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A new era for Deprivation of Liberty: what do I need to know, and what do I need to do?

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Care England, 8 September 2026

"Definitely my go to law firm, would highly recommend."

Andrew Luckett, Managing Director
New Concept Care and Nursing

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Overview

1. What is the *AGNI* case?
2. What is the new legal test?
3. What should I do now?
    - How do I apply the test?
    - What else do I need to do?
4. What will CQC be looking for?
5. Questions

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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")
- The AG of Northern Ireland asked the court 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.

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What did the parties say?

- AGNI: 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.
- DHSC: supportive of AGNI's position BUT invited the Court to depart from Cheshire West because it was "wrongly decided".
- Charities and Official Solicitor: lack of capacity to consent to care arrangements = inability to give valid consent. Proposed approach of AGNI is unworkable and removes "*vital safeguards*"

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Supreme Court's decision

Cheshire West

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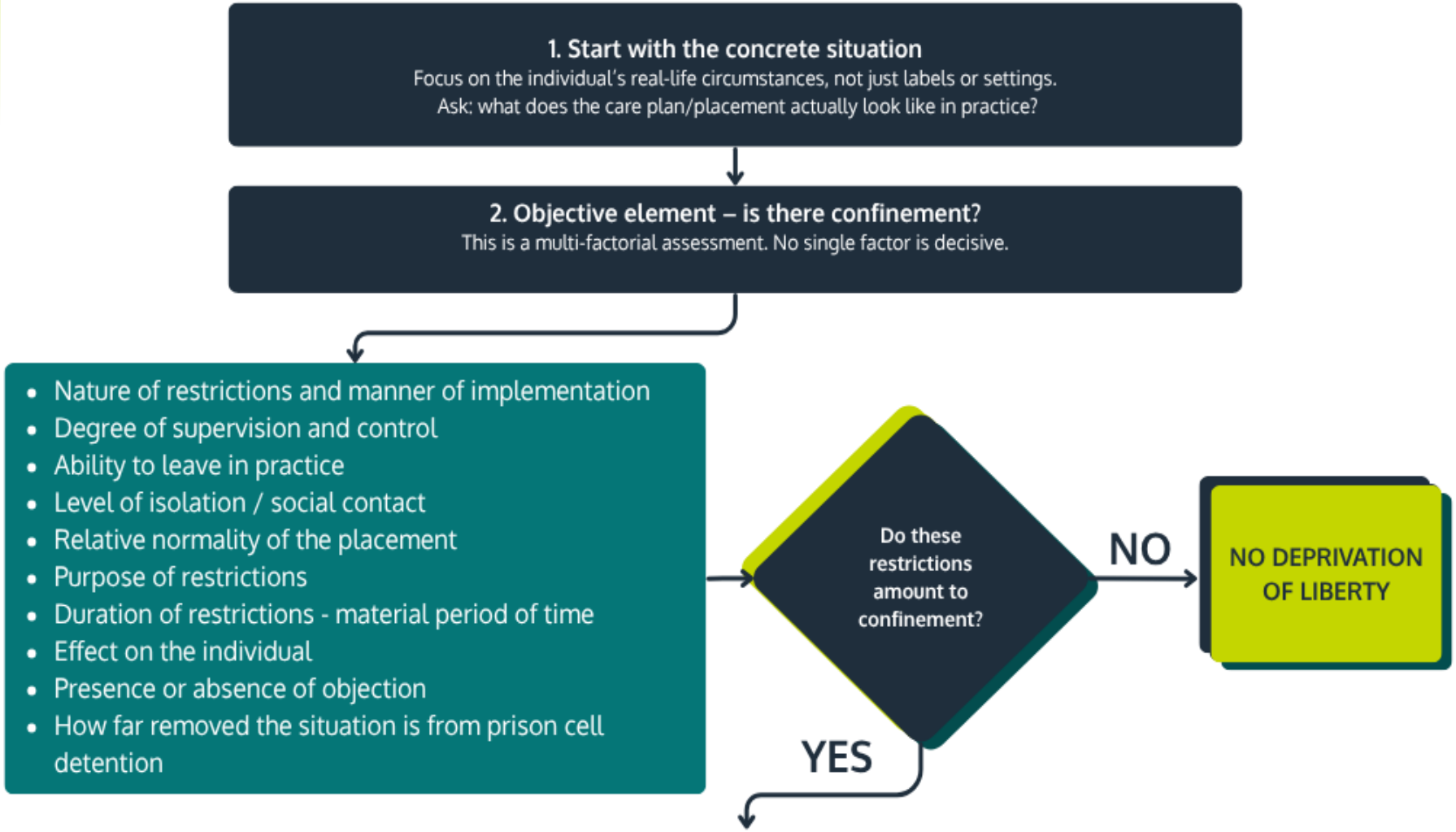
What is the new legal test? (1)



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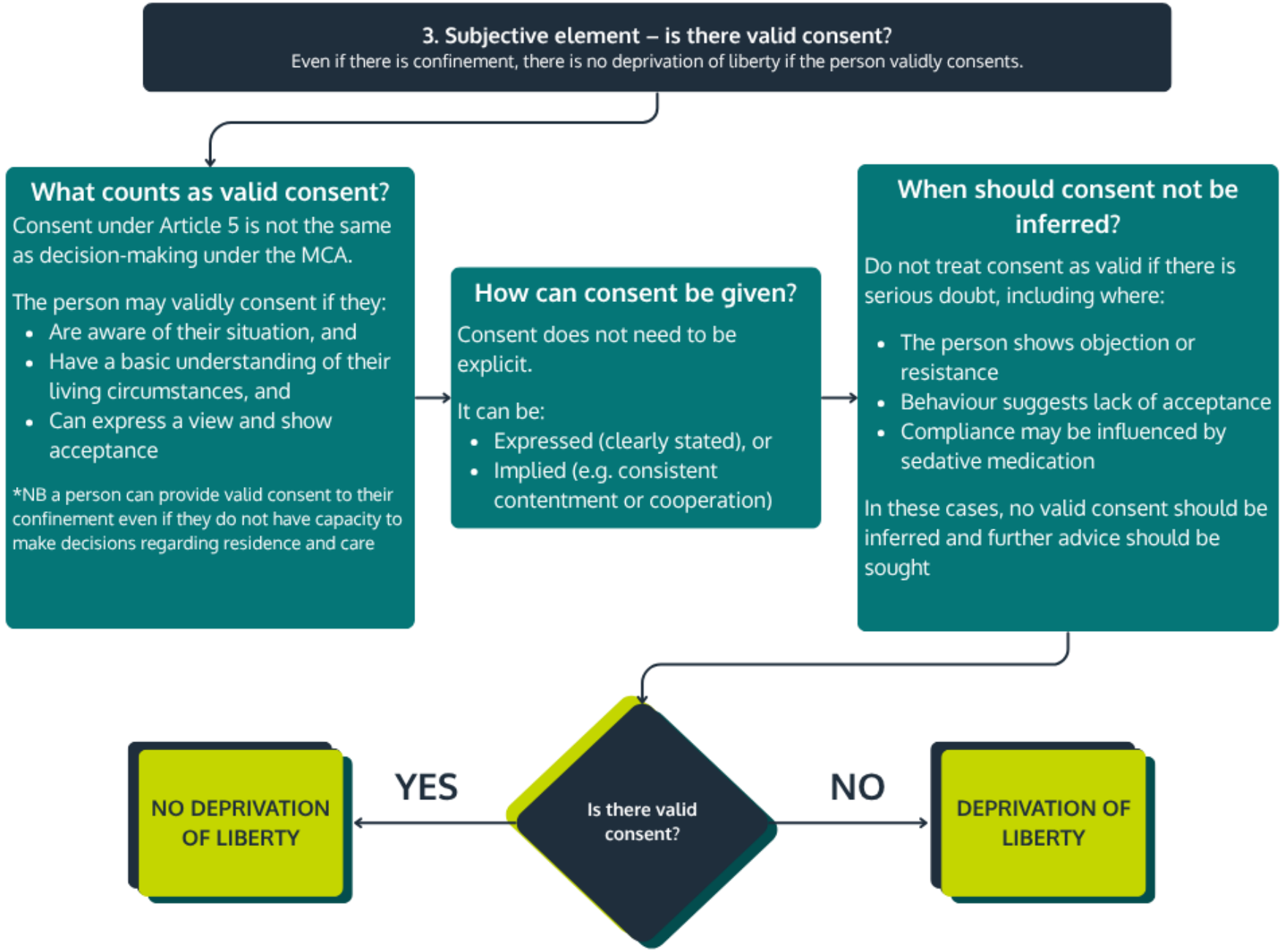
What is the new legal test? (2)



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What should I do now?

DON'T PANIC!

- You are still caring for P in line with their care plan
- This judgment does not remove the authorisation itself; the LA or ICB will need to come and do a review
- You can do the following:
  1. Look at the care plans for your existing service users under DOLS
  2. Compare them against the multi-factorial test and consider whether or not they now meet the criteria
  3. Get the LA or ICB to complete a review if:
     - You think they no longer meet the criteria
     - You are not sure whether they meet the criteria
  4. Any new service users will also need to be assessed and then referred in the usual way

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Case study 1: Does AR need a DOLs?

- AR is a 25 year old gentleman with learning disability and autism.

- He lives in a supported living placement and his care plan is as follows:
  - 24-hour 1:1 supervision
  - 2:1 staffing when accessing the community
  - Staff may use occasional physical redirection to maintain his safety
  - His daily activities and routines are closely managed and predictable to reduce distress and behavioural risks (aggression towards others, roof-climbing, electrical safety concerns, previous faecal smearing, and difficulties coping with changes in routine)

- The placement has:
  - Locked external doors and garden gates
  - Staff controlled community access (AR is not able to leave independently).
  - Window restrictors and
  - CCTV monitoring.

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Case study 1: AR

AR (Whether restrictions amount to a deprivation of liberty) [2026] EWCOP 45 (T2) (04 September 2026)

- Is AR deprived of his liberty? The Court of Protection says **no**. Why?
  - AR requires a **high level of lifelong supervision** and support due to his underlying condition.
  - A structured, predictable routine is essential to promote his wellbeing and stability.
  - He **will always require restrictions** on his movement and is **unlikely ever to be independently free to leave** wherever he lives safely.
  - Management of risks and behaviours requires close supervision and, when necessary, physical intervention.
  - Despite these restrictions, **AR is able to treat his placement as his home**, personalise his environment, build friendships and participate in community activities.
  - The restrictions are **implemented for his safety** and wellbeing and to achieve the best possible outcomes for him.
  - His living arrangements are **not comparable to detention** or secure confinement.
  - The overall care arrangements are considered **relatively normal for a person with AR's needs** and level of disability.

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Case study 2: Does P need a DOLs?

- P is 24 year old lady with a learning disability, with limited verbal communication and past emotional trauma.

- She also lives in a supported living placement and her care plan is as follows:
  - 35 hours of 1:1 support per week
  - She is not free to leave independently; all outings, appointments and journeys are supported 1:1)
  - Otherwise she has ongoing supervision and monitoring, but is able to complete some basic daily tasks independently (e.g. preparing breakfast)
  - No overnight waking support
  - No physical or chemical restraint
  - She has regular access to community outings and local clubs

- The placement has:
  - Locked external doors
  - door sensors on front and bedroom doors and
  - window restrictors are fitted
  - The placement is described as having a "relatively normal domestic environment"

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Case study 2: P

Oxfordshire County Council v P [2026] EWCOP 33 (T2)

- Is P deprived of her liberty? Court of Protection says **yes**. Why?
  - P is subject to a **high level of supervision**
  - P is objectively **not free to leave**
  - Considerable doubt about P's understanding of "home"
  - P has consistently stated she wants to live with various family members or her advocate
  - **Significant doubt about whether P is providing valid consent**

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What do these examples show us?

- The Court of Protection has looked at two sets of similar circumstances and got different results - why?
  - The way that practitioners and the Courts are applying this test is still developing, and each case is being decided on its own facts.
  - Continuous supervision and control, and not being free to leave, are still relevant considerations under the multi-factorial test but are not determinative.
  - To do the assessment properly, we need to look at individual service users and apply every factor to their particular circumstances.

- It is best practice to refer any cases that are borderline, or unclear to the LA/ICB.

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The LA did an assessment and said it is not a DOL - what do I do now?

Remember:

- The arrangements themselves don't change just because it is no longer a DoL
- The DoL ***authorised the arrangements which were already in place*** but the Court is now suggesting fewer care plans need authorisation
- The care plan stays the same, as long as all are agreed it in the person's best interests
- You can assure yourselves of this by:
  - Keeping care plans under review and updating them thoroughly if there are any changes
  - Conducting regular capacity assessments and best interests reviews for any restrictions
  - Documenting any objections by people and escalating these to the LA/ICB
  - Being aware of any disagreements or concerns by family as to best interests and escalating these to the LA/ICB
  - Asking the LA/ICB to maintain or fund independent advocacy arrangements

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What will CQC be looking for? (1)

CQC Guidance (June 2026) says:

- Providers must continue to demonstrate they:
  - Consider on a case-by-case basis whether a DOLS is required
  - Provide person-centred care (emphasising using these practices to gather people's views about their care)
  - Meet the requirements of the MCA and act in people's best interests
  - Comply with the HSCA regulations
    - There has been ***no change*** to the definition of consent to care
    - There has been ***no change*** to the MCA or Regulation 11 need for consent

- CQC will be checking compliance with Regulation 11
  - Care and treatment must only be provided with the consent of the service user
  - Where a service user is under 16 or lacks capacity, the provider must act in accordance with the MCA

- This ties in with Regulation 9 (Person Centered Care)

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What will CQC be looking for? (2)

CQC want to see...

- Evidence that staff understand the importance of consent, and are asking for it:
  - Observations of care
  - Care notes
  - Evidence of staff MCA and DOLs training

- Copies of up-to-date capacity and best interests decisions
  - Dated within the last 12 months
  - Detailed and person centred with clear consideration of the least restrictive option
  - decision specific; not covering whole aspects of care, but looking separately at individual restrictions (bed rails, sensor mats, tracking devices)
  - Cover all current restrictions, not ones that have been removed or added due to changes in care needs (they must match your current care plan!)

- Evidence that you have considered how the AGNI judgment affects your service users
  - Going back to the assessment we talked about earlier - document it and keep it! If CQC can't see it and read it, they won't believe you did it...
  - As well as documenting your assessment keep a log of:
    - Who you have asked the LA to review
    - Who you have asked the LA to assess
    - The date of your request
    - Any chasers sent

- Up to date policies and procedures
  - CQC will want to know that you know the law has changed; update anything referring to the old test

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Seek advice

Hempsons free social care advice line: 01423 724028

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Questions?

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Contact

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How can I apply this to my service?

Be prepared: book Hempsons' specialist training

Our specialist, provider-focused training sessions, led by expert social care lawyers, are designed exclusively for registered managers and nominated individuals who want clear, practical guidance on navigating this new legal landscape with confidence.

Save the date for your specific service:

- **23rd September** 14:00-15:00, residential care homes (older people services)
- **30th September** 14:00-15:00, learning disability/ supported living services
- **7th October** 14:00-15:00, domiciliary care services