

Cheshire West Overruled: What the Supreme Court ruling means for Deprivations of Liberty.



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David Welsh – Valid Consent
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Case Overview





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

- Case was brought by the Attorney General for Northern Ireland.
- Wanted to change the practice so that even if P lacked mental capacity to make decisions about their care arrangements they can give valid consent through the expression of current wishes and feelings.
- Intended to issue a revised code of practice to replace the existing Deprivation of Liberty Safeguards Code of Practice.
- Needed to make a reference as that change would differ from that determined by the Supreme Court in *Cheshire West*, which he said misinterpreted the European case law regarding the meaning of valid consent.
- AG invited the Supreme Court to find that the Revised Code was compatible with article 5 and so he would be acting within his competence to issue it.



Three elements to a deprivation of liberty (Storck v Germany [2005] ECHR 61603/00)

01

The objective element

Confinement in a particular restricted space for a material period of time

02

The subjective element

The individual has not validly consented to the confinement in question

03

State imputability

Attribution, in other words, the state is responsible, either directly or indirectly for that confinement.



AGNI

- Secretary of State for Health and Social Care:

'it is not possible to consider the subjective element of deprivation of liberty under article 5, and in particular the concept of valid consent, in isolation from the objective element of deprivation of liberty, as the starting point is to identify to what an individual is consenting. The overarching question is whether an individual is deprived of liberty within the meaning of article 5. This requires consideration of all three elements of the test (para 4 above) in combination'

- Supreme Court accepted this approach.



'[T]he majority decision in Cheshire West departed from the longstanding multifactorial approach to determining whether a person is deprived of liberty within the meaning of article 5 and is wrong'



P v Cheshire West and Chester Council & Anor [2014] UKSC 19

01

There is no 'acid test'.

Baroness Hale in error focused on particular factors of P's concrete reality – whether P was under continuous supervision and control and not free to leave.

Instead a multifactorial assessment must be undertaken.

02

Case proceeded on the erroneous basis that where a person lacked capacity in terms of their residence and care, within the meaning of the Mental Capacity Act, it meant they were unable to give valid consent to their confinement.



Valid Consent



Consent per Cheshire West

- “Acid test”: was the individual under continuous supervision and control, and were they not free to leave?
- Lack of mental capacity an automatic equivalent to a lack of "valid consent" subjectively.
- Compliance or happiness with the arrangement was irrelevant: “a gilded cage is still a cage”.

Consent per AGNI

- The “acid test” went too far.
- The subjective element requires an absence of valid consent.
- “Valid consent” is an autonomous concept under the ECHR. It is not the same as domestic legal capacity.
- An adult lacking capacity may still have sufficient understanding so as to express consent or objection.

Battle of the Interveners

- **Charities:** maintain the Cheshire West framework; any move away from a bright-line objective test would erode safeguards for highly vulnerable people.
 - Eliciting true wishes from certain individuals is very difficult.
 - Disabled individuals prone to suggestibility.
 - Behaviour is easily misread.

Battle of the Interveners

- **MWC:** highly vulnerable people require a balance to be carried out between their Art 5 and Art 8 rights; a blanket disregard for an individual's expressed contentment or happiness is inherently disempowering and fails to respect their human dignity.
 - Capacity is a spectrum.
 - Lack of de jure capacity does not extinguish de facto expressions of comfort and choice.
 - Interpreting those expressions will involve those who know and work with the individuals, making it individualised rather than a blanket approach.
 - Where there is any doubt or dissent, the usual safeguarding protections should be applied.

Battle of the Interveners

- MWC written argument:

"[The position of the Charities] appears to suggest that because some adults will find it difficult to communicate and express views and feelings about their placement, the views of no adults should be capable of vouching consent. That, in the MWC's view, is to create an arbitrary threshold which would require unnecessary and therefore disproportionate interference with the private lives of those incapable adults who are able to express those views and feelings."

Battle of the Interveners

- Decision at [192]:

“A theme of the Charities’ case is that because this exercise of evaluating the wishes of an individual who lacks legal capacity to consent to their care arrangements is going to be difficult or impossible in some cases, possibly even many cases, there should be no attempt to consider lack of objection or wishes and feelings in any case at all. We do not accept this. It is contrary to the fundamental principle underlying the Convention that individuals should be treated with due regard to their dignity as persons and that their own views should be accorded respect. It is also too crude as an approach in this area, where sensitive judgments are required. The argument that, because some adults will find it difficult to communicate and express views and feelings about their placement, the views of no 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.”

Practicalities

- Move away from rigid “gilded cage” definitions.
- Focus on individualised and qualitative assessments.
- Actively seeking out and taking account of the preferences of individuals in whatever way they choose to express them.
- Remain highly vigilant to the risks of suggestibility or hidden trauma.
- Where there is friction or distress, legal safeguards must be used.



Has everything changed?

A cage is still a cage



One stage or two?



Objective



Subjective

Objective first?

- At 120: In *Storck*, para 74, the European court held that the notion of deprivation of liberty in article 5(1) contains (i) an objective element, involving confinement in a particular restricted space for a material period of time and (ii) an additional subjective element: “Individuals can only be considered as being deprived of their liberty if, as an additional subjective element, they have not validly consented to the confinement in question”. This formula was repeated in *Stanev*, para 117.
- At 53(ii) Although the objective and subjective elements of deprivation of liberty are often considered sequentially by the European court in its assessment of an applicant’s specific situation, there is an overlap. The requirement to take account of the “type” and “effects and manner of implementation” of the measure in question means that the assessment of the objective element can take account of the specific context and circumstances of restrictive measures that are different from the paradigm of confinement in a cell.

Objectively, what is a deprivation?

- So you have to ask whether there is objective DoL
- The “paradigm example” is a prison cell [5]
- In considering “P”’s case from *Cheshire West* the Supremes thought he was not deprived of his liberty despite :-
 - “his life is completely under the control of members of staff at Z House. He cannot go anywhere or do anything without their support and assistance. More specifically, his occasionally aggressive behaviour, and his worrying habit of touching and eating his continence pads, require a range of measures, including at times physical restraint, and, when necessary, the intrusive procedure of inserting fingers into his mouth whilst he is being restrained”
- because [205] “It is not obvious that P’s case bore any real similarity to confinement in a prison cell”.

Objectively, what is a deprivation?

- Nonetheless, the prison cell comparator cannot be the “new acid test”:
 - “even a domestic setting can involve a deprivation of liberty” [54]
 - Because “Care plans, even for those who live in their own homes in the community, can involve a wide range of restrictive measures that are considered to be in the individual’s interests (for example, the use of sedative medicines, physical restraint devices, electronic and other monitoring) but which have the potential to be overused, misused or abused.”
- Some of the scenarios we are used to in the CoP will continue to be considered as DoL:
- [121] Factors relevant to the objective element include 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.
- [127] 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

Objectively clear cases

- Detention under Mental Health Act 1983 - yes
- Being questioned in a Police station even if not under arrest – yes
- Protesters kettled – no
- Being stopped at a border for passport checks – no
- Being catatonic – no

Their “concrete” or “specific” situation is such that, by virtue of their physical condition, they do not have any possibility of exercising physical control over their body, either by means of engaging their own motor skills or by being able to request others to help them to move. Hence, they do not have any bodily, physical liberty to exercise, irrespective of the circumstances in which they are being cared for.

Paragraph 193

193. Thirdly, the European court has emphasised that article 5 is concerned with the **physical liberty** of the person and is not concerned with mere restrictions on the liberty of movement: para 118 above. Yet the acid test takes no account of the type of setting where an individual receives care and treatment and draws no distinction between the position of an individual in, say, a category A prison or a high security psychiatric hospital on the one hand, and a person supported to live as independently as possible in their own accommodation or in their family home. The effect of the restrictions on an individual living in their family home with their family, or living in their own home, with opportunities for leaving the place of residence for recreation, education or social contact, is likely to be very different from the effect on an individual held in a psychiatric hospital or a prison. The **normality** of the circumstances in which an individual is cared for is a relevant factor: see para 145 above. Moreover, the parties identified no decision of the European court to date which has held that an individual living in their own home is deprived of liberty. And although the majority in Cheshire West discounted the point, because it had not been argued, we think it is noteworthy that the European court in HL focused on the applicant's position in the hospital (finding that to involve a deprivation of liberty), by contrast with his position when being cared for in the community (which the court did not suggest would involve such deprivation). This does not mean that an individual living in their own home could never be subject to a deprivation of liberty. However, 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.

the Strasbourg jurisprudence reflects the need for coercion or some externally imposed restrictions on an individual that prevent them from exercising their fundamental right to physical liberty.

Paragraph 195





What next?



**Immediate
impact**

**What
next?**

**The
longer
term**

**Any
hints?**

**Approach
to take**

**Ongoing
cases**



Thank you

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