

Supreme Court redefines deprivation of liberty

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Overview

Our planned content:

- Brief introduction to the 'AGNI' case
- Key submissions of the parties/intervenors
- Summary of judgment
- Identifying a deprivation of liberty
- Our thoughts on operational implications for:
 - NHS Trusts
 - Integrated Care Boards
 - Social care providers
- Questions and discussion

Background

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 – (“AGNI”)

Heard by a panel of 7 judges in the Supreme Court in October 2025

Background

Article 5 ECHR / Cheshire West

Important context

Storck [2005] – For the purpose of Article 5 ECHR, a person is deprived of their liberty if three elements are satisfied:

- (a) The “**objective element**”: the person is confined to a particular restricted space for more than a negligible period of time;
- (b) The “**subjective element**”: there is no valid consent to that confinement;
- (c) The **state is responsible** for the confinement.

Cheshire West [2014] – the “acid test”

The **objective element** is satisfied where a person is:

- (a) Subject to continuous supervision and control; and
- (b) Is not free to leave

No focus on the subjective element – it was commonly understood that the individuals lacked capacity to make decisions about their residence and care and therefore could not validly consent.

What was the Supreme Court asked to do?

Scope of the application

- To determine the lawfulness of a proposed revision by the Minister of Health in Northern Ireland to their DoLS Code of Practice.
 - The revision provided that individuals aged 16+ with "*impaired decision-making*" may be able to "*consent*" to their confinement through expression of wishes and feelings.
- It was **not** asked (by the Applicant) to review or alter the Cheshire West "acid test" for identifying an objective deprivation of liberty.

Positions

Parties and Intervenors

Advocate General for Northern Ireland

- A person who lacks capacity to consent to their confinement may nonetheless be able to give “valid consent” to that confinement through expression of their wishes and feelings.
- Concept of ability to give valid consent to confinement = broader than ability to give consent applying statutory test under MCA

Lord Advocate (Scotland)

- **Supportive of AGNI’s position**
- With procedural safeguards in place, valid consent to a situation of confinement may be given by a person without legal capacity.
- Approach not precluded by ECtHR case law

Mental Welfare Commission for Scotland

- **Supportive of AGNI’s position**
- If an adult can understand a situation so as to express an opinion/feeling about it, that should be given significant weight and can “*clearly indicate*” valid consent.
- Contrary to balancing Article 8 and Article 5 to render expressions “*irrelevant on blanket basis*”.

Positions

Parties and Intervenors

(Cont'd)

Secretary of State for Health and Social Care

- Supportive of AGNI's position **BUT** invited the Court to depart from Cheshire West
- Cheshire West was "*wrongly decided*", going "*far beyond*" ECtHR case law
- If not departing from Cheshire West, accept AGNI's submissions

Mencap, Mind and National Autistic Society

- **Opposed to AGNI's position (and SoSHC's)**
- ECtHR caselaw supports view that lack of capacity to consent to care arrangements = inability to give valid consent
- Proposed approach of AGNI is unworkable and removes "*vital safeguards*"
- Cheshire West does not need to be interfered with to decide reference

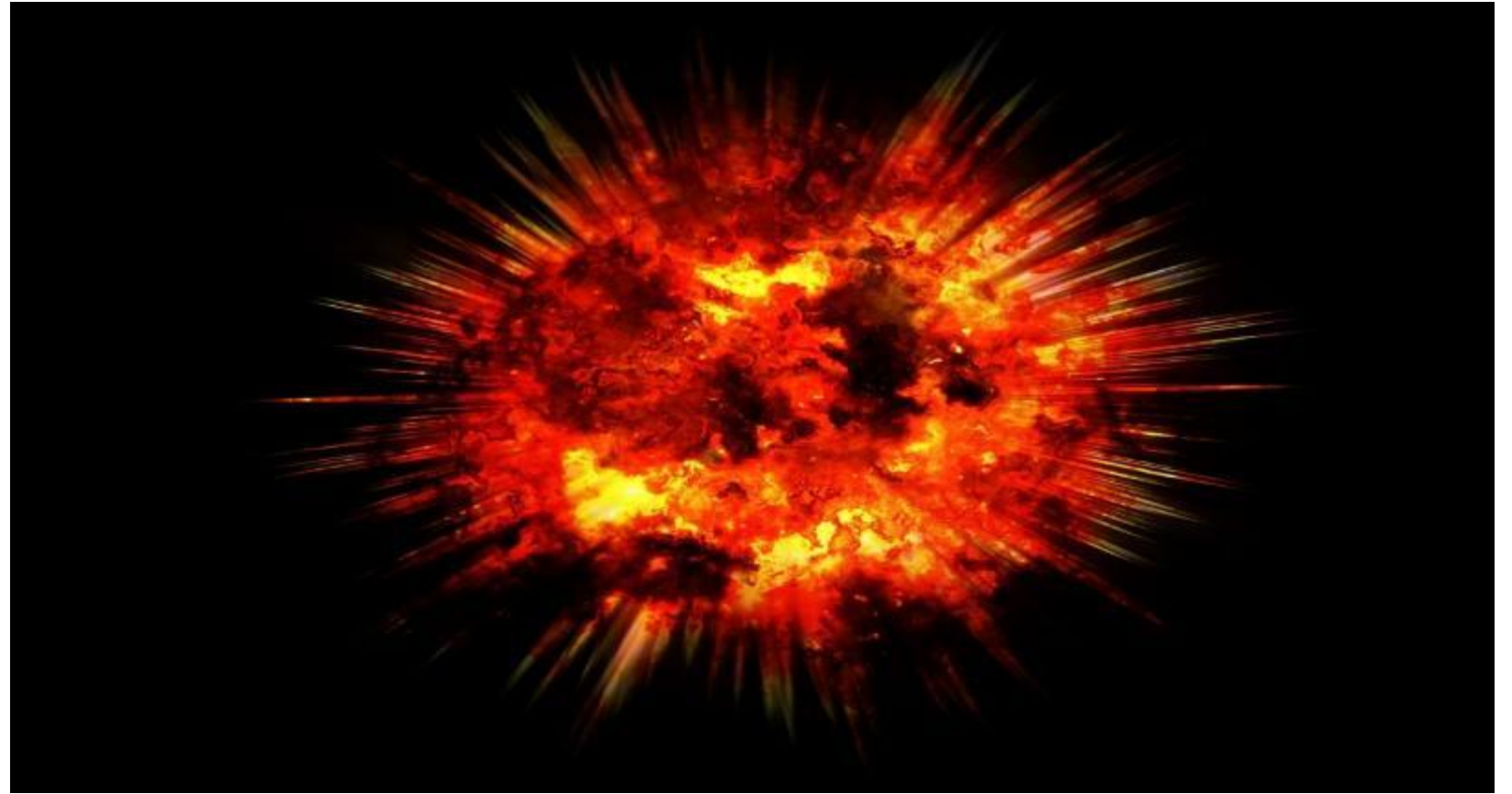
Official Solicitor

- **Opposed to AGNI's position (and SoSHC's)**
- AGNI's approach would create a "two-tiered" system between those who lack capacity who can and cannot consent, preventing access to justice for those who "consent".
- No need to revisit Cheshire West

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Supreme Court's decision

Impact



Supreme Court's decision

Summary of unanimous decision

1. Cheshire West was wrong.

2. "Multifactorial assessment" for objective element per *Guzzardi* [1981] – whole range of factors, not just continuous supervision and control.

3. The effect of the restrictions, including compliance or lack of objection, is relevant for assessing objective element

4. There is an overlap between objective and subjective elements – specific context and circumstances to be taken account of

5. If objective element met, an individual will only be considered deprived of their liberty if subjective element met i.e. no valid consent

6. Borderline cases: where there is "*serious doubt*", no inference of valid consent should be drawn

7. AGNI's revised code could be issued.

Supreme Court's decision

Why Cheshire West was wrong

The Supreme Court gave 6 reasons:

1. The acid test is not sufficient by itself – it may be relevant as part of the multifactorial test.
2. It was wrong to conclude a person's compliance or lack of objection is never legally relevant to the objective test.
3. Acid test takes no account of the type of setting/normality of the circumstances – "paradigm case" of confinement in a prison cell.
4. Acid test takes no account of an individual's "innate limitations" by reason of their physical / medical condition.
5. It was wrong to discount the "*potential relevance*" of the purpose for which the measures were imposed.
6. It was wrong to equate legal capacity with lack of valid consent – basic awareness and happiness = enough to demonstrate consent.

Objective element

A multifactorial assessment – is it a confinement?

Focus on:

- The “*concrete situation*” of the individual, taking into account the “*whole range of factors*”
- The “*realities of the situation*”

Relevant factors:

- Type, duration, and manner of implementation of any restrictions
- The effect of the restrictions on the individual
- The possibilities available to the individual to leave the restricted area
- The degree of supervision and control of the individual’s movements
- The extent of isolation and availability of social contacts
- The “relative normality” of the placement
- The purpose of the restrictions, albeit not decisive in itself
- In borderline cases, the paradigm of imprisonment in a prison cell as a “*useful comparator*”
- The presence or absence of objection.

Subjective element

Valid consent

Consent ≠ decision-making capacity

- Subjective consent under Art 5 is not the same as decision-making capacity under MCA.
- The bar is lower than for MCA – can give consent if they are “conscious of their environment” and have a “*basic understanding of their living circumstances*” in order to “*express their view*” and “*manifests their acceptance*”.

Implied consent

- Does not need to be explicit agreement.
- “*Tacit positive indication*” of positive views “*showing contentment*” may be enough.

Inference

- If there is “*serious doubt*” about P’s attitude, no inference of valid consent should be made.
- Compliance might carry less weight if P is being given sedative medication “*which is capable of suppressing objections*”.

Effect of consent

- If P is consenting, they are not being deprived of their liberty.

Who is not deprived of their liberty?

Worked examples from the judgment

- P in hospital in a minimally conscious state
- P in a catatonic state or "*so profoundly disabled they cannot conceptualise leaving let alone physically achieve this*".
 - Someone who cannot express any views about what should happen, because they do not have "*bodily, physical liberty*" to exercise
- Many hospital inpatients
 - Looking at "*ordinary expectations and the ordinary conduct of life*".
- MIG and MEG from *Cheshire West*:
 - Living arrangements as close to normal as possible
 - For benefit and protection
 - Indications of views likely valid consent

Additional key takeaways

for NHS Trusts

- Fewer DoLs for patients receiving routine treatment
- 16/17 year olds being accommodated for the LA highly likely to still be a DoL
 - Think "*prison cell*" comparison
- DoL and court approval likely still needed for patients being sedated for lengthy periods for treatment
 - E.g. patients on ICU for chemo or NG feeding
- GA for scans unlikely to be a DOL
 - Duration of restrictions key part of objective test
- DO NOT confuse valid consent under subjective element with consent to medical treatment
- SMT guidance still applies
 - May need court approval for BI decision even if not DoL, e.g. if finely balanced or if there is a dispute

Additional key takeaways

for Integrated Care Boards

- Fewer DoL authorisations
 - Fewer s21A applications as a result
- Increased need for monitoring
 - Still hold responsibility for authorising DoL if one did arise
- Don't ignore the requirements of Arts. 2, 3 and 8
 - More focus on other forms of safeguards now
- MCA still applies
 - May be s16 applications about care and residence even if not a DoL
- Individual multifactorial assessment required for each live case

Additional key takeaways

for Social Care Providers

- Need to recalibrate process for identifying a DoL
 - May still need to make application to the LA to allow them to make a decision
- All standard authorisations will need to be "part 8" reviewed
 - CQC expects proactivity
 - Raise the need for a review with the LA
 - Keep track of which DoLS have and haven't been reviewed
- Still caring for P in line with their care plan
 - The arrangements themselves don't change just because it is no longer a DoL
 - Remember, the DoL *authorised* the arrangements *which were already in place*

What happens next?

Test cases

- Expect a wave of cases coming through the Court of Protection helping to define what is a DoL in this brave new world
- Increase in cases where residence/care arrangements are looked at as best interests decisions, rather than authorisation/challenge of a DoL

Guidance

- Expect new guidance for practitioners in multiple different areas
- Timelines for this are unclear, but hopefully soon!

Internal procedures

- Review your policies now – this decision has immediate effect
- Ensure staff training reflects the new position

If in doubt...

- Give us a call!

Questions?



Feedback

We would be grateful if you could fill out our [feedback form](#) and let us know which topics you would like us to cover in future sessions.



Contact

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