

WHAT DO CONTINUOUS SUPERVISION AND CONTROL AND NOT FREE TO LEAVE MEAN?

Paper prepared for the Care Provider Alliance

In the Cheshire West case, the Supreme Court said that people are deprived of their liberty in different care settings, if they:

- are under continuous supervision and control
- are not free to leave, and
- lack capacity to consent to these things.

This applies where the state (eg the NHS or a local authority) is involved in the arrangements for the care. It may also apply even in wholly private arrangements where the care is stated regulated (eg by the Care Quality Commission).

It is not possible to say for certain precisely what “continuous supervision and control” and “not free to leave” means. Every case needs to be looked at individually and in the round. But the following examples may help providers think about whether their service users are deprived of their liberty. If they are (or are going to be), the deprivation of liberty must be properly authorised.

Continuous supervision and control

Service users are very likely to be considered under continuous supervision and control if, for example, any of the following applies:

- they need constant or frequent supervision to stop them harming themselves (either deliberately or by accident);
- they would not be left on their own for more than a short period, even if they asked to be;
- they are so disabled that carers are effectively deciding all or many aspects of their daily life (eg when to get up and go to bed, where to sit, when to watch TV, when to eat, when and where to go out); or
- they need support with all or many everyday tasks (eg cooking, shopping, bathing) and would be stopped from trying to do them if no carer was available to help or supervise them at the time; or
- their care plan or carers impose severe restrictions on their contact with their family.

In addition, the more likely they are to be subject to any form of control or restriction (eg restraint, medication to control behaviour, restrictions on contact with other people, limitations on how much privacy they get), the more likely it is that the supervision and control element of their care would be considered “continuous”. “Continuous” does not have to mean literally every minute of the day – it is more about the overall effect on a person’s life.

It is less likely that they would be considered under continuous supervision and control if, for example:

- there are only a few particularly risky things (eg cooking) which they would be stopped from doing on their own if no carer was available to help or supervise them at the time;
- carers check in on them from time to time to make sure they are all right, but they are otherwise largely free to get on with their daily lives without supervision; or
- they sometimes need to be supervised or restrained to stop them coming to harm, but this only happens from time to time.

Not free to leave

Service users are very likely to be considered not free to leave if, for example, any of the following applies:

- they would not be allowed to go back to live in their family home, even though the family was happy to have them;
- they would not be allowed to go back to live in their old home, even if it were still available for them;
- all or much of the time they have to ask carers' permission before going out;
- all or much of the time they are only allowed out with an escort, and would be stopped if they tried to go out alone; or
- they don't show any interest in going out, but would probably be stopped if they did, either always or much of the time.

It is less likely that they would be considered not free to leave if, for example:

- they can't go out without help, but help is always, or almost always, available to take them wherever they want to go;
- they can't go out without help, but would always, or almost always, be allowed to go out whenever they wanted if they arranged for someone else (eg a friend or family member) to help them;
- they are normally free to come and go as they want, but are occasionally stopped from going out (or going out alone); or
- they are free to come and go as they want, except for limited times of day, or certain particular places.

Under continuous supervision and control, or not free to leave, but not both

Being under continuous supervision and control and not being free to leave more often than not go together. After all, not being allowed out unsupervised, or not be allowed to choose to live somewhere else, is a form of supervision and control.

But the Court left open the possibility of cases where someone is not deprived of their liberty because although they are under continuous supervision and control, they are still free to leave. Or alternatively, they are not free to leave, yet not under continuous supervision and control.

The Court did not give any examples, so until particular cases are decided in court, it is not possible to be confident about what kind of situations would count. So providers should probably be cautious about deciding that someone's care falls into one of these categories. If in doubt, it would probably be better to seek authorisation for a deprivation of liberty.

But it is possible that there might not be a deprivation of liberty in some cases where, for example:

- someone is under continuous supervision and control in the place they are living, but would be allowed to return to their family home if they wanted; or
- someone has no choice about where they live, but is otherwise largely free to come and go and get on with their life as they wish.