11KBW

The Supreme Court overrules *Cheshire West*: what now for deprivation of liberty?

Joanne Clement KC, Zoe Gannon and
Tim Spencer-Lane

8 June 2026

Contents

11KBW

- Introduction
- Limb (a) Objective test
- Limb (b) Subjective test “valid consent”
- Case studies and examples
- Safeguards and protections
- What next?

1. Introduction

11KBW

- *Attorney General for Northern Ireland Reference :* [2026] UKSC 16
- https://supremecourt.uk/cases/uksc-2025-0042
- Seismic judgment – most significant judgment for social care (adult and children) and health sector for a generation
- Unanimous judgment – invoke Practice Statement, and overturned *Cheshire West.* Important ramifications for limb (a) of *Stork* test (confinement) and limb (b) valid consent. Most cases determined under limb (a)
- Anything we say in today's webinar represents our personal views - we are not speaking on behalf of DHSC

1. Introduction

11KBW

- *Cheshire West* - limb (a) confinement. The “acid test” – (i) under continuous supervision and control, and (ii) not free to leave
- **Limb (b)**: assumed that if lacked capacity under domestic law to decide where to reside and care/treatment they received, could not provide valid consent to confinement
- c. 400,000 disabled people in England and Wales being deprived of liberty by the state per year.
- Article 5 safeguards for physical liberty – extensive and intensive
- Paradoxical outcome: happy with living arrangements, don't want to leave them, lives enriched by care and support they receive, don’t object to any of the restrictions necessary to keep them safe. Still DoL.
- *HL* – DoL in hospital (social isolation, sedated, under complete control of others, kept away from family). Also DoL once released to foster carers
- Acid test draws no distinction between high security prison and family home

2. Objective test

11KBW

Article 5 – concerned with protecting physical liberty

- Paradigm of deprivation of liberty – detention in a prison cell
- Other scenarios akin to that – psychiatric institutions, immigration detention, Soviet-era institutional social care facilities
- ECtHR never held that the objective element was satisfied in a social care community setting – residential care home, supported living, shared lives, family home, own home

2. Objective test: *Cheshire West* overturned

11KBW

multi factorial test - *Guzzardi*:

- Concrete situation of the individual.
- "account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question" (§118)

Important points to note:

- No single factor is determinative (§186)
- The process of distinguishing between a deprivation of liberty and a mere restriction on liberty of movement can sometimes be "no easy task", particularly in borderline or marginal cases (§127)
- "The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance" (§119, 186)
- "Where there are a number of restrictions involved in the treatment of an individual, it is necessary to consider them "cumulatively and in combination" (§119)
- It is intended to be a "practical and realistic approach" (§127)

2. Objective Test

11KBW

Factors: "acid test" part of factors, but not sufficient by itself

- **Degree of restrictions**: the possibilities available to the individual to leave the restricted area, the degree of supervision and control over their movements, the extent of isolation and the availability of social contacts (§121)
- **Effect and lack of objection** (§§53(iii)187) - Effect of restrictions on an individual is liable to differ according to whether they are content with or object to their living arrangements. There may be arguments, attempts to leave, expressions of a wish to leave, or conduct showing a wish to leave. The resulting stress for the individual in having their objections overruled may lead to suffering and result in the use of physical force or physical restraint.
- **Medication** (§188) – mere compliance may carry little weight particularly if accompanied by administration of sedatives, particularly if administered with force. Absence of medication may point in the opposite direction.
- **Relative normality of the situation** (§§53(iv), 193) is it a family home? Or a locked psychiatric hospital akin to a prison. If in own home "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."
- **Closeness to the paradigm of a prison** (§§53(iv),190) this is important in borderline cases
- **Coercion** (§195) "the need for coercion or some externally imposed restrictions on an individual that prevent them from exercising their fundamental right to physical liberty"
- **Purpose:** purpose of restriction in a marginal case – aim of punishment or coercion, more closely approximate to prison cell. Imposed for protective reasons, further it is from that paradigm (§134)
- **Duration**: in marginal cases "whether the duration of confinement corresponds to that purpose" (§134)

3. Subjective Test

11KBW

- Incapacitious consent – valid consent for purposes of Article 5?
- NI argument (only ever fall back for DHSC, if SC rejected case under limb a - person who lacks capacity to consent to confinement can give valid consent under limb (b) of *Storck* test
- Actively express positive wishes and feelings about arrangements in place. Not enough P does not express objection, must be evidence of positive attitude to care arrangements. Through expression of wishes and feelings
- Administrative arrangements – use form to set out why P is giving valid consent, keep under review.

3. Subjective Test

11KBW

- Valid consent not equated to consent to waiver of rights under the Convention or of legal capacity under the MCA
- Lack capacity to decide on living and care arrangements under MCA – does not necessarily mean they are de facto unable to understand and consent to arrangements to prevent them becoming a DoL
- Conscious of their environment, basic understanding of their living circumstances so they can in some suitable way express their view about their situation
- Manifests their acceptance of the situation they are in, should have their opinion respected when assessment made whether DoL under Article 5
- Choices made by individuals with impaired understanding should be respected where possible, as an aspect of respecting their dignity as human beings (UNCRPD?)

3. Subjective Test

11KBW

- Can be difficult to ascertain true feelings or preferences of vulnerable individuals who do not have capacity to decide on living arrangements.
- Where there is serious doubt, no inference of valid consent should be drawn
- NB: §164, 176 – some suggestion about substituted consent
- P incapable of expressing any view does not mean subjective element is made out.
- In an appropriate case, *may* lead to conclusion subjective element is assessed by reference to the view of the person with authority other make decisions for the individual, in their best interests
- *NB: J v Bath* (public authority responsible for confinement cannot itself provide valid consent)

4. Case Studies and Examples: in the Judgment

11KBW

MIG (§§72-74, 203)

- Key facts:

1. Moderate to severe learning disability. Very limited cognitive ability. Communicated with difficulty and required help crossing the road because she was unaware of danger.
2. She was living with a foster mother in her private home and regarded the foster mother as "Mummy". Her foster mother provided her with intensive support in most aspects of daily living.
3. MIG was not on any medication. She was not restrained or locked in.
4. She had never attempted to leave the home by herself and showed no wish to do so, but, if she had done so, her foster mother would have restrained her for her safety
5. MIG attended a further education college daily during term time and was taken on trips and holidays by her foster mother.

Not confined – no DOL

- "Her living arrangements were as close to normal as possible and such minimal element of confinement as existed was for her benefit and protection; so in our opinion the objective element of confinement was not present either. Overall, her situation was very far removed from the paradigm case of confinement in a prison cell."

4. Case Studies and Examples: in the Judgment

11KBW

MEG (§§72-74, 204)

- Key facts:

1. "Mild learning disability and cognitive ability was limited"
2. Lived with 3 others in a small NHS residential home for learning disabled adolescents with complex needs.
3. Had "occasional" outbursts of challenging behaviour towards three residents and sometimes required physical restraint for her own protection or others (not punishment)
4. "was prescribed (and administered with) tranquilising medication to control her anxiety" – not to disable her from forming a view.
5. Not a "locked environment" but had 1:1 or 2:1 support and was accompanied by staff every time she left
6. She showed no wish to leave and so there was no need to prevent her from doing so, but if she tried to leave "*she would have been restrained or brought back for her own safety*"
7. She attended the same further education college as her sister during term time and had a full social life.

Not confined – not a DOL

- "The 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."

P (§205)

1. P was 38 born with cerebral palsy, range of difficulties
2. Lived in a staffed bungalow with two other residents
3. P could walk short distances but otherwise required prompting and help with all activities of daily living, getting about, eating, personal hygiene and continence.
4. He sometimes required intervention (amounting at times to physical restraint) when he exhibited challenging behaviour
5. Was not prescribed any tranquilising medication.

Reserved position

SM (§196): inability not lack of freedom

- 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

Not confined – not a DOL

R (Ferreira) v Inner South London Senior Coroner (§114-116, 142-145)

- The case concerned an individual, M, with severe mental-health impairment
- Was admitted to hospital suffering from breathing difficulties which required intubation and sedation.
- Subsequently, she suffered a heart attack and died in the intensive care unit of the hospital.

Not confined – not a DOL

4. Case Studies and Examples: Strasbourg

11KBW

HL - DoL

- Autistic adult was confined in a secure psychiatric hospital after becoming agitated and engaging in violent behaviour and self-harm.
- Objective elements: strict measures of confinement and denial of access to the applicant's carers in the period between July and October 1997. Compulsory detention would be used if HL tried to leave. And was sedated. (§§152-155)
- Subjective element: The applicant "was compliant and never attempted, or expressed the wish, to leave". Initially his compliance was secured by his being sedated, and maintained in a tractable state with regular sedation.

HM v Switzerland - not DoL

- Elderly lady moved into a nursing home and initially objected.
- Objective element: a secure nursing home. It was "open institution which allowed freedom of movement and encouraged contacts with the outside world" (§§124, 150, 156)
- Subjective element: where she said that she had no reason to be unhappy, and, after her arrival there, agreed to stay.

4. Case Studies and Examples: hypotheticals

11KBW



Elderly person in ordinary care home



Own home - Re AB; AEL v Havering



Person who is catatonic or end stage dementia- no bodily, physical liberty to exercise. No DoL



Temporarily unconscious – potential to regain consciousness, make assessment in light of that. Unconscious and kept in care to have medical treatment is not DoL (unless ev would object)

5: Safeguards

11KBW

- Given the link to our written case before the Supreme Court. Has a detailed Annex listing safeguards available
- Other Convention rights – Article 2, Article 3 (inhuman or degrading treatment)
- Article 8 – private life, dignity, self-determination, respect for the home and family life
- Cannot be left unprotected and without appropriate review of their interests on a continuing basis
- Positive obligations under Article 5 – reasonable steps to prevent a deprivation of liberty, e.g. providing a wheelchair or other aid to enable individual to leave (care package?)
- Care Act 2014 – meet eligible needs, regular reviews (expectation at least annually)
- MCA – section 5 decisions
- Best interest decision making, take account of wishes and feelings, principle that any act/decision must be leastrestrictive of person's rights and freedom of action
- MCA – section 16, best interest declarations
- If disagreement, duty on public authority to take matter to court
- Schedule A1: para 67 (right of third party to require consideration whether authorisation needed)
- Safeguarding duties
- Advocacy – IMCA , Care Act advocacy, CHC etc. Duty to appoint
- Focus on those cases that really need it.
- Reflect ADASS prioritisation tool, make it lawful.

6. What Next?

11KBW

- Existing DOLS Authorisations – expiry date, (Part 8 reviews)
- Current court orders (will all have review provisions/expiry date)
- New matters – pending request for authorisation, pending before CoP, wondering whether to issue

6. What Next?

- Guidance for the social care and health sectors?
- ADASS guidance: wrong in one crucial aspect
  - No one can sue a local authority (or any other body) if a DOLS authorisation / court order is in place and it later transpires they were not deprived of liberty at all
  - DOLS authorisation / court order is just a piece of paper, has no legal effect
  - Certainly can't sue for unlawful deprivation of liberty if they never were deprived of liberty
- SJ Hilder guidance to Re X judges

Thank you for joining.

11KBW

11KBW

“Barristers of the very highest quality”
Legal 500

11KBW is renowned for the outstanding quality of its advice, advocacy and client service. Our barristers are experts in Public, Employment and Commercial Law and lead the field in a number of specialist areas.

“The clerks are absolutely fantastic; they are approachable, friendly and they deliver on time.”
Chambers & Partners

Please get in touch with our team to discuss what you need:

Senior Clerks –Mark Dann
Director of Business Development – Andrea Kennedy
Director of Operations– Claire Halas

Tel: +44 (0) 20 7632 8500
Email: clerksteam@11kbw.com
11 King’s Bench Walk, Temple, London, EC4Y 7EQ