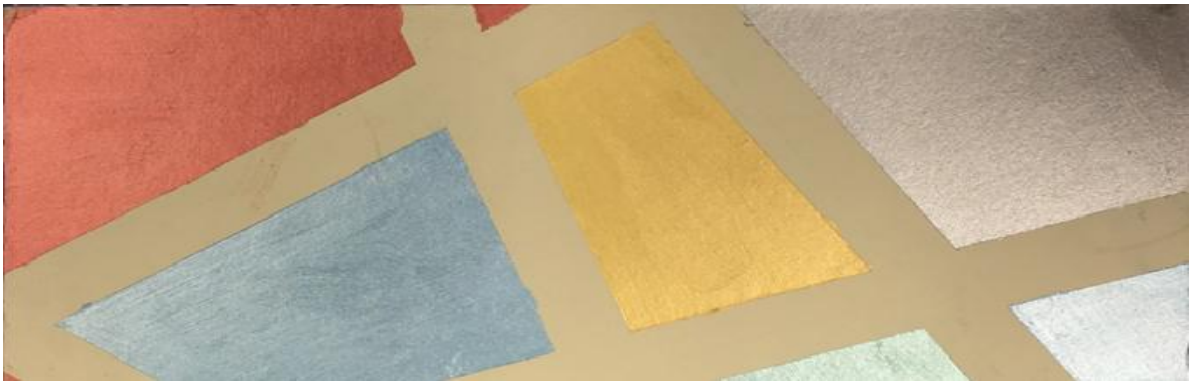
THE ATTORNEY GENERAL FOR NORTHERN IRELAND'S REFERENCE (DEPRIVATION OF LIBERTY) [2026] UKSC 16

June 2026



Introduction

1. A seven member constitution of the Supreme Court has set aside the decision of *P v Cheshire West and Chester Council* [2014] UKSC 19 ('*Cheshire West*'). In *A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2026] UKSC 16, the Supreme Court has determined that:

    a. The *Cheshire West* 'acid test' for identifying the objective element of deprivation of liberty was wrong and departed from Strasbourg case law;

    b. A person without mental capacity to make decisions about their residence and care arrangements can give subjective consent to what would otherwise be a deprivation of liberty, so as to take their circumstances out of Article 5 ECHR.

2. The judgment did not involve determination of the rights of specific individuals, and thus cannot be appealed to the European Court of Human Rights as there is no relevant 'victim.'

3. This note serves as a summary of the judgment. It does not address its potential – significant – implications; commentary will be forthcoming in the June Mental Capacity Report. The Supreme Court has published a summary of the judgment available here and sets out a summary of the judgment's conclusions at paragraph 53.

Background and the issues in the case

4. The definition of deprivation of liberty in the care and treatment context set out by the Supreme Court in *Cheshire West* directly determined the scope of the (different) deprivation of liberty safeguards frameworks in both England & Wales and Northern Ireland, because both Mental Capacity Acts do not contain a

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

5. In 2025, the Attorney General of Northern Ireland ('the Attorney General') made a reference to the Supreme Court as to the lawfulness of a proposed revision by the Minister of Health there of the Code of Practice accompanying the deprivation of liberty provisions in the MCA (Northern Ireland) 2016. The proposed revision to the Code would guide professionals to identify that people could give subjective consent to confinement through words or conduct showing contentment with their care arrangements even if they lacked capacity to take decisions as to their residence and care. That revision did not suggest that the *Cheshire West* 'acid test' [2] to determine whether a person is confined. The Attorney General referred the proposed revision to the Code to the Supreme Court for it to determine whether the Minister of Health there would be acting incompatibly with his obligations under the ECHR if issued it. The Attorney General invited the Supreme Court to find that the Minister could lawfully issue the revision, on the basis that *Cheshire West* had taken too narrow a view of what 'valid consent' to confinement means for purposes of Article 5 ECHR. The Attorney General took the position that it was not necessary to revisit the 'acid test' to determine the reference.

6. The Lord Advocate (the senior Law Officer in Scotland) acted as respondent to the reference, reflecting (no doubt) the concern of Scottish Government as to the proper interpretation of Article 5 in the context of moves towards provisions relating to deprivation of liberty in Scotland. The Lord Advocate adopted a position broadly supportive of the Attorney General.

7. The Secretary of State for Health and Social Care ('the Secretary of State') intervened and invited the Supreme Court to conclude that the earlier decision in *Cheshire West* was wrong in identifying that there was an 'acid test' to determine whether a person was confined, In the alternative, the SSHD adopted the Attorney General's submissions as to an expansion of the understanding of the concept of valid consent, subject to a number of caveats.

8. Three charities (Mind, Mencap and the National Autistic Society) intervened to argue that the Supreme Court should take particular care in determining the reference in the absence of a clear factual matrix. They argued that the appropriate test to apply was whether there was a 'real risk' the outcome sought by the Attorney General would breach fundamental rights, and that such a risk

[2] The *Cheshire West* 'acid test' was set out by Lady Hale at paragraphs 48-49 of the judgment of the Supreme Court in 2014 (emphasis added):

> *48. So is there an acid test for the deprivation of liberty in these cases? I entirely sympathise with the desire of Munby LJ to produce such a test and thus to avoid the minute examination of the living arrangements of each mentally incapacitated person for whom the state makes arrangements which might otherwise be required. Ms Richards is right to say that the Guzzardi test is repeated in all the cases, irrespective of context. If any of these cases went to Strasbourg, we could confidently predict that it would be repeated once more. But these cases are not about the distinction between a restriction on freedom of movement and the deprivation of liberty. P, MIG and MEG are, for perfectly understandable reasons, not free to go anywhere without permission and close supervision. So what are the particular features of their "concrete situation" on which we need to focus?*
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> *49. The answer, as it seems to me, lies in those features which have consistently been regarded as "key" in the jurisprudence which started with HL v United Kingdom 40 EHRR 761: **that the person concerned "was under continuous supervision and control and was not free to leave"**…*

existed where ECtHR caselaw supported the view that people who lack the mental capacity to consent to their particular care arrangements cannot give valid consent to them. To the extent the ECtHR caselaw allowed for a person to lack capacity and be able to provide valid consent, the charities argued that this was where the lack of capacity has been determined on a global basis, such as under a system of guardianship, not where there had been a finding of a lack of capacity with respect to the particular care arrangements. In relation to DHSC's submissions, they argued that the objective limb of Article 5 ECHR did not fall to be considered in the reference, but if it was to be considered, *Cheshire West* should be followed.

9. The Official Solicitor to the Senior Courts in England & Wales intervened in particular to raise concerns about departing from the decision in *Cheshire West*. The Mental Welfare Commission for Scotland intervened in (broad) support of a wider concept of valid consent.

The Supreme Court's judgment

10. The Supreme Court in its decision did not fully adopt the submissions of any of the parties, but was mostly strongly influenced by the positions of the Secretary of State and the Attorney General (as well as the observations of the Mental Welfare Commission for Scotland relating to the weight that could be placed on the views of those with impaired decision-making capacity).

11. In a unanimous decision (authored by Lord Sales and Lady Simler), the Supreme Court determined that in considering whether a person is deprived of their liberty, there is an overlap between the objective and subjective elements,[3] and it was necessary to consider both parts to determine the reference. The Supreme Court also determined it was appropriate to apply the House of Lords' *1966 Practice Statement (Judicial Precedent)* ([1966] 1 WLR 1234 and overrule *Cheshire West* on the basis that it was wrong, had given rise to practical difficulties and unjust costs and was impeding proper development of the law due to an anticipated divergence between Strasbourg law and domestic law which could not be corrected given that public authorities have no right of appeal to the ECtHR.

Deprivation of liberty – a multi-factorial approach

12. The Supreme Court considered that the test for determining whether a person is deprived of liberty was found in *Guzzardi v Italy* (1981) 3 EHRR 333. The *Guzzardi* judgment takes into account the concrete situation and totality of the restrictions on the individual, including their type, duration, effects and manner of the restrictions on the person, with no single factor being determinative.

13. The Supreme Court accepted that part of the *Cheshire West* 'acid test' was found in *Guzzardi* [184], but considered that *Guzzardi* required consideration going beyond the factors of being subject to continuous supervision and control, and not being free to leave the place of detention. Whilst the

[3] The third element, state imputability, was only touched on in passing in the judgment, the Supreme Court noting at paragraph 116 that, although the Strasbourg jurisprudence on article 5 makes it clear that a state party to the Convention is only responsible for a deprivation of liberty if there is a relevant element of state responsibility in relation to the situation, in the care context it is relatively easy to identify factors giving rise to such responsibility, including where public officials are on notice that an individual is subject to a deprivation of liberty at the hands of a private party.

Supreme Court had some sympathy with the desire with the earlier court in *Cheshire West* to establish a universally applicable bright-line test to assist decision makers, they noted that such a test had the negative feature of 'failing to be appropriately responsive to the justice of particular situations arising across the whole field of its application' [183]. And, whilst it was understandable in its context, the Supreme Court considered that underlying policy concern of the majority in *Cheshire West* - that it is only by treating the vulnerable individual as being deprived of their liberty that one can be confident that there will be regular reviews of the suitability of their placement and an independent person appointed with a duty to pursue the individual's best interests – was not a good reason for extending the definition of deprivation of liberty [183].

14. The Supreme Court considered that "[t]*he paradigm case of deprivation of liberty is detention in a cell, but so far as article 5(1)(e) is concerned, this has extended to include detention in psychiatric hospitals and certain social care institutions*." [5] The Supreme Court considered that to determine whether a deprivation of liberty existed, consideration should be given to "*how close the [restriction] in question is to the paradigm of deprivation of liberty, which is confinement in a prison cell.*" [119]

15. Before we turn to set out how the Supreme Court addressed the objective and subjective elements of liberty, it is important perhaps to make clear their approach to the concept of 'liberty' as (although set out late in the judgment), it underpinned their judgment. Relying in significant part upon the (extra-judicial) writings of former District Judge Anselm Eldergill, they held that "*[l]iberty means the same thing for everyone. As explained in Engel, it means physical liberty, including the freedom to go where one pleases. For those who are unable to do this because they are unconscious, in a minimally conscious state, or so profoundly disabled that they cannot conceptualise leaving let alone physically achieve this, they are not being prevented by a third party from doing something and are not being deprived of anything. The state may in some circumstances be subject to positive obligations (as the Secretary of State accepts) to take reasonable steps to prevent a deprivation of liberty, by, for example, providing a wheelchair or other aid to enable the individual to leave. But that is a wholly different point.*" [198][4] They considered that this did not give rise to discrimination, because "[t]*he non-disabled person is in a fundamentally different position from persons who are unconscious, or in a minimally conscious state, or profoundly mentally and physically disabled. The former is capable of leaving but prevented from doing so. The latter are simply, by reason of their condition, not capable of leaving. It follows that there is no less favourable treatment of people in a materially similar position*" [199].

Deprivation of liberty – the objective element

16. Although the Supreme Court emphasised that it was not always easy to split out the objective and subjective elements of the test for deprivation of liberty, it did nonetheless set out in different places

[4] At paragraph 196, the Supreme Court also noted that '[d]*ifficult issues could arise regarding the possibility that a state (under the Convention) or a public authority (under the Human Rights Act) might owe a physically disabled but mentally alert individual a positive duty under any of articles 3, 5 and 8 of the Convention to assist them to be physically mobile, but we do not seek to address them in this judgment.*"

considerations it considered relevant specifically to determining whether the objective limb of Article 5 had been satisfied:[5]

- The degree of supervision and control over the person's movements, the possibility for them to leave the restricted area, the extent of isolation and the availability of social contacts [121];

- The effect of the restrictions on the individual. The Supreme Court considered that restrictions which were 'fairly limited' and therefore unlikely to suggest the objective element was satisfied included "*locking the doors of a care home to stop individuals who are not capable of looking after themselves from wandering into the streets)*." [136(iv)] "Wh*ere restrictions become progressively more intrusive, it will be relevant to consider whether they are imposed in response to an increase in the need in a particular case to protect the individual and/or the interests of others* […] *the subjective experience of the individual affected is relevant. If they do not experience a restriction as a major intrusion in their life, that tends to indicate a classification as a restriction on liberty of movement rather than as a deprivation of liberty*." [136(iv)];

- The duration of the restrictions.[6] It was noted while the duration of restrictions in the context of people who lack capacity and live in care settings was likely to be long in many cases, "i*t is significant that they are specifically taken in the individual's own interests, to care for them and to keep them well and safe (consistently with safeguarding others against harm they might cause, if that is an issue)*…[I]*t is important to recognise that individuals in care enjoy a range of personal protections under the regimes applicable to them, including rights to independent external reviews and audits by qualified professionals* […] *and to express their own views and preferences and have them taken into account. This helps ensure that the measure is applied only for as long as necessary*." [136(iii)]

- The presence or absence of objection if the person is "*capable of objecting or giving tacit agreement*."[7] [53(iv)] The incapacitous person's "*subjective attitude, as so expressed, carries significant, indeed usually decisive weight, according to the criteria set out in Storck. Conversely, if such a person manifests a view that they do not accept that situation, that opinion should also be respected and will usually lead to the conclusion (if the objective circumstances indicate that they are detained) that they are subject to a deprivation of liberty*." [151] Coercion is seen as a 'necessary element' in defining a deprivation of liberty [187]. "*The…stress for the individual in having their objections overruled may lead to suffering and result in the use of physical force or physical restraint. These features of the individual's concrete situation are likely to be clear indicators that they are being confined, in the sense of suffering a deprivation of liberty.'* [187] *'[I]f an individual is able to, and does, express their wishes and preferences about their living arrangements, and is happy with them, it will ordinarily be difficult to see how they are being*

[5] Note, we have not always these references out in the order that they appear in the (very wide-ranging) judgment, as, at times, discussions of similar themes appear in quite widely spread out points.
[6] There was no specific discussion of the issue of what constitutes a 'non-negligible' period of time, an issue which has featured quite often in post-*Cheshire West* discussions.
[7] See further the section on the subjective element below.

coerced". [189]. In the regard, the Supreme Court also note that the presence or absence of sedative medications will be relevant where they are capable of suppressing objections. [188]

- The 'relative normality' of the placement: "*if an individual is living in their own home, in accordance with their wishes and feelings, it makes it less likely that the individual is being subject to a deprivation of liberty within the meaning of article 5. Put another way, the restrictions imposed would need to be more severe or extensive to amount to such a deprivation, such as, for example, a combination of restraint, medication, and seclusion.*"[193]

- Where measures are far from confinement in a prison cell, the purpose of the measures. The judgment considered that therapeutic purpose may make it less likely that a measure is a deprivation of liberty, [130] as is the proportionality of the restriction to achieving the relevant purpose. [132][134]

- Other relevant rights in play, particularly Articles 2, 3 and 8; the Supreme Court noted the potential for intrusive assessments to have to be carried out in the context of determining whether any deprivation of liberty is justified. [141]

Deprivation of liberty – the subjective element

17. The Supreme Court considered that the ability to give subjective consent to what would otherwise be a deprivation of liberty was an 'autonomous concept' for the purposes of Article 5 ECHR which was untethered to domestic test for decision-making capacity, or tests for waivers of ECHR rights (which must be free and fully informed, and the individual would need to have legal capacity to make such a decision [126]).

18. The Supreme Court found that the test for whether a person is able to give subjective consent to an Article 5 deprivation of liberty was lower than the test for capacity under the Mental Capacity Act 2005, with a person being able to give consent if they are "*conscious of their environment and has a basic understanding of their living circumstances so that they can express their view about their situation, [and] manifests their acceptance of the situation they are in.*" [53(ii)]. In reaching this conclusion, the Supreme Court observed that "[*t]he argument that, because <u>some</u> adults will find it difficult to communicate and express views and feelings about their placement, the views of <u>no</u> adults should be capable of vouching consent creates an arbitrary threshold and may lead to unnecessary and intrusive interference with the private lives of those adults with impaired mental capacity who <u>are</u> able to express views and feelings*' (emphasis in the original)[192].

19. In defining the 'autonomous concept' of consent for the purposes of Article 5 ECHR, the Supreme Court further considered that *'mental capability recognised under the Convention…focuses on the individual's de facto ability to express their own view'* [158] rather than an ability to make an informed decision. The Supreme Court further considered that "*if an individual is placed in a secure care home, has de facto understanding of their situation and does not express or manifest any objection to staying there despite having a realistic opportunity to do so, they can be taken to have given tacit consent sufficient to negative the subjective element required for a finding that there has been a deprivation of liberty.*" [172]

20. The judgment described what was required for consent in a number of different places:

- "*Where an individual lacks full mental awareness (in a factual sense) in relation to their circumstances, so that they cannot be regarded as someone with full ability to decide how they wish to be treated for all purposes, they may nonetheless be sufficiently aware of the circumstances in which they are maintained in confinement as to be able to register whether they are happy or unhappy with those circumstances and to enter protests against their treatment if they are unhappy with them* […] *They may have impaired understanding of many things and may lack capacity in a full legal sense, but they may nevertheless have a fundamental understanding of whether they are broadly happy or unhappy about something so basic, and their understanding of and choices regarding that should be accorded respect.*" [135]

- Subjective consent for the purposes of Article 5 ECHR is "*concerned with a person's de facto understanding of their situation and how they experience it*." [201]

- If a person has "*a basic level of awareness and consciousness of their living arrangements that is sufficient to enable them to know and communicate whether they are happy or unhappy with them, they may be treated as able to give or withhold valid consent to confinement by an expression of their wishes and feelings.*" [201]

- Compliance or acquiescence may carry less weight "*if it is accompanied by the administration of sedative medication which is capable of suppressing objections.*" [188]

- A "*tacit positive indication of wishes and feelings showing contentment with the arrangements*' may be sufficient to show consent".[191]

- The approach taken to whether a person has given this consent should be "*practical and realistic.*" [127] Where there is 'serious doubt' as to the incapacitous person's "*attitude*" "*no inference of valid consent should be drawn*." [191]

21. Although no party to the reference suggested that it was possible for another to give substitute consent for an adult with impaired decision-making capacity, the Supreme Court appeared to leave the door open for this at paragraph 164, where it noted that 'the mere fact that the individual concerned is incapable of expressing any view does not lead to the conclusion that the subjective element of a deprivation of liberty is made out. On the contrary, in an appropriate case it may lead to the conclusion that the subjective element is assessed by reference to the view of the person with authority to make decisions for the individual, in their best interests.'

Who is or is not deprived of their liberty

22. The judgment offered some specific examples of people who were or were not deprived of their liberty, some of which drew on existing case law:

- A person cared for in hospital (or probably, in any other setting) in a minimally conscious state is not deprived of their liberty. [116] "*The non-disabled person is in a fundamentally different position from persons who are unconscious, or in a minimally conscious state, or profoundly mentally and physically disabled. The former is capable of leaving but prevented from doing so. The latter are simply, by reason of their condition, not capable of leaving. It follows that there is no less favourable treatment of people in a materially similar position*." [199]

- A person experiencing catatonia (eg due to severe dementia or in the aftermath of suffering a stroke or traumatic head injury) and 'unable to express any view at all about what should happen to them, whether verbally or by physical manifestations of contentment or discontent' cannot be deprived of their liberty as they lack control over their body. [142] The Supreme Court found that such individuals do not "*have any bodily, physical liberty to exercise, irrespective of the circumstances in which they are being cared for. Also, since there is no possibility of anyone contradicting their will in that regard, it cannot sensibly be said that anyone is subjecting them to treatment which constitutes a "deprivation" in relation to their physical or bodily liberty*." [142]

- The temporarily unconscious may experience a deprivation of liberty even if they are not immediately aware of it, if they would be prevented from leaving when they regain consciousness (the examples being a prisoner, or a person already subject to detention under mental health legislation) [143].

- Certain hospital inpatients: "I*n ordinary circumstances, an individual in hospital to receive treatment (and who, for their own protection, would be prevented from leaving while, say, confused and unable to think because of medication) would not be regarded as suffering a deprivation of liberty within the meaning of article 5. Ordinary expectations and the ordinary conduct of life play a significant role in the assessment whether there is a deprivation of liberty* […] *The presumption is that a person who is unconscious and kept in care to have medical treatment administered does not suffer a deprivation of liberty, unless there is evidence that they are in fact in detention or there is an established pattern of behaviour to show that they clearly do (or would) object to being cared for in this way.'* [145] [8]

- 'MIG' in *Cheshire West* (who lived in a Shared Lives placement) was not deprived of her liberty as "*there were sufficient indications of her being happy with her living arrangements to amount to valid consent*" and "[h]e*r living arrangements were as close to normal as possible and such minimal element of confinement as existed was for her benefit and protection*". [203] The Supreme Court considered that neither the subjective nor objective elements were met, as "*her situation was very far removed from the paradigm case of confinement in a prison cell*". [203]

- 'MEG' in Cheshire *West* (who lived in a small residential children's home run by the NHS) was not considered to be deprived of her liberty. The subjective element was not met because she

[8] Note that, whilst agreeing with the conclusion of the Court of Appeal in *Ferreira*, which 'carved out' those in receipt of life-sustaining medical treatment in hospital where the arrangements for their treatment were not out of the ordinary, the Supreme Court reached it for different reasons. One matter which will need considering in due course is where the person is subject to mental health legislation but transferred to another (acute) hospital for physical health treatment.

was *"happy living in the NHS facility where she was placed as to amount to valid consent to being there. She showed no wish to leave the facility or go out on her own. Although she received tranquillising medication, that was not administered with a view to disabling her from forming a view about her living circumstances and does not seem to have had such an effect."* [204] MEG's having 'outbursts' were not considered to undermine this consent. The Supreme Court also considered that the objective element was not met either because her "l*iving arrangements were as normal as possible in the circumstances, and the continuous supervision and control to which she was subject were directed to meeting her care needs rather than to making her a prisoner. Although she was physically restrained on occasion, that was done for her own protection or for the protection of others, and not with a view to punishing her. Overall, again, her situation was far removed from the paradigm case of confinement in a prison cell.*" [204]

- The Supreme Court reserved its opinion on whether 'P' in *Cheshire West* was deprived of his liberty and appear not to have set aside this aspect of the judgment, though expressed some features of the situation "*tend to indicate that he was not subject to a deprivation of liberty.*" [205]

- The Supreme Court endorsed the finding of Lieven J in *Re SM (Deprivation of Liberty; Severely Disabled Child)* [2024] EWHC 493 (Fam) that no deprivation of liberty existed for a 12-year-old with "*profound cognitive and physical disabilities, who responded like a child of a few months old) was under constant supervision and control, but this was because her condition was such as to require this by way of care, not to prevent her from leaving her placement. In fact, SM was wholly incapable of leaving, both because of physical inability and because she was unable to form any desire or intention to leave. In our view, the judge was right to conclude that this situation did not involve a deprivation of liberty within the meaning of article 5*" [196].[9]

What does the judgment mean?

23. Narrowly, the outcome of the case means that the Health Minister in Northern Ireland can issue a revised Code (albeit, as the Supreme Court identified, the version before the court will require further modification in light of the judgment).

24. More broadly, the MCA 2005 expressly ties the application of DoLS to the definition of deprivation of liberty in Article 5, and requirements to seek community deprivation of liberty authorisations also stem from Article 5. Who is (and is not) deprived of their liberty for purposes both of DoLS and community authorisation of deprivation of liberty is now as set out by the Supreme Court in *AGNI*. The same also applies in relation to situations where the question is whether authorisation of deprivation of liberty may be required in respect of admission and treatment under the MHA 1983.

25. There is no 'grace period' for implementation of the judgment: i.e. the approach in *Cheshire West* must not be followed with immediate effect, and all the (many) guidance documents which refer to it need to be read in that light. Further commentary about some of its practical implications will

[9] The Supreme Court did not appear to reach this conclusion on the basis that SM was a child per se as opposed to by reference to the nature of SM's physical and cognitive disabilities. The Supreme Court did not address the judgment in *Re D* or the role of parental authorisation of situations which would otherwise amount to a deprivation of liberty.

be set out in the June Mental Capacity Report. We anticipate that official bodies will be issuing guidance sooner rather than later.

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