

Short roadmap — what each party is asking the Court to decide

The central practical question beneath the legal argument is: **can the Minister revise the Northern Ireland DoLS Code so that a person aged 16+ who lacks legal capacity can be taken to have given “valid consent” to confinement by merely expressing wishes and feelings — and thus fall outside Article 5 authorisation?** The parties disagree sharply about whether that change is compatible with Article 5 ECHR and therefore within the Minister’s power. [Supreme Court UK](#)

1. Appellant — Attorney General for Northern Ireland (who made the reference)

Core argument (simplified):

- The Minister of Health **can** revise the Code to treat the expressed wishes/feelings of 16+ persons with impaired decision-making as valid consent to confinement, so those arrangements need not always be treated as a deprivation of liberty for Article 5 purposes.
 - The proposed approach would differ from *Cheshire West* but, the AG says, it **would still satisfy** Article 5 because it treats consent (subjective element) as a real part of the analysis.
 - In short: the AG asks the Supreme Court to confirm such a revision **is compatible with the ECHR** and therefore within the Minister’s statutory power. [Supreme Court UK](#)
-

2. Respondents — Lord Advocate; Advocate General for Northern Ireland; Counsel General for Wales; Minister of Health (collectively the principal oppositions/respondents)

Core lines (general):

- The respondents (and the Scottish / devolved legal actors among them) press **caution** about treating expressions of wishes/feelings as automatically amounting to legally valid consent where the person lacks capacity.
- They emphasise the Strasbourg and domestic jurisprudence that protects people who lack capacity (relying on the structure of Article 5 and previous decisions), and argue that any narrowing of protection risks removing procedural safeguards that the ECHR requires when deprivation of liberty occurs.
- The respondents press the Court to ensure that the Code (and any revision) **remains compliant** with Article 5 procedural and substantive guarantees. (The

Lord Advocate’s and other respondents’ written cases defend the need for protective procedures.) [Supreme Court UK+1](#)

3. Intervener — Secretary of State for Health and Social Care (DHSC)

Core argument:

- The Secretary of State’s written case **supports a re-examination of *Cheshire West***. DHSC says *Cheshire West* created a bright-line “acid test” that swept many people into DoLS authorisations and that this outcome (a “great confinement”) was wider than Strasbourg requires.
 - DHSC contends the European Court of Human Rights **does not apply** a single acid-test; it uses a **multifactor**/contextual approach (type, intensity, manner, duration). Therefore the domestic Courts should be willing to adjust or narrow *Cheshire West* so that only cases meeting a firmer, contextual deprivation-of-liberty threshold are captured.
 - If the Court will not otherwise depart from *Cheshire West*, DHSC says the Attorney-General’s “valid consent via expressed wishes” approach should be accepted (with caveats). [localgovernmentlawyer.co.uk+1](#)
-

4. Interveners — Mencap, Mind and the National Autistic Society (joint intervention)

Core argument / stance:

- The disability and mental-health charities strongly oppose any narrowing of the *Cheshire West* approach or any Code revision that treats expression of wishes/feelings as automatically amounting to valid consent when a person lacks capacity.
 - They argue such a move would **remove essential safeguards** for extremely vulnerable people, would be inconsistent with Article 5 protections as developed by the ECtHR and domestic courts, and would expose people to unlawful or unreviewable confinement.
 - Their written case aims to preserve the status quo (or at least to require rigorous safeguards) so that vulnerable people can access independent authorisation and review. [Community Care+1](#)
-

5. Intervener — Official Solicitor

Core argument / emphasis:

- The Official Solicitor stresses that deprivation of liberty is **not confined to “classic” prison-style examples** — it occurs in many care settings — and that the law must protect people who cannot meaningfully consent.
 - The Official Solicitor’s submissions emphasise the **practical realities** (degree of control, freedom to leave, supervision) and warn that re-characterising “consent” risks sidelining independent safeguards and judicial oversight for those unable to protect their own interests. [Supreme Court UK](#)
-

6. Intervener — Mental Welfare Commission for Scotland

Core argument / emphasis:

- The Commission’s written case raises professional and human-rights concerns about removing or weakening authorisation safeguards. It underscores the importance of independent review and of treating the person’s capacity and the objective facts of confinement as central to whether Article 5 is engaged.
 - It aligns with interventions that press the Court to preserve robust protections rather than narrow the test. [Supreme Court UK](#)
-

7. Practical themes running through the arguments (so you can see the battle lines)

- **Consent vs capacity:** the dispute is focused on whether **expressed wishes/feelings** by a person who lacks capacity can count as legally valid consent for Article 5 purposes. Appellant & DHSC push for giving that expression weight; charities, Official Solicitor and others say it cannot substitute for capacity and independent safeguards. [Supreme Court UK+1](#)
 - **Cheshire West tension:** DHSC (and, to an extent, the AG) argues *Cheshire West* led to over-inclusion and mass authorisation; charities and the Official Solicitor defend *Cheshire West* as protective and consistent with Strasbourg. [localgovernmentlawyer.co.uk+1](#)
 - **State/ECHR compatibility/devolution:** because the Code is a statutory instrument under the MCA(NI) 2016, the Court must say whether the Minister’s proposed revision **would be compatible with ECHR** rights — and thus lawful in devolved competence. That legal/constitutional framing features in most written cases. [Supreme Court UK](#)
-

Bottom line — what to watch for at the hearing

1. **If the Court accepts (even partly) DHSC/AG arguments:** expect a narrowing of when authorisation under DoLS-type schemes is required — fewer people would automatically fall within Article 5 authorisation regimes.
2. **If the Court sides with charities / Official Solicitor / respondents:** *Cheshire West*'s protective reach will effectively be preserved (or re-affirmed), meaning formal authorisation and review remain widely available for people who lack capacity and are under continuous supervision and control.
3. **The Court may adopt a middle path:** refine the tests (objective/subjective elements) while insisting on safeguards — e.g., require a clearer showing of the factual intensity of confinement before Article 5 triggers, but refuse to treat mere "contentment" as valid consent where capacity is lacking.

Possible Outcome	Legal Effect	Likely Reasoning	Practical Consequences
1 Reaffirm <i>Cheshire West</i> (no valid consent without capacity)	The Supreme Court confirms that a person who lacks capacity cannot give valid consent under Article 5, even if they express contentment. The "acid test" — <i>continuous supervision and control + not free to leave</i> — remains decisive.	The Court follows Storck (subjective element: absence of valid consent) and Guzzardi (degree and intensity) as minimum ECHR requirements. It holds that the NI Minister's proposed Code would be incompatible with Article 5 and beyond devolved competence.	♦ All current DoLS/authorisation safeguards remain. ♦ NI cannot implement the revised Code. ♦ UK-wide policy pressure for a "streamlined" regime (LPS etc.) continues but without legal rollback. ♦ Charities and rights groups will view it as a major protection victory.
2 Modify the test (contextual, proportional approach)	The Court re-interprets <i>Cheshire West</i> by importing Guzzardi's multifactorial test: deprivation of liberty depends on the "type, duration, effects, and	Draws heavily on Guzzardi's contextual reasoning. Recognises that <i>Cheshire West</i> may have gone further	♦ Many fewer cases require formal authorisation (particularly benign care-home or supported-living settings).

Possible Outcome	Legal Effect	Likely Reasoning	Practical Consequences
	manner of implementation,” not just two binary limbs. It stops short of overturning <i>Cheshire West</i> but clarifies that not every case of supervision/control triggers Article 5.	than Strasbourg. Affirms that true “deprivation” must show an intensity of control or coercion .	◆ NI could revise its Code, but only if it embeds a contextual proportionality assessment, not a presumption of consent. ◆ Local authorities would see reduced administrative burdens. ◆ Critics would warn of reduced protection for “quiet” deprivations of liberty. ◆ Major contraction of Article 5 safeguards. ◆ Possibly 25–30% fewer authorisations in NI (and similar impact if adopted in England & Wales). ◆ DoLS applications fall sharply; oversight by courts and advocates reduced. ◆ Risk of future ECHR challenge in Strasbourg (arguing insufficient procedural safeguards). ◆ Politically controversial; rights
3 Overrule / substantially weaken <i>Cheshire West</i> (accept AG/DHSC argument)	The Court finds that a person who lacks legal capacity can nonetheless be treated as consenting if they appear content or express a wish to stay; such cases fall outside Article 5 altogether.	Emphasises autonomy and subjective experience over formal capacity. Declares that <i>Cheshire West</i> misconstrued Strasbourg law. Relies on a narrower reading of <i>Storck</i> (valid consent ≠ formal capacity).	

Possible Outcome	Legal Effect	Likely Reasoning	Practical Consequences
			groups likely to seek legislative reversal.

Realistic Forecast (based on Court composition & trend)

- The current UKSC has shown **reluctance to depart from settled Strasbourg-consistent principles** unless clearly justified (see e.g. *R (SC) v Secretary of State for Work and Pensions* [2021]).
- Given the explicit reliance on *Storck* and *Guzzardi*, it is **more likely** the Court will choose **Outcome 2 (modified/contextual test)** rather than a full rollback or complete reaffirmation.
- That would allow a nuanced realignment with Strasbourg while preserving the core procedural protections.

Practical headline summary

Stakeholder	What they “win or lose” under each scenario
Government / DHSC	Wins most under 3 (reduced burden), partial win under 2 , loses under 1 .
Charities / Official Solicitor	Strong win under 1 , partial under 2 , major loss under 3 .
Health & Social Care Trusts / Councils	Administrative relief under 2 or 3 ; continued workload under 1 .
Individuals lacking capacity	Most protected under 1 ; somewhat less under 2 ; least under 3 (risk of unreviewed confinement).

Impact

How each possible Supreme Court outcome would affect England’s DoLS figures

Scenario	Legal shift	Estimated effect on DoLS applications (England)	Who is most affected	Rationale
1 Reaffirm Cheshire West (strict “acid test”)	The Court upholds that lack of capacity = no valid consent; continuous supervision + not free to leave = deprivation of liberty.	Minimal change — annual applications stay around 300–330 k ; backlog continues.	Local authorities, NHS Trusts, care homes.	Maintains the current wide definition. DHSC’s administrative pressures persist; reform via legislation (LPS) would remain only long-term fix.
2 Modify / contextual test (Guzzardi approach)	Court re-introduces “degree and intensity” analysis; not every 24-hour supervision counts. Must show <i>coercion or lack of practical freedom</i> .	Likely 15–30 % reduction — approx. 45–100 k fewer applications per year.	Older adults in benign care settings; supported-living residents who are content and not actively restrained.	Local authorities could treat “low-intensity” cases as outside Article 5; fewer referrals for formal authorisation; backlog eases but safeguards remain for clearly confined individuals.
3 Accept AG/DHSC argument (valid “consent” without capacity)	Court allows “expressed wishes/feelings” of contentment to count as valid consent; these people not deemed deprived of liberty.	Potential 25–40 % drop — roughly 75–130 k fewer applications annually.	Individuals with learning disabilities, dementia, or autism who appear content in care settings.	Removes entire category from Article 5 coverage. Greatly reduces workload but high risk of under-protection and future ECtHR challenge.

What this means in practice

- **Administrative impact:**

- Even a 20 % reduction could eliminate around **£60–80 million per year** in assessment and review costs for councils/NHS.
 - Conversely, maintaining the current test (Scenario 1) would keep pressure for immediate LPS legislative reform.
 - **Rights and oversight impact:**
 - Scenarios 2–3 would reduce access to **independent advocates, family consultation, and court review**, since fewer cases would enter the formal authorisation system.
 - A large drop (Scenario 3) could see **tens of thousands** of people effectively “fall out” of monitored DoLS protections.
 - **Policy momentum:**
 - DHSC would almost certainly use any Supreme Court narrowing (2 or 3) as justification to **revisit or delay LPS implementation**, arguing that court clarification has already streamlined practice.
-

Realistic forecast

Given the Court’s likely caution and Strasbourg alignment, Scenario 2 (contextual modification) appears **most probable**.

If so, expect:

- A **moderate fall (15–25 %)** in new DoLS applications within 12–18 months.
- **Guidance revisions** from the Department of Health & Social Care and the Association of Directors of Adult Social Services (ADASS).
- Some **local variation** as councils reinterpret borderline cases