked, food. In accordance with the assessments and care plan prepared by the local authority, his foster parents lock him in his bedroom from 7pm until 7am every night to keep David safe. Doors and windows around the house are also kept locked at all times with keys hidden. During the day he receives intensive support from his foster parents with all aspects of daily living, and at least one of them is with him at all times.

Factors pointing to a deprivation of liberty:

- *David is regularly locked in his room for 12 hours of each 24, and the doors to the house are locked.*
- *David is supervised and accompanied by a foster parent on a 1:1 basis throughout the day.*

Foster home: potential deprivation of liberty

9.20 We suggest that the measures in the following scenario may give rise to a deprivation of liberty:

Michaela is a 16 year-old girl with severe learning disability and hearing, visual and speech impediments and is largely dependent on others. She does not communicate very readily, hardly at all in sentences, and lives most of her time in her own world, typically listening to music. She can read familiar words and, with support, is able to give a basic account of her living arrangements and to describe her feelings in often monosyllabic speech. She is emotionally attached to her foster mother in a good loving home with the person she regards as 'mummy'. She is supported with basic life skills and personal care with clear boundaries and routines. She attends a school every day during term time and her foster mother provides her with educational input. Continual support is available to meet her care needs and she is taken on exciting holidays and trips. She shows no wish to go out on her own. She is not physically restrained or locked in the home in any way. But if she wished to leave the home by herself she

15 See, in particular, Parts 3, 7 and 8 of the Children Act 1989, Care Standards Act 2000, Fostering Services (England) Regulations 2011, the National Minimum Standards for Fostering Services (2011) and *'The Children Act 1989 Guidance and Regulations Volume 4: Fostering Services'* (revised 2011).

16 Pursuant to ss. 17(6) or 20(4) of the Children Act 1989.

would be prevented from doing so for her own immediate safety as she has no sense of safety, in particular road safety. Some of the parenting provided is in line with that usually provided to a much younger child.

Key factors pointing to potential deprivation of liberty:

- *These facts are similar to those of MIG, who was found by the Supreme Court to be deprived of her liberty.*
- *However, as Michaela is two years younger, the key question for professionals is the extent to which the measures applied to her are comparable to those which would be applied to a non-disabled young person of comparable age and maturity.*

Foster home: not a deprivation of liberty

9.21 The following scenario is unlikely to amount to a deprivation of liberty:

Nathan is 16 years old with mild learning disability. His foster parents prepare his meals, wash his clothes, and are available around the house if he needs them. They do not otherwise support him with activities of daily living any more than they do the activities of Carole, the 16½ year-old daughter of his foster parents. He attends a mainstream school with pre-arranged transport. At weekends the family go shopping and on trips. Once his foster parents have helped Nathan to familiarise himself with the route, he is able to go out with his friends and has a mobile phone to call them if he needs help.

Key factors pointing away from deprivation of liberty:

- *Nathan's age and the extent to which the measures applied to him are comparable to those which would be applied to a 16 year old without disabilities, a direct comparison being Carole.*

F: Children's homes

9.22 A children's home (defined in s.1 Care Standards Act 2000) is generally an establishment providing care and accommodation wholly or mainly for children. Since 1 April 2015 it is subject to the Children's Homes (England) Regulations 2015 and the quality standards therein. Care models differ from the larger children's homes designed with routines to meet the needs of teenagers, to homes providing therapeutic input for young persons with complex needs, to one-bedded homes.

Children's home: a deprivation of liberty

9.23 We suggest that the measures in the following scenario are likely to amount to a deprivation of liberty:

Ahmed, a 16 year old boy with autism and learning disability resides in a children's home and attends specialist school. On a daily basis he screams, kicks, bites, and hits out at staff and his peers. He receives two-to-one support throughout the day. Once or twice per week he goes into a soft play area, or 'safe space', in order to calm down, during which the door is closed, not locked, and a teaching assistant watches him through the door window. At many other times he is physically restrained using Team-Teach methods to prevent him assaulting others. He

receives visits from his grandparents and mother; his father decides not to visit but could do so if he wished.

Key factors pointing to deprivation of liberty:

- *the intensive and continuous nature of the control and supervision exercised over him*
- *the use of the ‘safe space’ on a regular basis*
- *the use of physical restraint - Ahmed would not be free to leave the children’s home.*

Children’s home: potential deprivation of liberty

9.24 We suggest that the measures in the following scenario may give rise to a deprivation of liberty:

Joanna, aged 16, has autism, severe learning disability and epilepsy, and aggressive and self-harming behaviours. She resides in a children’s home from Monday to Friday, which her parents can visit at any time, and spends the weekends at her parents’ home. During term time she attends school. Both at school and in the children’s home she is supervised most of the daytime to prevent her harming herself or others. She compliantly takes her prescribed medicines. She is not physically restrained other than on a few occasions to prevent her attacking others. Her behaviour has led to minor sanctions being imposed on a few occasions, such as not allowing her to eat a takeaway meal or stopping her listening to music when in a car. The front door to the children’s home is not locked but, were she to run out of it, she would be brought back.

Key factors pointing to potential deprivation of liberty:

- *similar circumstances were held in [RK v BCC, YB and AK](#)¹⁷ not to amount to a deprivation of liberty*
- *however, in light of the decision in Cheshire West, we suggest that this conclusion would have to be revisited, in particular, given her age, the continuous nature of the supervision to which she is subjected, and the fact that she is not free to leave.*

Children’s home: not a deprivation of liberty

9.25 The following scenario is unlikely to amount to a deprivation of liberty:

Connie is 16 years old and has a mild learning disability. After breakfast she is transported to school for 9am and brought back at 3.20pm. From then until 5pm she is supported to do her homework, attend any health or social care appointments, and is able to go out the home to see her friends. Along with the other young persons, Connie helps to prepare the dinner. After eating together, staff spend time with them pursuing their hobbies and interests, watching television and socialising.

Key factors pointing away from deprivation of liberty:

- *the extent to which the measures applied to Connie are comparable to those which would be applied to a young person of comparable age and maturity.*

17 [\[2011\] EWCA Civ 1305](#)

G: Educational establishments

- 9.26 Educational establishments come in many guises: from nurseries and child minders, to schools maintained by the local authority, independent schools, academies and free schools, through to special schools and further education colleges. Those most relevant to this guidance are establishments providing care and accommodation alongside special education: that is, residential special schools.¹⁸
- 9.27 Proportionate restraint is permitted.¹⁹ In particular, school staff may use reasonable force to prevent a pupil committing an offence, causing personal injury or damage to property, or behaving in a manner prejudicial to the maintenance of good order or discipline.²⁰

Residential special school: a deprivation of liberty

- 9.28 The measures in the following scenario are likely to amount to a deprivation of liberty:

David, aged 17, has been resident in a school for some years. He has autism and severe learning disability with extremely challenging behaviour. His behaviour is managed in large part by the use of a padded blue room in which he was secluded when he exhibited challenging behaviour. He has developed a number of behaviours that are particularly prevalent when in the 'blue room' including defecating, smearing and eating his own urine and faeces, and stripping naked. He is prevented from leaving the blue room for reasons of aggression and nakedness. The blue room is also used as a room to which David had been encouraged to withdraw as a safe place.

Key factors pointing to a deprivation of liberty:

- *the particular techniques used to manage his behaviour*
- *the use of seclusion in a blue room from which he was prevented from leaving.*²¹

Residential special school: potential deprivation of liberty

- 9.29 The measures in the following scenario may give rise to a deprivation of liberty:

Gary is 17 years old and has severe learning disability. He is non-weight bearing. Throughout the year he lives in a special school which is in 10 acres of land and surrounded by a high perimeter fence. There are three houses, each with their own care team, in which 2 to 5 children and young persons reside. Entry is via keypad which he cannot use. Gary needs two members of staff to assist him with all personal care interventions and to hoist him from bed to his electric wheelchair. From 9am to 3pm at school, and from 3pm to 9pm in the house, he is supported by one staff member. Waking staff check on him every hour during the night. After a number of incidents when Gary drove his wheelchair into his peers and staff causing injury, staff decided to replace the arm to a slow speed version so as to minimise the risk.

18 See the *National Minimum Standards for Residential Special Schools* (2013). Where a school provides, or intends to provide, accommodation to children for more than 295 days a year, it must be registered as a children's home and becomes subject to the Children's Homes (England) Regulations 2015 and the quality standards therein.

19 See s. 550A Education Act 1996. In relation to young persons lacking the material capacity, ss.5-6 MCA 2005 will also be relevant

20 See s. 93 of the Education and Inspections Act 2006.

21 See *R (C) v A Local Authority and others* [2011] EWHC 1539 (Admin) where it was held that similar circumstances were unlawful in the absence of judicial authorisation.

Key factors pointing to a potential deprivation of liberty:

- *Gary is not free to leave*
- *whether or not he is deprived of his liberty will depend crucially on the extent to which the support provided by staff can properly be described as support or whether it is to be considered supervision and control. In light of MIG's case (discussed further at paragraph 2.26), we suggest that caution would need to be exercised before such a conclusion is reached.*

Residential special school: not a deprivation of liberty

9.30 The following scenario is unlikely to amount to a deprivation of liberty:

Vanessa is 16 years old and has autism. For 38 weeks per year she lives in a school set in 25 acres which has 11 house groups, each accommodating between 4 and 8 students. It has high fences to prevent students reaching the road and to deter intruders and access to buildings and accommodation is via keypads or double-handled doors. Each house has a care team and each student has a key worker. Throughout the day there is usually one staff member for four students, although some activities like swimming require a higher ratio. All students have a structured, predictable daily routine of activities. During the week they wake at 7am, get washed and dressed, have breakfast, with school starting at 9.15am and finishing at 3.40pm. She has some down-time until 5pm when she eats with the others in her house. Evening activities with staff include art, cookery and sometimes outings. Vanessa is helped to go to bed in her personalised room at 9pm, with waking staff available during the night. Her door is always slightly ajar so staff can check on her. Timings are more flexible at weekends. Staff are trained in positive physical intervention techniques and follow her education and health care plan which does not envisage its use. Paediatricians and psychiatrists visit the school monthly and weekly respectively. Her videos, DVDs and CDs are checked to ensure they are age appropriate. She is encouraged to phone her parents every week and they are encouraged to visit at weekends.

Key factors pointing away from a deprivation of liberty:

- *the extent to which the measures applied to Vanessa are comparable to those which would be applied to a child of comparable age and maturity in an educational establishment.*

H: Considerations for front-line practitioners

9.31 These questions may help establish whether an individual is deprived of their liberty in this context:

- Compared to another person of the same age and relative maturity who is not disabled, how much greater is the intensity of the supervision, support, and restrictions?
- Can the person go out of the establishment without the carer's permission? Can they spend nights away? How do the arrangements differ to the norm for someone of their age who is not disabled?

- To what extent is the person able to control his or her own finances? How does this differ to the norm for someone of the same age who is not disabled?
- Can the person choose what to wear outside school hours and buy his or her own clothes?
- To what extent do the rules and sanctions differ from non-disabled age appropriate settings?
- Are there regular private times, where the person has no direct carer supervision?
- What is the carer to person ratio and how different is this to what would usually be expected of someone of that age who is not disabled?
- Is physical intervention used? If so, what type? How long for? And what effect does it have on the person?
- Is medication with a sedative effect used? If so, what type? How often? And what effect does it have on the person?
- How structured is the person's routine compared with someone of the same age and relative maturity who is not disabled?
- To what extent is contact with the outside world restricted?