Heather Stevens
Director of Mental Health

Department of Health
An Roinn Sláinte
Männystrie O Poustie
www.health-ni.gov.uk

Circular HSC Circular MCAU 1/26

Subject: Interim Guidance for Practitioners in relation to Deprivation of Liberty for those who lack capacity following the UK Supreme Court Judgment on Valid Consent and the overturning of "Cheshire West"

Circular Reference: **HSC circular MCAU 1/26**

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Chair Review Tribunal
Royal College of Psychiatry (NI Division)
Royal College of GPs
Royal College of Emergency Medicine
Royal College of Nursing
British Association of Social Workers (NI)
The Attorney General for Northern Ireland

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This circular is to provide interim guidance for practitioners in relation to Deprivation of Liberty for those who lack capacity following the UK Supreme Court Judgment on Valid Consent and the overturning of "Cheshire West"

Dear Colleagues

Interim Guidance for Practitioners in relation to Deprivation of Liberty for those who lack capacity following the UK Supreme Court Judgment on Valid Consent and the overturning of "Cheshire West"

Introduction

1. This circular provides interim guidance to practitioners and stakeholders in relation to Deprivation of Liberty (DoL) for those who lack capacity following the UK Supreme Court Judgment on the issue of valid consent, and the Court's overturning of the previous "Cheshire West" judgment, delivered on 2 June 2026.

Background

2. In November 2024, the Attorney General for Northern Ireland signalled her intent to make a reference to the UK Supreme Court (UKSC), seeking a determination if proposed changes to the Deprivation of Liberty Safeguards (DoLS) Code of Practice, would be compatible with Article 5 of the European Convention of Human Rights (ECHR) and within the remit of the Minister of Health to make. These proposed changes related to the issue of valid consent, and whether, where a person lacks capacity to make decisions about their care arrangements, they may be able to give the necessary valid consent through the expression of current wishes and feelings that go beyond mere acquiescence to the confinement.

3. This reference was heard in October 2025 and the judgment delivered on 2 June 2026.

UK Supreme Court Judgment

4. The judgment confirmed that this proposed change to the DoLS Code of Practice would be ECHR Article 5 compliant and as such within the competency of the Minister of Health to make. However further to this, the Court overturned its previous "Cheshire West" ruling. Cheshire West, a UKSC judgment from 2014, established that a person who was under "continuous supervision and control" and "not free to leave" was deemed to be subject to a deprivation of their liberty, thereby putting in place "the acid test" for practitioners to determine if a person was subject to a DoL.

5. The Court has ruled through this most recent judgment that the previous Supreme Court ruling erred in its analysis of Strasbourg European Court of Human Rights (Strasbourg) case law, and that it was now appropriate to depart from that decision.

6. On the issue of valid consent the Court accepted that this approach was compliant with ECHR Article 5, stating "…an individual without legal capacity under domestic law, but who is conscious of their environment and has a basic understanding of their living circumstances so that they can express their view about their situation, who manifests their acceptance of the situation they are in, should have their opinion respected when an assessment is made of whether they are deprived of liberty under article 5."

Capacity

7. Whilst the 2 June judgment has changed considerations required with regard to whether a person is subject to a Deprivation of Liberty, the situation remains that P must lack capacity in relation to this. When reviewing "legacy cases" this may have previously been assessed through a formal capacity assessment, or it may be reasonable belief that P lacks capacity. If there is a belief that P has capacity, then they should not be deprived of their liberty and the MCA does not apply.

8. Throughout the process outlined in this guidance practitioners should remain person-centred in their approach. Whilst the 2 June judgment reviewed if these changes would be compliant with ECHR Article 5, practitioners should remain mindful of Article 8 and consider any infringement on the individual's right to a private and family life and whether there are less restrictive options or any other additional safeguards which could be put in place to protect P's rights, wellbeing and dignity.

9. The principles of the MCA remain applicable throughout. P should be offered help and support throughout the process, with their best interests also being considered.

Deprivation of Liberty - Multi-Factorial Assessment

10. Prior to the 2 June judgment, if a person was under continuous supervision and control and not free to leave (the acid test established through Cheshire West), they were deemed to be under a Deprivation of Liberty and as such the appropriate safeguards had to be put in place, in order for protection from liability to be applicable and the detention to be lawful.

11. ***The 2 June judgment means that the Acid Test of "under continuous supervision and control and not free to leave" is now no longer sufficient to assess if a person is subject to a DoL and must be included as part of a multi-factorial, context specific assessment of all the factors including type, duration, relative normality, effects and manner of the implementation of the measure in question. The UKSC reiterated, in the 2 June judgment, the Strasbourg position that no single factor is determinative.***

12. In the 2 June judgment the court ruled that when considering whether the objective element of a deprivation of liberty has been met a multi-factorial

assessment is required. The judgment referred to the following, although not exhaustive, factors as being relevant in the assessment:

- The type of restrictions involved;
- The duration of the restrictions;
- The effect of the restrictions on the individual;
- The manner of implementation of the restrictions;
- The degree of supervision and control over the person's movements, the possibility for them to leave the restricted area, the extent of isolation and the availability of social contacts;
- The presence or absence of objection if the person is "capable of objecting or giving tacit agreement. This includes consideration of force, coercion and sedative medication;
- The 'relative normality' of the placement;
- The purpose of the measures (in "borderline cases" where the measures are far from the 'paradigm' case of detention in a prison cell): the extent to which the measures are therapeutic, and their proportionality to that purpose; and
- Whether other relevant rights are in play including Articles 2, 3 and 8 when considering the potential intrusive nature of assessments required in determining the presence of a deprivation of liberty.

13. Having undertaken the multifactorial assessment to ascertain if the objective element is met, i.e. there is a confinement, then practitioners should turn to the issue of valid consent, the subjective element.

Valid Consent

14. When considering the subjective element of a deprivation of liberty the issue of valid consent becomes relevant. The Court has been clear in its 2 June judgment that even if a person lacks legal capacity to make a decision about their care and treatment, that if they can demonstrate an understanding to understand and offer valid consent to those arrangements, then that should be respected. If valid consent is present,

then the subjective element is not met and therefore there is no deprivation of liberty to consider.

15. Practitioners should consider if P appears happy, resistant, distressed, ambivalent or unable to express a view. Whether P is actively attempting to leave or if their behaviour indicates a level of unhappiness should also form part of the consideration.

16. It is important to remember that consent must go beyond mere compliance or acquiescence and demonstrate genuine contentment. If P is incapable of expressing a view and there is serious doubt about their attitude, no inference should be drawn.

17. Consideration must be given to the likelihood of coercion, pressure or conflict which may influence P's apparent agreement, or the use of sedation/medication which may impact alertness and restrictions used to suppress P's behaviour. Practitioners carrying out the assessment must be able to evidence clearly that valid consent is present.

18. Appropriate care management measures should be put in place to ensure any possible change in P's behaviour is identified. An individual's care plan must be reviewed on an annual basis as a minimum; however should practitioners identify a change of behaviour in P, or if someone connected with P, for example a family member, should raise concerns regarding a change in behaviour, this should trigger a review of whether P is still demonstrating valid consent, their care plan and if relevant, the objective element of the DoL.

Recording of Evidence

19. Practitioners should keep clear documentation of their decision making in this process and all the relevant factors that have been considered, including reference to care records or professional assessments.

20. Care should be taken to capture P's views accurately and include any relevant wider perspectives such as those of family members.

21. The decision as to whether P is demonstrating valid consent should be stated clearly and any monitoring arrangements documented. This decision should be documented using the "Record of Consideration" form.

Next Steps and Enquiries

22. The Department is aware that significant work is required to update wider guidance and related policies following this judgment, most notably significant changes will be required to the DoLS Code of Practice. Officials will now prioritise these changes to the Code and ask that stakeholders adhere to this interim guidance until the revised Code is published.

23. A Departmental review of all guidance on the DoH website will take place. Until such time as that review is complete, a warning message will note that some guidance may be outdated following this judgment. However, some resources will not be impacted and as such it is important that there is not a blanket removal of all guidance, but the Department would ask that if viewing such materials, stakeholders do so with this interim guidance in mind.

24. In the interest of providing as much interim guidance and information as possible, an information leaflet has been designed and accompanies this Circular. The Department, in collaboration with Trusts, is also working to design a series of case examples to help offer guidance in some more complex areas where this applies.

25. Any queries relating to this Circular should be directed to Mental Capacity Act Unit, D2.10 Castle Buildings, Stormont, Belfast, BT4 3SQ, or e-mail: mcaimplementation@health-ni.gov.uk

Heather Stevens
Director of Mental Health
Department of Health