



Supreme Court Overturns Cheshire West | What Providers Need to Know.

As you may already be aware, the Supreme Court has handed down a landmark judgment on the meaning of deprivation of liberty under Article 5(1) of the European Convention on Human Rights (ECHR). This applies not only to people subject to DoLS in hospitals and care homes, but also to people whose deprivation of liberty is authorised by the Court of Protection, including some people in supported living, with what are often referred to as ‘community DoLS’.

This is an initial briefing for VODG members on what the ruling says, and what providers need to know.

There is work underway across government to develop relevant responses and guidance following the decision. VODG is involved in some of this and will keep members updated. In the meantime, if you have any queries regarding this ruling please [do get in touch](#).

The Ruling

The Supreme Court has handed down a landmark judgment on the meaning of deprivation of liberty under Article 5(1) of the European Convention on Human Rights (ECHR) in *A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 24 of Schedule 10 to the Northern Ireland Act 1998* [2026] UKSC 16. In doing so it has overturned its decision in *Surrey County Council v P Cheshire West and Chester Council v P* [2014] UKSC 19 (*Cheshire West*).

The Supreme Court's recent decision is likely to lead to a fall in the number of cases where a person's placement in a health or social care setting will require authorisation as a deprivation of liberty for the purposes of Article 5(1) of the ECHR.

Deprivation of Liberty under the Mental Health Act 2005

The Mental Health Act 2005 defines deprivation of liberty by reference to its meaning in Article 5(1). Under ECHR case law, deprivation of liberty exists if three elements are met:

- The objective element: the person is confined to a particular restricted space for a material period of time;
- The subjective element: the person has not given valid consent to the confinement; and

- Whether the state is responsible, either directly or indirectly, for that confinement.

The Cheshire West Case

Since 2014, providers, local authorities and the courts have applied the decision in *Cheshire West* known as the "acid test". Under this test, the objective element referred to above was satisfied if a person was under continuous supervision and control; and not free to leave. As far as the subjective element was concerned the Court proceeded on the basis that as a person lacked capacity under the Mental Capacity Act 2005 to consent to their care or living arrangements this meant that they were unable to give valid consent.

If these conditions were met, formal legal safeguards (Deprivation of Liberty Safeguards (DoLS)) were required regardless of how caring or beneficial the arrangements were. This involved independent assessments to ensure placements were safe, justified and in the person's best interests.

What did the Supreme Court decide?

By way of background, the recent case arose from a reference to the Supreme Court made by the Attorney General for Northern Ireland on the issue of whether a revised Deprivation of Liberty Safeguards Code was compatible with Article 5 of the ECHR. The Court had to consider the proper application of the subjective element of a deprivation of liberty, but also the objective element (the "acid test").

The Supreme Court overruled *Cheshire West*, finding that the "acid test" should no longer apply as it went beyond the ECtHR case law interpreting Article 5(1). These case law decisions show that the starting point in assessing whether someone has been deprived of liberty is the specific situation of the individual concerned.

Instead of a single test, the Court said that a "multifactorial approach" should be adopted. Limited guidance is provided on what this will look like in practice, except that "the court must focus on their concrete situation and must take account of the whole range of factors in the particular case, including the type, duration, effect and manner of implementation of the measures in question".

The Court also considered that a lack of legal capacity had been wrongly equated with lack of valid consent (the subjective element). It found that the fact that an individual lacks legal capacity to make decisions about their living and care arrangements does not necessarily mean that they are unable to understand and consent to those arrangements.

In other words, if an individual is happy with their care arrangements and is able to express this, they will be deemed to consent to their care arrangements and so there will be no deprivation of liberty. However, if an individual manifests a view that they are not happy with those arrangements their opinion should be respected and it is likely that it will be concluded that they are subject to a deprivation of liberty.

What does this mean in practice for providers?

The Supreme Court's decision means that fewer arrangements may require formal authorisation, particularly where individuals are settled, do not object to their care and may be viewed as positively accepting their arrangements.

It is important to note that this decision is confined to the question of deprivation of liberty under Article 5 ECHR. It does not affect other aspects of the Mental Capacity Act 2005 framework or other legal safeguards, and should not be used as a basis for reducing protections in other contexts

For providers, the focus shifts from applying a checklist to making a balanced, case-by-case judgment about the individual's situation. Key implications include:

- **A more individualised approach:**
Decisions must now be based on the person's overall circumstances, rather than whether specific criteria are met.
- **Potential reduction in DoLS/LPS applications:**
Some arrangements that previously required authorisation may no longer fall within Article 5. DoLS remain the current system; the Liberty Protection Safeguards (LPS), intended to replace them, have not yet been implemented.
- **Greater emphasis on the person's experience:**
The individual's wishes, feelings and level of engagement with their care will be central and should be clearly evidenced.
- **Increased reliance on professional judgment:**
Staff will need to apply more nuanced judgment rather than relying on a straightforward legal test, with consistency across teams becoming increasingly important.
- **Stronger focus on record keeping and justification:**
Providers will need to demonstrate clearly how decisions have been reached, particularly where the conclusion is that Article 5 is not engaged.
- **Governance and oversight considerations:**
Organisations may need to review policies, training and internal assurance processes to reflect the new approach.

Immediate action for providers

It is likely that significant numbers of individuals will no longer be considered to be deprived of their liberty and will need their cases reviewed in due course.

Providers should start to consider:

- identifying arrangements where individuals may no longer be considered to be deprived of their liberty under the new approach;
- revisiting how they identify and record restrictive care arrangements;
- being aware that there is a risk of inappropriate withdrawal of safeguards of people's liberty if newly understood tests are misapplied;
- ensuring staff capture evidence of individuals' wishes, feelings and behaviours relevant to whether restrictions amount to a deprivation of liberty;
- establishing a shared understanding with the local authority on understanding of DoLS and valid consent; and
- reviewing whether current DoLS applications remain necessary under the new approach.

In the meantime, we await the Department of Health and Social Care's response to the ruling and further guidance for the sector, which is expected shortly.

VODG are gathering case studies, examples, questions and concerns members have on this to inform our discussions with DHSC, ADASS and others, and invite members to [get in touch](#).