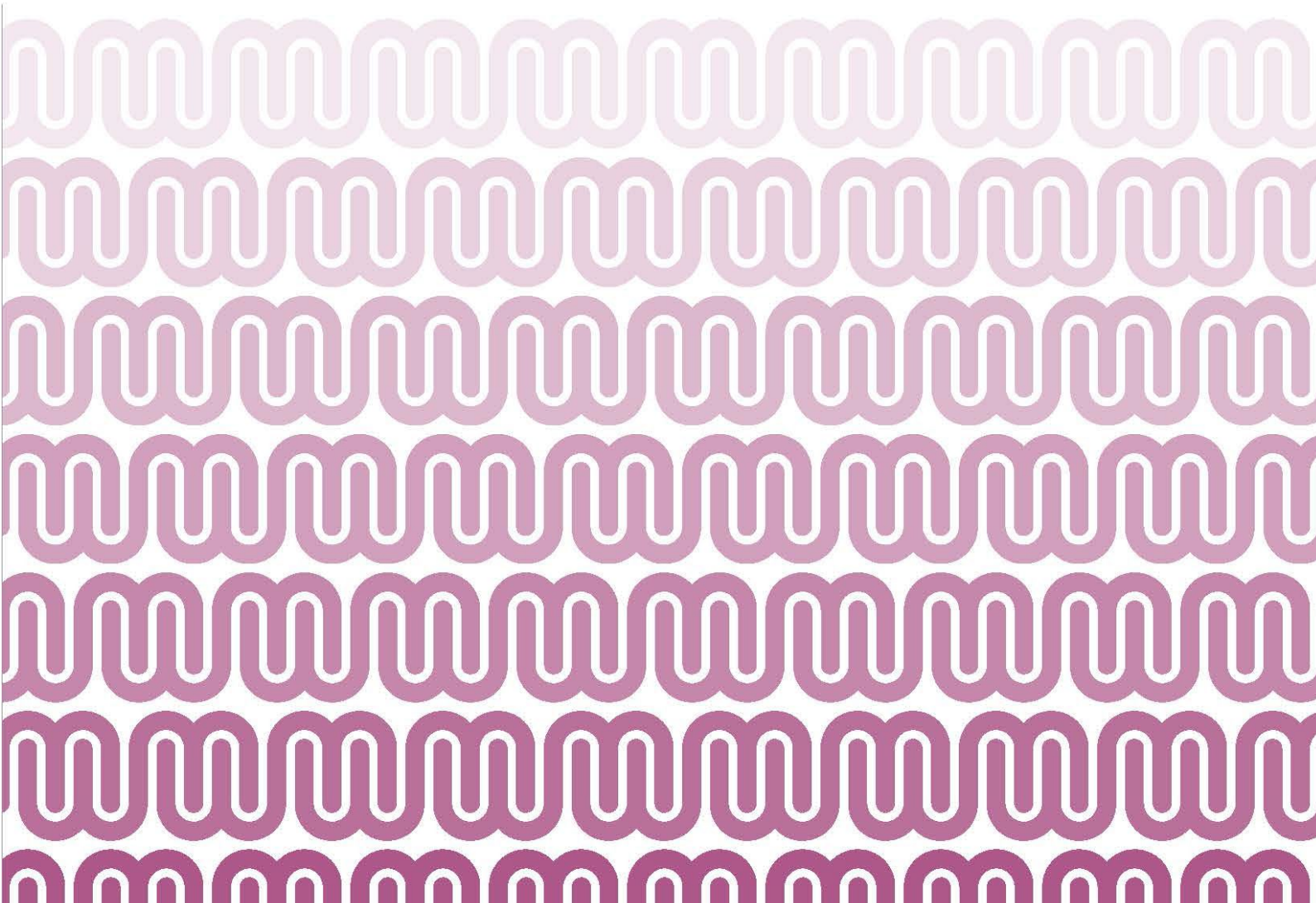
mental welfare commission for scotland

Applying the Deprivation of Liberty Test Following a Reference by the Attorney General for Northern Ireland [2026] UKSC 16

Advice note

November 2026



Our mission and purpose

Our Mission

To be a leading and independent voice in promoting a society where people with mental illness, learning disabilities, dementia and related conditions are treated fairly, have their rights respected, and have appropriate support to live the life of their choice.

Our Purpose

We protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions.

Our Priorities

To achieve our mission and purpose over the next three years we have identified four strategic priorities.

- To challenge and to promote change
- Focus on the most vulnerable
- Increase our impact (in the work that we do)
- Improve our efficiency and effectiveness

Our Activity

- Influencing and empowering
- Visiting individuals
- Monitoring the law
- Investigations and casework
- Information and advice

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Purpose of this advice note

This advice note concerns the ruling set out on 2June 2026 by the UK Supreme Court: *A Reference by the Attorney General for Northern Ireland* [2026] UKSC 16.

It is not intended to replace legal advice, statutory guidance or organisational policy. Its purpose is to support the health, social work and social care workforce to promote consistent, rights-based practice when assessing the unique circumstances of each individual.

Background

The Attorney General for Northen Ireland proposed changes to the Northern Irish Deprivation of Liberty (DOL) Code of Practice. The proposed changes meant that, for the purposes of article 5 ECHR, even where a person lacks mental capacity to make decisions about their care arrangements, they can give “valid consent” to their confinement through the expression of current wishes and feelings that go beyond mere acquiescence.

UK domestic law does not set out what a deprivation of liberty looks like in practice and relies on the legal developments through both domestic and European case law.

The UK Supreme Court took the opportunity to reconsider the wider law on deprivation of liberty including P v Cheshire West and Chester Council & Another 2[014] UKSC 19 and the *Storck vs Germany*[1] case

Practitioners will be familiar with the approach that followed *Cheshire West* in 2014. In practice, this led to assessments often being focused on two main questions:

- Is the person under continuous supervision and control?
- Is the person free to leave?

These questions became known as the "acid test" and suggested that deprivation of liberty is a matter of fact and does not depend on the purpose of the intervention or the nature of the person’s individual circumstances. According to *Cheshire West* individuals who lacked capacity could not consent to their confinement, regardless of whether they appeared content with their arrangements.

[1] *Storck v Germany [2005] ECHR 406*

The *Storck vs Germany*[2] case, on the other hand, provided a three-pronged approach to determine whether a person has been deprived of their liberty under Article 5 of the European Convention of Human Rights; the three elements are set out below:

- **the objective element** - that the person is physically confined to a particular restricted place for a "not-negligible" period of time.
- **the subjective element -** that the person does not or cannot provide valid consent to that confinement, perhaps because of a lack of mental capacity
- the confinement needs to be **imputable to the State**; the state is responsible, either directly or indirectly for that confinement (this includes situations where a public authority knows or should know that a deprivation of liberty is occurring.

The UK Supreme Court considered all three elements of the Storck test and concluded that all three elements of the Storck deprivation of liberty test must be considered. That is, a multifactorial test rather than the 'acid test'.

[2] *Storck v Germany [2005] ECHR 406*

What did the UK Supreme Court decide?

The 2026 UK Supreme Court redefined two of the aspects relevant to determining whether a deprivation of liberty for the purposes of Article 5 ECHR has occurred -

The objective element

Deprivation of liberty should be defined by conducting a multi-factorial assessment considering many more factors than the 'acid test' laid down in the *Chesire West* ruling. Factors to be considered include the type, duration, effect, manner of implementation and purpose of the restrictions and whether the adult objects to the restrictions.

The subjective element

It is not necessary for an adult to have capacity to consent to their care arrangements for them to be able to give 'valid consent' to what otherwise would be a deprivation of liberty. Individuals can give valid consent through expressing their wishes and feelings, if they have sufficient understanding and awareness of their care arrangements to express their view about their situation, and communicate whether they are happy or unhappy with the arrangements. It should be noted that where there is serious doubt, no inference of valid consent should be drawn.

The Strasbourg Court has always considered 'valid consent' as being an autonomous concept, not to be equated with definitions of legal capacity in domestic law. Altogether, the UK Supreme Court ruling identified six distinct aspects of the *Chesire West* judgement considered to be wrong with reference to Strasbourg jurisprudence.

See paragraphs 184 - 201 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.

What does this mean for practice in Scotland?

In Scotland, it has been the case since the inception of the Adults with Incapacity (Scotland) Act 2000 (AWI Act) that adherence to the principles means that the adult's wishes must be taken into account. Capacity should be considered as a spectrum which may mean that someone is lacking in capacity to make a decision but may still retain the ability to understand matters and at least contribute to that decision making. That is, where an incapable adult has sufficient understanding to express a feeling one way or another, that feeling must be taken into account.

The Supreme Court's judgment reinforces this approach. It recognises that capacity is not an "all or nothing" concept. A person may be unable to make a complex legal decision about their care arrangements but still have enough understanding to express meaningful views about where they live, the support they receive and whether they are content with the arrangements.

This argument is consistent with long-established Scottish legislation and practice, including in relation to section 13ZA of the Social Work (Scotland) Act 1968 (see appendix 1).

To disregard the views and wishes of the adult because he or she is incapable of making the ultimate decision is to (i) undermine the purpose of the AWI Act to include the person in decision making as much as possible, and (ii) place an arbitrary barrier in the way of the inclusion of that person in a manner that professionals have determined to be in his or her best interests. To do so would go further than the European Court of Human Rights has gone in terms of Article 5 and gives insufficient weight to the balancing of the person's Article 8 rights.

Assessing for deprivation of liberty

The **three distinct elements** must be thoroughly considered and cognisance given to overlap between the objective and subjective elements in individual situations.

1. Is the Situation Attributable to the State?

Before considering whether a deprivation of liberty exists, ask whether the person's care and support arrangements are attributable to public authorities.

This will usually be the case where the care or support arrangements are:

- arranged by a local authority, Health Board or Scottish Ministers;
- authorised under legislation;
- funded by public bodies; or
- subject to oversight or control by public authorities.

In most health, social work and social care settings this requirement will be met. However, practitioners should remember that Article 5 may also be engaged where public authorities know, or ought to know, that a person is being confined, even if the arrangements were not directly put in place by the state.

If the arrangements are attributable to the state, then consider the objective and subjective elements also.

2. The Objective Element: multifactorial assessment

Does the Person's Situation Amount to Confinement?

Deciding whether an individual is confined to a particular place for a not-negligible period of time, **is not** now solely about whether the person is subject to continuous supervision and control and not free to leave, as stipulated in the *Chesire West* judgement. The Supreme Court requires a **multifactorial assessment** of confinement in line with the jurisprudence of the Strasbourg Court.

In carrying out a multi-factorial assessment, an individualised, person-centred approach is the starting point. A whole range of factors need to be considered when deciding if a deprivation of liberty is occurring or is likely to occur in future care arrangements for an individual. These factors should not be applied in isolation, and all inform a holistic professional judgement. The factors, including questions and points to consider, are as follows -

Expressions of objection - This could be verbal, via gestures or signs or through behaviours. Examples could include; attempts to leave the setting, refusing personal care, requiring administration of medication covertly, being prescribed sedative medication, receiving continuous intervention due to behaviours, needing to be restrained, expressing distress when returned to the setting. Practitioners should consider the frequency and intensity of such expressions. Additionally consider the root cause of distressed behaviours: are they linked to being in the care setting or is there another cause such as pain or confusion? The person's behaviour may be particular to them, so it is important to know the person well to understand their unique communication and behaviour.

The subjective experience and expression of the individual informs the objective element. Expressions of objection may indeed indicate that a deprivation of liberty is likely but must be considered together with all other factors.

- **Type of restrictions –** Consider whether doors are locked? Is the person cared for/supported in an area separated from others? Is technology used to monitor? Is sedative medication prescribed? Is there continuous supervision?
- **Duration of restrictions –** How long are restrictions in place? Are some continuous? Others brief or intermittent?

- **Effects on the individual –** This is where the subjective informs the objective aspect again**.** How do restrictions impact daily life, routines, social inclusion, social contact, family life, independence, autonomy and choice? There could be both positive and negative or limiting consequences. There could be limitations in one area of life but increased choice and opportunity in another area? Is the individuals' experience one of feeling that restrictions are being imposed upon them or one of being supported to be as safe and well as possible? Are they disappointed due to not being able to do what they want, or are they excited that they get to try new things?
- **Purpose of the arrangements –** Are the main aims about care, support, promoting safety, optimising quality of life as opposed to punishment or coercion? Is this primarily about protecting others? Consider AWI Act and Mental Health Act principles of least restriction. Were there any less restrictive options available to meet the essential purpose?
- **Manner of implementation -** Consider how written care/support plans are put into effect, you may not get the full sense of this by reading what's written down. The reality of day-to-day life may differ from what is written in assessments and support plans.
- **Relative 'normality' of the arrangements –** How far do the arrangements depart from the life a person in a comparable situation (similar demographics) might generally live? Consider the experience of detention in a prison cell, how far away from that are these arrangements?

The judgement set out that for there to be a deprivation of liberty, there needs to be **coercion or some externally imposed restrictions** on an individual that prevent them from exercising their fundamental right to physical liberty. If a person's liberty is limited only by their own disability/illness this is unlikely to engage Article 5. However, in this situation careful analysis is required to avoid any under recognition of restrictions that may appear natural but are in fact imposed onto the person. Careful analysis and robust safeguards remain essential.

3: The Subjective Element

Is the Person Giving Valid Consent?

A key change arising from the judgment is that a person may be able to give valid consent for Article 5 purposes even if they lack legal capacity to make decisions about care and residence under domestic law.

For this third element of the deprivation of liberty test, the question is not:

Does this person have legal capacity?

Instead, it is:

Does this person have sufficient understanding of their situation to express a meaningful view about the arrangements?

The focus is on whether the person has enough awareness to communicate whether they are happy or unhappy with the arrangements.

The following are suggestions to guide professional judgement and not a prescribed list of questions or prompts. The ruling was clear that an individual does not have to exhibit a sophisticated understanding of their care and residence arrangements.

Understanding of Home and Living Environment

- In whatever way they are able to communicate, can the person tell you where they live? Can they tell you their address, fully or partly or what area they live in?
- Can they tell you who else lives with them if it is a shared setting?
- Do they understand what space is just for them and what space is shared?
- Can they communicate whether they like living there?
- Can they indicate whether this place feels like 'home' to them?
- Is there anywhere else they would prefer to be living? Do they have some understanding of alternative options?

Understanding of Care and Support Arrangements

- Are they able to communicate who provides them with care/support? Do they know the names of staff or whether they have a key worker?
- Can they tell you about some or all of the things that support staff help them with?
- Can they say what they would do if they needed help with something different?
- Do they think that they need the help that staff give them?

Freedom from Undue Influence

- Are their expressions of agreement free of coercion, threats, or manipulation?
- Is there any pressure from family, staff, or others that might influence what they express?

Consistency and Reliability of Expressed Views

- Is what they are expressing consistent over time?
- Does what they say and what they do align?

How to support the expression of wishes and feelings

Scots law already reflects many of the key ideas behind **supported decision-making.**

The principles underlying the AWI Act, Mental Health (Care and Treatment) (Scotland) Act 2003 (Mental Health Act) and the Adult Support and Protection (Scotland) Act 2007 all seek to ensure respect for a person's capacity and autonomy, even if they have an impairment or disability.

These principles are reinforced by human rights standards in various international treaties, the most relevant being the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities. A more detailed application of these treaties in the context of supported decision making can be found in the Mental Welfare Commission good practice guide; Supported decision making good practice guide 2024.

Some factors for practitioners to consider in terms of supporting individuals to express their wishes and feelings in the context of determining if there is, or is likely to be a deprivation of liberty include;

- **Time -** Good practice would point to making this judgement following multiple visits to the person.
- **Communication needs and support** - Support may be required to ensure a person **understands** their situation and can **express** their views or wishes. A speech and language therapist could assist in understanding a person's communication needs, identifying appropriate tools or support, and developing easy read information.
- If a move is being planned, consider what information is needed for the person to understand about the proposed move and how to present this in a way that makes sense to them.
- If a person is already living in a care setting and statutory powers are being considered, what information do they need on the aims and purpose of being in that setting to support their understanding, and express their views?
- **Relationship-based practice** - Put the essential elements of relationship-based practice front and centre; empathy, working collaboratively, respect for autonomy, kindness and compassion, building trust through consistency and honesty, respecting the inherent dignity of the person.
- **Advocacy support** could be invaluable in these circumstances – this is someone independent, focused solely on amplifying the individuals' voice, with no other agenda.

- **Get the basics right** – arrange a private and quiet space to meet, ensure that the person is physically comfortable and that they have their glasses/hearing aids/dentures in. Consider having a pen and paper ready and any photos or images that might be useful. If the person uses communication equipment, ensure they have it.
- **Trusted person** - Consider whether having a trusted person there to support them when you visit will enable the person to express their views more fully.
- **Carers, friends and family -** Talk to people who know the individual well to explore their interpretation of the persons' views.
- **Involved professionals -** Talk to staff supporting the person.
- **Records and patterns** - Review the care records, focusing on evidence over time of patterns of behaviour and what the person has expressed about their life.
- **Emotional responses** - Consider emotional responses over time – particularly when visiting a new placement, or when leaving or coming back to a current placement.
- **Language** - Check if English is the individuals first language and if not, arrange an interpreter. Consider translation of written information for the person to keep and reflect on for your next visit.
- **Communication tools and technology** - A speech and language therapist could be consulted if communication needs are more complex. Ensure you are familiar with any communication supports the person currently uses. You might also consider the use of AAC tools and equipment. Further information and educational resources on communication and technology are available on the Person-Centred Care Zone in Turas: Alternative augmentative communication (AAC) | Turas | Learn
- Abilitynet have produced a helpful Easy Read guide on AAC for people with disabilities Communication Aids.

Indicators for valid consent

Professional curiosity is vital across professional roles in health, social work and social care. To look deeper into what is communicated in such circumstances is important. Practitioners should be alert to the presence of any undue pressure on the individual to comply with arrangements. Practitioners should be attuned to any misplaced desire to please or that the individual is expressing what they believe you want to hear. This is unlikely to be as straightforward as someone telling you they like where they live and they want to stay. They may not be able to articulate that position fully and clearly and the dynamics of the whole situation will require consideration. Some indicators of valid consent to consider include that;

- The person appears happy and contented much of the time, and if they are unhappy there is an explanation for this that is not directly related to their care arrangements e.g., headache, toothache, anxiety about an appointment coming up.
- There may be restrictions that amount to a deprivation of liberty, but the person understands the reasons for these or does not experience any distress due to the restrictions e.g. 'I understand that the kitchen is locked at night so that I don't overeat and become unwell.' The person's understanding does not need to be detailed, but sufficient to express their wishes and feelings.
- The person consistently talks about their placement as being their home.
- They look for reassurance that they will not have to move from their home.
- They are keen/enthusiastic to show you their home when you visit.
- They are keen to introduce you to their support staff.
- They feel a sense of ownership of their own space and have personalised this or been supported to personalise it.
- They are accepting of the care and support offered by staff.

The Supreme Court acknowledged the concerns raised by the charities who intervened in the proceedings, about learned compliance, people being suggestible, being fearful of consequences and acquiescing rather than validly consenting. It is of vital importance therefore that practitioners determining whether there is a deprivation of liberty in terms of Article 5 are aware of these risks throughout the assessment and ongoing review process.

The vital importance of safeguards

If all three parts of the deprivation of liberty test are met, that is:

1. The arrangements are the responsibility of the state.
2. The arrangements amount to a deprivation of liberty.
3. The person is not giving valid consent to the arrangements.

then there is a deprivation of liberty and appropriate legal authority should be put in place.

State responsibility + deprivation of liberty + no valid consent = legal authority required.

Depending on the circumstances of the individual this will be through use of the Mental Health Act; or via the AWI Act where criteria and principles can be evidenced.

The Commission is supportive of the Supreme Court ruling advising that a cautionary approach be taken if there is uncertainty about whether particular arrangements constitute a deprivation of liberty or whether there is valid consent, and that relevant formal powers are sought in such circumstances.

Robust and explicit recording of the reasoning behind decisions relating to deprivation of liberty including the factors considered as part of the objective element (type, duration, effect, manner, etc), analysis of wishes and feelings and valid consent; the subjective element and a clear conclusion on whether Article 5 is engaged and if so, the legal authority to be used, will be required. Regular review of care and support plans including whether the person continues to give valid consent to any ongoing restrictions is important in the context of this ruling.

The Health and Social Care Standards in Scotland set out what individuals accessing services and carers can expect and provides reassurance of the need for services to improve outcomes, promote flexibility, encourage innovation, ensure that dignity and human rights are upheld and that everyone is treated with respect and compassion. The Standards serve as a benchmark for scrutiny bodies such as the Care Inspectorate and Healthcare Improvement Scotland to evaluate against, to ensure quality and promote continuous improvement. Health and Social Care Standards: My support, my life

Conclusion

The UK Supreme Court's judgment in *A Reference by the Attorney General for Northern Ireland* has indicated how deprivation of liberty must be understood and assessed by the health, social work and social care workforce across the UK. By confirming that Article 5 ECHR requires a multifactorial, person-centred assessment, and by recognising that 'valid consent' (for article 5 ECHR purposes) is not solely based on clinical assessment but rather is based on the person's own wishes and feelings, the UK Supreme Court decision aligns domestic practice with the European Court of Human Rights.

For Scotland, the ruling sits comfortably alongside the long-established statutory principles in the AWI Act and the Mental Health Act, and indeed Section 13ZA of the Social Work (Scotland) Act 1968 which already require practitioners to take account of an adult's wishes and feelings, support decision-making, and apply the least-restrictive option. The judgment reinforces these principles and confirms the Commission's position that individuals who lack capacity may nonetheless be able to express 'valid consent' to care arrangements.

The judgment is effective from 02 June 2026. Scotland's health, social work and social care workforce must now, if it has not done so, move beyond the former *Cheshire West* acid test and undertake a holistic analysis of the objective and subjective elements of deprivation of liberty, including the adult's own experience of their care arrangements. Robust safeguards, careful documentation, and regular review remain essential to protect individuals from learned compliance, undue influence, or unrecognised restrictions.

Ultimately, the ruling strengthens the human rights framework within which care and treatment decisions are made.

Appendix 1: Section 13ZA Social Work (Scotland) Act 1968

In 2014, the Mental Welfare Commission for Scotland confirmed the belief that what was good practice in Scotland before the *Cheshire West* case was, in large part, still good practice, but that the *Cheshire West* decision made it even more necessary that there was a proper and auditable process for taking decisions on care arrangements for people who lack capacity, and that this process fully reflected the principles of the AWI Act.

Section 13ZA of the Social Work (Scotland) Act 1968 allows a local authority to arrange significant care and support services for an adult who is unable to make decisions about receiving those services.

It can only be used when:

- The person **does not object** and seems likely to accept the arrangements.
- **Everyone agrees** including professionals, family and carers.
- No deprivation of liberty is created by the arrangements.
- There is no welfare attorney or guardian with authority to make the decision.
- There is no court application in progress that would address the decision.

The UK Supreme Court judgment may mean that section 13ZA can be used in a wider range of situations. Some care arrangements where regard was given to a deprivation of liberty under the *Cheshire West* "acid test" may no longer meet the threshold for a deprivation of liberty under Article 5.

As a result, practitioners need to continue to take a detailed and balanced approach when deciding whether section 13ZA can be used. This includes carefully considering both the nature of the care arrangements and the person's own views, experiences and circumstances. Records of views and well-documented reasons for any decision continue to be essential.

The judgment also further profiles the importance of **supported decision-making**. Practitioners should therefore continue to take all reasonable steps to understand and give weight to the person's wishes, feelings, values and preferences when considering whether section 13ZA is appropriate.

Decisions made under Section 13ZA may still affect a person's **Article 8 rights**, including their right to private and family life and personal autonomy. Where this is the case, practitioners must be able to demonstrate that there is no dissent, the arrangements are **necessary, proportionate and the least restrictive option available** and that regular review will take place to monitor.

Annex 1: CCD5/2007 Guidance for local authorities: provision of community care services to adults with incapacity - Adults with incapacity: code of practice for local authorities - gov.scot.



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