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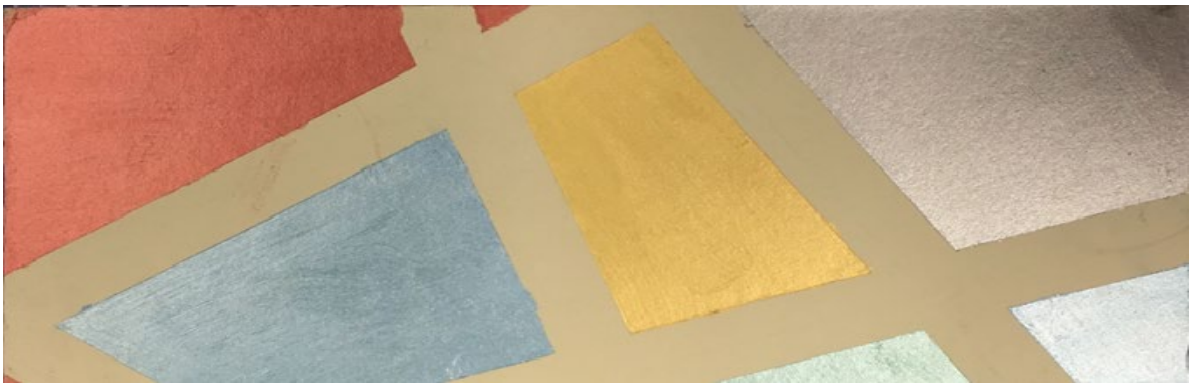

Welcome to the June 2026 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: coverage of 'year zero' as regards deprivation of liberty following the *AGNI* case;

(2) In the Property and Affairs Report: the SCCO and costs where P has died or regained capacity, and can you lie as to your own capacity;

(3) In the Practice and Procedure Report: the Court of Appeal resets transparency;

(4) In the Mental Health Matters Report: nominated persons resources and 20 years of Mental Health Law Online;

(5) In the Children's Capacity Report: overseeing consent;

(6) In the Wider Context Report: well-being and wishes, and capacity and divorce;

(7) In the Scotland Report: Scottish reactions to *AGNI*.

Nyasha Weinberg's practice having taken in a new direction, we say a farewell and thank you to her this issue; we are, however, delighted to welcome Alex Cisneros to the team.

A reminder that that whilst Chambers have launched a new and zippy version of our website which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via here.

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

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HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

Cheshire West overruled

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) (Supreme Court (Reed, Hodge, Lloyd-Jones, Sales, Stephens, Rose and Simler SCJJ)

Article 5 – deprivation of liberty

Summary[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 determined that:

a. The *Cheshire West* 'acid test' for identifying the objective element of deprivation of

[1] Note: Arianna, Tor and Alex contributed to the summary. They have not contributed to the commentary which follows.

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.

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.'

Background and the issues in the case

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 statutory definition of deprivation of liberty, but cross-refer directly to Article 5 ECHR.

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.

The Lord Advocate (the senior Law Officer in Scotland) acted as respondent to the reference, reflecting (no doubt) the concern of Scottish

[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?*
>
> *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"...***

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.

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.

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 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.

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

The Supreme Court in its decision did not fully adopt the submissions of any of the parties, but was most 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).

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

[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.

that public authorities have no right of appeal to the ECtHR.

Deprivation of liberty – a multi-factorial approach

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.

The Supreme Court accepted that part of the *Cheshire West* 'acid test' was found in *Guzzardi* (see paragraph 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 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* (paragraph 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 (paragraph 183).

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*" (paragraph 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* (paragraph 119).

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*" (paragraph 198).[4] They

[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."*

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*" (paragraph 198).

Deprivation of liberty – the objective element

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 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 (paragraph 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*" (paragraph 136(iv). "*Where 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*" (paragraph 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, "*it 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*." (paragraph 136(iii).
- The presence or absence of objection if the person is "*capable of objecting or giving tacit agreement*"[7] (paragraph 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*

[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.

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" (paragraph 151). Coercion is a "necessary element" in defining a deprivation of liberty (paragraph 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*" (paragraph 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 coerced*" (paragraph 189). In the regard, the Supreme Court also noted that the presence or absence of sedative medications will be relevant where they are capable of suppressing objections (paragraph 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* (paragraph 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, as is the proportionality of the restriction to achieving the relevant purpose (see paragraphs 130, 132 and 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 (see paragraph 141).

Deprivation of liberty – the subjective element

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 (paragraph 126).

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 in a secure care environment, so that they can in some suitable way express their view about their situation, who manifests their acceptance of that situation."* (paragraph 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*

are able to express views and feelings." (emphasis in the original) (paragraph 192).

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*" (paragraph 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*" (paragraph 172).

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*" (paragraph 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*" (paragraph 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* (paragraph 201).

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

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

- The approach taken to whether a person has given this consent should be "*practical and realistic*" (paragraph 127). Where there is 'serious doubt' as to the incapacitous person's "*attitude*" "*no inference should be drawn*" (paragraph 192).

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

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 (paragraph 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*" (paragraph 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 (paragraph 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*" (paragraph 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 given being a prisoner, or a person already subject to detention under mental health legislation) (paragraph 143).

- Certain hospital inpatients: *"In 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* (paragraph 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*

[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.

to amount to valid consent" and "*[h]er living arrangements were as close to normal as possible and such minimal element of confinement as existed was for her benefit and protection*" (paragraph 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*" (paragraph 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 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*" (paragraph 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 *"living 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* (paragraph 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*" (paragraph 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*" paragraph 196.[9]

What does the judgment mean?

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).

More broadly, the MCA 2005 expressly ties the application of DoLS to the definition of deprivation of liberty in Article 5, and

[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.

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.

Comment[10]

The Dawn of Article 8?

It will take time for the dust to settle, but the Article 5 ramifications of the judgment are clear as health and social care start embarking on a return to the pre-*Cheshire West* era. Although the DoLS numbers are very unlikely to suddenly drop from the 365,000 requests last year to anywhere near the original impact assessment estimate of 21,000, there will of course be a significant reduction over time. Current low and medium priority DoLS requests will be triaged against the new test, Part 8 reviews will keep best interests assessors very busy, and a cautionary approach in borderline cases seems likely to be adopted.

The Supreme Court's interpretation of confinement is now arguably more aligned with that of the Strasbourg Court, which has a Council of Europe-wide meaning, although some may academically question whether its 'Guzzardi-add-ons', coupled with its approach to valid consent, has interpreted the concept too narrowly. Article 5 concerns physical liberty and the prison cell paradigm (originating from Article 5(1)(a) and (b) contexts) has since *HL* and *Stanev* long been recognised by Strasbourg in hospital and care home scenarios respectively for the purposes of Article 5(1)(e). Neither before nor since *Cheshire West* has Strasbourg found a deprivation of liberty in other care contexts.

The practical advantage of the *Cheshire West* acid test was its simplicity. Arguments about the borderline between restricting movement and depriving liberty were rendered largely otiose. A multifactorial approach with no factor being decisive will inevitably lead to new case law as judges at first instance are asked to apply it to specific factual scenarios. Chapter 2 of the DoLS Code of Practice, which was out of date for over a decade, is now very much back in fashion.

Before analysing the judgment, it is important to make an obvious point that is often overlooked. Regardless of whether someone's liberty is restricted or deprived, the underlying legal basis under the MCA 2005 is the same: (i) inability to decide, (ii) best interests, (iii) necessity and (iv) proportionality. The only difference is that the defence to liability derives solely from ss.5-6 MCA 2005 rather than from an authorisation by a local authority, Local Health Board, or Court of Protection judge. The judgment does however mean that fewer people will have (i) representation, be it lay and/or legal, (2) access to non-means tested legal aid, and (iii) an independent assessment of best interests.

1. <u>The multifactorial approach to confinement</u>

A deprivation of liberty concerns compulsory confinement, directly or indirectly attributable to the State, and the Supreme Court's endorsement of the *Guzzardi* multifactorial approach reflects what it has considered to be the European approach. Factors including the type, duration, effect and manner of implementation of the measures in question are key. What the judgment highlights is what *Winterwerp* has

[10] For a rapid reaction webinar held on the day the judgment was handed down, see <u>here</u>.

always said: "*the mental disorder must be of a kind or degree warranting compulsory confinement*." If confinement was not compulsory, why would compulsory confinement ever need to be justified for Article 5(1)(e) purposes?

The controversial part of *Cheshire West* was, for some, the irrelevance given to objections. It reduced a test of *compulsory* confinement to confinement alone, which meant that the 'effect' factor was rendered meaningless. The 'type' and 'manner of implementation' of restrictions means having regard to the specific context and circumstances surrounding them. The possibility of leaving, the degree of supervision and control, the extent of isolation and the availability of social contacts form part of that context. However, the forthcoming first instance arguments are likely to concentrate on the weight to be given to the issues of relative normality and purpose, and how to interpret 'valid consent' in the real world.

2. Relative normality

The judgment states that "*liberty means the same for everyone*" (at paragraph 198) but also refers to the "*relative normality of the placement*" as being a relevant factor. Strasbourg has never used a relative *disabled*-normality approach; it focuses on how distant the arrangements are from the paradigm. Whether the Supreme Court intended such an approach is not immediately obvious. The 'type' of measures could incorporate relative normality but one needs to be clear: relative to what? If it is relative to the paradigm which applies regardless of disability, which bears in mind the ordinary universal restrictions of modern life that everyone endures, that could be uncontroversial ('universal-normality'). But if it involves comparing one disabled person with the normal life of another disabled person, that would be a real concern ('disabled-normality').

One could argue that whether anyone is confined against their will must be benchmarked against universal-normality. If someone with a disability is supported to go out in the community if they wish, to engage in daily living activities, is not prevented from having contact with loved ones etc, that is relatively normal compared to those *without* disability. Relying on others to help or support in the pursuit of one's will and preferences is not supervision and control. It *enables* physical liberty, not deprives. If one needs someone to go out with them to avoid a significant impact to their well-being, that must be provided. Indeed, the positive obligations of Article 5 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*" (paragraph 198), now assume much greater prominence. Failing to promote physical liberty will now be a more meaningful argument to deploy.

3. Purpose

Whether the purpose of a measure is relevant to establishing a deprivation of liberty (Article 5(1)), or only at a later stage when examining its justification (Article 5(1)(e)), has always been hotly debated. It has arisen at the initial stage in the context of whether someone's *residual* liberty has been deprived, and in circumstances where Article 5 would provide *no* lawful basis for detention. But whether the borderline between restricting and depriving liberty should vary according to the particular interests served by the restrictions is contentious. It is therefore important to note that the judgment says that purpose is relevant (but not decisive) in "*more marginal or borderline"* cases.

4. Valid consent

This is the part of the judgment which many will find the most challenging. Article 5 is an autonomous European concept, so valid consent

to confinement does not mean valid consent under the Mental Capacity Act 2005. Under domestic law, if someone lacks capacity to decide a matter, consent cannot be inferred or implied and a best interests decision is required. None of that is affected by this judgment.

All of the relevant European case law on this issue concerns scenarios where someone has been deprived *globally* of legal capacity. In the Strasbourg context, this is generally because a guardian has been appointed by a court to make decisions for them. Much of the debate about valid consent has therefore focused on whether the guardian can give valid consent or whether the person can validly consent *despite* what may be a contrary view held by their guardian.

Strasbourg sees legal capacity as a status test, whereas the MCA 2005 focuses on the functional test of mental capacity. Mental and legal capacity are not synonymous, and debate may follow as to the precise circumstances in which someone unable to functionally decide on their arrangements can still validly consent to something as serious as being in confinement. *Stankov* at paragraph 90 provides:

> [A] *person's consent to admission to a mental health institution for treatment can only be considered valid under the Convention if there is sufficient and credible evidence suggesting that the capacity to consent, and to understand the consequences of that act, have been established in a fair and appropriate procedure, and that all necessary information concerning the placement and the proposed treatment has been adequately provided to the interested party … The court considers that this principle is also applicable when it comes to obtaining consent for the placement in a social care home of a person whose legal capacity is impaired due to their mental health, as in the present case.*

But the Supreme Court interprets this in the context of whether *Stankov* had waived his rights to victim status, rather than as an explanation of the valid consent requirement. There will no doubt be an academic focus on whether this is the correct interpretation, for when Strasbourg says in *Stanev and Shtukaturov* that "*the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation*", it is correcting the bluntness of plenary guardianship or incapacitation proceedings so as to empower the person. For now, there are three features in play:

1. Mental capacity: the functional, matter-specific test of whether a person can understand, retain, use, weigh and communicate the decision.

2. Legal capacity: the status of being able to hold and exercise rights and make legally effective decisions.

3. Factual ability: being 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.

The Supreme Court was not pointed to any Strasbourg decision suggesting that a person lacking legal capacity, invalidly placed by a guardian, is outside the protection of Article 5 merely because they appear content. Every guardian-placement before it has been identified as a deprivation of liberty. Whereas those cases of valid consent involved either the person retaining legal capacity or factually accepting the placement, as opposed to merely appearing content with it. *HM* was legally capable; *Mihailovs* was "*well aware of his situation*" and tacitly agreed to staying in the open institution at Lielbērze which he left voluntarily on occasions.

Those with mental capacity to decide either way who agree to the arrangements will be providing valid consent in both domestic and European terms. Those with such mental capacity who do not consent will not. The Supreme Court held at (paragraph 191) that, *"If the individual is capable of expressing a view and there is serious doubt about their attitude, no inference should be drawn"*. But what if they are incapable of expressing a view? Those who lack such mental capacity cannot give 'domestic consent' and it is anticipated that a cautionary approach may be taken to 'European consent' to confinement, particularly in borderline or marginal cases. And it would be no surprise if a longitudinal approach to 'happiness' is adopted to ensure this is applied narrowly. Indeed, the relationship between the judgment and *HL v UK* may well come under further judicial scrutiny in due course.

5. Consent from others

The courts will need to grapple with the remit of paragraph 164 that says:

> *… 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. The court's analysis of the Nielsen judgment confirms this.*

Is this only applicable if the individual is incapable of expressing *any* view? Is the appropriate case those under 16 without a care order whose parents can consent, or are there others? Nothing in the judgment appears to disturb the rules regarding the limits of parental responsibility in the confinement context. But where does this leave health and welfare LPAs and deputies? What about others "*with authority to make decisions for this individual, in their best interests*"? Does the s.5 MCA 2005 defence provide such 'authority'?! Surely the Supreme Court did not intend for health and social care practitioners making best interests decisions to have the authority to take people outside Article 5 protection? For that would be completely contrary to *HL v UK*.

6. Community cases

On the face of it, there seems likely to be a significant drop in the need for *Re X* authorisations. By their very nature, they typically relate to people in their own tenancy or home without any 'triggers' for an oral hearing who are far less likely now to be seen as deprived. Of course, as paragraph 193 recognises, living in your own home could still engage Article 5, but "*the restrictions imposed would need to be more severe or extensive… such as, for example, a combination of restraint, medication and seclusion*". Those sorts of combined measures would not have gone down the streamlined *Re X* process in the first place and a welfare application would still seem likely given – at the very least – the significant Article 8 issues, discussed below.

7. Medical treatment

Strasbourg has never found medical treatment *per se* to deprive liberty and in its re-alignment the Supreme Court approves the approach adopted in cases like *Ferreira* and *Briggs*. Moreover, at paragraph 145 it held, "*in 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 thing because of medication) would not be regarded as suffering a deprivation of liberty within the meaning of article 5.*"

However, emphasis was put at paragraph 141 on the other ECHR rights which meant those in care "*cannot be left unprotected and without appropriate review of their interests on a continuing basis*". It is anticipated that Article 8 may feature more heavily in future, perhaps by extending the *Neary* principle so that significant healthcare issues (eg Article 8 interferences with bodily integrity against the person's will) that cannot be resolved by discussion must be placed before the Court of Protection. That would also accord with *X v Finland* (Application no. 34806/04; 3 July 2012) at paragraph 220 which, in the context of forced administration of medication, held that "*this represents a serious interference with a person's physical integrity and must accordingly be based on a "law" that guarantees proper safeguards against arbitrariness.*" It would also accord with the clear line of authority from Strasbourg that, whilst there are no express procedural safeguards contained in Article 8, there are implicit safeguards aimed at giving a person a degree of involvement in decisions affecting their private and family life that is sufficient to protect their interests, the requisite degree of involvement being calibrated to the circumstances of the case, and the seriousness of the interference with the rights that the article protect (see, for instance, *Shtukaturov v Russia* [2012] EHRR 27 (App No 44009/05) at paragraphs 88 to 89.

8. Not negligible or significant?

The judgment's summary at [53](ii) that refers to "*confinement in a restricted space for a significant period"* seems out of kilter with the "*not negligible period*" adopted by Strasbourg. There is a big difference between the two, and the issue could be important for example in A&E scenarios were risks are high but inpatient beds awaited. How long can ss.5-6 MCA 2005 be relied upon before a deprivation of liberty arises? The conventional European rule of thumb was that, depending on the circumstances, beyond 72 hours was more than negligible but is that "*a significant period*"?

9. Other rights and safeguards

Identifying the (domestic) restrictions first before considering (European) happiness is crucial because a happiness-first approach risks overlooking the restrictions and therefore risks a breach of s.6 MCA 2005, as a result of which there would be no s.5 defence to liability. Even if cases are miles away from the paradigm, s.6 demands that any *intended* restriction of movement, whether or not the person resists, is only lawful if it is both necessary and proportionate to the risk of harm. Unless and until those domestic law requirements are identified and analysed, the person's European happiness is not relevant.

Advocacy will also continue to play a key role. For those lacking capacity to decide who are unbefriended, an IMCA at 28 days of hospital admission or 8 weeks of residential care is mandatory. Advocacy under the Care Act 2014 and Social Services Well-being (Wales) Act 2014 are mandatory where the conditions are satisfied. Under the former's statutory guidance at para 13.32, "*It is the expectation that authorities should conduct a review of the plan no later than every 12 months*". At least annual care reviews provide professional oversight in social care.

It might also be thought particularly important that DHSC is held to the promise that it could be taken to have made to the court (reflected in paragraphs 10 and 141) that there are sufficient safeguards in domestic law to secure the wider rights of those with impaired decision-making capacity that everything did not need to be hung off Article 5.

The contact constraints on the Court of Protection

Re PB (Appeal: Best Interests: Restrictions on Contact in a Care Home) [2026] EWCOP 21 (T2) (HHJ Burrows)

Article 8 – contact

Summary

The issue of visiting in care homes is a distinctly hot topic. Linked, it appears, to high profile media coverage, DHSC has announced a review of Regulation 9A of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, itself introduced in the wake of the pandemic. Regulation 9A does not, however, apply to judges making decisions in the Court of Protection. The media coverage noted above was focused primarily on the role of the Court of Protection. Whilst it does not expressly refer to that coverage, it does not require too much reading between the lines to see the careful and comprehensive judgment of HHJ Burrows in *Re PB (Appeal: Best Interests: Restrictions on Contact in a Care Home)* [2026] EWCOP 21 (T2) as drafted, in part, to explain why the Court of Protection takes the approach that it does.

The case itself took the form of an appeal against a decision of a district judge that it was in the best interests of a lady in her late 80s, PB, to remain at the care home, and that contact between her and her daughter, SB, should continue to be supervised and limited. As HHJ Burrows noted:

> *14 The history leading to these proceedings is properly summarised in the Local Authority's position statement for the hearing before the DJ, as follows:*
>
> *(9) PB bought the property she lives in with her late husband and it is understood that PB is the sole beneficiary and owner of the property. SB is believed to have moved into the property with PB in November 2017.*
>
> *(10). The local authority had previously commissioned the agency to provide a package of care three times per day to PB in her home and the agency had been providing this care for [around] two years; prior to that, eight different care agencies had [been] commissioned but then ceased involvement, citing issues in the working relationship with SB.*
>
> *(11). The court will note the exhibits provided from the previous care provider, the agency, which detail incidents and difficulties in work conditions allegedly due to SB's behaviour over a near two year period. No one has sought for the previous provider to give evidence; nor is it considered necessary for the court to determine the detail of what went on prior to PB's move to the care home. It is an accepted fact that the relationship with the agency became difficult, but SB's case is that the agency remain willing to resume the care package and that she will work with them. She has provided evidence from the agency, most recently in November 2025, confirming that they would resume the package.*
>
> *15. Pausing there, the foregoing history is not unusual in Court of Protection cases. There are often fallings out between professional care givers and the families of those to whom they provide care, both in the setting of their own home, or in the institutional setting of a care home. Sometimes these are the almost inevitable result of differences of opinion as to what sort of care P should receive. Sometimes it is to do with concerns on the part of P's family as to the standard of care P is being provided by the care giver. Sometimes there are serious problems*

that arise out of the behaviour of one party or another.

16. In most cases, the relationship continues, and the care giver and the family simply learn to cooperate and place the interests of P above their own. Sometimes, however, that proves impossible and the relationship breaks down. When care is provided in P's home, this results in the care giver withdrawing. When the care is provided in a residential setting operated by the care giver, it can result either in restrictions on, or the total suspension of, visits by P's family members or friends, or at least some of them. Sometimes, the management of the home simply gives notice to P that they will have to leave the home and find somewhere else.

17. That last option can be highly disruptive for P, and it can result in it being very difficult, maybe even impossible to find any appropriate alternative provision. When one is found, it may be inconveniently far away for the family or for P. It may be more expensive, perhaps prohibitively so. The history of rancour oftens follows P and can lead to the new care provider imposing restrictions on the family as a condition precedent for P's residence at the new home. This is a difficult situation for the families, the providers, the public authorities with responsibility for P's care, and for P, whose interests are often adversely affected by all this.

18. It is also a great problem for the Court of Protection. As I will explain later, the Court's limited legal powers over care providers often leaves it in the position the DJ found herself in this case. Any power the Court has over the care provider to modify their approach towards P, for instance by imposing conditions on a standard authorisation, must be used sparingly if, by their use, all that happens is that the "nuclear option" of the termination of the placement will ensue.

As HHJ Burrows identified:

> *19. In this case, both these issues feature. Not only had there been a breakdown in agency provision whilst PB was at home, but there were restrictions on SB's visits at the care home, along with the threat that termination would follow any attempts to interfere with the home's exercising of its powers over contact.*
>
> *20. This is an important issue in this case because it has a direct impact on PB's best interests in two interrelated ways. Firstly, PB and SB are close, and it maybe in PB's best interests for her to have extensive contact, as and when she wishes, with her daughter. Or, to put it another way, it may upset her and injure her best interests for that contact to be restricted. Secondly, however, the breakdown in relations between the caregivers and SB is also relevant to PB's best interests. That is because it makes her tenure at the care home less secure, for the reasons I have already explained.*

On the facts of the case (but, again, not unusually) the question of whether it was necessary to hold a fact-finding hearing to identify the cause of the breakdown arose. The district judge had considered that it was not necessary, a decision HHJ Burrows entirely agreed with:

> *24. I think it is clear that the DJ decided a fact-finding hearing concerned with the history of SB's relations with care providers over a period of years, and at the present care home would have involved a considerable amount of court time. That is not always the end of the story. Sometimes there is a need for a*

> *prolonged fact finding, where, for instance, neglect or abuse are live and decisive issues in the case. However, that is only when the outcome of the fact finding will have an impact on the decision the Court has to make. This is similar to the position in the Family Court. It is a matter best determined by the judge with management of the case applying the principles enunciated by Mr Justice McFarlane (as he then was) in A County Council v DP [2005] EWHC 1593 (usually referred to as the Oxfordshire case) and most recently G (a child: scope of fact finding) [2025] EWCA Civ 1044 and as distilled into the issues before the Court of Protection by Re H-D-H [2021] EWCA Civ 1912.*

HHJ Burrows further concluded that the judge had been entitled to proceed on the basis that this was a situation where the court had to look forward, rather than backwards. He also concluded that she had not placed determinative reliance on a Decision Support Tool assessment (designed to inform decisions about CHC funding) in reaching her conclusions as to PB's care needs, and, overall, that her decision about PB's best interests as regards her continued residence in the care home was one she was entitled to reach.

HHJ Burrows then turned to the question of contact, identifying that "[r]estrictions on contact between a vulnerable adult and close family members, plainly engage Article 8 of the European Convention on Human Rights (ECHR), and the court, as a public authority itself, must ensure that any interference is necessary and proportionate." He accepted the contention that the care home was to be seen (via ss.73(1) and (2) Care Act 2014) as performing functions of a public nature, so as to be bound, directly, by the ECHR. He then turned to the operation of Regulation 9A (a matter he had raised of his own motion before the parties), identifying that

> *40. The importance of these regulations is that a registered person, such as the managers of the care home, must comply with them in carrying out a regulated activity, i.e. running the care home (see Regulation 8). A failure to do so leaves the care home and its managers open to regulatory action by the regulator, the Care Quality Commission (CQC). This could lead to sanctions, and even the cancellation of their registration and the likely closure of the home.*
>
> *41. In other words, there is an incentive for those who operate care homes to ensure they enable their residents to receive visits at the home, and to leave the home in order to pay visits. A failure to do so is a serious matter, with perilous consequences.*
>
> *42. However, the wording of Regulation 9A, along with the general obligation under Article 8 (via s. 73 Care Act) is necessarily subject to qualifications. So, although the wording in Regulation 9A(2) provides that those staying in care homes "**must** be facilitated to receive visits" unless there are "exceptional circumstances", paragraph (3), whilst purporting not to limit that right, immediately qualifies it. The visits must be "received in a way that is **appropriate**". That visit must meet "the service user's **needs**" and "so far as **reasonably practicable**, reflect their preferences" (All emphasis added). Each of the emphasised provisions requires a judgment on the part of the service provider, having first consulted with the relevant parties.*
>
> *43. Then comes another significant provision (my emphasis, once again). In order to comply with the provision enabling visits, the care home*

> *owner **must** take action, "or put in place such precautions, as is **necessary and proportionate** to ensure that service users may receive visits to be accompanied **safely**". In determining those "precautions" regard must be given to any care or treatment plan for the service user".*

HHJ Burrows then set out what happened in PB's case, noting that it was:

> *44.* […] *not only typical of relationship breakdown between families and care providers, but also how Regulation 9A is used in such situations. Without going into detail, there were a number of allegations of incidents involving SB at the care home. These culminated in a letter on 26 November 2025. I will repeat the letter verbatim (literally), not just so as to underline its relevance to this case, but to emphasise its relative normality in this context. It said:*
>
> > *Following yesterdays incidents with SB, at the home and after careful consideration of SB ongoing challenging , and detrimental behaviours towards PB, staff, residents, and relatives within the home. e.g.*
> >
> > *1. Affecting staff morale, and their mental health, due to being rude, condescending, doesn't listen to staff, talks over staff, or walks away from staff whilst they are talking to her, also interrupts staff, and disrupts care by trying to tell staff how to do their jobs by telephone and in person, or threatens them with solicitors, the staff are afraid of SB and this impacts on PB, other residents, staff, and visitors who witness her behaviour's.*
> >
> > *2. Has demonstrated with yesterdays 2 incidents that she has put PB at a high risk of harm due to bringing food into the home for PB from an unknown source, modification, quantity, how has this been stored, when / where cooked purchased from? Which makes this food untraceable in the event of salmonella etc. SB knows as discussed in the schedule of expectations that she should not be here at mealtimes, and that the care home provides meals for PB in line with SALT assessment and guidelines for PB, due to high choke risk, and noncompliance with recommended IDDSI levels which are prescribed by SALT on assessment. SB has had a copy of the assessment from SALT, and the care home, and SALT team and I have discussed this in great depth With SB on many occasions. SB is not permitted to feed her mum due to the above, also SB refused to tell staff what she had fed/how much to PB so staff were unable to record PB intake at teatime yesterday.*
> >
> > *SB also put her mum at high risk by tampering with and repositioning PB bed leaving her in a flat position which is a choke risk, despite the maintenance team at the home asking SB not to touch the bed as the hand Set wasn't working properly, and he left the room to get a replacement, when he arrived back SB had put the bed up to the highest position of the headboard and in doing so damaged the bed, and bent the frame.*
> >
> > *This resulted in PB spending a long period out of bed in a chair whilst a replacement bed and mattress could be built/ set up and the other bed and mattress*

removed, compromising PB pressure relief and distressing PB.

Also, staff were away from caring for PB and other residents due to having to source/dismantle and rebuild the bed and set up the mattress, also resulted in staff not getting off shift on time due to this situation.

The business owners and management team must consider the wellbeing and safety of all residents and staff first and foremost, managing SB behaviours is no longer sustainable, especially as we approach the festive period which SB has already delayed the home in decorating the home for Christmas due to yesterday's incidents. Therefore we have only 2 choices available to us,

1. We serve PB 4 weeks' notice to leave the home as per contract, or

2. We take legal advice about barring SB from the home completely. The home feels the 2nd option would better serve PB, staff, and residents, and we are currently awaiting a call back from the care homes legal team.

As soon as I have an update, I will notify you of the decision. I'm sorry we have had to come to this, but we feel all other avenues have been taken and failed.

In an important passage, subtitled "*Choice, Regulation and the limits of the Court's Power*," HHJ Burrows set out how:

53. This case illustrates a recurring difficulty in Court of Protection proceedings, which is not always made explicit when welfare decisions are considered on a case-by-case basis. It concerns the interaction between the limits of the court's welfare jurisdiction, the contractual and regulatory position of private care home providers, and the practical consequences for decisions about residence and contact.

54. It is now well established that, when determining best interests under the Mental Capacity Act 2005, the Court of Protection must choose only between options that are legally and practically available. The court does not have a free-standing power to require public authorities, or private providers, to create services, placements or arrangements that do not exist or which they are unwilling to offer. That principle was authoritatively confirmed by the Supreme Court in N v ACCG [2017] UKSC 22 and has since been consistently applied in cases where the range of options is narrow or severely constrained.

55. That principle does not reflect judicial passivity. It reflects the legal limits of the court's welfare jurisdiction. Dissatisfaction with the options that are in fact available to P may, in an appropriate case, give rise to public-law or regulatory challenge. It does not entitle this court to distort the welfare evaluation by treating unavailable options as if they were realistic contenders.

56. The point assumes particular significance where, as here, the court is faced in substance with a binary choice: either maintaining a single existing placement or risking its loss in circumstances where no alternative satisfactory placement has been identified or secured. In such cases the court is entitled, and in my judgment often required, to give decisive weight to the preservation of a stable placement, even where that stability is

accompanied by restrictions that engage Article 8 rights.

57. That approach does not involve subordinating P's welfare to institutional convenience. It reflects the reality that the maintenance of stability is itself a core welfare consideration, and that the loss of a placement may have consequences which are materially more harmful than the continuation, for the time being, of arrangements which are less than ideal.

58. The analysis cannot, however, stop there. Care homes are, almost invariably, privately owned and operated pursuant to contractual arrangements. Those arrangements ordinarily confer on the provider a right to terminate the resident's occupation in defined circumstances. The Court of Protection has no jurisdiction to rewrite those contracts, nor to prevent a lawful termination pursued through the county court.

59. At the same time, care home providers performing regulated activities do not operate in a purely private sphere. By virtue of section 73 of the Care Act 2014, they are to be treated as public authorities for the purposes of section 6 of the Human Rights Act 1998. Restrictions on contact between a resident and her family therefore engage Article 8 of the Convention.

60. In addition, Regulation 9A of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 imposes a positive obligation on providers, save in exceptional circumstances, to facilitate visits and to adopt the least restrictive measures that are necessary and proportionate to address identified risks. Compliance with that obligation is a matter subject to regulatory oversight by the Care Quality Commission.

61. A failure to comply with those obligations may expose a provider to regulatory action, including warning notices, conditions on registration and, in serious cases, suspension or cancellation of registration. The imposition of restrictions on contact, or the use of the threat of eviction as a means of regulating the behaviour of family members, may therefore have significant regulatory consequences.

62. However, regulatory accountability does not equate to immediate unavailability of the placement. Unless and until regulatory action is taken, the placement remains either available or withdrawn as a matter of practical fact. The Court of Protection cannot assume future enforcement, nor can it compel a provider to continue a placement against its will on the basis that the regulator might intervene.

63. The court is therefore required to decide the case before it on the basis of present realities. In doing so, it is entitled to take into account evidence that insisting upon greater or differently-structured contact, contrary to the provider's stated position, would be likely to precipitate termination of the placement altogether.

64. That does not involve an abdication of the court's responsibility to scrutinise the proportionality of contact restrictions. Rather, it reflects an acknowledgement that the welfare jurisdiction operates within a wider legal and practical framework over which the court does not have direct control.

65. Nor does it render contact arrangements static or immune from future challenge. The court's tolerance of restrictive arrangements in circumstances of constrained choice is necessarily fact-sensitive and time-

> *limited. Any diminution of contact beyond that authorised by the court, or any failure by the local authority to keep contact arrangements under active and meaningful review, would require careful scrutiny in future proceedings.*
>
> *66. Equally, any material change in circumstances, whether a shift in the provider's position, the emergence of a realistic alternative placement, or the taking of regulatory action, may require the welfare balance to be revisited.*

Applying that approach, HHJ Burrows found that the district judge was entitled to reach the conclusion that she did:

> *67. I do not accept that the judge abdicated her responsibility. She was clearly troubled by the limitations on contact and expressly encouraged the local authority to work towards increasing it, potentially with third-party supervision. She weighed the interference with family life against the real risk that imposing greater contact against the provider's position could destabilise PB's only available placement.*
>
> *68. The District Judge did not disregard the Article 8 obligations. She was faced with evidence that, unless contact was restricted and supervised, the care home was likely to terminate PB's placement. The judge was entitled to treat that risk as real, whether or not the allegations underpinning it were disputed.*
>
> *69. In those circumstances, the judge was required to choose between legally and practically available options. The Court of Protection has no power to compel a private provider to continue a placement against its will, nor to rewrite contractual arrangements. That limitation is well established.*
>
> *70. The judge balanced:*
>
> - *the importance of contact between PB and SB;*
> - *the interference with family life occasioned by supervision and limitation; and*
> - *the materially greater harm that would likely result from the sudden loss of PB's only available placement.*
>
> *71. While the proportionality analysis could have been more fully articulated, it is apparent from the judgment read as a whole that the correct approach was applied. The restriction on contact was not treated as an end in itself, but as a contingent and time-limited measure adopted to preserve PB's residential stability. This Court will not intervene simply because a judgment might have been expressed differently. The question is whether the outcome was one the judge was entitled to reach.*
>
> *72. In the circumstances of this case, where no alternative placement was available and the court was faced with a binary choice, I am satisfied that the judge was entitled to conclude that the maintenance of a stable placement was, for the time being, in PB's best interests, even at the cost of restricted contact.*
>
> *73. That said, I emphasise that contact arrangements are not static. Section 21A reviews require ongoing vigilance. Any diminution of contact beyond that authorised by the court, or any failure by the local authority to keep contact under active review, would require careful scrutiny in future proceedings.*

HHJ Burrows therefore granted permission – given the importance of the issue raised – but refused the appeal, although "*strongly enourag*[ing] *the local authority and the care provider to continue exploring ways of facilitating*

meaningful and dignified contact between PB and SB, consistent with PB's welfare and safety."

Comment

As set out at the outset, this decision serves as a very useful primer for those who are wanting to understand how and why the Court of Protection considers questions of contact in the care home context – and, in particular, the (distinctly depressing) extent to which it can find itself navigating a set of very constrained options, especially where private providers are involved. A 'full-spectrum' response to the issues raised in the media coverage [11] would therefore – ironically – have to include giving the Court of Protection more power.

.

11 In referring to this coverage, we should make clear that we are not saying that all of the situations identified there fall into the same category as that of PB's case. It is also the case that stress on families seeking to secure care can very easily and very quickly give rise to breakdowns of trust where that care is not (for whatever reason) available.

PROPERTY AND AFFAIRS

SCCO procedure – P died or regained capacity

The SCCO has introduced a new procedure for costs have not been agreed in matters where P has either died or regained capacity. We reproduce it below.

> ***Where the protected party (P) has passed away***
>
> *As soon as the Deputy is aware of the death of P, they should inform the SCCO via email to scco@justice.gov.uk of the date of death.*
>
> *If either:*
>
> *(1) It proves impossible for the Deputy to agree any outstanding costs with the executors of the estate; or*
>
> *(2) The Deputy is also the executor*
>
> *Then the Deputy should complete the form titled* ***Senior Courts Costs Office – Court of Protection matters – Costs not agreed*** *so that the outstanding costs can be progressed. The form should then be sent to SCCO@justice.gov.uk with the following wording in the subject heading –* ***SCCO COP costs not agreed – SCCO reference and P's name*** *(e.g. SCCO COP Costs not agreed SC-2020-COP-000001/1)*
>
> *If, on the other hand, there are bills already awaiting provisional assessment by the court and the outstanding costs are agreed with the executors please inform the court by email confirming that costs have been agreed and requesting that the pending bills be withdrawn.*
>
> ***Where the protected party (P) has regained capacity***
>
> *The same approach should be taken to dealing with the outstanding costs where P regains capacity. The SCCO should be informed of the date on which the order was discharged and whether any outstanding costs, including those awaiting provisional assessment, have been agreed or not.*
>
> *The form titled* ***Senior Courts Costs Office – Court of Protection matters – Costs not agreed*** *should also be used for this purpose.*
>
> *This note should be read in conjunction with the note re: Post-Death Costs in the Court of Protection dated 13th May 2024 and section 27.16 of the SCCO Guide 2025.*
> *The process will be reviewed at the end of December 2026*

OPG investigations – clarification

In our May report, we noted a new policy adopted by the OPG in relation to requirements to trigger investigations. In evident response to concerns raised by that policy, the OPG has published a letter outlining more detail about background to and implications of the policy change, in particular in relation to solicitors. The OPG has sought to emphasise that:

> *The changes we are making are intended to ensure we are in the strongest possible position to complete an investigation, with all relevant information that may be available shared at the outset when a concern is reported to OPG. It is not our intention to prevent investigations from taking place where there are genuine concerns, nor to set requirements that professionals cannot reasonably meet because of a lack of access to P or to financial information.*
> *Instead, these changes are to make sure our investigation team are equipped with the information available*

to investigate by asking for the relevant information at the point the concern is raised, rather than later in the process. Professionals usually have access to the information that we are requesting, but if they do not, that would not prevent the concern still being raised with us and being considered for investigation.

Can you lie about your own capacity?

UK Insurance Ltd v Hassankhail [2026] EWHC 1020 (KB) (High Court (King's Bench Division (Master Šabić KC))

Other proceedings – civil

Summary

Setting aside a court-approved settlement on the ground of fraud is not straightforward. The settlement carries real weight, and before the fraud allegations can be tested, the party bringing the claim has to secure disclosure of the documents it needs to do so.

UK Insurance Ltd v Hassankhail [2026] EWHC 1020 (KB) was an application for wide-ranging disclosure in the context of a fraud claim which has not yet been heard. At its core is an allegation that Hassankhail dishonestly represented himself as lacking capacity to manage his financial affairs, and that this misrepresentation infected both the expert evidence and the approval hearing itself.

Background

The proceedings arose out of a road traffic accident in 2016. The defendant, Bahader Hassankhail, brought a personal injury claim in which he alleged that he had sustained a moderate to severe brain injury. As Master Šabić KC noted at paragraph 11, his case in the original proceedings was that he lacked capacity both to litigate and to manage his property and affairs as a result of his injuries, such that the Official Solicitor was appointed as his litigation friend at the approval hearing.

His final schedule of loss totalled £12,702,415, including more than £1.8 million for the costs of a financial deputy arising from that lack of capacity, and over £7.8 million for past and future care and case management, a figure which also rested, at least in part, on his presentation as a person unable to manage his affairs independently. A settlement of £2.5 million was approved by the court on 29 June 2022.

The insurer's case, as presented at the disclosure hearing, was built on three distinct strands of alleged fraud.

- *Drug use and misrepresentation to medical experts*. The insurer placed before the court 37 text messages sent by or to Hassankhail, showing regular use of crystal methamphetamine, GHB, and other substances throughout the period covered by the personal injury proceedings. According to the insurer's case, Hassankhail had consistently denied any drug use throughout the proceedings, and those denials had informed the expert assessments on which the claim was valued.

  Master Šabić KC found that it was the "cascading effect" of this false reporting on the expert assessments which took the conduct outside the ordinary run of cases, noting at paragraph 41 that the drug use was directly relevant to the assessment of:

  "the severity of Mr Hassankhail's cognitive impairments, their impact on day to day functioning, ability to manage property and affairs and the valuation of Mr Hassankhail's injury related needs and

losses, all of which are or at least can be affected by significant and frequent drug taking."

- *The capacity claim*. The claim that Hassankhail lacked financial capacity had justified more than £1.8 million of the settlement. His financial deputy had reported that he spent all of his benefits money on taxis and pizza, could not estimate his outgoings even roughly, and that cash found in his room was *"consistent with his lack of understanding about budgeting or his own vulnerability."* Master Šabić KC set out, at paragraph 44, the evidence which on the insurer's case contradicted that picture entirely:
    - The available phone records showed Hassankhail managing his own finances and travel arrangements independently and without support.
    - Within two months of the approval hearing, he applied to the Family Court for a non-molestation order, in proceedings in which he asserted that he had capacity to litigate.
    - Within four months, he sought and obtained a COP3 declaration from his GP confirming that he had regained financial capacity.
    - At a subsequent assessment in Court of Protection proceedings in September 2023, it emerged that he had also secured a tenancy without the knowledge of his deputy.
- *The false witness statement*. The third strand concerned a witness statement provided by a third party, David Mansour, in the original proceedings. Mansour's statement had been filed in response to surveillance footage gathered by the insurer. After the settlement, Mansour contacted the insurer to say that the statement was false, and subsequently signed a further statement apologising to the court for the earlier one. The insurer's case was that Hassankhail had known from the outset that Mansour's original statement was untrue.

Master Šabić KC found, on the balance of probabilities, that fraud had likely occurred across all three areas, a finding sufficient to justify the wide-ranging disclosure order the insurer was seeking. The order was wide-ranging, extending to bank records, medical files, the COP3 and supporting documents, the tenancy agreement, and privileged communications, the latter on the basis of the *Cox and Railton* principle that fraud defeats privilege. Master Šabić KC also ordered disclosure of the advice prepared for the approval hearing and the instructions given and received by Hassankhail's legal representatives, finding both to be *"central to this claim."*

The ruling did not, however, go entirely in the insurer's favour. Master Šabić KC found that a second email from Mansour, held on the servers of the Direct Line Group and known to the insurer's solicitors since at least July 2025, had never been disclosed to the defendant or to the court, meaning "*the basis on which the case was presented in Court on 16 March 2026 was false.*" Master Šabić KC described the failure as *"deeply concerning"* and noted that no good reason had been given for it.

Comment

The full fraud trial remains to be heard. Nothing in Master Šabić KC's ruling amounts to a final

determination of the underlying allegations; that will be a matter for trial.

However, this case will be of interest beyond the insurance fraud community. The central puzzle it raises is a simple one: how was a settlement of this size approved on a capacity basis, with the Official Solicitor acting as litigation friend, when, on the insurer's case, the contemporaneous evidence so thoroughly contradicted the picture presented to the court?

On the insurer's case, the approval hearing was conducted on a false evidential basis: the experts, the deputy and the approval judge were all working from a picture that other evidence now directly contradict. The case is a reminder that court approval of a protected party settlement is only as reliable as the evidence on which it rests and that those settlements can be unwound if that evidence is false. It also raises the interestingly existential question of whether you can lie about your own capacity.

PRACTICE AND PROCEDURE

Personal welfare deputies in the Court of Appeal

The 'leapfrogged' appeal from the decision of HHJ Beckley in the *HDEB* case is to be heard by the Court of Appeal on 17 June.

Transparency must support justice, not overwhelm it

Re Gardner (Deceased) (Court of Protection: Disclosure of Position Statements) [2026] EWCA Civ 640 (Court of Appeal (Sir Stephen Cobb P, Peter Jackson and Coulson JJ))

Practice and procedure (Court of Protection)

Summary[12]

The Court of Appeal has set aside the decision of Poole J in *Re AB (Disclosure of Position Statements)* [2025] EWCOP 25 (T3) (summarised in the July 2025 Practice and Procedure Report). The tragic underlying factors of the case were set out in *Re AB (ADRT: Validity and Applicability)* [2025] EWCOP 20 (T3), and involved a dispute over the validity of Carl Gardner's Advance Decision to Refuse Treatment ('ADRT'), which once given effect, led to the cessation of treatment and the end of Mr Gardner's life.

A satellite issue in the underlying application had been an application by an observer, Professor Celia Kitzinger, for the position statements of the parties in the application. Mr Gardner's mother had opposed the disclosure of position statement (which was also the position other members of Mr Gardner's family). Professor Kitzinger was given leave to intervene in the proceedings before Poole J to make submissions on the disclosure issue, and was given leave to intervene in the appeal. The Official Solicitor was also given leave to intervene in the appeal in her own right, having ceased to be Mr Gardner's litigation friend in the proceedings on his death.

Writing the lead judgment (the first delivered as the new President of the Court of Protection), Sir Stephen Cobb gave a summary of his conclusions at paragraph 12:

> *i) Court of Protection proceedings are private by default (rule 4.1 of the Court of Protection Rules 2017) ('COPR 2017'), even where the court directs that hearings are to be held in public under rule 4.3 of the COPR 2017. Many hearings in the Court of Protection are of course in public, but a direction for a public hearing does not convert the proceedings into "public proceedings" equivalent to litigation in the civil courts or tribunals. The judge below erred in treating the proceedings as public simpliciter and in importing openness principles from jurisdictions which are public by default;*
>
> *ii) Once lodged, position statements are "court records" within the meaning of rule 5.9(2) of the COPR 2017 (following Dring v Cape Intermediate Holdings Ltd [2019] UKSC 38 [2020] AC 629) ('Dring'). However, they are not automatically disclosable to observers or non-parties, and court authorisation is required for disclosure of them to non-parties under rule 5.9(2) COPR 2017;*
>
> *iii) Open justice does not entitle observers to access all material informing judicial decision-making. Access to documents must be justified by a demonstrable application of the open justice principle, not by curiosity,*

[12] Alex and Katie having been involved in the case, they have not contributed to this note.

research, education, or personal interest;

iv) Disclosure of position statements which cite highly personal source material from the written evidence is a serious interference with Article 8 ECHR rights; in this case, the court failed to engage with rule 5.9(4) COPR 2017 and specifically consider whether disclosure should be: refused, redacted, or subject to use restrictions (e.g., in relation to source evidence);

v) The procedure for disclosing position statements to members of the public should be considered as a matter of priority by the ad hoc Court of Protection Rules Committee ('COPRC'); in the meantime, the guidance offered by the Judge at [J2/36] should not be followed; the court should in the meantime consider disclosing case summaries, chronologies and lists of issues to observers who request information;

vi) The Court of Protection exists for P's benefit. Transparency must support justice, not overwhelm it.

There were a series of hearings in the case, dealing with distinct and complex issues relating to the ADRT, and a number of applications were made for disclosure:

1. Professor Kitzinger made an application in advance of a hearing in March 2025 for disclosure of the position statements; Poole J gave 'permission' for the parties to release the position statements, but did not require them to do so (Mr Gardner's family declined, as did the ICB with responsibility for Mr Gardner's care). Mr Gardner's legal representatives "*made known to Professor Kitzinger that Mr Gardner's family had found the request for disclosure of the position statements distressing and intrusive given the intensely personal nature of the material involved*" (paragraph 20);

2. Following the March 2025 hearing, Professor Kitzinger applied for disclosure of the ADRT. All parties objected, and the court declined the request;

3. Professor Kitzinger made a further application for position statements filed for the May 2025 hearing. Again, Poole J granted permission for the parties to disclose these, stating that doing so was at the discretion of the parties. Again, Mr Gardner's family and the ICB declined.

The central conflict arose at the hearing on 30 June 2025, which was the first day of a hearing listed for four days. Mr Gardner's family withdrew their contentions that the ADRT had been made under undue influence and was fraudulent. Where all parties accepted that the ADRT was valid on face, the contents of the ADRT and associated documents were not subject to examination in court. Poole J "*went on to make a number of welfare decisions to give effect to the withdrawal of treatment for Mr Gardner and his transfer to a hospice for the commencement of palliative care. The Judge resolved a minor dispute about final contact for Mr Gardner with members of his family and his fiancée*" (paragraph 23).

On the same day, Professor Kitzinger again (informally) applied for disclosure of the parties position statements. Poole J declined to consider this on 30 June 2025, but directed that Professor Kitzinger file a position statement on 1 July 2025 explaining the request, and the parties respond to it 24 hours later. In her written application, Professor Kitzinger now sought all positions filed throughout proceedings (including those which had not been disclosed by the family and ICB), not just those filed for 30 June 2025. Professor Kitzinger "*argued that the case was of legitimate public interest, illustrating the Court of Protection's*

role in end-of-life decision-making, and that meaningful open justice required access to position statements so that observers could understand, report on, and educate the public about how the case had unfolded" (paragraph 24). The application stated (in part)

> *[11] I have explained that I am seeking disclosure of the Position Statements in order to better understand how this case unfolded over time and the (shifting) position the parties took on different issues. It's important for me to understand this for two reasons: (1) as an individual personally invested in making my own end-of-life plans in a manner than will hopefully convince medical professionals to act in accordance with my advance decisions and pre-empt judicial scrutiny (see (Determining the legal status of a 'Living Will': Personal reflections on a case before Poole J); (2) in my role as an educator and as author and editor for the Open Justice Court of Protection Project blog, which serves to inform and educate the public about the law – both statutory and case law – as applied by judges in the Court of Protection. In addition to my own blog posts cited above, I worked with another member of the public as editor on a third blog about this case …"* (emphasis added by Sir Stephen Cobb)

Mr Gardner was transferred to a hospice, where life-sustaining treatment was withdrawn. He died on 8 July 2025.

Poole J considered the submissions and directed disclosure of the position statements on 14 July 2025 from the four hearings, as well as directing that the Transparency Order would expire on 30 August 2025 (which was later the subject of further consideration).

Transparency and open justice

Sir Stephen Cobb observed that "[t]*he objective of transparency is not to put a non-party observer in the position of the judge on the bench, nor does it entail, as a condition of achieving that objective, that the observer be furnished with the entirety of the material underpinning the judge's decision. The objective of open justice is long-acknowledged to be twofold: first, to enable public scrutiny of the way in which courts decide cases, to hold judges to account for the decisions they make and to enable the public to have confidence that they are 'doing their job properly' (Dring at [42]); secondly it is 'to enable the public to understand how the justice system works and why decisions are taken'* […]" (paragraph 62).

Sir Stephen Cobb considered that the context of Court of Protection proceedings was important, and noted that in relying on the authority of *Dring* on transparency, "[i]t *is material to note that Dring was an asbestos-linked personal injury claim, and Article 8 ECHR rights were not engaged at all. In this case, there is no question but that Article 8 is firmly engaged, adding significantly greater weight to the privacy arguments which were outlined by Baroness Hale in Dring*" (paragraph 62). At paragraph 63, he noted that Baroness Hale also observed in *Dring* that the "obvious" exceptions to the disclosure principle are: "*national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally*"

Sir Stephen Cobb cited with approval the decision of Rajah J in *W v P* [2025] EWCOP 11, which raised as a consideration that those with capacity were entitled to deal with their personal affairs in private, and those lacking capacity should not necessarily lose this status. Cobb LJ considered that "*there are many legitimate reasons why extensive disclosure of court documents should not be ordered in cases*

involving such intensely personal matters arising in the Court of Protection" (paragraph 63).

Sir Stephen Cobb was clear that it was for the person requesting documents "*to explain why they seek them and how granting them access will advance the open justice principle (see Dring at [45] and Re HMP at [23]). If there is no good reason for granting disclosure, that will be the end of the matter. Moreover, disclosure of court documents in the fulfilment of the transparency objectives (outlined above) should be limited, in my judgment, to the extent essential to achieve those objectives and no further*" (paragraph 63).

While recognising the importance of open justice, Sir Stephen Cobb emphasised that the administration of justice was the 'primary duty of any court,' and that "*disclosure of personal documents in the name of transparency may either support or jeopardise that aim. While public scrutiny undoubtedly strengthens the integrity of the process, it must not be forgotten that such proceedings exist for P's benefit. The administration of justice must never be compromised in the name of openness*" (paragraph 64). He gave two specific examples of this:

1. Justice would be impeded if a witness withheld material from the court due to concerns about it being available to non-parties; and
2. While the MCA has a 'core aim' the participation of P in decision-making as far as possible, "[t]*he quest to achieve openness should not operate as a deterrent to P from direct engagement in the proceedings, nor should it (as it might do) add to confusion for them*."

Sir Stephen Cobb was clear that open justice should support, rather than overshadow, the court's core purpose. "[S]*atellite disputes about the form, content or disclosure of position statements risk obscuring the key issues and objectives of the proceedings' and 'that judicial office holders should guillotine the process, or even decline to deal with an application if they would otherwise be disabled or impeded from administering justice in the case itself, or diverted from other pressing judicial duties*" (paragraph 80).

Sir Stephen Cobb found that Poole J had fallen into error in considering the Court of Protection proceedings "public" (paragraph 71). The starting point was that the open justice principle does not apply in Court of Protection proceedings (due to their 'default' status as private). Poole J had therefore fallen into error "*in determining this application (i.e., for disclosure of position statements) when he wrongly relied on guidance from judgments delivered in jurisdictions which operate in public*" (paragraph 72). Further, "*in civil or public law proceedings for example, when the court is balancing the competing considerations of privacy and openness, no consideration needs to be given to the welfare of P as must happen in the Court of Protection*" (paragraph 73).

Peter Jackson LJ agreed "wholly" with the lead judgment of Sir Stephen Cobb, and added his own observations on the nature of transparency:

> *85. The Court of Protection decides questions of often fundamental importance for those who lack capacity to decide them for themselves, and for their families. It is strongly in the public interest for the public to be able to reach its own conclusions about how the court is working, and to do so on the basis of reliable information. However, as My Lord has so clearly explained, the amount of information that can lawfully be put into the public domain has to be controlled so that proceedings that exist to protect vulnerable individuals do not become a means of harming them. The*

> *rules of court are accordingly designed to help judges to strike the balance in a way that can enjoy the confidence of parties, practitioners, reporters and members of the public, including those with an informed interest, such as Professor Kitzinger, who has made such a signal contribution in this field.*
>
> *86. Court of Protection proceedings are private by default but they will often be heard in public under the protective umbrella of a Transparency Order. Although the order is necessarily framed in restrictive terms, it is in fact the means by which the greatest possible transparency is achieved. Its restrictions are no more than the price that has to be paid to make it lawful for the proceedings to be heard in public. I accept that this is somewhat counter-intuitive, as Males LJ recently remarked in Pringle v Nervo [2026] EWCA Civ 266 at [72]. He commented that the sole purpose of a Transparency Order is to ensure privacy, and that it is odd that it does "precisely the opposite of what it says on the tin". However, as I have explained, the purpose of a Transparency Order is much wider than that. By ensuring that, where it is appropriate, these important decisions can be taken in public, these orders decidedly advance the interests of open justice rather than hampering them.*

Status of position statements in the Court of Protection and who discloses them

Sir Stephen Cobb noted that Court of Protection proceedings do not involve formal pleadings, and position statements are not formally 'filed' with the court nor do they have a statement of truth, though they are a well-established practice in the court. C Sir Stephen Cobb considered that the interchangeable use of 'skeleton arguments' and 'position statements' was unhelpful, and they should be identified accordingly. Where position statements are not mentioned in the COPR or COP Practice Directions, there was no explicit provision to be found within the rules for their treatment.

None of the parties in the appeal adopted the approach of Poole J that position statements could be obtained directly from the parties without an approach to the court, nor that the parties were obliged to prepare anonymised versions of position statements if disclosure was directed. Sir Stephen Cobb agreed with both of these submissions, noting that while protection of P may require anonymisation of judgments, it was not necessary for position statements disclosed along with transparency orders.

Disclosure of position statements

All Court of Protection hearings are private by operation of the COPR; however, Practice Direction 4C has created a default position that attended hearings are to be in public, subject to reporting restrictions as set out in a standard transparency order. An attended hearing may be held in private if there is good reason for doing so.

Part 5 COPR governs the 'supply of documents to a non-party from court records.' There is a general right to inspect judgments or orders made in public. However, access to any other documents is subject to an application under Part 10 COPR, and if minded to give disclosure, the court will consider whether to give it on an edited basis.

It was agreed between the parties (and accepted by the court) that "[o]n*ce position statements have been lodged with the court (whether to the court office or to a judge's clerk) they become "documents and records which the court itself keeps for its own purposes" (Baroness Hale in Dring at [22]) and therefore fall within the class of "any other documents in the court records"*

within the terms of COPR 2017 rule 5.9(2)(a)" (paragraph 51(iv).

Sir Stephen Cobb noted that Professor Kitzinger never made a formal, written application for documents in accordance with Part 10 (but the court has the power to dispense with the requirements of any rule, and was entitled to consider an informal application). Sir Stephen Cobb, however, found that Poole J had erred in giving Mr Gardner's family no warning that she was extending her application to all position statements in the case (thus returning to reconsider earlier, unchallenged decisions in proceedings), leaving Mr Gardner's family only 24 hours to respond to this request. This was particularly challenging in light of the orders made on 30 June 2025, which put Mr Gardner on an end-of-life pathway and move to palliative care, and Sir Stephen Cobb considered that the family was justified in their 'strong complaint' about the timing of the request. "*There was no need for the Judge to determine the disclosure application at that precise point in time, and it was, I believe, unfair to place the family under pressure to deal with it; whilst this was a foreseeable consequence of the timing of the application, we accept the submission of Ms Sutton that this was not Professor Kitzinger's intention*" (paragraph 66(ii). Sir Stephen Cobb also found that Poole J had erred in viewing the family's earlier refusal to provide position statements as somehow un-cooperative or obstructive, even though the court had left disclosure at the discretion of the family.

Sir Stephen Cobb further considered that Professor Kitzinger's reasons for wishing to see all of the position statements (which focused on understanding "*how the case had "unfolded" given her wish to "pre-empt judicial scrutiny" in relation to her "own end-of-life plans" and separately "in my role as an educator and as author and editor" for the Project's blog*" (paragraph 67) did not "*support the case for retrospective disclosure of sensitive information in order to 'advance the open justice principle' (Dring at [45]) for the benefit of members of the general public*" (paragraph 67).

Sir Stephen Cobb considered that "*the provision of position statements to an observer which contain large amounts of highly personal and sensitive source evidence (including allegations which were disputed and never subject to findings) without redaction or restriction on the use of such material, represented a significant intrusion on her Article 8 ECHR rights and those of the family, which was neither necessary or proportionate*" (paragraph 76). While a Transparency Order protected Mr Gardner's identity, it did not protect the personal and sensitive document found in his ADRT and the position statement, and in any event, expired after his death.

Process and procedure

Sir Stephen Cobb considered this issue should be referred to the Court of Protection ad hoc Rules Committee for further consideration (and we understand such a referral has now been formally made by Senior Judge Hilder), but offered some practice points in the interim at paragraph 80:

> *(a) that it would be appropriate for the observer / non-party to make some form of application to the court for sight of the filed documents in accordance with rule 5.9 COPR 2017 so that the respondents know what is in issue and have the chance to express views,*
>
> *(b) the decision about disclosure should be that of the Judge, not the parties or their legal representatives, and*
>
> *(c) the issue should (unless impractical) be dealt with proportionately and briskly in advance of (or at the very outset of) a hearing so as to ensure that observers are best able to understand the hearing,*

> *and to avoid disputed issues of disclosure arising after the substantive determination.*

Sir Stephen Cobb considered that the initial stage would need to be consideration of whether there is a 'good reason' for the request for disclosure. The process must respect P's Article 8 ECHR rights, be proportionate to the open justice principle. Sir Stephen Cobb suggested that disclosure of the following would generally support the open justice objective:

a. *The case summary;*

b. *Chronology of relevant events; and*

c. *Issues for determination.*

Sir Stephen Cobb considered that "[t]*hese documents are generally expected to be short and uncontentious; indeed, they should ideally be agreed. The case summary will usually set out the essential background to the proceedings without any, or any material, quotation from the source material (i.e., the filed evidence), and should also comply with the Transparency Order*" (paragraph 78). These documents would "*meet the needs of the observers to receive basic information about the case and fulfil the objective for open justice. With the benefit of the information contained within such documents, an observer can, if they feel compelled to do so, then make an application to the judge (on a more informed basis than they would at present) for disclosure of other documents, in accordance with rule 5.9 COPR 2017*" (paragraph 79).

Comment

This judgment is a welcome appellate clarification in relation to what can often be very inconsistent practice in the Court of Protection as to how requests of this nature should be addressed and by whom. We consider it clearly correct that the application is made to a judge (rather than directly to advocates) and taken by a judge with adequate notice to the parties, and taking into clear consideration P's own wishes and feelings, and Article 8 ECHR rights. We also welcome Sir Stephen Cobb's clear and robust statements that the administration of justice is the primary role of the court and if the presence of observers is leading to satellite issues which are interfering with the court's role, the judge may 'guillotine' that process to ensure focus remains on the application before the court.

We would note that while Sir Stephen Cobb cites the COPR's provisions on the need to file a case summary, chronology and list of issues for determination (which are to be agreed if possible), these documents are very often omitted in practice, and changes will need to be made to standard practice in the COP to routinely produce these documents.

We would consider that this change of practice may very well be a positive development in the welfare jurisdiction. COP proceedings can often suffer from drift, particularly where there is not judicial continuity, as many of the individuals at the heart of Court of Protection welfare proceedings can have many challenges and complex circumstances. There can sometimes be a push to consider "*every conceivable legal or factual issue, rather than concentrating on the issues that really need to be resolved*" *A & B (Court of Protection: Delay and Costs)* [2014] EWCOP 48 at paragraph 15.

By virtue of a change to the template orders held by the Court of Protection, we understand that orders will provide that case summaries are now to be prepared and provided at the time of the provision of the bundle (which is typically several days ahead of the provision of position statements). We consider that this may offer several benefits:

1. As in family proceedings, a chronology and case summary document can be prepared at the start of proceedings by the solicitors issuing the case, and updated as necessary to reflect developments. We would anticipate that work around these documents at subsequent hearings should be limited, and focused on the significant developments.

2. It would appear sensible to hold round-table meetings ahead of the preparation of the case summary, and for the content of the issues to be determined to be agreed at the round-table meeting. This would hopefully help to clarify the extent of any disputes in good time ahead of a hearing, or else identify that the parties are not in dispute and allow for timely consent orders to be submitted (rather than these being filed shortly prior to a hearing).

3. Agreed case summaries and chronologies would likely be of considerable assistance to judges hearing COP matters. COP bundles are often hundreds of pages long, including lengthy care planning documents or assessments. When hearings are listed for one hour, it is simply unreasonable to expect that a judge will have time to read those hundreds of pages of material in detail prior to the hearing. Chronologies and case summaries of a few pages highlighting the significant events in P's life and setting out a clear, concise list of what disputes exist would likely assist in helping judges in their preparation.

The use of a case summary may also help to address what are often excessively long position statements in the Court of Protection. Where the case summary document sets out the agreed facts and the judge has a chronology available, the position statements do not need to recount that information, and can instead simply focus on the position of the parties on the issues in dispute (which would have already been identified in the case summary). We consider that considerably shorter, focussed position statements which clearly articulated what the parties wanted the court to do and why the parties argued the court should do it would help to improve the efficiency of Court of Protection proceedings both in and out of court.

Short note: upholding the Article 8 / 10 balance

F v The London Borough of Hackney & Anor [2026] EWCOP 20 (T3) concerned an appeal (brought by the mother of P, 'EF') against an order of District Judge Elllington refusing to discharge a Transparency Order. McKendrick J stated that he had 'little difficulty' refusing the appeal, which was opposed by the local authority and supported by the Official Solicitor.

District Judge Ellington had considered s.21A MCA proceedings in respect of P, who had had a turbulent history and had repeatedly been detained under the MHA. P had been in a residential placement from 2021 which had been agreed on an interim basis, but it appeared that there had been significant delays in identifying a permanent home for P. An alternative placement was found in 2024, and P's move there was agreed by all parties (including EF). Following the move, the reports were that P was doing very well in the new placement, which was again agreed by all parties. P required a judicial authorisation of her deprivation of liberty (which was uncontentious, and to be heard under the streamlined procedure in the future).

After the final hearing, EF made an application to discharge the Transparency Order (which appears to have been in the standard terms). EF's reasons for doing so were summarised by McKendrick J at paragraph 4):

> *a. She set out her understanding of the TO (including its breadth), which*

meant that if she told someone her daughter was the subject of Court of Protection proceedings, she would be in breach of it.

b. *She emphasised that P's article 8 rights are not just concerned with her privacy but ensuring her care needs are met, seeing her family and being in the community where she grew up.*

c. *She explained how she feels like she is being gagged by the terms of the TO and that she cannot have normal everyday conversations with her friends and family (including seeking their support), which has caused her great distress and has led her to feel isolated.*

d. *She also wants to raise issues arising from the proceedings publicly, such as the lack of local provision for people in P's position, her concerns about P's care needs not being met. The Court of Protection proceedings are intrinsically linked to this history. Her witness statement said:*

"I also think it is particularly relevant that the court has spent a number of years trying to identify suitable provision in Hackney and the local area for [P], and that it has found that the only option identified during this time did not have sufficient experience or expertise to care for someone of [P]'s complexity, and that the only option is for her to be cared for away from her family and local community."

McKendrick J considered that DJ Ellington had handed down a careful and detailed judgment refusing the application, weighing up the competing Article 10 rights of EF and Article 8 rights of P. DJ Ellington's conclusion was reproduced at paragraph 23 of McKendrick J's judgment, and stated that it would be a disproportionate breach of P's Article 8 rights to discharge the Transparency order:

[P] is a young woman whose deeply sensitive personal information has been put before the court. Disclosure of the entirety of that information or some of it would represent a grave invasion of her privacy. Her identification whilst living at the current placement may interfere with the stability of the placement and her stability at the placement. It is not any attempt to police what is written about the care provider to note that discharging the Transparency Order completely leads to a risk of door stepping at the address and asking for comment from hard pressed staff at the placement. It is not possible to have formal evidence on this before making this decision because once the full details are in the public domain, the damage would be done. Precisely because EF seeks a full public debate, without the protection of the Transparency Order, [P]'s the address would be known.
I have no information as to [P]'s wishes and feelings about this. I have no submissions as to the degree to which she would be able to express them. I have no submissions or evidence that she would want to be a public figure or campaigner. I have found that it is in her best interests to see her family and I have found EF to be a devoted mother. I have found that [P] is happy at the Placement and it is in her best interests to live there currently. She requires the continued protection of the Transparency Order, the purpose of which is to protect her and the integrity of the proceedings.
As I have found, none of the cases relied on have a similar factual matrix to [P]'s situation. They assist on the process to be followed and factors to be considered, but not on the decision I should reach. [P] is alive, subject to

continuing court proceedings, highly vulnerable and has experienced a high number of placements which have failed in the past, as well as detentions under the Mental Health Act 1983.
Neither EF not the Official Solicitor have offered any alternative to full discharge of the Transparency Order. I have recognised the need to support EF so far as is proportionate and appropriate in her aims, taking into account [P]'s Article 8 rights.
I am willing to consider giving EF permission to discuss the case with close supporters, such as her adult children or her siblings, provided she serves the Transparency Order on them.
I would need details of any person or category of person proposed. I am also willing to consider giving EF permission to discuss the case with her MP. Two observers from the Open Justice Transparency Project attended the hearing and I understand were provided with position statements and served with the Transparency Order. They can blog about [P] whilst complying with the Transparency Order in the same way any members of the press can, using pseudonyms as appropriate. For the avoidance of doubt, EF can raise safeguarding concerns about [P] with the relevant Ombudsman and Local Authority as she has done throughout. As I said at the hearing, EF can liaise with the Department of Work and Pensions as any mother might.
Whilst I acknowledge the 'chilling effect' of the Transparency Order, the analysis I have reached is that with appropriate safeguards to support EF, the order is necessary and proportionate for the protection of [P]."

EF advanced five grounds of appeal, which were broadly that the judge gave insufficient weight to Article 10 in her balancing exercise, that the judge had erred in finding that proceeding had not concluded, and in finding that PD4A did not apply to the Transparency order.

After a detailed summary of the law, McKendrick J gave his judgment relatively briefly, accepting the local authority's submissions on all points and dismissing the appeal. He considered it clear that DJ Ellington had directed herself correctly on the law, and weighed up Articles 8 and 10 ECHR in the balance. The judgment considered proportionality, and the sensitivity of the information which would be made public if the Transparency Order were lifted (which appeared to create a real risk of destabilising the placement, the address of which would be public knowledge if the Transparency Order was lifted). McKendrick J considered it entirely correct that the Transparency Order did not prevent EF from raising safeguarding concerns. He held that DJ Ellington had given a clear, structured and reasoned analysis, correctly summarised the law and offered a proposal that the Transparency Order could be modified to allow EF could speak with a specific list of people (who would be served with the Transparency Order themselves). McKendrick J found that "*the judge's assessment of proportionality was perfectly sound*" (paragraph 50). and acknowledged the human rights dimension of the decision. Minor internal inconsistencies did not undermine the judgment as a whole, which demonstrated that the judge was well aware of the competing arguments. Grounds 1, 2 and 4 thus failed.

On Ground 3, McKendrick J held that DJ Ellington had been correct that proceedings had not concluded, as the proceedings remained open to authorise the deprivation of liberty, and a review hearing was listed.

On Ground 5, it was "*accepted that the Judge made an error, as Part 3 of PD4A did properly apply to the TO*" (paragraph 55). EF's argument was that the Transparency Order might preclude

her from seeking informal counselling. However, DJ Ellington had offered EF an opportunity to "*identif*[y] *a number of informal support people and they could have been provided with the TO and the Judge would have granted permission for Mrs EF to discuss the proceedings with them. As guardian of her own Article 8 rights Mrs EF chose not to disclose her informal support network to the court. The Judge, as the guardian of P's rights, was entirely right to protect her Article 8 rights even if this prejudices with whom the appellant can talk to about P's role in these proceedings. The Judge's proportionality evaluation was correct and in no way impacted by this minor error. This ground is dismissed*.

Goldilocks decision-making in the medical context

NHS Kent & Medway Integrated Care Board v OQD & Anor [2026] EWCOP 23 (T3) (Lieven J)

Best interests – medical treatment

Summary[13]

The involvement of the Court of Protection in medical treatment cases is very much on the radar at the moment as we wait to hear whether the Supreme Court has granted permission to appeal in the *Townsend* case. Whilst the case is not mentioned in the decision of Lieven J in *NHS Kent & Medway Integrated Care Board v OQD & Anor* [2026] EWCOP 23 (T3), it is difficult not to see it lurking behind her judgment. The case is the follow up to an earlier decision about the same man, who had been in a prolonged disorder of consciousness receiving Clinically Assisted Nutrition and Hydration under the care of the Royal Hospital for Neurodisability ('RHN') for 12 years. At the point of acceding to the application by the ICB responsible for commissioning his care for endorsement of the withdrawal of CANH, Lieven J had been critical of the delay in bringing proceedings. The second judgment focused specifically on the issue of delay.

Lieven J set out in some detail the cases that had been heard by Hayden J and Theis J concerning the RHN, starting with *North West London Clinical Commissioning Group v GU* [2021] EWCOP 59. She summarised the evidence of both the RHN and the ICB, and concluded as follows:

> *30. The sequence of events, since GU, is deeply troubling. That the RHND takes a careful and sensitive approach to these emotionally difficult decisions is both understandable and commendable. I also appreciate that they have a large number of patients in PDOC (there were 70 relevant patients in the cohort being considered after GU and new patients will continue to arrive on a very regular basis). However, the striking absence of urgency which is apparent from OQD's chronology indicates a lack of focus on the patient's own best interests. Throughout those 4 and a half years OQD has been suffering burdens which have ultimately led to a unanimous view of professionals and the Court that CANH should be withdrawn. The RHND (and ICB)'s failure to address the issue timeously has led to the prolonging of these burdens, and the undermining of OQD's human dignity, as explained so eloquently by Hayden J.*
>
> *31. In my view, a significant issue for the RHND is its focus on the views of the family and on reaching consensus with the family on a decision. As Hayden J sets out in both JP and GU, the views of the family are sought primarily in order to illuminate what*

[13] Katie has not contributed to this note given her involvement in cases involving the RHN.

the P would have wished, not for their own sakes. There is a degree to which the RHND appears to have put the views of the family concerned above focusing on the best interests of the patient. This is plainly wrong.

32. There was over a year in this case (February 2022 until summer 2023) when OQD's best interests were not being addressed, whilst the RHND sought the family's views in a not very effective manner. This is clear evidence of putting the family's views, and what was perceived to be their interests, before those of OQD.

33. I am also concerned about the lengthy and in my view misguided efforts to establish what OQD would have "wished" if he had been able to express a view. It goes without saying that P's wishes are a very important part of making a best interests decision under the Mental Capacity Act 2006. They must be given great weight and in many cases they will be determinative.

34. However, by the time of GU, OQD had been in a vegetative state for 7 years with no prospect of recovery. There is no evidence, and there has been no suggestion, that he had turned his mind before the injury to the prospect of any such situation. It would be fairly extraordinary for anyone to do so. In those circumstances there is only so far that P's wishes before losing capacity can take the determination of what is now in his best interests. Even if OQD had expressed a wish to be kept alive as long as possible, it is hard to imagine that he would have contemplated the burdens that have been placed upon him by his injuries, (e.g. the storming) and the indubitable evidence of there being no hope of any form of recovery.

35. The lengthy delays, and therefore the prolonging of the burdens upon OQD and the impacts on his human dignity, are not possible to justify on the facts of this case.

36. I am sufficiently concerned both about what has happened here, and by the apparent pattern of similar cases at the RHND, that I intend to send this judgment to the Secretary of State for Health and the Chief Executive of NHS England.

Before turning to the two '*Townsend*' points lurking behind the judgment, we think it is important to emphasise that, whilst – and rightly – there has been very specific attention paid to the RHN in these cases, there are likely to be very many more people in PDOC being provided with CANH in other facilities, often for very sustained periods of time.[14] The fact that there are very few cases concerning them is in many ways as much, if not more, alarming than the delays identified in relation to the RHN: in other words, we simply have no idea of whether best interests decisions are being made and routinely revisited in the way required by good clinical practice and by the MCA 2005.

We cannot emphasise enough in this regard that we are not suggesting that treatment should be stopped in all of these cases; we just do not know whether the assaults that are being perpetrated by the administration of non-consensual (and intrusive) methods to deliver CANH are justified by being in the person's best interests (and

[14] See, for instance, the 2022 iteration of the Parliamentary POST Note on PDOC, estimating that were between 4,000–16,000 patients in nursing homes with VS, with three times as many in MCS.

hence the organisations in question are able to rely on the defence contained in s.5 MCA 2005).

The two *Townsend* points lurking underneath the judgment are, first, the role of the ICB, and second the problem caused by pursuing consensus at all costs.

As to the first, Lieven J was critical of the ICB's 'hands-off' (my words) stance, and the fact that it relied upon the RHN. ICBs, as commissioning bodies, rarely have the degree of day-to-day operational knowledge of the situation that the provider does. In *Townsend*, the Court of Appeal suggested that it was the ICB which should apply to court wherever there is a dispute, even where the patient is in a hospital run by an NHS Trust. That is:

1. At odds with practice to date (the number of applications brought by ICBs in serious medical treatment cases is vanishingly small – the RHN cases are an outlier because the RHN is a charity, with care being commissioned, via CHC, on an individual basis);

2. Likely to cause delay and additional expense as those with the information (the Trust personnel) liaise with those who commission at a population level (the ICB).

The second *Townsend* point arises in relation to Lieven J's emphasis on the way in which a desire to place weight on the views of the family and to reach consensus can lead to sight being lost of whether the person is, in fact, being harmed. If every decision relating to an incapacitated adult is a best interests decision, as the Court of Appeal held in *Townsend*, then s.4(6) MCA 2005 undoubtedly requires that the voices of those who are close to the person are heard. They can very often bring expertise in the person (including, where relevant – sadly not *OQD*'s case – about what the person might have wanted),[15] but Lieven J's judgment can be read as an important reminder that:

1. Good clinical practice requires a continued evaluation of whether treatment is helping or harming the person;

2. There will be situations in which the person's views simply are not known, so it is not possible to add into the mix what the person might have thought;

3. There will be situations where what the person might have thought about their position cannot alter clinical reality;

4. The search for consensus is very important, and true consensus can often be achieved;[16]

5. But a search for consensus must not become the imposition of a 'rotten' compromise which puts the (understandable) interests of family over the interests of the person – for more on this, see this recent and important paper by Jordan Parsons and Jonathan Ives;

6. There is therefore a clear application of the Goldilocks principle in judging how long to work towards consensus, and when to recognise that other steps are required.

[15] But to the extent that Lieven J, and before her, Hayden J, proceeded on the basis that relaying the views of the person was the sole relevance of families, this is to go beyond what the MCA provides. The family's own independent views about what should happen are a part of the mix, given that the MCA best interests test is not a pure 'substituted judgment' test to identify what decision P would have taken.

[16] So the sample which reaches the court is, to that extent, a skewed sample upon which to draw wider conclusions.

Townsend makes clear that, where there is a disagreement which cannot be resolved, the case must come to the Court of Protection. However:

1. The Court of Appeal made clear that the Court of Protection cannot ultimately require the clinicians to provide treatment they do not consider appropriate. Unless the clinicians have been clear about (1) to (3) above, they cannot give a clear answer to the court if asked a direct question about whether they would be willing to continue treatment. Honest communication with families requires such clarity before as well as in court;

2. A failure to identify (5) above means that cases which should be coming to the Court of Protection because there is a dispute which cannot be resolved doing proper justice to the interests of P are not in fact coming.

MENTAL HEALTH MATTERS

Nearest relative resources

We understand that 'nominated persons' are likely to be treated as so-called 'Phase 1' reforms in relation to the Mental Health Act 2025. In other words, they are likely to be amongst the first to be brought onstream to amend the MHA 1983, in this case, to remove nearest relatives and replace them with nominated persons. However, even Phase 1 reforms are not immediate. It is therefore interesting and important to note the impact report about the Nearest Relative resources project hosted by the University of Bristol (for a video about the project, see here).

Mental Health Law Online – 20 years!

The Mental Health Law Online website celebrated its 20th birthday in April. A labour of love, and entirely free, it is an extraordinary resource for both mental health and mental capacity law. All those whose lives are touched in any way by any aspect of those laws (i.e. everyone) owes a huge debt of gratitude to Jonathan Wilson for establishing it and keeping it going for so many years.

CHILDREN'S CAPACITY

Short note – overseeing consent

Summary

The decision of Keehan J in *University College London Hospitals NHS Foundation Trust v GH & Ors* [2026] EWHC 1064 (Fam) provides a useful reminder that the legal capacity of children is different to their cognitive capacity. The case concerned investigation and treatment of leukaemia in relation to a 15 year old girl, GH. Keehan J framed matters as regards competence (the relevant test for those under 16) thus:

> *6.* […] *A consultant child and adolescent psychiatrist, concluded that it was not evident that GH explicitly or obviously lacked Gillick competence.*

Until shortly before the hearing, both GH and her mother had questioned and doubted whether GH required any further medical treatment; however, after further test results were explained,

> *26* […] *they now both accept that there is no option other than for GH to undergo the treatment plan advised by GH's treating consultant, which is strongly supported by Dr YX.*
>
> *27. This has been a frightening and very difficult time for GH. She knows the treatment plan will, at times, be painful and difficult for her. Once the harvesting of the cells has been completed and they have been prepared she will have to spend a prolonged period of weeks as an inpatient at hospital. She quite understandably has her doubts and reservations. Nevertheless, she knows and understands that the only alternative to this treatment plan is her death. She was clear in the views that she expressed to her guardian that she very much wants to live and to live a normal, happy and fulfilling life. She has, therefore, agreed to undergo the cell replacement therapy treatment.*

There was, therefore, some doubt as to whether it was really necessary for the court to make the declarations originally sought. However,

> *9.* […] *The trust submitted that because of the past history it was necessary and appropriate for the court to make a best interests decision in case GH changed her mind and withdrew her consent.*
>
> *10. In any event, I was invited by the mother to give a judgment which would provide a base line in respect of any future application to discharge or revise a best interests decision in the event that GH withdrew her consent*.

Keehan J was persuaded to make the declarations sought:

> *29. There are two important points to make. First, the medical evidence and the opinions of GH's treating consultant and Dr YX are clear and unequivocal. The treatment plan is GH's only possible course to achieve a cure and long-term recovery from her cancer. Once embarked upon it is essential that it proceeds without any interruption. In these circumstances, it is entirely right and appropriate that the court approves the treatment as being in GH's best interests, not least to endorse and support her decision to proceed with the treatment. Second, it is imperative that everyone involved with GH gives her the support and encouragement she needs to enable her to embark upon the treatment plan and to engage with her treating clinicians so that she may successfully complete the treatment.*

> *30. At the request of all parties, I wrote a letter to GH explaining why the court considered it to be in her best interests to undergo the cell replacement therapy and to endorse her decision to consent to the treatment.*

Comment

This case is another in a long line of cases which might be thought to show that *Gillick* is crumbling as a meaningful concept. The CAMHS psychiatrist in this case (and, it appears, Keehan J) appeared perfectly happy to proceed on the basis that GH was to be presumed competent until shown otherwise. 'Conventional' approaches to *Gillick* would have required GH to jump through significant hoops to prove the direct opposite – i.e. that she could overcome the presumption that she lacked the ability to give consent.

The case is also interesting as a reminder that the court's oversight obligations extend to situations where there is a purported consent by a child just as much as an attempted refusal. A child is therefore viewed, legally, as a very different being to an adult in terms of their decision-making authority, even if, almost 40 years after *Gillick*, we are still struggling to explain why and how.

SPROCKET

We note here the launch of SPROCKET, a research, innovation and co-creation hub, led by University College London, that will transform key but challenging transition points for children with complex health needs, such as starting school or returning home from hospital. To sign up for the newsletter, see here.

A DoL House

Those in or around London later this month or in July will want to attend *A DoL House*, aplay about deprivation of liberty as experienced by children. For tickets and more details see here.

THE WIDER CONTEXT

Short note: well-being and wishes

In *BNF v Newport City Council* [2026] EWHC 1212 (Admin), a (rare) reported decision relating to the Social Services and Well-Being (Wales) Act 2014, HHJ Jarman KC (sitting as a High Court Judge) has emphasised that – even where a person lacks capacity – their wishes and feelings must be taken into account when making plans to meet their eligible needs. The case is also of interest as – although not immediately obvious on first reading – it is clear that the judicial review proceedings were taking place in parallel with Court of Protection proceedings: it is unclear whether the judicial review proceedings were being brought (in effect) to expand out the options for BNF. If so, they provide a reminder that the Court of Protection cannot 'magic up' options that would not exist for a person with capacity – the remedies for public law failures in this regard lie in the Administrative Court.

Short note: capacity and divorce

In *SL v SM* [2026] EWFC 109, Trowell J had to consider (in the Family Court) whether Ms L had capacity to decide to divorce her husband. Perhaps because both parties were litigants in person, he did not have brought to his attention the decision of Hayden J in *D v S* [2023] EWCOP 8, in which this issue was considered in some detail (by the Court of Protection). In that earlier case, Hayden J had considered that the relevant information was, in effect, the inverse of the information relevant to marry. In *SL v SM*, Trowell J proceeded on a slightly different tack (although in reality getting to what is very likely to be the same destination), noting that:

> *29. I have now had the advantage of two hearings in which I have heard extensively from the wife and the advantage of reading a statement and a position statement prepared by her. She has been clear at all of the hearings before me that she wants a divorce. She has explained to me why she wants a divorce: she does not want the husband to refer to her as his wife and she does not want to be his wife. She is aware that she would have a financial claim against him on a divorce but tells me that she does not want any of his money. She tells me that she has discussed the divorce with her partner, Mr D, and he has said that she should not bother with continuing to pursue one because it will not make much difference because they live together at any rate.*
>
> *30. Her understanding of the consequences of a divorce I find at least as good as an ordinary persons. She does not present with any difficulty understanding the relevant information, retaining the information, using or weighing the information or communicating the information. She has missed a court appointment. She does appear to have had second thoughts about the divorce having initiated it. Neither suggest she does not have capacity to make the decision to divorce.*

Trowell J also refused to accede to the husband's request that the court seek out the papers relating to (much earlier) proceedings before Hedley J in which the wife's capacity to marry had been considered, as well as subsequent care proceedings, on the basis that "[i]t is not appropriate for me to trawl through the wife's life when I have the opportunity of hearing from her and the reassurance of the letter from her GP.

Ceilings of treatment in context

The Health Services Safety Investigation Body (an independent arms-length body of the DHSC, formed in October 2023, who investigate patient safety concerns across the NHS in England) are conducting an investigation into the risks to patients in the community who self-administer insulin and who may be at risk of increased harm because of their circumstances.

The investigation focuses on the insulin-related harm to adults with (i) mental health diagnoses at risk of suicide; (ii) those with a disability; and (iii) those with a learning disability. They have published reports for those in the first two groups. They are due to publish reports for those with a learning disability as well as a separate report for those with memory difficulties later this year. The first report, on those with mental health diagnoses, is available here. The report has a particular focus on adults with type 1 diabetes and disordered eating – a group of patients who often come before the Court of Protection and in respect of whom there is a real lack of community services equipped to manage their particular needs. The report makes a series of findings and a number of recommendations, including that NHS England/DHSC develop a strategy for improving collaboration between mental health services and specialist diabetic services; that the National Institute for Health and Care Research map the knowledge gaps around type 1 diabetes and disordered eating and asses the priority and feasibility of commissioning research to address those gaps; and that ICBs formalize collaboration between mental health and specialist diabetes services in their local systems.

The second report, into those with a disability, can be found here. Its findings include that

- Healthcare workers may not identify when a patient's mental capacity to make decisions in relation to their insulin may be compromised, meaning a more in-depth assessment in line with the Mental Capacity Act (2005) may not occur.
- Limited education and practical support for application of the Mental Capacity Act (2005) by healthcare staff means its principles are sometimes misunderstood.
- Patients with diabetes (who require insulin) and who experience fluctuations in their mental capacity, are at risk of harm when services do not proactively plan for a time when the patient may lose the ability to manage their insulin safely.

It recommends that:

> *National bodies can improve patient safety by providing clarity on expectations around 1) how staff recognise that a patient's mental capacity may be compromised in relation to decisions about their self-management of insulin, and 2) the undertaking of a mental capacity assessment by the most appropriate person. This should include clarification on the practical application of the Mental Capacity Act (2005) to situations where a patient's capacity may fluctuate and where sharing confidential information to support patient safety may be appropriate.*

The EU and cross-border cases

The EU Council and Parliament have moved closer to replicating (albeit some potentially quite significant variations) the 2000 Hague Convention on the International Protection Adults as a regulation governing cross-border matters between EU states. We – slightly vainly – hope that this will place further pressure on Ministers in London to ratify the 2000 Convention in respect of England & Wales (as

opposed to just Scotland), to ensure that we do not get left even further behind than we have to when it comes to effective protection of rights across borders.

SCOTLAND

Cheshire West overruled: initial thoughts from Scotland (1): Jill Stavert

Introduction

On 2 June 2026, the UK Supreme Court published its *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* ruling. This has significant implications across the UK, it reverses its own 2014 *Cheshire West* ruling, and it has been met with mixed responses. The ruling presents something of a two-edged sword, and there is pressure as immediate implementation is required.

There are already plenty of excellent summaries of the ruling and, of course, one can read the ruling itself. I do not therefore propose to go into much detail here on the minutiae of the ruling apart from providing some background information, brief 'headlines' from the judgment and observations about it's likely implications for Scotland. It should also be noted that the Mental Welfare Commission for Scotland was an intervener in this case, demonstrating the importance of this from a Scottish perspective.

What the UK Supreme Court was asked to rule on?

The Minister of Health for Northern Ireland wished to issue a revised the Mental Capacity Act Northern Ireland 2016 code of practice so that even where a person may lack mental capacity to make decisions about their care arrangements they can still give the necessary valid consent by expressing their current wishes and feelings, such wishes and feelings being more than their merely appearing to go along with their confinement. The Supreme Court was essentially asked to determine whether this was Article 5 ECHR compatible and thus lawful.

The situation since *Cheshire West* until 2nd June 2026

The European Court of Human Rights' *Bournewood*[17] ruling in 2004 raised significant concerns across the UK over whether our laws and practices were Article 5 ECHR compliant. It ruled that although Article 5(1)(e) allows for 'the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind..' where a person lacks mental capacity to consent to a deprivation of liberty (DoL) then they are entitled to safeguards (e.g. lawful authorisation of the DoL, the ability to timeously challenge that DoL in a court and be released if the DoL is deemed to be unlawful). Moreover, an individual's silence or appearing to be going along with a care arrangement made for them does not amount to competent consent to a DoL. This triggered considerable anxiety about whether the law governing measures for adults who lacked capacity in Scotland, namely the Adults with Incapacity (Scotland) Act 2000 and section 13ZA Social Work (Scotland) Act 1968[18], are sufficiently robust in Article 5 ECHR terms[19]. It resulted in work being undertaken by both the Scottish Law Commission and the Scottish Government. In short, although the Scottish courts had ruled that DoLs could be lawfully authorised by welfare guardians with

[17] *H.L. v. The United Kingdom* [2004] ECHR 471 (Application No. 45508/99)
[18] Section 13ZA Social Work (Scotland) Act 1968 allows local authorities to arrange community care services (e.g. moves to residential care homes) for adults without capacity to make or consent to those decisions.
[19] Detentions under the Mental Health (Care and Treatment)(Scotland) Act 2003 are considered to be largely Article 5 ECHR compatible.

appropriate powers the question remained as to whether this went far enough in terms of safeguards, particularly where it came to challenging the lawfulness of a DoL. Similarly, questions arose over whether welfare attorneys with appropriate powers can lawfully authorise a DoL and also over the lack of Article 5 safeguards for individuals moved by local authorities to residential care where they might or would face a DoL.

The UK Supreme Court *Cheshire West* ruling in 2014 significantly increased the pressure here. In this case the Supreme Court ruled that a deprivation of liberty occurs wherever a person is under continuous supervision and control and is not free to leave[20] (which became known as the 'acid test') and they are unable to competently consent to such restriction then Article 5 ECHR is engaged and entitles that person to its safeguards. Consent was equated with having full legal capacity. This greatly extended the potential for a DoL to occur across all health and social care settings, including community settings. This was absorbed by the Scottish Law Commission and Scottish Government in their work, and subsequently also considered by the Scottish Mental Health Law Review (2019-2022). The Review made various relevant recommendations in its September 2022 final report, following which the Scottish Government embarked on a law reform programme. So far, this programme has largely focused on reform of the Adults with Incapacity (Scotland) Act 2000, including the DoL issue, and this is ongoing and has survived, it would seem, the recent Scottish Parliament election in May 2026.

As time went by, there was a growing awareness that we were sitting on a 'ticking time bomb' in Scotland in terms of an Article 5 ECHR violation being ruled by the Scottish courts. However, apart from a few 'near misses' which did not progress sufficiently far to result in the Scottish court rulings, it wasn't until 2024[21] and 2025[22] when the English and Welsh Court of Protection effectively ruled that guardianship orders and the Adults with Incapacity (Scotland) Act 2000 do not provide sufficient Article 5 ECHR protections for adults with incapacity who are deprived of their liberty.

UK Supreme Court ruling in the Attorney General for Northern Ireland case

For those who with an interest in constitutional law, the judgment also goes into some detail about devolution references, reserved and devolved powers and the Supreme Court's power to consider these.

However, in relation to Article 5 ECHR, DoLs and people with incapacity, in a nutshell, the Supreme Court, considering relevant Strasbourg jurisprudence, ruled on 2 June 2026 that:

1. It is not possible to completely separate the objective (a person being confined to a particular restricted space for a significant period of time) and the subjective (a person being unable to give valid consent to this) elements of a DoL engaging Article 5 ECHR.

2. The *Cheshire West* ruling in separating out the objective and subjective elements – although admittedly it was only being invited to consider the objective element – went beyond what the European Court of Human Rights has ruled and extended the reach of Article 5 ECHR further than was intended.

3. Ascertaining whether there is a DoL depends on a number of factors including the type,

[20] *Surrey County Council v P; Cheshire West and Chester Council v P* [2014] UKSC 19; [2014] AC 896, per Lady Hale at paras 48-49 and 54 and Lord Neuberger at para 63.

[21] *Aberdeenshire Council v SF & Ors (No. 2)* [2024] EWCOP 10.

[22] *Argyll and Bute Council v RF* [2025] EWCOP 12.

duration, effects and manner of implementation of the particular measure. Additionally, the actual setting and its normality are relevant, as are whether a person's inability to leave a particular care setting influenced by their physical or mental disability. Clearly, therefore, there is also a level of subjectivity here.

4. A person may lack full mental capacity but still have an awareness of their situation and can communicate whether or not they are happy with the measure. These expressed wishes and feelings can amount to valid consent. This delinks consent with having full legal capacity.

5. The Cheshire West 'acid test' is dead *to the extent that it is possible to elicit whether or not a person is happy with their living situation and any restrictions associated with it.* If ascertaining a person's wishes and feelings is impossible then they will be deemed not to have consented the DoL and are entitled to the protection of Article 5 safeguards.

6. For this reason, the Attorney General for Northern Ireland's proposed Revised Code is Article 5 compatible.

Implications for Scotland

To some extent the following observations will also apply to other UK jurisdictions although I am specifically directing them towards the current Adults with Incapacity reform programme.

1. Apart from one mention in a quotation,[23] the Supreme Court judgment did not discuss the UN Convention on the Rights of Persons with Disabilities (CRPD). However, in essentially saying that giving effect to the person's ascertainable wishes and feelings in these circumstances transcends any finding they lack mental capacity is very much in line with Articles 12 (equal recognition before the law/equality in the exercise of legal capacity) and 19 (independent living) CRPD. This reflects to some extent the recommendations of the Scottish Mental Health Law Review when it observed that capacity assessments as they currently operate can be an unreliable indicator of a person's decision-making ability and views and often result in either too much intrusion in a person's life or, conversely, denying a person vital support. That being said, for this to operate effectively there will need to be a robust system of supported decision-making in place.

2. Concerns have been raised over the potential for this approach to place vulnerable persons in situations where their rights are unprotected. For example, a person may not be considered to be deprived of their liberty in such a manner to engage Article 5 ECHR and thus deprived of a protective framework which may expose them to significant and inappropriate restrictions and treatments which may amount to abuse without any protection, thus violating their Articles 8 and 3 ECHR. This is a real risk and therefore calls for safeguards in the form of direct accountability, monitoring and accessible redress need to be put in place to ensure this does not happen.

3. There will need to be clear statutory direction and associated guidance and training in place so that those implementing this are clear whether or not the factors present do or do not amount to a DoL engaging Article 5 ECHR and around whether or not it is

[23] At para 109.

possible to genuinely ascertain a person's wishes and feelings. This is no small or easy task.

4. This requirements above must all happen quickly as the judgment took immediate effect.

The Adults with Incapacity Reform Expert Working Group is certainly going to have its hands full navigating this, as will practitioners, carers, and family members, as well as the adults themselves. It will undoubtedly also fall on the Adults with Incapacity Reform Ministerial Oversight Group to ensure that momentum towards reform, including encompassing this ruling, is maintained. The Supreme Court also discussed the resourcing implications of the *Cheshire West* ruling and whilst this is a not insignificant consideration if individuals' rights are to be fully protected then even the new 'regime' will doubtless require to be adequately and appropriately resourced.

Jill Stavert

Cheshire West overruled: initial thoughts from Scotland (2): Adrian Ward

This item does not seek to summarise the judgment, headlines of which are set out in item 1 above, with more detail in the Health, Welfare and Deprivation of Liberty section of this Report. Rather, it picks out a few aspects of particular relevance for Scotland. There are two main points. Firstly, this decision of the Supreme Court appears substantially to align with what at least some of us have always argued should be the correct approach under Scots law to deciding what is a deprivation of liberty under Article 5 of the European Convention on Human Rights, and – importantly – what is not. On the other hand, however, the decision emphasises that: "*… the question whether an individual in care is subject to a deprivation of liberty depends on the factual circumstances of their particular case*" [paragraph 202 of the decision]. That will necessitate careful enquiry and assessment in each individual case, and most certainly not any form of "tick box" exercise. We no longer have Lady Hale's famous "acid test" to guide decision-makers: it has been rejected.

Before those points are developed further, it must be emphasised that the Supreme Court's decision in no way alters the fact that what have hitherto been unlawful decisions and practices will remain completely unacceptable. That is because the Supreme Court case was concerned with "the question of what counts as 'deprivation of liberty' under Article 5(1) of the European Convention on Human Rights ('the Convention')", as confirmed in the first sentence of the Supreme Court's lengthy decision [1]. Although the position in Scotland was referred to only sporadically by the Supreme Court, and not using relevant Scots terminology, if an adult has validly consented to arrangements, or can reasonably be judged to have assented – even tacitly – then there is no deprivation of liberty, and Article 5 of the Convention does not apply. If, however, there has been an Article 5 deprivation of liberty, or if proposed action or arrangements would amount to a deprivation of liberty, then the requirements and provisions of Article 5 will apply in full, without amendment. Indeed, in situations such as the over 5,200 unlawful discharges from hospitals to care homes during the first three months of the Covid pandemic, when it would appear that in no individual case was there any attempt to assess whether the person discharged had or had not capacity to consent, the breach of Article 5, and thus the automatic entitlement under Article 5.4 to a minimum of nominal damages which should be measured in Scotland in thousands of pounds, is now even more stark, because of the need for careful assessment in each individual case.

From a Scottish viewpoint, it must be recorded that the Mental Welfare Commission for Scotland must be credited with having made the most significant impact from here upon the eventual decision. The Commission's intervention is summarised in [32] and [33]. As there narrated, the Commission's position was that:

> *"If an adult can understand their situation and circumstances so as to express an opinion or feeling about them, that can and should be given significant weight in the determination of that individual's consent to the arrangements in their case."*

The Commission argued that:

> *"To the extent that it is suggested that Cheshire West requires those feelings and wishes to be disregarded, the Commission submits that this is contrary to the principle of encouraging those lacking capacity to take part as much as possible in the appropriate balancing of the individual's Article 5 and Article 8 rights which is necessarily inherent in the application of those provisions to treat such expressions of view by them as irrelevant on a blanket basis."*

That in fact went to the very heart of the basis upon which the Supreme Court has now overruled *Cheshire West*. With reference to the submissions by "the Charities" narrated in [27]-[31], the Commission was instrumental in pointing out the problems in the approach of the Charities in seeking to downplay the will and preferences of all people with impaired capacity just because some might have difficulty in expressing their wishes and feelings.

The view has long been held in Scotland (including in my case as first formulated in a 2004 paper submitted to the Mental Welfare Commission in the context of its then consideration of when Part 5 applications were necessary, and to which I have adhered since then) that conduct amounting to tacit consent to arrangements would generally be sufficient for them not to be regarded as Article 5 deprivations of liberty. Put the other way round, so-called "challenging behaviour" in a particular setting might well be indicative of significant dissatisfaction with such a setting: and if in such a situation such behaviours were to be clearly and significantly mitigated by transfer to other arrangements, that would open up the possibility that such other arrangements might have thus received sufficient tacit assent for them not to be Article 5 deprivations of liberty.

Advocacy of the "assent" approach in Scotland has also drawn attention to Scotland's unique (in the UK) procedure under the Adult Support and Protection (Scotland) Act 2007, not replicated in any form in England & Wales, where the alternative of an application to the inherent jurisdiction of the High Court is not a practical, straightforward or equally accessible alternative. The Scottish "assent" approach (calling it that for simplicity) has already informed submissions as to the outline structure of a possible deprivation of liberty scheme for Scotland. It would appear that under this decision those proposals can be carried forward with some confidence towards formulating the promised urgently required establishment of a deprivation of liberty scheme for Scotland.

The two elements that we have identified of the rejection of the "acid test" in favour of the approach now formulated by the Supreme Court, but the resulting onus upon decision-makers to enquire and assess more carefully in each individual case, both feature, and are brought together and balanced, in the lengthy paragraph [53] of the decision. For example, the court points out that valid consent:

> *"is an autonomous concept and not to be equated with the concepts of consent for the purpose of waiver of rights under the Convention or of legal capacity in domestic law. The fact that an individual lacks legal capacity to decide on their living and care arrangements does not necessarily mean that they are de facto unable to understand and consent to those arrangements in a manner that prevents those arrangements from becoming a deprivation of liberty."*

Judgments of the Strasbourg Court are referred to at this point. An individual "without legal capacity under domestic law", but who can manifest acceptance of their current situation on the basis of "a basic understanding" of it, "*should have their opinion respected when an assessment is made of whether they are deprived of liberty under Article 5*".

On the other hand, in the same paragraph, the court narrates that:

> *"The European court has recognised that the process of assessing whether there has been a deprivation of liberty is no easy task in some contexts and may give rise to difficulties, especially in borderline or marginal cases. Equally, it may sometimes be difficult to ascertain the true feelings or preferences of vulnerable individuals who do not have mental capacity to decide on their living arrangements. The approach should be practical and realistic. Where there is serious doubt, no inference of valid consent should be drawn."*

This necessarily rapidly compiled review from a Scottish viewpoint should conclude with a few further comments.

This "correcting" decision was unanimous, and was formulated at a time when both the President and the Vice President of the Supreme Court were Scots lawyers. Various Justices contributed their own views, some of them dissenting views, in *Cheshire West*. This latest Supreme Court judgment was unanimous. The judgment of all Justices was delivered by Lord Sales and Lady Simler. The other Justices were simply narrated as being in agreement. Those who attended Lord Hodge's lecture to the Royal Faculty of Procurators in Glasgow in October 2024 will remember how he developed an answer to a question about the position under Scots law from me to something akin to a public debate on that subject. It might have been interesting to have had his views narrated. He was one of the dissenters in *Cheshire West*. He is still listed as one of the concurring Justices in the present case.

It is said, correctly, that as the present case is not founded upon a complaint of breach of the European Convention by any individual, it cannot be the subject of an appeal to the Strasbourg Court. It will nevertheless be interesting to see the decision, when issued, of the Strasbourg Court in *TD and MZ v France*, in which case interveners have asked the Strasbourg Court to review its own jurisprudence on what constitutes an Article 5 deprivation of liberty, and have advanced views – including suggestions as to the extent that *Cheshire West* was wrongly decided – that, put minimally, resonate with the deliberations in this latest UK Supreme Court case. That Strasbourg case could therefore amount to something approaching a review on appeal of this latest UK case.

This quick review may be followed by further coverage in the Scotland section of the July Report. In the meantime, I shall "sign off" with the following paragraph from this latest decision:

> *"[206.] We have come to the clear conclusion, with respect, that the majority in Cheshire West erred in their interpretation of the Strasbourg*

jurisprudence in relation to the meaning of deprivation of liberty in article 5. Moreover, because the jurisprudence of the European court is clear in adopting the multifactorial approach and giving weight to valid consent, this is a further reason why that reasoning should not be followed: see R (Elan-Cane) v Secretary of State for the Home Department, above; and R (AB) v Secretary of State for Justice, above, paras 54-59. On such a fundamental issue regarding the proper interpretation of the Convention, it is for the European court to give the lead in laying down the approach to be followed."

Adrian D Ward

UK Supreme Court in Glasgow

A major focus this month is upon the decision of the UK Supreme Court in the Application by the Attorney General for Northern Ireland, but it is nevertheless appropriate to mark the first occasion on which the court sat in Glasgow, on 18th – 21st May 2026. A main policy of the court's President, Lord Reed, is to make the court more accessible to the public. He has committed the court to being as transparent and accessible as possible. The court's presence in Glasgow was accordingly marked not only by the judicial business of the court, but by three outreach events on which we report briefly.

The court came to Glasgow to hear an appeal in the case Forthwell Limited (Appellant) v Pontegadea UK Limited (Respondent). The point at issue was: "*In what circumstances can a party to a contract recover damages for a breach of that contract in respect of losses that were sustained not by the contracting party itself but by its subsidiary?*". To the great embarrassment of respective counsel, the case settled literally on the eve of the first day of the hearing. Lord Reed nevertheless said that: *"It is a matter of public importance that the time of the court is used in the public interest, and it is in the public interest that we should resolve the legal question raised by the case, which will be important in other cases."* The point at issue is interesting, but is unlikely to lead to further coverage in this Report unless arguments about the need for commercial consistency between English and Scots law lead to consideration of the fundamental difference in how the two systems respectively treat the incapacity of a party to a purported contract in relation to that contract. Otherwise, the main point of interest is that the court did demonstrate willingness to hear argument upon, and determine, a case of significant public interest even though it had been settled. Most practitioners have had the experience that a most interesting and important case from the point of view of the development of the law halted and went no further after the parties had achieved a settlement. Indeed, most practitioners would take the view that if there appear to be reasonable prospects of a settlement, the interests of their client in pursuing that possibility would have to take precedence over the public interest in seeing a particular point in law addressed and resolved. It would appear that even for the Supreme Court to decide to proceed as it did in Glasgow, a specific case would still have to have reached that court. The European Convention on Human Rights goes further in Article 47, allowing the Committee of Ministers of the Council of Europe to refer a question to the Strasbourg Court for an advisory opinion.

Lord Reed was himself busy in the outreach role of the court. He was the invited speaker at a well-attended event hosted by the Law Society of Scotland in Glasgow City Chambers on 20th May. The topics that he addressed included accessibility of the court, the importance of clear communication, and the fallout from controversial cases. However, he had no hesitation in answering a question as to what

was the biggest challenge that will face the Supreme Court in the years ahead. He identified artificial intelligence on the one hand improving accessibility to the courts in ways "already resulting in a huge increase in the number of claims being brought before courts", because (he suggested) the difficulties faced by "ordinary people" in bringing claims were being reduced; and on the other hand the imperative for the courts to make use of AI in order to be able to handle such increases in litigation. Interestingly, he stressed the importance of making best use of particular expertise among Justices when dealing with cases, commenting that although he sits in court more than any of his colleagues, he writes fewer judgments than he used to. "I write about half as many as my colleagues do, so the role has become one in which there is a much greater element of, if you like, being an ambassador for the court and being somebody who is setting a strategic direction for our management".

Lord Doherty, also a UK Supreme Court Justice, delivered the 2026 Lord Rodger Memorial Lecture to the Royal Faculty of Procurators in Glasgow. He concentrated on interesting and important aspects of the actual working of the Supreme Court. In order, the largest and most frequently heard cases are commercial cases, then public law and human rights cases, then business property, then Wills and trusts, then tax. To qualify for permission to appeal, an application for permission must (a) raise an arguable point in law, which is (b) a point of general public importance, and which (c) ought to be considered by the court at the time. Where appeals are heard, there will normally be at least one Justice with expertise in the particular area of law under consideration. Hearings are normally fixed nine months after permission is granted. In 90% of cases, the judgments are unanimous.

Lord Stephens is the third Justice upon whose extra-judicial engagements in Glasgow we report. He addressed the Family Law Association on the concept of "matrimonialisation". While that of itself might be a topic of relatively marginal interest to practitioners of capacity law (nothing in the law, of course, will ever be completely irrelevant to that topic, because of the great range of issues and cases that can arise), one point which he stressed is certainly relevant. He pointed out that significant development of the law almost always starts with cases which test out new possibilities. That depends upon practitioners identifying suitable cases for the purpose. Towards the end of last century, that is certainly how significant developments in adult capacity law were driven. First came the cases, or developments that went beyond existing assumed boundaries but appeared to command a degree of consensus in that they were not challenged. The first category included, for example, the world-leading development of modern forms of guardianship in the *Morris* (1986) and *Britton* (1992) cases; the second is exemplified by the drafting and granting of powers of attorney which, contrary to assumptions at the time, explicitly declared that they would continue to apply in the event of the granter's incapacity; and that they applied to personal welfare as well as financial matters. Only after these initiatives had been developed, and cases had been successfully argued, did the legislature subsequently catch up (in the case of establishing a modern guardianship regime, in the Adults with Incapacity (Scotland) Act 2000; and in the case of modern powers of attorney, partly in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and more comprehensively in the 2000 Act). One is left with the question whether current practice equally lives up to the ethical obligation upon practising lawyers to test out further possibilities when issues or cases brought to them challenge

them to do that; or whether practice has tended to become a rather more circumscribed follower rather than a leader.

Adrian D Ward

World Congress 2026

The 2026 World Congress on Adult Capacity will be held in the Vrije Universiteit (VU University) in Amsterdam 8th – 10th July 2026. If practitioners and others in all relevant professions, researchers, people who care or are cared for, policy makers, involved organisations, and other stakeholders were to attend no other conference every two years, without doubt they should attend the World Congress. To be convinced of that, it is only necessary to glance through the programme for WCAC 2026 on the Congress website www.vu.nl/wcac2026, where you can still register for the Congress. From Scotland, and from various other parts of the United Kingdom, the venue in Amsterdam is more accessible than any equivalent venue in London. There are multiple flights every day, in both directions, to Amsterdam Schiphol Airport. Then it is six minutes by train from the airport in the station to Amsterdam Zuid ("south") station and a ten-minute walk from there to the venue.

I would urge all readers to glance through the Congress programme. The range of topics covered, the depth of coverage, and the multiplicity of speakers from across the world is remarkable, and seems only to develop further in each successive World Congress. Nowhere else will you find such a large percentage of the world's leading authorities on the subject gathered together in the same event, alongside many able younger speakers destined for similar status in the future. From a Scottish viewpoint, if one were to seek to organise a conference at home covering a similar range of topics, one could not do better than the range of Scottish speakers contributing in Amsterdam.

There is noticeable continuity from each successive World Congress through to the next, as conference venues have moved around the world. The first three Congresses took place in East Asia, United States and Australia, before coming to Europe (Germany) for the first time in 2016. That was followed by a second Congress in East Asia (Korea) in 2018. The 2020 World Congress, allocated to South America, was cancelled due to Covid, so our own World Congress in Edinburgh came next in 2022. Then the Congress originally allocated to Buenos Aires triumphantly materialised in 2024, before this year's World Congress is back in Europe for the third time. The 2024 event in Buenos Aires was the largest up to that point. It is perhaps unsurprising that it generated massive participation from South and Central America, but more remarkable that those continents have remained "on board" with, for example, substantial numbers of key people from a wide range of countries in those continents continuing to join International Guardianship Network, and substantial participation in Amsterdam next month: in the programme as it stands, there will be speakers from Argentina, Bolivia, Chile, Columbia and Peru, among them contributing ten speakers.

One interesting link back to our 2022 event in Edinburgh is that a highlight of that event was the magnificent summing-up given by Professor Wayne Martin (Essex University and Essex Autonomy Project) in the concluding session. The 2026 organisers have successfully recruited him to do the same in Amsterdam – a contribution already to be looked forward to.

Importantly but not obviously visibly to the generality of delegates, the International Advisory Board which recommends allocation of future Congresses, and provides support to the organisers of each successive Congress, meets in person during the course of each World

Congress. It is notable that all but one of the 15 members of the Board, attending from all of the continents that have previously hosted the event, will be personally present in Amsterdam except for one not personally present for unavoidable reasons, but who will participate remotely. Preparations for the 2028 World Congress in Girona, Catalonia are well advanced. Applications will be considered for 2030.

Adrian D Ward

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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in July. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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