



# Tying ourselves into (Gordian) knots?

## *Deprivation of Liberty and the MCA 2005*

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### A. Introduction

1. This paper<sup>1</sup> seeks to take a step back from the intricacies of the DOLS regime that we have learned to know and, at best (I sense) tolerate since it was introduced in April 2009. Rather, it seeks to re-examine the fundamental question of what constitutes a deprivation of liberty for purposes of Article 5(1) ECHR in the context of those without capacity to determine their own residence and care/treatment arrangements. In so doing, it seeks to make good the following propositions:
  - a. it is possible to discern certain fundamental principles set down by the ECtHR to guide us as to the correct approach;
  - b. that the course taken by the Court of Appeal in *Cheshire West*<sup>2</sup> represents a departure from those principles for which support cannot be found in the jurisprudence of the Court; such that
  - c. the Supreme Court should – and is in fact required by the provisions of s.64(5) MCA 2005 to – take the opportunity when the Official Solicitor’s appeal<sup>3</sup> reaches it to bring our approach back into alignment with that of Strasbourg.
2. More ambitiously, the paper also seeks to move beyond criticism of the decision in *Cheshire West* to offer a modest suggestion as to a working definition of what the phrase ‘deprivation of liberty’ should mean in the context of the MCA 2005. In so doing, it seeks to cut the Gordian knot(s) into which we have tied ourselves.

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<sup>1</sup> Which represents a work in progress (not least because of the stream of cases coming out of Strasbourg), and upon which I welcome comment to [alex.ruckkeene@39essex.com](mailto:alex.ruckkeene@39essex.com). I am grateful to Lucy Series of the University of Exeter (whose blog - <http://thesmallplaces.blogspot.co.uk/> - is required reading for all those concerned with matters relating to the MCA 2005), Paul Barber, Jonny Landau and Richard Murphy for their stimulating comments provided in response to this invitation upon earlier iterations of the paper. It was most recently updated in September 2013.

<sup>2</sup> *Cheshire West and Chester Council v P* [2011] EWCA Civ 1257 [2012] COPLR 37. Case summaries of this, the other domestic cases referred to, and the recent Strasbourg jurisprudence, can all be found at [www.copcasonline.com](http://www.copcasonline.com).

<sup>3</sup> Against the decision of the Court of Appeal in *Cheshire West*, and also against the earlier decision in *P and Q v Surrey County Council & Ors* [2011] EWCA Civ 190 [2011] COPLR Con Vol 931.



3. In full knowledge that the debate over the definition of a deprivation of liberty for purposes of the MCA 2005 will not be resolved for some considerable period of time – the Supreme Court not being listed to hear the appeals in *Cheshire West* and *P and Q* until October 2013 – the paper then asks how best those at the front-line can approach best approach matters in the interim.
4. The paper then concludes by offering thoughts on three further areas related to the deprivation of liberty: (1) the burden of proof; (2) the concept of ‘residual liberty’ and (3) the award of damages for breach of Article 5.
5. In particular because this paper is prescriptive, not descriptive, I must emphasise that all views expressed are my own and they do not reflect the views of others in the 39 Essex Street Court of Protection Team or those public bodies (including the Official Solicitor) on whose behalf I have appeared in cases to argue matters relating to the deprivation of liberty and the DOLS regime.<sup>4</sup> I also reserve the right to argue upon instruction the direct contrary of any or all of the propositions set down below, even if my advice behind the scenes may reflect such propositions.
6. The paper is divided into the following sections:
  - a. Section B: The starting point: s.64(5) MCA 2005: paragraphs 8-22;
  - b. Section C: Article 5 ECHR: the Strasbourg jurisprudence: the canon before *Cheshire West*: paragraphs 23-38;
  - c. Section D: Article 5 ECHR: the Strasbourg jurisprudence: developments since *Cheshire West*: paragraphs 39-54;
  - d. Section E: Article 5 ECHR: the domestic jurisprudence: paragraphs 55-66;
  - e. Section F: *Cheshire West*: a step too far away from the Convention? paragraphs 67-75;
  - f. Section G: Where do we go from here? paragraphs 76-81;
  - g. Section H: A modest suggestion: paragraphs 82-116;
  - h. Section I: What do we do (as opposed to what should we do)? paragraphs 117-122;
  - i. Section J: Deprivation of liberty: three further aspects: paragraphs 123-137;
  - j. Section K: Conclusion: paragraph 138.
7. In order for me to make good the propositions summarised above, it will be necessary for me to traverse at some length the Strasbourg jurisprudence to see what the ECtHR in fact said (and the factual basis upon which they said what they said), rather than to proceed – as is all too easy – on the basis of summaries of summaries of that jurisprudence, which at each process of summation remove themselves one stage further

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<sup>4</sup> I am, however, extremely grateful to Fenella Morris QC and Victoria Butler-Cole of 39 Essex Street for their comments upon the first draft of this article.



from the actual decisions and the Convention itself. The reader in a hurry (and/or willing to take my workings on trust) can proceed immediately to Section G below.

## **B. The starting point: s.64(5) MCA 2005**

8. It is clear that all is not well with the DOLS regime introduced by the Mental Health Act 2007 ('MHA 2007'). In its post-legislative scrutiny of the Act published in August 2013,<sup>5</sup> the House of Commons Health Select Committee considered the deprivation of liberty safeguards, and found them profoundly wanting. Evidence was received from (inter alia) the Department of Health, the Care Quality Commission and the Mental Health Alliance, and the Committee concluded thus:

*'106. The Committee found the evidence it received about the effective application of deprivation of liberty safeguards (DOLS) for people suffering from mental incapacity profoundly depressing and complacent. The Department itself described the variation as "extreme". People who suffer from lack of mental capacity are among the most vulnerable members of society and they are entitled to expect that their rights are properly and effectively protected. The fact is that despite fine words in legislation they are currently widely exposed to abuse because the controls which are supposed to protect them are woefully inadequate.*

*107. Against this background, the Committee recommends that the Department should initiate an urgent review of the implementation of DOLS for people suffering from mental incapacity and calls for this review to be presented to Parliament, within twelve months, together with an action plan to deliver early improvement.'*

9. It is clear that the problems lie not just in the implementation of the DOLS safeguards, but also at the heart of the regime. In its third report upon the DOLS safeguards produced by the Care Quality Commission published in March 2013 and covering the period 2011-12,<sup>6</sup> the Commission concluded that, whilst MCA 2005 is a very important mechanism for protecting the rights of people who do not have capacity to make certain decisions for themselves, "[t]here continues to be confusion around the precise definition and thresholds for deprivation (as opposed to restriction) of liberty. Recent court cases have ruled that there is no universal definition. Decisions can only be made on individual circumstances. The relationship between care, appropriate restrictions of liberty, the Deprivation of Liberty Safeguards and the wider MCA has become complex and potentially confusing."<sup>7</sup>

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<sup>5</sup> <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhealth/584/584.pdf>

<sup>6</sup> Available at: [http://www.cqc.org.uk/sites/default/files/media/documents/dols\\_report\\_-\\_main\\_-\\_final.pdf](http://www.cqc.org.uk/sites/default/files/media/documents/dols_report_-_main_-_final.pdf).

<sup>7</sup> Ibid, p.8.



10. In research conducted by South London and Maudsley NHS Foundation Trust,<sup>8</sup> a series of real-life case examples were given to lawyers, psychiatrists, Independent Mental Capacity Advocates and Best-Interests Assessors. The upshot of the research was that there was little agreement in decision-making and “[e]ven the lawyers could not agree among themselves, although they were selected for their in-depth knowledge of the subject.” If such lawyers could not agree, one might ask, what hope for those actually on the ground seeking to implement the provisions of Schedule A1?<sup>9</sup>
11. To understand how we got to this unhappy position, it helps to remind ourselves of the route that we took, which entails a detour into history. For these purposes, I want to focus on s.64(5) MCA 2005, introduced (as with the provisions of Schedules A1 and 1A) into the MCA 2005 by the MHA 2007.<sup>10</sup> It provides that “[i]n this Act, references to a deprivation of a person’s liberty have the same meaning as in Article 5(1) of the European Convention on Human Rights.”<sup>11</sup>
12. This tying is unusual in English statutes. Indeed, it may well be unique.<sup>12</sup> I will return to the significance of the wording of s.64(5) later, but it is useful to remind ourselves of how it came to be worded this way.
13. The linkage in s.64(5) MCA 2005 is undoubtedly explained by the fact that it (and Schedule A1) was introduced in specific response to the Bournewood case.<sup>13</sup> Readers will recall that Strasbourg handed down judgment in that case too far down the legislative passage of what became the MCA 2005 for that Act to include a statutory response. During the passage of what became that Act, however, the Government made it clear that it would be consulting as to an appropriate response, the first issue being

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<sup>8</sup> Published in Cairns et al, “Judgements about deprivation of liberty made by various professionals: comparison study,” *The Psychiatrist*, September 2011. The research is summarised (and the quotation above given) in the Discussion Paper upon Adults with Incapacity produced by the Scottish Law Commission in July 2012:

<http://www.scotlawcom.gov.uk/news/discussion-paper-on-adults-with-incapacity/> at paragraph 4.30. I return to this Discussion Paper below.

<sup>9</sup> A point amplified by the reaction of one BIA to the *Cheshire West* judgment set out at paragraph 117 below.

<sup>10</sup> To be precise, s.50(7) of and Paragraphs 1 and 10(4) of Part 1 of Schedule 9 to the MHA 2007.

<sup>11</sup> Section 64(6) providing that “for purposes of such references, it does not matter whether a person is deprived of his liberty by a public authority or not.” Ss.64(5) and (6) were introduced by s.50(7) of and Paragraphs 1 and 10(4) of Part 1 of Schedule 9 to the Mental Health Act 2007.

<sup>12</sup> A *Westlaw* search would suggest this to be the case. By way of a contrast, note the way in which the Human Rights Act 1998 (‘HRA 1998’) addresses the concept of ‘just satisfaction.’ Section 8(3) HRA 1998 provides that damages may not be awarded unless, taking account of all the circumstances (including certain specified circumstances), the award is necessary “to afford just satisfaction to the person in whose favour it is made.” Whilst the phrase ‘just satisfaction’ appears in Article 41 of the Convention, the HRA 1998 does not tie the definition in s.8(3) to the Article, but adopts a significantly weaker approach, requiring only (by s.8(4), that, in determining whether to award damages or the amount of such damages, a Court “must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.”

<sup>13</sup> *HL v United Kingdom* (2005) 40 E.H.R.R. 32, discussed in more detail in Section D below.



“identifying relevant cases where there is a deprivation of liberty. There is no clear legal definition that will resolve the issue. We shall have to consider carefully the facts of a range of potential situations.”<sup>14</sup>

14. In response to the *Bournewood* case, the Government also circulated a Draft Illustrative Code of Practice upon the *Bournewood* safeguards,<sup>15</sup> which set out a series of factors which would tend to indicate that a person was being deprived of their liberty, but made clear that “[t]he meaning of deprivation of liberty is a question for the Courts.”<sup>16</sup> The factors identified as contributing a deprivation of liberty were that:

- “ - Restraint was used, including sedation, to admit a person who is resisting;
- Professionals exercised complete and effective control over care and movement for a significant period;
- Professionals exercised control over assessments, treatment, contacts and residence;
- The person would be prevented from leaving if they made a meaningful attempt to do so;
- A request by carers for the person to be discharged to their care was refused;
- The person was unable to maintain social contacts because of restrictions placed on access to other people;
- The person lost autonomy because they were under continuous supervision and control.”

15. Consistent with the approach indicated during the passage of the MCA 2005, when it came to introducing the necessary amendments to that Act to close the ‘*Bournewood* gap’ by means of the Mental Health Bill, the Government, whilst committing itself to providing guidance as to identifying a deprivation of liberty in the form of a Code of Practice, expressly declined to commit itself to defining the phrase.<sup>17</sup>

16. In response to a question from the Joint Committee on Human Rights during the passage of the MHA bill as to whether it would be possible to provide a statutory definition of the term ‘deprivation of liberty’,<sup>18</sup> Rosie Winterton MP, the then-Minister of State in the Department of Health, responded as follows:

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<sup>14</sup> Baroness Ashton at the Committee Stage of the Mental Capacity Bill, Hansard, HL, 25.1.05, col. 1252

<sup>15</sup> Available at

[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_064605.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_064605.pdf). The approach set down here translated through to the Deprivation of Liberty Safeguards Code of Practice issued in 2008, discussed below.

<sup>16</sup> Paragraph 19.

<sup>17</sup> See, for instance, Baroness Ashton at Committee Stage in the House of Lords: “*The noble Baroness, Lady Barker, rightly says that we have not tried to define [a deprivation of liberty] but I want to say what I believe she is looking for in terms of what the European Court of Human Rights has identified in judgments in cases to date as contributing to the deprivation of liberty. Briefly, they are: restraint was used, including sedation, to admit a person who is resisting; professionals exercised complete and effective control over care and movement for a significant period; professionals exercised control over assessments, treatments, contacts and residence; the person would be prevented from leaving if they made a meaningful attempt to do so; a request by carers for the person to be discharged from their care was refused; the person was unable to maintain social contacts because of restrictions placed on access to other people; and the person lost autonomy because they were under continuous supervision and control. I hope that that sets out some of the areas, but we have determined that ultimately this is for the courts to decide.*” (emphasis added) (Hansard, HL, 17.1.07, cols. 763-4.

<sup>18</sup> Prompted, it would appear, by Justice’s Briefing on the Mental Health Bill for the Lords’ Second Reading, prepared (in part, by Fenella Morris, Katie Scott, Victoria-Butler Cole, Alexis Hearnden and I); the briefing is to be found at [http://www.39essex.com/docs/articles/Justice\\_Mental\\_Health\\_Bill\\_Nov06.pdf](http://www.39essex.com/docs/articles/Justice_Mental_Health_Bill_Nov06.pdf). The Committee’s report is at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/40/4005.htm#note69>.



“52. The Department considered defining deprivation of liberty in the statute but felt that this was not possible. There is no definitive legal test for what will amount to a deprivation of liberty within the meaning of Article 5 of the Convention. The European Court of Human Rights (ECtHR) has instead addressed this as a case specific decision based on the facts of each situation. In the case of *HL v United Kingdom* (“*HL v UK*”) the ECtHR confirmed that the distinction between restriction and deprivation of liberty is a matter of intensity rather than substance. It was therefore felt that it would not be appropriate to incorporate a binding legal test into the statute. Instead the Department has issued draft illustrative Guidance for England, which will form part of the statutory Code of Practice provided for under section 42 of the Mental Capacity Act 2005. The guidance is based on the main principles that can be drawn from the key relevant cases on deprivation of liberty decided by the ECtHR and domestic courts. The guidance seeks to offer practical interpretations of the principles along with examples to aid practitioners in their evaluation of each case. More information can be found at pages 9 - 12 of the Draft Illustrative Guidance on Bournemouth, which can be accessed on the Department of Health website.”<sup>19</sup>

17. The Government was warned at the time of the passage of what became the MHA 2007 that there were risks in the approach that it took to the definition of what would constitute a deprivation of liberty. In passages which may now raise a wry smile on the faces of at least some readers, the Joint Committee on Human Rights had this to say:

“86. We consider that deprivation of liberty is a less flexible and elusive concept than might be thought from the draft illustrative guidance [set out above]. Since we posed this question to the Government, Munby J has delivered judgment in *JE and DE v Surrey County Council and EW*, holding that the crucial issue in determining whether there is a deprivation of liberty is not so much whether the person's freedom within the institutional setting is curtailed, but rather whether or not the person is free to leave. In this case *DE*, although lacking decision-making capacity, was clearly expressing his wish to be allowed to live with his wife, even though his wife could not cope without support from social services. In *HL v United Kingdom* although *HL* was not expressing a desire to leave, his carers wanted him to come home to live with them. Neither was free to leave. Both were deprived of their liberty. It is not necessary for all the elements identified in the list of factors contributing to a deprivation of liberty to be present. There will be a deprivation of liberty if it is known that a person is to be prevented from leaving the place where they are being taken to reside.”

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90. In *HL v United Kingdom* the Court held (at para 114) that 'an important ingredient of lawfulness is that all law must be sufficiently precise to allow the citizen - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail.' **The proposals to amend the Mental Capacity Act are detailed and complex, and we question whether they will be readily understood by proprietors of residential care homes, even with the benefit of professional advice.**” (emphasis in the original).

<sup>19</sup> <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/40/4005.htm#note69>.



18. As noted above, the Government chose not to take the heavy hint from the Joint Committee<sup>20</sup> that a statutory definition might be beneficial. The Deprivation of Liberty Safeguards Code of Practice issued on 26.8.08<sup>21</sup> contained a lengthy discussion of the question “[w]hat is deprivation of liberty?”<sup>22</sup> The discussion was prefaced by the statement that “[t]here is no simple definition of deprivation of liberty. The question of whether steps taken by staff or institutions in relation to a person amount to a deprivation of liberty is ultimately a legal question, and only the courts can determine the law.” The Code of Practice – as with the Code of Practice issued under the MHA 1983 – is not in any event a document which has the binding effect of a statute,<sup>23</sup> so the ‘guidance’ given there was of deliberately weak effect.
19. We may question – with the benefit of hindsight – whether the Government was wise not to attempt a statutory definition of the phrase ‘deprivation of liberty,’ and as discussed in Section G below, it would appear that the Scottish Law Commission take the view that any Scottish regime should include such a definition.
20. However, Parliament has made it entirely clear that we must look to the decisions of the Courts to understand what constitutes a deprivation of liberty, and we must therefore turn to the jurisprudence.
21. In so doing, however, I will proceed on the basis that we can, and should, look in the first instance to the decisions of the Strasbourg court. This is for two reasons:
- a. the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court;<sup>24</sup>
  - b. the wording of s.64(5) MCA 2005 itself. Unlike, for instance, with s.2(1) HRA 1998, which only requires that the courts must “take account” of any judgment, declaration or advisory opinion of the European Court of Human Rights,<sup>25</sup> it seems to me that it can properly be said that the Parliament

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<sup>20</sup> And others. For a particularly thoughtful and detailed example of the criticism from commentators at the time, see Robert Robinson (solicitor for HL), *Amending the Mental Capacity Act 2005 to provide for deprivation of liberty*, (2007) Journal of Mental Health Law 27.

<sup>21</sup> [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_087309.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf).

<sup>22</sup> Chapter 2.

<sup>23</sup> See *SBC v PBA & Ors* [2011] EWHC 2580 (Fam) [2011] COPLR Con Vol 1095 at paragraph 67 per Roderic Wood J, citing *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148. This aspect of the decision in *Munjaz* was recently – and very belatedly – upheld in Strasbourg. See *Munjaz v UK* (Application No. 2913/06; ECtHR, 17 July 2012).

<sup>24</sup> See *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at paragraph 20, in the context of the interpretation of s.2(1) HRA 1998.

<sup>25</sup> Section 2(1) HRA provides that when “determining a question which has arisen in connection with a Convention right,” namely that the Courts must (inter alia) “take account of any judgment, declaration or advisory opinion of the European Court of Human Rights.” For a detailed discussion of the case-law upon the construction and effect of s.2(1), see Richard Clayton



intended in passing s.64(5) (responding in so doing to the *Bournemouth* judgment) to ensure that we marched in lockstep with Strasbourg when it comes to defining ‘deprivation of liberty.’<sup>26</sup> In consequence, I would suggest that we can and must proceed on the basis that Parliament intended that: (1) our courts should not seek to develop a jurisprudence relating to the meaning of deprivation of liberty in the context of the mentally incapacitated that goes beyond that developed in Strasbourg; and (2) the duty upon our courts is to discern and apply as best as possible the principles that can be derived from Strasbourg.<sup>27</sup>

22. If, therefore, our courts have developed an approach to deprivation of liberty in the context of the mentally incapacitated that is at odds with such principles that can be derived from the Strasbourg jurisprudence, then I would suggest that – if such is required – s.64(5) provides the clear route back to that jurisprudence.

### **C: Article 5 ECHR: the Strasbourg jurisprudence: the canon before *Cheshire West***

23. The Strasbourg jurisprudence upon Article 5(1), 5(1)(e) and 5(4) ECHR has been reviewed on many occasions, for many different purposes.<sup>28</sup> I make no apology for revisiting the key decisions so as to make good my criticisms of *Cheshire West*; I also consider that it is fruitful to revisit the key decisions with the benefit of hindsight so that we can see how they have been interpreted subsequently. I do so bearing in mind that, whilst the strict principle of precedence does not apply in Strasbourg,<sup>29</sup> the Court generally seeks to follow its earlier decisions<sup>30</sup> and to this end tends to develop ‘mantras’ by way of recitation of core passages or principles derived from earlier cases. In this regard, and as noted in Clayton & Tomlinson’s

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QC’s article “*Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law*” (2012) 4 Public Law 639-657.

<sup>26</sup> Note – possibly – in this regard the judgment of the Court of Appeal in *G v E* [2010] EWCA Civ 822 [2010] COPLR Con Vol 431 at paragraph 21: “Section 64(5), the definition section, provides, in our judgment *importantly*, that references to “deprivation of liberty” in MCA 2005 have the same meaning as in Article 5(1) of ECHR” (emphasis added).

<sup>27</sup> One could go so far as to suggest that a lower Court, relying on s.64(5), could decide that it was not bound by the decision of the Court of Appeal in *Cheshire West* because it was inconsistent with the (subsequent) Strasbourg jurisprudence and that the principle set down in the context of s.2(1) HRA 1998 in *Kay v Lambeth BC* [2006] 2 AC 465 as to the binding effect of domestic authority even in such situations does not apply. That would be a brave step, and I note that in *CC v KK and STCC* [2012] EWHC 2136 (COP), the first decision to consider *Cheshire West* in any detail, Baker J proceeded (it appears without argument) on the basis that the decision of the Court of Appeal was “of course” binding upon him (paragraph 92), albeit that he then sought to take into account the decision of the Grand Chamber in *Austin v United Kingdom* (2012) 55 E.H.R.R. 14 insofar as it cast doubt upon the approach taken to ‘purpose’ by the Court of Appeal (see paragraph 96).

<sup>28</sup> Most recently by the Scottish Law Commission in its Discussion Paper on Adults with Incapacity (Discussion Paper No. 156), published in July 2012, a document to which I shall return. The Paper is available at <http://www.scotlawcom.gov.uk/news/discussion-paper-on-adults-with-incapacity/>.

<sup>29</sup> Not least because of the principle that the Convention is a living instrument: see *Tyrer v United Kingdom* (1978) 2 E.H.R.R. 1 paragraph 16, also – in this context – *Austin v United Kingdom* (2012) 55 E.H.R.R. 14 (discussed further below) at paragraph 53; see generally Clayton & Tomlinson paragraphs 6.30-41 and 23.10.

<sup>30</sup> It being “in the interests of legal certainty, foreseeability, and equality before the law that it should not depart, without good reason” from its earlier decisions: *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18, paragraph 74.



*Law of Human Rights*,<sup>31</sup> I also bear in mind that decisions of the Court concerning the applicability of rights are more likely to take the form of authoritative statements of general practice than those decisions concerning the justification for interference with those rights, as the latter tend to be very much more fact-specific.

24. To start with the Convention itself, Article 5 provides, in material part, as follows:

*“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

...  
*(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*

...  
*4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”*

25. It is also convenient here to set out Article 2 of Protocol 4. Although the United Kingdom has not ratified the Protocol,<sup>32</sup> and it does not therefore contain Convention rights for purposes of the HRA 1998, Article 2 is regularly referred to both in English Courts and in Strasbourg as an interpretative counterpoint to Article 5(1); it provides as follows:

*“ARTICLE 2*

*Freedom of movement*

*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

*2. Everyone shall be free to leave any country, including his own.*

*3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

*4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”*

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<sup>31</sup> Clayton & Tomlinson, eds, *The Law of Human Rights* (OUP, 2<sup>nd</sup> edition 2009), paragraph 23.10.

<sup>32</sup> Having signed it on 16.9.63.



26. The foundational Strasbourg decisions upon Article 5(1) generally are *Engel & Ors v the Netherlands (No 1)*<sup>33</sup> and *Guzzardi v Italy*.<sup>34</sup> The former set down two principles applied in every subsequent case:
- a. Article 5(1) is not concerned with mere restrictions upon liberty of movement, which are governed by Article 2 of Protocol 4;<sup>35</sup>
  - b. in order to determine whether someone has been deprived of his liberty within the meaning of Article 5, the starting point must be his ‘concrete situation.’<sup>36</sup>
27. *Engel* has also been taken as establishing a third principle, namely that in determining whether a measure surpasses the threshold of a mere restriction of liberty, account should be taken of a whole range of factors such as the nature, duration, effects and manner of implementation of the measure in question. The so-called *Engel* criteria have been applied by the Strasbourg Court in subsequent cases from *Guzzardi* onwards (and hence have also sometimes been called the *Guzzardi* criteria).<sup>37</sup>
28. As perceptively discussed by Laura Davidson,<sup>38</sup> what the ECtHR said in *Engel* must be approached carefully. The Court there was concerned with the question of whether disciplinary penalties imposed upon conscript servicemen amounted to deprivations of their liberty. In that regard, the Court noted at paragraph 59:
- “the bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States.”*
29. It was for these specific and limited purposes – i.e. to determine whether the restrictions deviated from the normal conditions of life within the armed forces – that the Court examined the nature, duration, effects and manner of implementation of the measures in question. Whilst (as noted above), this has become the

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<sup>33</sup> (1979-80) 1 E.H.R.R. 47.

<sup>34</sup> (1981) 3 E.H.R.R. 333.

<sup>35</sup> Paragraph 58.

<sup>36</sup> Paragraph 59. This mantra was repeated in *Ashingdane v United Kingdom* (1985) 7 E.H.R.R. 528, and the Court now tends to cite *Ashingdane* when it refers to this proposition.

<sup>37</sup> See *Guzzardi* at paragraph 92, in which the word ‘type’ was substituted for ‘nature,’ a substitution which has remained constant thereafter.

<sup>38</sup> See “*Deprivation of Liberty: was Engel wrongly applied? (Part 1)*” <http://www.no5.com/news-publications/publications/laura-davidson---august-2012>, a longer version of an article appearing in the Solicitors Journal on 6.6.12 entitled “*Turning Back the Clock.*”



mantra recited in each subsequent case, it is not necessarily clear that the Court was intending in *Engel* to set down an approach of general application; it is also clear that these criteria are frequently difficult to apply in the context of the MCA 2005.

30. Moreover, and by way of anticipation of a point that I will develop further, I suggest that we should be very cautious in seeking to find in *Engel* the identification of a ‘comparator’ principle that features so heavily in *Cheshire West*. At paragraph 59 of *Engel*, the Court was very clear that it was dealing with a specific class of individuals in circumstances where military service “*does not on its own in any way constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 para. 3 (b) (art. 4-3-b).*”<sup>39</sup> In other words, the ECtHR was dealing with a specific class of persons who were required – lawfully – by the State to undertake military service with all the attendant “*rather wide*”<sup>40</sup> restrictions upon their freedom of movement that that entailed. The State had chosen to impose that service requirement; that service requirement and the restrictions that it brought with it were time-limited, and the individuals in question would return to the full freedoms of civilian life. The Court was not dealing with a class of persons who by reason of their own innate disabilities (and without any intervention by the State) was already subject to limitations upon their freedoms which (in many cases) would never alleviate with time. I would suggest that any attempt to draw a wider principle from the comparison that the Court undertook in *Engel* between those subject to military service and civilians must be read in that light.
31. In *Guzzardi*,<sup>41</sup> the ECtHR reiterated and/or clarified the three principles set out above, and identified a fourth cardinal principle, namely that the distinction between a deprivation of and a restriction of liberty is merely one of degree or intensity, and not one of nature or substance.<sup>42</sup> It then went on to make a comment whose prescience has only become clearer with the passage of time, noting that: “*the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion.*”<sup>43</sup>
32. Whilst Article 5(1) applies very much more widely than the context with which we are now concerned, Strasbourg has sought to apply the principles set out above to those who lack (or may lack) the capacity to

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<sup>39</sup> Paragraph 59. Article 4(2) provides that no one shall be required to perform forced or compulsory Labour, Article 4(3) then providing that “[f]or the purpose of this Article the term ‘forced or compulsory Labour’ shall not include... (b) any service of a military character.”

<sup>40</sup> Ibid.

<sup>41</sup> At paragraphs 92-3.

<sup>42</sup> Paragraph 93.

<sup>43</sup> Ibid.



decide where they wish to live in four seminal cases: *Nielsen v Denmark*,<sup>44</sup> *HM v Switzerland*,<sup>45</sup> *HL v United Kingdom*<sup>46</sup> and *Storck v Germany*.<sup>47</sup>

33. The first in time of these decisions, *Nielsen*,<sup>48</sup> is now generally recognised as an problematic case:<sup>49</sup>
- a. Kurt Nielsen, a minor, complained that he had been committed to a child psychiatric ward of a state hospital for a period of 5½ months at the request of his mother, his sole legal custodian at the time. His complaint was that he had been deprived of his liberty for reasons other than the need for medical treatment (as well as to the absence of any opportunity to challenge the lawfulness of his detention before a Court). The Government contended that the child was not, in fact, deprived of his liberty at all. The Commission considered that there was a deprivation of liberty.<sup>50</sup> The Court concluded that the applicant's admission to and stay in the child's psychiatric ward was decided by the mother in the exercise of her parental rights, such that Article 5 was not applicable insofar as it was concerned with deprivation of liberty by the authorities of the State.<sup>51</sup> The Court, however, went on to examine whether the “Article [w]as applicable in the circumstances of the present case in regard to such restrictions on the applicant's liberty as resulted from the exercise of the mother's parental rights;”<sup>52</sup>
  - b. citing the *Engel/Guzzardi* criteria and examining the applicant’s situation, a slim majority of the Court<sup>53</sup> concluded that the restrictions imposed upon him were not of a nature of degree similar to the cases of deprivation of liberty specified in Article 5(1). In coming to its conclusion, the Court appears to have been struck that the fact that: (1) the applicant was not detained as a person of unsound mind

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<sup>44</sup> (1989) 11 E.H.R.R.175.

<sup>45</sup> (2002) 38 E.H.R.R. 314.

<sup>46</sup> (2004) 40 E.H.R.R. 761.

<sup>47</sup> (2005) 43 E.H.R.R 96

<sup>48</sup> (1989) 11 E.H.R.R.175.

<sup>49</sup> Although, as I develop in Section I below, it is of considerable significance for any attempts to derive a workable definition of what a deprivation of liberty means in the context of the MCA 2005.

<sup>50</sup> See paragraph 111 of the Commission report, which I set out here because it is rarely, if ever, noted and because it provides a route down which the Court might have gone were it to be considering the case now:

*“When examining the specific circumstances under which a person is kept in a hospital it becomes clear that the process of classification into either deprivation of or restriction upon liberty is no easy task. Obviously special difficulties arise in this connection with regard to the conditions under which a child is placed in a hospital because precautions may be necessary for protecting the child and other patients from the risks it could involve if the child could move freely within and outside hospital premises. In the present case, however, the Commission places considerable weight on the fact that the case concerns detention in a psychiatric ward of a 12-year-old boy who was not mentally ill and that the applicant, when he disappeared from the hospital, was found and brought back to the hospital by the police. Therefore, despite the possibilities to leave the premises of the ward, with the permission of the staff, the involuntary placement of the applicant under the conditions in which he stayed in the hospital must in principle be considered as being a deprivation of liberty within the meaning of Article 5 (Art. 5) of the Convention.”* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-45397>.

<sup>51</sup> Paragraphs 63-4.

<sup>52</sup> Paragraph 64.

<sup>53</sup> The Court being split 9-7.



so as to bring the case within Article 5(1)(e),<sup>54</sup> and also that the restrictions to which he was subject “were no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions in which the applicant stayed thus did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated.”<sup>55</sup> The Court was not troubled by the minor’s lack of consent to his hospitalisation, in essence because he was still of an age at which it would be normal for a decision to be made by a parent even against the wishes of the child,<sup>56</sup> nor by the fact that the police intervened to return him when he absconded, because “such would have been appropriate for the return of any runaway child of that age even to parental custody.”<sup>57</sup> The Court therefore concluded that “the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of Article 5, but was a responsible exercise by his mother of her custodial rights in the interest of the child;”<sup>58</sup>

- c. concern about the *Nielsen* case<sup>59</sup> has centred, in particular, upon the weight placed upon the role of the mother in a factor determining whether the minor was deprived of his liberty. Interestingly, in the domestic context, the Court of Appeal recently accepted<sup>60</sup> the ‘consensus’ of the Bar that the decision<sup>61</sup> in *Nielsen* stood for the proposition that an adult in the exercise of parental responsibility could impose (or authorise others to impose) restrictions on the liberty of the child, but that such restrictions could not in their totality amount to a deprivation of liberty, and that a parent could not lawfully detain or authorise the deprivation of liberty of a child.

34. *HM v Switzerland*<sup>62</sup> is also a problematic case. It is also a case which has been the subject of some (frankly heroic) reinterpretation by the ECtHR in subsequent decisions. We need therefore to see exactly

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<sup>54</sup> It is, frankly, difficult to understand how this factor stood as a justification for there not being a deprivation of liberty; if anything, as the Commission and the dissenting judges noted, the factor pointed the other way.

<sup>55</sup> Paragraph 72.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Paragraph 73.

<sup>59</sup> In respect of which seven of the judges dissented, noting their agreement with the Commission’s conclusions. In their joint dissent, the judges placed particular reliance upon (1) the specific conditions under which the applicant was admitted to the hospital and placed, against his will, in the psychiatric ward, and (2) the length and nature of the committal. They attached “great importance to the fact that the committal lasted over a period of several months and involved the placing in a psychiatric ward of a twelve-year-old boy who was not mentally ill.”

<sup>60</sup> *RK v BCC & Ors* [2011] EWCA Civ 1305 [2012] COPLR 146 at paragraph 14, reversing the decision of Mostyn J on this point [2010] EWHC 3355 (COP) [2010] COPLR Con Vol 1047.

<sup>61</sup> Together with the decision of the Court of Appeal in *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 2 WLR 1141, in which Butler-Sloss P (at paragraph 27) “recognise[d]” the force of the principles set out in the decisions in *Nielsen* [sic] and *Family T* (1990) 64 DR 176, but stated that “[t]here is a point, however, at which one has to stand back and say — is this within ordinary acceptable parental restrictions upon the movements of a child or does it require justification?”

<sup>62</sup> (2002) 38 E.H.R.R. 314.



what happened in the case and, in particular, to have regard to the underlying facts, which are frequently glossed over:

- a. HM, an elderly widow living with her son, was placed by a public authority in S nursing home for an unlimited period on account of serious neglect.<sup>63</sup> HM had previously indicated that she did not wish to go to the nursing home,<sup>64</sup> and the order sought the assistance of the municipal police and health inspectors in its implementation;
- b. from the recital of facts in the judgment, there is no indication that the order made by the public authority was made on the grounds that HM lacked capacity to decide where she wished to live; nor is there any indication that any assessment of this capacity was made at any point during her subsequent stay.<sup>65</sup> Indeed, on any proper reading of the judgment, it would seem to me clear that the applicant contended she had (and was accepted by the responsible authorities as having) the requisite capacity;
- c. HM and her son both appealed to the relevant Appeals Commission charged with considering orders of the nature made in her case. The Court noted that the record of the hearing stated that “[t]he applicant explained that she had no reason to be unhappy with the nursing home, that, as she could no longer walk, it would be better for her to stay there, and that she did not see how matters could get better for her. However, she also said that she ‘wanted to get out of S.’” Pausing there, I note that this is far from an unfamiliar sentiment for P to express in the context of Court of Protection proceedings, and far from an obvious ‘consent’ to a continued placement;
- d. the Appeals Commission noted that the “*appellants’ argument is not helped by the fact that [the applicant] has accepted that she needs to go into a nursing home, as she explained during the appeal hearing. It is true that there would be no need for deprivation of liberty on grounds of welfare assistance if [the applicant] went to reside at the S. Nursing Home of her own free will. However, it*

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<sup>63</sup> Paragraph 18. The order was made under the provisions of Articles 397a et seq. of the Swiss Civil Code and s. 9 of the Deprivation of Liberty on Grounds of Welfare Assistance Act of the Canton of Berne. The former provided that “[a]n elderly or incapacitated person may be placed or retained in a suitable institution on account of mental illness, mental disability, alcoholism, other addictions or serious neglect, if the person cannot otherwise be afforded the necessary personal care” (emphasis added); the latter provided for the deprivation of liberty on the grounds of welfare assistance, the extract in the judgment of the Court suggesting that orders could be made in respect of persons who put themselves or others in danger on account of mental illness, mental disability, alcoholism, other addictions or serious neglect, i.e. a lack of decision-making capacity not being a necessary factor.

<sup>64</sup> Paragraph 17.

<sup>65</sup> It would appear that the applicant was said to be suffering from senile dementia: see paragraph 23. As Judge Loucaides pointed out in his dissenting judgment, the applicant contended that this was not the case and that he had never had a right of reply to that accusation before the Appeals Commission, and had never been examined by a medical expert in that connection.



*transpires from the case file that although she has already frequently stated that she was now willing to enter S. voluntarily, finally this has not happened.”<sup>66</sup>*

- e. the Appeals Commission appears to have accepted that there was a deprivation of liberty (albeit that it found that the applicant was hardly aware of it, that it was minimal, and that it mainly affected her son, who did not want to leave his mother);<sup>67</sup>
- f. HM and her son appealed to the Federal Court, which dismissed their appeals but did not appear to disturb the conclusion that she was deprived of her liberty;
- g. the order made was then lifted by the relevant Government Office “*as she had agreed to reside in the nursing home of her own free will;*”<sup>68</sup>
- h. the applicant’s complaint to the ECtHR was squarely based upon a contention that she had been deprived of her liberty against her will. In an argument with a familiar ring to it, she contended (inter alia) that: “*[i]n the nursing home she was no longer free to make decisions about her place of residence or her daily life. She was unable to return home, as she would have been brought back again. It was irrelevant that she had later agreed to stay in the nursing home, since she disagreed with the original decision which had deprived her of her liberty.*”<sup>69</sup>
- i. In concluding that HM was not deprived of her liberty, the Court noted that “*the applicant herself was undecided as to which solution she in fact preferred. For example, at the hearing before the Appeals Commission, she stated that she had no reason to be unhappy with the nursing home.*”<sup>70</sup> With respect, I would suggest that this is to give a distinctly one-sided paraphrase of the record of hearing set out above;
- j. The Court also noted that HM had subsequently changed her mind and agreed to stay in the nursing home, before concluding that:

*“Bearing these elements in mind, in particular the fact that the Cantonal Appeals Commission had ordered the applicant’s placement in the nursing home in her own interests in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene, and also taking into consideration the comparable circumstances in Nielsen (cited above), the Court concludes that in the circumstances of*

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<sup>66</sup> Judgment, paragraph 23.

<sup>67</sup> Paragraph 24.

<sup>68</sup> Paragraph 27.

<sup>69</sup> Paragraph 32.

<sup>70</sup> Paragraph 46.



*the present case the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5 § 1, but was a responsible measure taken by the competent authorities in the applicant's interests. Accordingly, Article 5 § 1 is not applicable in the present case.*"<sup>71</sup>

35. Judge Loucaides dissented strongly from the decision.<sup>72</sup> He noted that the applicant's placement in the nursing home was against her will. It was implemented by the police under an order explicitly defined by the national law itself and referred to by the national authorities as a measure of deprivation of liberty, and she was not permitted to leave the nursing home. In a statement upon which subsequent commentators have placed considerable reliance, and with which I would respectfully agree, he made clear his opinion that:

*"the question whether a measure amounts to a deprivation of liberty does not depend on whether it is intended to serve or actually serves the interests of the person concerned. This is illustrated by De Wilde, Ooms and Versyp [...]"<sup>73</sup> and the examples of minors and persons of unsound mind requiring educational supervision, whose detention is expressly justified under the provisions of Article 5 § 1 (d) and (e) on the premise that their case concerns "deprivation of liberty", even though such detention may be exclusively in the detainees' interests."*

36. Taking the next in sequence, we come to *HL*.<sup>74</sup> The facts of this case are well known, and I do not propose to set them out in the same detail as I have done for *Nielsen* and *HM*. In summary, however, *HL*, a profoundly autistic man, was admitted informally to Bournemouth Hospital in 1997. He undoubtedly lacked the capacity to consent to his admission. He was compliant, and did not attempt to leave, but his carers were concerned as to the apparently indefinite nature of the admission, and (by his litigation friend), he brought judicial review proceedings together with a writ of habeas corpus to challenge the lawfulness of his detention. For our purposes, the material aspects of the subsequent proceedings are those concerned with the question of whether he was detained and/or deprived of his liberty:

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<sup>71</sup> Paragraph 48.

<sup>72</sup> As did Judge Gaukur Jörundsson.

<sup>73</sup> *De Wilde, Ooms and Versyp v Belgium* (1970) 1 E.H.R.R. 373, para 78, where the Court had held (at paragraph 65) that the fact that a person has submitted voluntarily to a particular regime of detention does not exclude the operation of Article 5 when it came to challenging its lawfulness or seeking release. The Court stated:

*"... the right to liberty is too important in a 'democratic society' within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention might violate Article 5 even although the person concerned might have agreed to it."*

and went on to state:

*"In so far as the wishes of the applicants were taken into account, they cannot in any event remove or disguise the mandatory, as opposed to contractual, character of the decisions complained of; this mandatory character comes out unambiguously in the legal texts ..."*

<sup>74</sup> (2004) 40 E.H.R.R. 761.



- a. the first instance judge, Owen J, did not consider him to be so deprived, and (ultimately) the majority of the Law Lords agreed.<sup>75</sup> The Court of Appeal and two of the Law Lords took the opposite view. Giving the judgment of the Court of Appeal,<sup>76</sup> Lord Woolf MR asked:

*“Is L. detained?”*

*In Hoggett, Mental Health Law , 4th ed. (1996), p. 9 the author describes as ‘the de facto detained:’*

*“those elderly or severely disabled patients, who are unable to exercise any genuine choice, but who do not exhibit the active dissent which provokes professionals to invoke the compulsory procedures.”*

*This description aptly fits L. He has not chosen to leave the hospital because he is incapable of choice as to the environment in which he lives. In those circumstances is he “detained” as a matter of law? This is no easy question.*

...

*In our judgment a person is detained in law if those who have control over the premises in which he is have the intention that he shall not be permitted to leave those premises and have the ability to prevent him from leaving. We have concluded that this was and is the position of L. In concluding that L. was not detained, Owen J. said:*

*‘Detention is defined (Oxford English Dictionary) as kept in confinement or custody. I agree that if in fact [L.] has been detained it matters not whether he knows it or not but there must be some restraint within defined bounds. In some ways the position may be likened to that when a suspect attends a police station to ‘help with police inquiries.’ At that stage he is not detained although detention might follow on very quickly after an indication by the suspect that he was leaving. Likewise, only more strongly, here it can be said that [L.] has at all times been free to leave because that is a consequence of an informal admission, and he will continue to be free to leave until Dr. [Manjubhashini] or somebody else takes steps to section him or otherwise prevent him leaving. In other words there will be no restraint of [L.] until he has attempted to leave and [the trust], by its agent, has done something to prevent this’*

*We do not consider that the judge was correct to conclude that L. was “free to leave.” We think that it is plain that, had he attempted to leave the hospital, those in charge of him would not have permitted him to do so...”<sup>77</sup>*

- b. I would invite the reader to put a mental highlight against this passage;

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<sup>75</sup> Nb, the domestic courts proceeded by reference to the tort of false imprisonment, rather than by reference to Article 5(1) ECHR. When it came to Strasbourg, the ECtHR considered “*the criteria for assessing those domestic [false imprisonment] and Convention issues [to be] different.*” See paragraph 90 of the decision. However, as set down below, the ECtHR then in fact placed very considerable reliance upon the factors identified as relevant by Lord Steyn in his analysis of the position. Whilst this provided a ground upon which the Court could diplomatically depart from the decision of the House of Lords, it does not seem to me that anything ultimately turned on any difference between the common law position and that which pertains under Article 5(1).

<sup>76</sup> [1998] 2 WLR 764.

<sup>77</sup> [1998] 2 W.L.R. 764 at 768-770.



- c. in the House of Lords, Lord Steyn, dissenting, expressed the trenchant view that:

*“Counsel for the trust and the Secretary of State argued that L. was in truth always free not to go to the hospital and subsequently to leave the hospital. This argument stretches credulity to breaking point. The truth is that for entirely bona fide reasons, conceived in the best interests of L., any possible resistance by him was overcome by sedation, by taking him to hospital, and by close supervision of him in hospital. And, if L. had shown any sign of wanting to leave, he would have been firmly discouraged by staff and, if necessary, physically prevented from doing so. The suggestion that L. was free to go is a fairy tale.”<sup>78</sup>*

- d. I would invite another mental highlight to be placed against this passage;

- e. when the matter reached Strasbourg, the Court was unimpressed by the fact (which had weighed heavily with the House of Lords) that the applicant had never attempted or expressed the wish to leave. It was also unimpressed by the fact that the regime applied to the applicant did not materially differ to that applied to a person who had the capacity to consent to hospital treatment, recalling (upon the basis of a citation from *De Wilde*) that:

*“the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action.”<sup>79</sup>*

- f. the Court therefore turned to the ‘concrete situation,’ and – in a sentence relied upon heavily in subsequent decisions – stated that it considered *“the key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems on July 22, 1997 to the date he was compulsorily detained on October 29, 1997”<sup>80</sup>* (emphasis added);
- g. the focus of subsequent commentary has frequently been upon the nature of control over Mr L’s regime within the hospital, but it seems to me from the continuation of the passage set out above the ECtHR in fact was rather less concerned with this factor than with the control exercised over Mr L’s movements and, specifically, whether or not Mr L could in fact leave:

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<sup>78</sup> [1999] 1 A.C. 458 at 495.

<sup>79</sup> Paragraph 90. At paragraph 90, the Court also laid down the marker that, whilst it would have regard to findings of fact made by the domestic courts, it was not constrained by their conclusions as to whether they gave rise to a deprivation of liberty within the scope of Article 5(1).

<sup>80</sup> Paragraph 91.



*More particularly, the applicant had been resident with his carers for over three years. On July 22, 1997, following a further incident of violent behaviour and self-harm in his day-care centre, the applicant was sedated before being brought to the hospital and subsequently to the IBU, in the latter case supported by two persons. His responsible medical officer (Dr M) was clear that, had the applicant resisted admission or tried to leave thereafter, she would have prevented him from doing so and would have considered his involuntarily committal under s.3 of the 1983 Act : indeed, as soon as the Court of Appeal indicated that his appeal would be allowed, he was compulsorily detained under the 1983 Act. The correspondence between the applicant's carers and Dr M 44 reflects both the carer's wish to have the applicant immediately released to their care and, equally, the clear intention of Dr M and the other relevant health-care professionals to exercise strict control over his assessment, treatment, contacts and, notably, movement and residence: the applicant would only be released from the hospital to the care of Mr and Mrs E as and when those professionals considered it appropriate. While the Government suggested that "there was evidence" that the applicant had not been denied access to his carers, it is clear from the above-noted correspondence that the applicant's contact with his carers was directed and controlled by the hospital, his carers visiting him for the first time after his admission on November 2, 1997.*

Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as "stretching credulity to breaking point" and as a "fairy tale" (emphasis added)

- h. I have set out above the extract from the speech of Lord Steyn: his concern (endorsed in terms by the Court in concluding – ‘accordingly’ – that L was deprived of his liberty) was that L was not free to leave. The supervision and control referred to by Strasbourg was aimed, above all, at preventing him leaving the hospital, and it seems to me that it can properly be said that control of (e.g.) assessments, treatment and contact was a subsidiary factor for the treating clinicians and for the ECtHR;
- i. in light of its analysis above, the ECtHR made clear<sup>81</sup> that the question of whether or not the ward upon which Mr L was placed was “locked” or “lockable,” and reminded itself that the applicant in *Ashingdane* was considered to have been “detained” for the purposes of Art.5(1)(e) even during a period when he was in an open ward with regular unescorted access to the unsecured hospital grounds and unescorted leave outside the hospital;
- j. in order to reach its conclusion that HL was deprived of his liberty (a conclusion I should hasten to add I consider to be entirely sound), the ECtHR had to undertake some intellectual gymnastics to reconcile its position with the earlier decisions in *Nielsen* and *HM*. As to the latter, the Court frankly mischaracterised the position of the applicant, stating baldly and incorrectly that “*she had often stated that she was willing to enter the nursing home.*”<sup>82</sup> As to the former, it distinguished the position on

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<sup>81</sup> Paragraph 92.

<sup>82</sup> Paragraph 93.



the – shaky – ground that the case had turned on the ‘specific fact’ that the mother had committed the applicant minor to an institution in the exercise of her parental rights, pursuant to which rights she could have removed the applicant from the hospital at any time, whereas the fact that Bournemouth hospital had to rely on the doctrine of necessity and, subsequently, on the involuntary detention provisions of the 1983 Act “*demonstrate[d] that the hospital did not have legal authority to act on the applicant's behalf in the same way as Mr Nielsen's mother.*”<sup>83</sup>

37. Before turning to *Storck*, the last of the pre-*Cheshire West* Strasbourg authorities discussed in that case, two general comments are in order about *HL*:

- a. first, we must recall at all times that the DOLS regime was introduced to close the so-called *Bournemouth* gap: in other words, Schedule A1 (and s.64(5) MCA 2005) was introduced in response to the ruling in *HL*. We are therefore, I suggest, entitled always to ask ourselves whether any subsequent domestic definition of the term ‘deprivation of liberty’ would encompass Mr L’s situation. If it is not captured by such a definition, then I would respectfully suggest that the definition must be lacking;
- b. second, and as set out above, re-reading *HL* with the benefit of its subsequent application in the cases of *Storck* and, in particular, *DD*, discussed below, it seems to me that clear the focus of the discussion in Strasbourg was upon whether or not Mr L was free to leave the hospital where he was placed, not least as this question had formed so great a part of the discussion before the domestic courts. Questions of the nature of the regime at the hospital were very much secondary; considerations of ‘purpose’ were entirely absent. I will return to these points.

38. We now come to *Storck*. The applicant in this case was placed (initially as a minor) in a series of psychiatric institutions at the behest of her father, over a period of nearly 20 years. She was ultimately held never to have suffered from a psychiatric illness. Her attempts at seeking recourse in the German Courts having been refused, she brought a complaint to the ECtHR. For our purposes, the material question before the Court was whether she had been deprived of her liberty in a private psychiatric clinic. The Government contended that she had not been as she had consented to her stay there.<sup>84</sup> The Court approached the matter as follows:

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<sup>83</sup> Ibid.

<sup>84</sup> Paragraph 70.



- a. citing *Guzzardi*, *Nielsen* and *HM*, it recalled that the starting point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question;<sup>85</sup>
- b. as in *HL*, the Court made clear, whilst it had to have regard to the domestic courts' related findings of fact, it did not consider itself constrained by their legal conclusions as to whether or not the applicant was deprived of her liberty within the meaning of Article 5(1);<sup>86</sup>
- c. it noted that it was undisputed that the applicant had been placed in a locked ward of the private psychiatric clinic, and that:

*“She had been under continuous supervision and control of the clinic personnel and had not been free to leave the clinic during her entire stay there of some 20 months. When the applicant had attempted to flee it had been necessary to fetter her in order to secure her stay in the clinic. When she had once succeeded in escaping from there she had to be brought back by the police. She had also not been able to maintain regular social contacts with the outside world. Objectively, she must therefore be considered as having been deprived of her liberty.”*

- d. importantly, the Court went on to note that:

*“...the notion of deprivation of liberty within the meaning of Art.5(1) does not only comprise the objective element of a person's confinement to a certain limited place for a not negligible length of time. 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;”*

- e. interestingly, whilst the Court cited *HM* as support for this last proposition, the paragraph in question in that earlier judgment (46) does not on a proper analysis set out such a proposition. In any event, *Storck* is now identified as laying down the foundational principle that a deprivation of liberty must contain an objective as well as a subjective element. *Storck* is also now also usually cited as laying down the ‘non-negligible’ requirement set out in this same passage;
- f. analysing the subjective element in Ms Storck’s case, the Court was unimpressed by the fact that the applicant (who, at the material time, was over 18 and had the capacity to consent to or refuse admission to and treatment in hospital) had presented herself to the clinic accompanied by her father. Reciting *De Wilde* and *HL*, the Court reiterated that the right to liberty is too important for individuals

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<sup>85</sup> Paragraph 71.

<sup>86</sup> Paragraph 72.



to lose the benefit of the Convention protection for the single reason that they may have given themselves up to be taken into detention,<sup>87</sup>

- g. the Court found that “*the key factor*” was that the applicant had on several occasions tried to flee, had had to be fettered to prevent her absconding and had had to be brought back to the clinic by the police on the one occasion she did escape. The Court therefore found that she could not have been taken to have agreed to her continued stay,<sup>88</sup>
- h. relevantly for our purposes, the ECtHR found that Ms Storck’s situation was “*a fortiori*” that of the compliant Mr L.<sup>89</sup> Again, however, it had to jump through an unsatisfactory hoop to reconcile the decision with *HM*, seeking – as in *HL* – to distinguish the basis of the suspect conclusion that “[HM], who had been legally capable of expressing a view, had been undecided as to whether or not she wanted to stay in the nursing home. The clinic could then draw the conclusion that she did not object;”<sup>90</sup>
- i. the Court then went on to consider the fact that the deprivation of liberty was, prima facie, at a private clinic. In so it laid down the third of the trinity of principles for which *Storck* now stands, namely that the state must bear responsibility for the deprivation of liberty in order for it to fall within the ambit of Article 5(1). The Court found that there were three bases upon which this could be so:

*“First, the deprivation of liberty could be imputable to the state due to the direct involvement of public authorities in the applicant’s detention. Secondly, the State could be found to have violated Art.5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of Art.5. Thirdly, the State could have violated its positive obligations to protect the applicant against interferences with her liberty carried out by private persons.”*<sup>91</sup>

## **D: Article 5 ECHR: the Strasbourg jurisprudence: developments post *Cheshire West***

- 39. *Storck* was the last of the Strasbourg decisions considered by the Court of Appeal in *Cheshire West*. There was, in fact, a further decision, *Shtukaturv v Russia*<sup>92</sup> determined in 2008, which – perhaps surprisingly – was not referred to by the Court of Appeal. In that case, dealing with the detention of an incapacitated

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<sup>87</sup> Paragraph 75.

<sup>88</sup> Paragraph 76. The Court noted that, in the alternative, “*assuming that the applicant had no longer been capable of consenting following her treatment with strong medicaments, she could, in any event, not be considered as having validly agreed to her stay in the clinic.*”

<sup>89</sup> Paragraph 77.

<sup>90</sup> *Ibid.*

<sup>91</sup> Paragraph 89. The Court’s discussion of positive obligations is addressed further at Section H below.

<sup>92</sup> Application 44009/05, decision of 27.3.08, not reported until (2012) 54 E.H.R.R. 27. This case concerned an individual detained in a psychiatric hospital.



adult in a psychiatric hospital,<sup>93</sup> the ECtHR reiterated the mantras identified above from *Guzzardi*, *Ashingdane* and *HM*. Interestingly, responding to a submission by the Government that the applicant had consented to his stay, the Court noted<sup>94</sup> that:

*“... the applicant lacked de jure legal capacity to decide for himself. However, this does not necessarily mean that the applicant was de facto unable to understand his situation. First, the applicant’s own behaviour at the moment of his confinement proves the contrary. Thus, on several occasions the applicant requested his discharge from hospital, he contacted the hospital administration and a lawyer with a view to obtaining his release, and once he attempted to escape from the hospital. Secondly, it follows from the Court’s above conclusions that the findings of the domestic courts on the applicant’s mental condition were questionable and quite remote in time.*

*109 In sum, even though the applicant was legally incapable of expressing his opinion, the Court in the circumstances is unable to accept the Government’s view that the applicant agreed to his continued stay in the hospital. The Court therefore concludes that the applicant was deprived of his liberty by the authorities within the meaning of art.5(1) of the Convention.”*

40. I shall return to this below.

41. There having been something of a lull in the Strasbourg Court subsequent to *Storck*, 2012-3 saw a veritable flurry of activity, in the form of the following decisions:

- a. *Stanev v Bulgaria*;<sup>95</sup>
- b. *DD v Lithuania*;<sup>96</sup>
- c. *Austin v United Kingdom*;<sup>97</sup>
- d. *Mihailovs v Latvia*;<sup>98</sup>
- e. *Kędzior v Poland*;<sup>99</sup> and
- f. *MA v Cyprus*,<sup>100</sup>

all which merit examination before we turn back to the domestic jurisprudence.

42. *Stanev v Bulgaria*,<sup>101</sup> decided by the Grand Chamber on 17.1.12, addressed a number of issues of principle relating to those declared to be without capacity to take decisions for themselves.<sup>102</sup> For present purposes, I

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<sup>93</sup> Who – “it was largely undisputed... was confined in the hospital for several months, he was not free to leave and his contacts with the outside world were seriously restricted.” Paragraph 107.

<sup>94</sup> Paragraphs 108-9.

<sup>95</sup> Application No. 3760/06, decision of the Grand Chamber of 17.1.12.

<sup>96</sup> Application No. 13469/06, decision of 14.2.12.

<sup>97</sup> (2012) 55 E.H.R.R. 14.

<sup>98</sup> Application No. 35939/10, decision of 22.1.13.

<sup>99</sup> Application No. 45026/07, decision of 16.10.12.

<sup>100</sup> Application no. 41872/10, decision of 23.7.13.



will focus on the approach taken by the Grand Chamber to the issue of whether the applicant was deprived of his liberty, an approach of particular importance because the Grand Chamber was asked for the first time to consider these issues as they arose in the context of the placement of an incapacitated adult in a care home.<sup>103</sup>

43. The applicant, who had been declared by a Bulgarian Court to be ‘partially incapacitated’ and impaired in his ability to manage his own affairs and interests and realise the consequences of his own acts,<sup>104</sup> was placed in a social care home for persons with mental disorders some 400 km from his home. The placement was agreed by a state-appointed Guardian, Mr Stanev neither being consulted nor informed of the proposal.<sup>105</sup> Mr Stanev contended that he was deprived of his liberty at the placement, notwithstanding the fact that he was on occasion permitted to leave the home. The Grand Chamber approached the matter thus:

- a. the Grand Chamber reiterated the passage from *Guzzardi* set out above as to the difficulty of classifying whether a case amounts to a restriction or of deprivation of liberty, and the fact that some borderline cases are “*a matter of pure opinion*,”<sup>106</sup>
- b. in directing itself as to the approach to take, the Grand Chamber reiterated the principles adumbrated above in *Guzzardi*, *Storck*, *HL* and *De Wilde*;<sup>107</sup>
- c. it declined an invitation to determine whether “*in general terms, any placement of a legally incapacitated person constitutes a ‘deprivation of liberty’ within the meaning of Article 5§1*,”<sup>108</sup>
- d. still considering itself constrained to address *Nielsen*, the Grand Chamber distinguished the earlier case<sup>109</sup> on the basis of the particular basis upon which Mr Stanev’s guardian had been appointed and

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<sup>101</sup> Application No. 3760/06, decision of the Grand Chamber of 17.1.12.

<sup>102</sup> One point it is necessary to bear in mind when reading *Stanev* (and indeed *Shtukaturov*, *DD*, *Kędzior* and *Mihailovs*) is that the legal systems in the countries in question are predicated on a status-based approach to capacity; in other words, a person can be declared to be (either partially or totally) incapacitated, rather than – as here – declared to be without capacity to take certain decisions or categories of decisions. Some of the comments in the cases – in particular those relating to the subjective element of the deprivation of liberty – must be read in that light.

<sup>103</sup> To recap, the earlier cases concerned placement in a psychiatric hospital (*Nielsen*, *HL* and *Storck*), the placement of an adult with capacity in a nursing home (*HM*) or arose in an entirely different context (*Engel* and *Guzzardi*).

<sup>104</sup> Paragraph 10.

<sup>105</sup> Paragraphs 14-5.

<sup>106</sup> Paragraph 115.

<sup>107</sup> Paragraphs 116-119.

<sup>108</sup> Paragraph 121.

<sup>109</sup> Which it described as being a case in which “*the applicant’s mother committed her son, her minor, to a psychiatric institution in good faith, which prompted the Court to find that the measure in question entailed the exercise of exclusive*



arranged the placement, such that it found that the placement in the social care home to be imputable to the national authorities, by contrast with the position that pertained in *Nielsen*,<sup>110</sup>

- e. the Grand Chamber noted that, whilst the applicant was able to leave the building where he resided and to go to the nearest village, he needed to have permission to do so, and his visits outside were subject to controls and restrictions; it noted further that his leaves of absence were entirely at the discretion of the home's management, who kept his identity papers and administered his finances; and that, when he did not return from a leave of absence, the home asked the police to search for and return him (although it did not appear that the police escorted him back, nor was he arrested), such that he was returned to the home against his wishes. Accordingly, therefore:

*“although the applicant was able to undertake certain journeys, the factors outlined [in the paragraph above] lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home whenever he wished.”*<sup>111</sup>

- f. citing *Dodov v Bulgaria*,<sup>112</sup> the Government argued that the restrictions had been “*necessary in view of the authorities’ positive obligations to protect the applicant’s life and health.*” The Grand Chamber rejected that argument on the basis that the Government had not been able to show that applicant’s state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb. I will return below to whether *Stanev* represents authority for the proposition that ‘purpose’ is relevant to determining whether a person is deprived of their liberty, but for the present confine myself to noting that the case of *Dodov* was decided in a very different context, namely whether there had been a breach of the state’s obligations under Article 2 ECHR<sup>113</sup> following the disappearance of the applicant’s elderly mother from a nursing home. The Court in that earlier case had no cause to consider whether the applicant’s mother was deprived of her liberty;

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*custodial rights over a child who was not capable of expressing a valid opinion.*” Paragraph 122. In light of the summary above, I invite the reader to decide for themselves whether this represents a proper characterisation of the decision.

<sup>110</sup> Paragraph 123.

<sup>111</sup> Paragraph 128.

<sup>112</sup> (2008) 47 E.H.R.R. 41.

<sup>113</sup> Specifically relating to: (1) the adequacy of the domestic legal system to secure accountability for the negligent acts that had led to her disappearance; (2) the adequacy of the steps taken by the police in the immediate aftermath of her disappearance. As to the latter, the Court reiterated (at paragraph 100) the well-known *Osman* principle that state’s duty to take appropriate steps to safeguard the lives of those within its jurisdiction also extends in appropriate circumstances to a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, or from self-harm, but found that the reaction of the police was adequate, having regard to the “*concrete facts and practical realities of daily police work*” (paragraph 102).



- g. the Grand Chamber found that Mr Stanev was subjected to an indefinite measure, and that the eight year period of his residence in the care home was sufficient “*for him to have felt the full adverse effects of the restriction imposed upon him;*”<sup>114</sup>
- h. finally, the Grand Chamber considered the subjective aspect. In a somewhat Delphic sentence to which I will return, it noted that “*there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned;*”<sup>115</sup> but it also noted – citing *Shtukaturov* – that “*the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation;*”<sup>116</sup> and that the applicant was well aware of his situation and had – since 2004 at the latest – explicitly expressed his desire to leave the home. The Court therefore found that the position was unlike that which prevailed in *HM*, and that the applicant neither consented to the placement nor accepted it tacitly at any later stage;<sup>117</sup>
- i. having particular regard to the involvement of the authorities in the decision to place the applicant at the home and its implementation, the rules on leaves of absence, the duration of the placement and the applicant’s lack of consent, the Court concluded that the situation amounted to a deprivation of his liberty.<sup>118</sup>
44. One final point should be noted regarding *Stanev*. Whilst it did not make reference to it in its analysis of whether the applicant was deprived of his liberty, the Grand Chamber noted as a relevant international instrument the UN Convention on Rights of Persons with Disabilities,<sup>119</sup> and in particular Articles 12 and 14.<sup>120</sup>
45. Less than a month after the Grand Chamber decided *Stanev*, the Court handed down judgment in *DD v Lithuania*.<sup>121</sup> As in *Stanev*, the applicant’s application ranged over a considerably wider terrain than that with which we are concerned, but we will limit ourselves to an analysis of the Court’s approach to the question of whether her placement in a social care home for persons with “*general learning disabilities*”

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<sup>114</sup> Paragraph 129.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> Paragraph 131.

<sup>118</sup> Paragraph 132.

<sup>119</sup> Resolution A/RES/61/106, entering into force on 3.5.08. The United Kingdom ratified the Convention on 8.6.09.

<sup>120</sup> Paragraph 72.

<sup>121</sup> Application No. 13469/06, decision of 14.2.12.



amounted to a deprivation of her liberty. At paragraphs 143ff of its judgment,<sup>122</sup> the Court approached the matter thus:

- a. it reiterated the familiar principles set out above from *Guzzardi* and *HM*. At paragraph 146, in an important passage, it held thus:

*“In the instant case the Court observes that the applicant’s factual situation in the Kėdainiai Home is disputed. Be that as it may, the fact whether she is physically locked in the Kėdainiai facility is not determinative of the issue. In this regard, the Court notes its case-law to the effect that a person could be considered to have been “detained” for the purposes of Article 5 § 1 even during a period when he or she was in an open ward with regular unescorted access to unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see H.L. v. the United Kingdom, no. 45508/99, § 92, ECHR 2004-IX). As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant’s situation is that the Kėdainiai Home’s management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted to that institution, to this day (ibid., § 91). As transpires from the rules of the Kėdainiai Home, a patient therein is not free to leave the institution without the management’s permission. In particular, and as the Government have themselves admitted in their observations on the admissibility and merits, on at least one occasion the applicant left the institution without informing its management, only to be brought back by the police (see paragraph 29 above). Moreover, the director of the Kėdainiai Home has full control over whom the applicant may see and from whom she may receive telephone calls (see paragraph 81 above). Accordingly, the specific situation in the present case is that the applicant is under continuous supervision and control and is not free to leave (see Storck v. Germany, no. 61603/00, § 73, ECHR 2005-V). Any suggestion to the contrary would be stretching credulity to breaking point.” (emphases added)*

- b. again, therefore (and as in *HL*), a – if not indeed the – primary consideration for the Court was whether the applicant was free to leave, the supervision and control in question being aimed at ensuring that she did not leave;
- c. again, the Court resorted to intellectual gymnastics in an attempt to reconcile its conclusion with the decisions in *HM* and *Nielsen*. At paragraph 147, the Court suggested that a further distinguishing feature in respect of *HM* to those identified in previous decisions was the involvement or otherwise of the courts in the placement; at paragraph 148, the Court distinguished *Nielsen* on the basis that the former case involved a time-limited placement, without medication, where the involvement of the authorities in the decision to hospitalise the applicant was of a limited and subsidiary nature, whereas Ms DD was placed without limit of time, was subject to medication, and had been placed with the (ongoing) involvement of the authorities;

<sup>122</sup> Where it also made reference to the Convention on the Rights of Persons with Disabilities: paragraph 84.



- d. the Court also noted a specific incident where the applicant had been restrained, placed in a secure ward, administered medication and tied down for a period of 15-30 minutes. The Court noted the “*particularly serious nature of the measure of restraint*” and that “*where the facts indicate a deprivation of liberty within the meaning of Article 5 §1, the relatively short duration of the detention does not affect this conclusion.*”<sup>123</sup> I have to confess that the logic of this passage seems to me obscure given that the Court concluded Ms DD had been deprived of her liberty throughout the period of her residence at the home. In *Munjaz v United Kingdom*,<sup>124</sup> decided subsequently to *DD*, the Court accepted the possibility that a person already subject to a deprivation of their liberty could be further subjected to a deprivation of their ‘residual’ liberty,<sup>125</sup> but the Court in *DD* does not appear to have been approaching matters in this rather more nuanced fashion;
- e. the Court assessed the subjective element in a very similar fashion to that adopted in *Stanev* (although it did not cite from that case), and found that, although DD had been deprived of her legal capacity, she was still able to express an opinion on her situation, and that she had never agreed to her continued residence at the home;<sup>126</sup>
- f. the responsibility of the authorities being engaged on the facts, the Court therefore concluded that she had been (and continued to be) deprived of her liberty within the meaning of Article 5(1).<sup>127</sup>
46. The case of *Austin v United Kingdom*<sup>128</sup> arose out of the ‘kettling’ of people within a police cordon for up to seven hours during the course of the 2001 May Day demonstration in London. The context of this case was very different, but it is significant for the discussion by the Court of the relevance – or otherwise – of purpose. In order to understand the significance of this discussion, it is necessary to have brief regard to the position which had pertained domestically:
- a. in the House of Lords, Lord Hope had posed the question as to whether purpose was relevant to the determination of whether a person was deprived of his liberty;<sup>129</sup> at paragraph 27, he stated that:

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<sup>123</sup> Paragraph 149.

<sup>124</sup> Application No. 2913/06, decision of 17.7.12.

<sup>125</sup> See paragraphs 65-67, although the Court emphasised that there was no general rule that solitary confinement (in prison) or seclusion (in a psychiatric hospital) *per se* would amount to a further deprivation of liberty. I return to the concept of ‘residual liberty’ in the last section of this paper.

<sup>126</sup> Paragraph 150.

<sup>127</sup> Paragraph 151.

<sup>128</sup> (2012) 55 E.H.R.R. 14.

<sup>129</sup> *Austin v Commissioner of the Police for the Metropolis* [2009] 1 AC 564, at paragraphs 26-34.



*“If purpose is relevant, it must be to enable a balance to be struck between what the restriction seeks to achieve and the interests of the individual. The proposition that there is a balance to be struck at the initial stage when the scope of the article is being considered was not mentioned in Engel v The Netherlands (No 1) 1 EHRR 647 or Guzzardi v Italy 3 EHRR 333. Nor can it be said to be based on anything that is to be found in the wording of the article. But I think that there are sufficient indications elsewhere in the court’s case law that the question of balance is inherent in the concepts that are enshrined in the Convention and that they have a part to play when consideration is being given to the scope of the first rank of fundamental rights that protect the physical security of the individual.”*

- b. at paragraph 34, having reviewed cases including *HM* and *Nielsen*, Lord Hope concluded that:

*“I would hold therefore that there is room, even in the case of fundamental rights as to whose application no restriction or limitation is permitted by the Convention, for a pragmatic approach to be taken which takes full account of all the circumstances...”*

- c. the other Law Lords agreed with Lord Hope (and/or Lord Neuberger, who stated that he considered that the intention of the police was relevant<sup>130</sup>), Lord Scott noting in his agreement with Lords Hope and Neuberger that:

*“when deciding whether a confinement or a restriction of movement imposed on an individual by some public authority constitutes a deprivation of liberty for the purposes of article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the purpose of the confinement or restriction and the intentions of the persons responsible for imposing it rank very high in the circumstances to be taken into account in reaching the decision.”<sup>131</sup>*

- d. Lord Walker, agreeing with Lord Hope, added as a ‘footnote’ his view that the latter was right to be cautious when approaching the question of the relevance of purpose. He noted (at paragraph 43) that:

*“..The Strasbourg Court has frequently made clear that all the surrounding circumstances may be relevant in determining whether there is a deprivation of liberty: see for instance HM v Switzerland (2004) 38 EHRR 314, para 42: ... It is noteworthy that the listed factors, wide as they are, do not include purpose.*

*44 The purpose of confinement which may arguably amount to deprivation of liberty is in general relevant, not to whether the threshold is crossed, but to whether that confinement can be justified under article 5(1)(a) to (f): see for instance (in relation to article 5(1)(e) ) Nielsen v Denmark (1988) 11 EHRR 175; Litwa v Poland (2000) 33 EHRR 1267; Wall v Sweden (Application No 41403/98) (unreported) given 10 December 2002; HM v Switzerland 38 EHRR 314; HL v United Kingdom (2004) 40 EHRR 32; Enhorn v Sweden (2005) 41 EHRR 633; and Storck v Germany (2005) 43 EHRR 96. If confinement amounting to deprivation of liberty and personal security is established, good intentions cannot make up for any deficiencies in justification of the confinement under one of the exceptions listed in article 5(1)(a) to (f) , which are to be strictly construed.*

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<sup>130</sup> Paragraph 63.

<sup>131</sup> Paragraph 39.



45 Many of these article 5(1)(e) cases also raise issues as to express or implied consent (to admission to a psychiatric ward or old people's home). Some of the earlier cases seem questionable today in so far as they relied on "parental rights" (especially Nielsen 11 EHRR 175, which was a nine-seven decision that the admission to a psychiatric ward of a 12-year-old boy was not a deprivation of liberty, because of his mother's "parental rights"). Storck 43 EHRR 96 has, I think, sent out a clear message indicating a different approach to the personal autonomy of young people (although the unfortunate claimant in that case was 18 years of age at the time of her compulsory medication in a locked ward in the clinic at Bremen, for which she was made an exceptionally large award for non-pecuniary loss..."

47. The domestic dicta relating to purpose have been applied domestically in a number of cases, most significantly *Cheshire West*,<sup>132</sup> but the decision of the Grand Chamber in *Austin* shows that Lord Walker was right to be cautious in his 'footnote.' At paragraph 58, the Grand Chamber held thus:

*As Lord Walker pointed out [in the citation from paragraph 43 set out above], the purpose behind the measure in question is not mentioned in the above judgments as a factor to be taken into account when deciding whether there has been a deprivation of liberty. Indeed, it is clear from the Court's case-law that an underlying public interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty, although it might be relevant to the subsequent inquiry whether the deprivation of liberty was justified under one of the subparagraphs of Article 5 § 1 (see, among many examples, A. and Others v. the United Kingdom [GC], no. 3455/05, § 166, 19 February 2009; Enhorn v. Sweden, no. 56529/00, § 33, ECHR 2005-I; M. v. Germany, no. 19359/04, 17 December 2009). The same is true where the object is to protect, treat or care in some way for the person taken into confinement, unless that person has validly consented to what would otherwise be a deprivation of liberty (see Storck, cited above, §§ 74-78, and the cases cited therein and, most recently, Stanev v. Bulgaria [GC], no. 36760/06, § 117, 17 January 2012; see also, as regards validity of consent, Amuur v. France, 25 June 1996, § 48, Reports of Judgments and Decisions 1996-III).<sup>133</sup>" (emphasis added)*

<sup>132</sup> But also, in particular, *Re MIG and MEG* [2010] EWHC 785 (Fam) [2010] COPLR Con Vol 850, on appeal *P and Q v Surrey County Council & Ors* [2011] EWCA Civ 190 [2011] COPLR Con Vol 931. In *ZH v Commissioner of the Police for the Metropolis* [2012] EWHC 604 (QBD), Sir Robert Nelson suggested at paragraphs 63-4 that "[t]he court... is considering matters from the point of view of the person carrying out the measure, but from the point of view of the applicant who needs the measure to be carried out" and, tentatively (in the absence of in depth argument), that "the purpose of, or the need for a measure to be taken on the part of an applicant is one of the factors which should be taken into account in considering whether there has been an infringement of Art 5. It seems to me that if the consent of the applicant is relevant, which is not part of the concrete effect upon him, then need can also be said to be relevant." These dicta (and those in *P and Q*) must be read subject to the decision of the Grand Chamber in *Austin*.

<sup>133</sup> *Amuur* was a case concerning, inter alia, the holding of asylum-seekers in an 'international zone' at an airport. At paragraph 48, the Court had noted that: "[t]he mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."



- a. questions of purpose have been the subject of further consideration in the case of *MA v Cyprus* discussed further below, but I note that the Grand Chamber might be said to have qualified this clear statement slightly in the paragraph which followed,<sup>134</sup> when it stated that:

*“59. However, the Court is of the view that the requirement to take account of the “type” and “manner of implementation” of the measure in question (see Engel, § 59 and Guzzardi, § 92, both cited above) enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell (see, for example, Engel and Others, cited above, § 59; Amuur, cited above, § 43).”*

- b. I would suggest, though, that it is clear that this qualification is a qualification that was addressed to circumstances much further away from the ‘paradigm’ of confinement in a cell than a placement in a care home/hospital might be said to be, as the discussion in the remainder of the paragraph was addressed to “commonly occurring” restrictions on movement accepted by members of the public in certain context such as travel by public transport or on the motorway or when attending football matches;
- c. I would also note that, if and to the extent that context is in fact relevant in this regard, then the Strasbourg Court has pronounced upon the application of Article 5(1) within the context of care homes subsequent to *Austin* (in the *Kędzior* case discussed immediately below). We can therefore gain some considerable assistance from examining how the Court approached the question of deprivation of liberty in this regard.

48. *Kędzior v Poland*<sup>135</sup> concerned the placement of a person in ‘an adult social care home.’ Much of the discussion in the case concerned the ability (or otherwise) of the applicant to take steps to have his legal capacity restored, he having been declared totally incapacitated by a domestic court; for present purposes, I will confine myself to the analysis by the Court of the question of whether he had been deprived of his liberty:

- a. Mr K’s brother, in his role as Court-appointed guardian, asked that he be placed in a social care home, where he remained for a decade from 2002.<sup>136</sup> It would appear that, under Polish law, his admission was considered voluntary and did not require approval by a court.<sup>137</sup> He made repeated attempts to have his capacity restored, it would seem primarily so that he would be allowed to leave the home;<sup>138</sup>

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<sup>134</sup> Paragraph 59.

<sup>135</sup> Application No. 45026/07, decision of 16.10.12.

<sup>136</sup> It would appear that Mr K, in conflict with his brother, had not seen him since 2005: paragraph 49.

<sup>137</sup> Paragraph 13.

<sup>138</sup> Paragraph 33.



- b. the submissions of the parties took a familiar form, the Government relying upon the decision in *HM*;<sup>139</sup>
- c. the Court reiterated the general principles at play, again in familiar form, noting that it had had in *Stanev* and *DD* the opportunity to examine placements in social care homes of mentally incapacitated adults, and to find that it amounted to a deprivation of liberty;<sup>140</sup>
- d. applying the principles, the Court held thus as regards the objective element:

*“57. As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant’s situation is whether the care home’s management has exercised complete and effective control over his treatment, care, residence and movement from February 2002, when he was admitted to that institution, to the present day (see paragraph 44 above and D.D. v. Lithuania, cited above, § 149). The applicant was not free to leave the institution without the management’s permission. Nor could the applicant himself request leave of absence from the home, as such requests had to be made by the applicant’s official guardian. Accordingly, and as in the Stanev case, although the applicant was able to undertake certain journeys and to spend time with his family the factors mentioned above lead the Court to consider that the applicant was under constant supervision and was not free to leave the home without permission whenever he wished (see Stanev, cited above, § 128). Moreover the Court notes that it would appear that the applicant’s extended visits to his family were only authorised during the last few years of his stay in the Ruda Różaniecka Home.*

*Finally, the management of the care home controlled the remaining 30% of the applicant’s disability pension. The Court observes in this respect that the facts of the applicant’s situation at the home were largely undisputed.”* (emphases added, and noting that discussion of purpose/reason and context were entirely absent from this discussion)

- e. as regards the subjective element, the Court adopted a similar approach to that in *Stanev* and *DD*, concluding that:

*“In sum, even though the applicant had been deprived of his legal capacity, he was still able to express an opinion on his situation, and in the present circumstances the Court finds that the applicant had never agreed to being placed in the social care home.”<sup>141</sup>*

- f. the Court found that, although the applicant’s admission was requested by his guardian, a private individual, it was implemented by a state-run institution (the care home), and hence the responsibility

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<sup>139</sup> Paragraph 52.

<sup>140</sup> Paragraphs 54-56.

<sup>141</sup> Paragraph 58.



of the authorities for the situation complained of was engaged;<sup>142</sup> and that he was deprived of his liberty for purposes of Article 5(1) with effect from February 2002.<sup>143</sup>

49. *Kędzior* has a number of significant things to say about the requirements of lawfulness as regards the placement of individuals in care homes (especially as regards the requirements imposed by Article 5(1)(e) in respect of medical evidence),<sup>144</sup> but to address them would be to overburden this paper even further.
50. In *Mihailovs v Latvia*,<sup>145</sup> M challenged his confinement at a centre for people with mental disorders in Latvia on the grounds that it violated Articles 5 and 8 ECHR. A psychiatric examination in 2000 concluded that M was suffering from epilepsy with psychotic syndromes and symptoms but was not suffering from a mental illness. In 2002 he was admitted to the centre following an application made by his guardian. He had remained at the centre since that time, first in Īle and then in Lielbērze after it was relocated in 2010. M claimed he was detained against his will and numerous applications for his release were refused.

#### *Centre at Īle*

- a. there was a factual dispute between M and the government as to whether the centre in Īle was “open” or “closed” in nature. The Court emphasised that this question was not determinative of the issue and reiterated that the key factor was whether the management of the centre exercised “*complete and effective control over his treatment, care, residence and movement.*”<sup>146</sup> The Court concluded the objective limb of the test was met as M was under constant supervision and was not free to leave the institution without permission whenever he wished<sup>147</sup>
- b. in relation to the subjective element of the test, the Court reiterated (paragraph 134) the statement first made in *Shtukaturov v Russia* and then reiterated in *Stanev* that the fact that a person lacks de jure legal capacity to decide matters for himself does not necessarily mean that are de facto unable to understand their situation. The Court found that M was a person whose true wishes and feelings it was possible to ascertain. The Court recorded that the documents presented to the court showed that

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<sup>142</sup> Paragraph 59.

<sup>143</sup> Paragraph 60.

<sup>144</sup> It is perhaps worth recalling in this regard that the Court of Appeal in *G v E* [2010] EWCA Civ 822 [2010] COPLR Con Vol 431, discussing the question of how the *Winterwerp* criteria were to be interpreted in the context of Article 5, approached the matter on the basis that the “*European jurisprudence derives exclusively from the fact that in the cases which have reached the ECtHR, the issue has involved alleged mental illness and detention in a psychiatric hospital*” (paragraph 59). This can no longer be said to be the case.

<sup>145</sup> Application No. 35939/10, decision of 22.1.13.

<sup>146</sup> Paragraph 131.

<sup>147</sup> Paragraph 132.



M “*subjectively perceived his compulsory admission to the Īle Centre as a deprivation of liberty*”<sup>148</sup> having never regarded his admission as consensual and having objected to it during his stay there. The Court accordingly found that M was deprived of his liberty at the centre in Īle.

- c. the Latvian government failed to satisfy the Court that the conditions in Article 5(1)(e) were met as it had not proved the existence of “objective medical opinion” that M was suffering from a “true” mental disorder at the time he was placed in the centre.<sup>149</sup> The Court observed that the other requirements of Article 5(1)(e) were not met as it was not clear that M posed any danger to himself or others or would not submit to treatment voluntarily and insufficient consideration had been given to other less restrictive means of social assistance and care.<sup>150</sup> The Court went on to find that Article 5(4) was breached during M’s time in Īle as the regulatory framework for placing individuals in social care centres did not provide the necessary safeguards and he was prevented from pursuing any legal remedy of a judicial character to challenge his continued “involuntary institutionalisation”<sup>151</sup>

#### *Centre in Lielbērze*

- d. however, the Court declined to find that M was deprived of his liberty from 2010 onwards, after the centre relocated to Lielbērze. It rejected this aspect of his claim (addressing both the objective and subjective elements together), on the basis that M had acknowledged the centre at Lielbērze was an “open institution;” had refused to move to another branch of the centre (saying that he was satisfied with his stay at the centre in Lielbērze); was able to leave the centre on several occasions and did not approach any domestic authority with a view to obtaining his release or complaining about any breaches of his rights (which he had done whilst at the centre in Īle). The Court concluded:<sup>152</sup>

*“These factors, in contrast to those [pertaining at the centre in Īle] are sufficient for the Court to consider that the Government have shown that the applicant had tacitly agreed to stay in the Īle Centre in Lielbērze. The Court would add, in this respect, that it is not without importance that the applicant’s representative conceded that the applicant’s complaints related to the events in the past, thereby implicitly confirming that he did not have any objections to the current state of affairs in the Īle Centre in Lielbērze.”*

51. This case is perhaps noteworthy, in the first instance, not so much for the conclusion that M was deprived of his liberty at the centre in Īle, as this was largely for the reasons given in *Stanev v Bulgaria*, but for the

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<sup>148</sup> Paragraph 134.

<sup>149</sup> Paragraphs 147-148.

<sup>150</sup> Paragraph 150.

<sup>151</sup> Paragraphs 151 and 156.

<sup>152</sup> Paragraph 139.



conclusion that M was not deprived of his liberty at the Centre in Lielbērze. It is not entirely clear upon what basis this conclusion was reached because of the way in which the Court approached the objective and subjective elements compendiously; it appears, though, that the Court's primary reason for finding there to have been no deprivation of liberty was that the subjective element was not made out. Whilst M had perhaps been less vociferous in his objections to remaining at the centre in Lielbērze, and may have found it preferable to being moved to another branch of the centre, there may be some room for doubt as to whether he in fact wished to stay there. The Court's finding that M had tacitly accepted his placement is, in this respect, difficult to square with efforts that had been made (though possibly not fully pursued) by his newly-appointed guardian for M to be allowed to leave the centre (see for example paragraphs 50 and 51). As discussed below, the circumstances of this case (as with *Stanev*) are distinguishable from those which prevail in England and Wales, because, as with the Bulgarian legal system under consideration, the Latvian legal system is status-based. In other words, a person can be wholly or partially divested of legal capacity by an appropriate body (often, it would appear, in circumstances which have caused considerable concern to the Court). In such instances, the Court has therefore been at pains to secure as effective as possible a respect for the autonomy of the individual in question by allowing the possibility that, notwithstanding the fact that they have been formally divested of their capacity, they may still be in a position to understand their position and to act upon that understanding. This requires the Court – in essence – to undertake a rudimentary capacity assessment of its own in relation to the specific question of whether the person has capacity to consent to the confinement in question (or, to use the Court's words, express their "true wishes and preferences"). Depending on the result of that assessment, the Court can then decide whether or not the person has 'validly consented' to their confinement. This is rather different, I would suggest, to the position that prevails in England and Wales; a point that I address further at paragraph 109 below.

52. Finally, in *MA v Cyprus*,<sup>153</sup> the ECtHR considered the position of a man who had been involved with a number of others in a protest in Nicosia, and then taken by the police to their Emergency Response Unit headquarters and required to remain there for a period of time. He was subsequently detained under deportation and detention orders issued under Cypriot immigration legislation. The government contended that during the period prior to the issuing of the orders he had not been deprived of his liberty, but rather had been transferred to the headquarters of the Cypriot police's Emergency Response Unit "*for identification purposes and not to arrest and detain them (relying on X. v Germany, no. 8819/79, Commission decision of 19 March 1981, Decisions and Reports (DR) vol. 24, p. 158). They had not been kept in cells, they had not been handcuffed and they had been given food and refreshment. Those who had been identified as being lawfully resident in the Republic had gone home. The rest had been arrested. The applicant's detention*

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<sup>153</sup> Application no. 41872/10, decision of 23.7.13.



commenced once he had been charged with the flagrant criminal offence of unlawful stay in the Republic and arrested on this ground”<sup>154</sup>

53. The Court, however, assessed the legal position thus:

“188. The Court notes that in cases examined by the Commission, the purpose of the presence of individuals at police stations, or the fact that the parties concerned had not asked to be allowed to leave, were considered to be decisive factors. Thus, children who had spent two hours at a police station in order to be questioned without being locked up were not found to have been deprived of their liberty (see *X. v Germany*, no 8819/79, cited above) nor was an applicant who had been taken to a police station for humanitarian reasons, but who was free to walk about on the premises and did not ask to leave (see *Guenat v Switzerland (dec.)*, no. 24722/94, Commission decision of 10 April 1995). Likewise, the Commission attached decisive weight to the fact that an applicant had never intended to leave the courtroom where he was taking part in a hearing (see *E.G. v Austria*, no. 22715/93, Commission decision of 15 May 1996).

189. The case-law has evolved since then as **the purpose of measures by the authorities depriving applicants of their liberty no longer appears decisive for the Court’s assessment of whether there has in fact been a deprivation of liberty**. To date, the Court has taken this into account only at a later stage of its analysis, when examining the compatibility of the measure with Article 5 § 1 of the Convention (see *Creangă*, § 93, cited above; *Osypenko v Ukraine*, no. 4634/04, §§ 51-65, 9 November 2010; *Salayev v Azerbaijan*, no. 40900/05, §§ 41-42, 9 November 2010; *Iliya Stefanov v Bulgaria*, no. 65755/01, § 71, 22 May 2008; and *Soare and Others v Romania*, no. 24329/02, § 234, 22 February 2011).” (emphasis added).

54. To draw together the threads of the section above, it seems to me that it can now be said that:

- a. Strasbourg has now squarely addressed its mind to the application of Article 5 to the situation of those persons placed in care homes who do not have the capacity to consent to such a placement; such that
- b. if and to the extent that it could be said previously that it was necessary for our domestic Courts to seek to read the runes from decisions in different contexts so as to discern principles applicable to placements in care homes, that is no longer so;
- c. the approach taken by Strasbourg to placements in care homes is, in its essentials, identical to that taken in *HL* to placement in psychiatric institutions, such that there is no need to seek to reconcile different strands of thinking;

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<sup>154</sup> Paragraph 180.

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- d. further, the principles that can now be derived from the Strasbourg jurisprudence (at least insofar as they relate to the identification of the objective element) are sufficiently clear that they leave little or no room for our Courts to seek to interpret Article 5 for themselves in the context of the MCA 2005.

## **E: Article 5 ECHR: the domestic jurisprudence**

55. Having examined the view from Strasbourg, I turn now to the domestic jurisprudence. The reader will no doubt be relieved to learn that I do not intend to delve with anywhere near the same degree of detail into the domestic jurisprudence upon Article 5. Indeed, I intend to confine my analysis solely to the decision of Munby J (as he then was) in *JE v DE & Surrey County Council*,<sup>155</sup> and the decision of the Court of Appeal in *Cheshire West*.
56. I can deal shortly with *JE*, but it does merit a mention because it represented the first (and I would suggest correct) considered reaction of the domestic courts to the *HL* decision, and also because it was very much in the mind of commentators and legislators during the passage of the MHA 2007. I will then deal with *Cheshire West* in more detail; I do not then need to address the intervening cases, because:
- a. *Cheshire West* is the most recent Court of Appeal decision, which expressly seeks both to draw upon all previous jurisprudence, including the earlier decision in *P and Q*, with which it is entirely consistent and which, in essence, it subsumes.
  - b. for present purposes, *Cheshire West* is therefore the relevant binding authority upon both High Court judges and Circuit/District Judges considering questions involving deprivation of liberty in the Court of Protection context;<sup>156</sup>
  - c. further, in giving the lead judgment, Munby LJ sought to draw together all the preceding jurisprudence to provide a guide to determining where the line is likely to be drawn in cases coming before the Court of Protection, and hence sought to identify general principles of wide application;
  - d. since it was handed down, Strasbourg has handed down its decisions in *Stanev*, *DD*, *Austin* and *Kędzior*, all of which would I suggest cast very significant doubt upon the approach adopted by the Court of Appeal. The focus of a ‘normative’ paper such as this can properly be upon the Strasbourg rather than the domestic decisions.

<sup>155</sup> [2006] EWHC 3459 (Fam); [2007] 2 FLR 1150.

<sup>156</sup> See *CC v KK and STCC* [2012] EWHC 2136 (COP) at paragraph 92. As noted above, there may be an argument (based on s.64(5) MCA 2005) that *Cheshire West* is not in fact binding.



*JE v DE*<sup>157</sup>

57. I start with *JE*. It is worth reminding ourselves of the material facts of that case (as they are ones which may well strike a chord with many practitioners). As set out at paragraphs 79-91, they were these:
- a. DE lacked capacity to make decisions about his residence and the arrangements for his social care;
  - b. JE and DE had a long-standing relationship;
  - c. after DE had lost capacity there were many allegations of neglect and abuse of DE by JE when they were residing together, and she had terminated contact between DE and his daughter EW;
  - d. DE was admitted to a residential care home by Surrey after JE put DE on the street in his pyjamas, and asked for him to be taken away;
  - e. because of his incapacity, DE had no memory of these incidents;
  - f. while at the residential care home DE repeatedly asked to live with JE, but Surrey did not allow him to go;
  - g. Surrey did not consider that it was in DE's best interests to live with JE, but made it clear that it would facilitate his residence anywhere else apart from with JE; it stated that it was restricting his residence under the doctrine of necessity;
  - h. Surrey did not restrict contact between DE and JE, save for a brief period when JE was mentally unwell and her telephone calls were abusive and distressing to DE and save that DE was not permitted to go on unsupervised outings with JE;
  - i. Surrey did not restrict DE's activities in and around the home, and facilitated trips away from the home as far as DE was able to cope with them;
  - j. Surrey did not impose any other supervision, restraint or control on DE.

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<sup>157</sup> [2006] EWHC 3459 (Fam); [2007] 2 FLR 1150.



58. Surrey submitted that DE's case was closely analogous to that of *HM*, and that he was not deprived of his liberty. That case was therefore the subject of close dissection by Munby J. In his analysis, Munby J doubted the validity of the reasoning of the ECtHR in that case, and preferred the analysis of the dissenting judges, especially that of Judge Loucaides (set out above).<sup>158</sup> At paragraphs 48 ff, he went to analyse what he considered to be Strasbourg's 'retreat' from the reasoning in *HM*, such that he considered that he could safely conclude (at paragraph 70) that:

*"...In the light of the subsequent decisions of the Strasbourg court, I doubt that Nielsen v Denmark (1988) 11 EHRR 175 and HM v Switzerland (2002) 38 EHRR 314 can any longer safely be treated as authority for the proposition that "If the measures are taken principally in the interests of the individual who is being restricted, they may well be regarded as not amounting to a deprivation of liberty" — a proposition which, so far as I can see, receives absolutely no support from either HL v United Kingdom (2004) 40 EHRR 761 or Storck v Germany (2005) 43 EHRR 96."*

59. At paragraph 77, Munby J set out propositions advanced by Paul Bowen (as he then was) as to the tenets to be derived from the Strasbourg jurisprudence; at paragraph 78, he noted that *"agree[d] with Mr Bowen's formulation which, within the inevitable limits of compression, seems to me to be an entirely accurate and indeed helpful encapsulation of the Strasbourg jurisprudence."* Importantly, at paragraph 77, addressing the objective element, the propositions advanced and endorsed by the Court were the following:

*"a) The starting point must be the concrete situation of the individual concerned and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of and a restriction upon liberty is merely one of degree or intensity and not one of nature or substance ( Guzzardi v Italy (1980) 3 EHRR 333 at para [92], Nielsen v Denmark (1988) 11 EHRR 175 at para [67], HM v Switzerland (2002) 38 EHRR 314 at para [42], HL v United Kingdom (2004) 40 EHRR 761 at para [89] and Storck v Germany (2005) 43 EHRR 96 at para [42]).*

*b) In the type of case with which I am here concerned, the key factor is whether the person is, or is not, free to leave (HL v United Kingdom (2004) 40 EHRR 761 at para [91]). This may be tested by determining whether those treating and managing the person exercise complete and effective control over the person's care and movements ( HL v United Kingdom (2004) 40 EHRR 761 at para [91]).*

*c) Whether the person is in a ward which is 'locked' or 'lockable' is relevant but not determinative (HL v United Kingdom (2004) 40 EHRR 761 at para [92])."*

60. I have emphasised the words in sub-paragraph (b) above. These were the subject of some criticism at the time – in essence for being too simplistic in its approach to the question of whether DE was deprived of his

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<sup>158</sup> Noting, at paragraph 47 that *"[t]he [apparent ratio of the majority in HM], if taken to its logical conclusion, would seem to lead to the absurd conclusion that a lunatic locked up indefinitely for his own good is not being deprived of his liberty. And if beneficent purpose cannot deprive what is manifestly a deprivation of liberty of its character as such, why should a beneficent purpose be of assistance in determining whether some more marginal state of affairs does or does not amount to a deprivation of liberty? No doubt it is some imperfection in my understanding or reasoning, but I confess to having great difficulty in identifying any satisfactory answer to the point made so convincingly by Judge Loucaides."*



liberty. I put my hands up to being one of those offering such criticism.<sup>159</sup> However, with the benefit of hindsight, of the further assistance to be gleaned from *Stanev*, *Austin, DD* and *Kędzior* and of significant experience now in seeking to advise those attempting to implement the DOLS regime in practice and to distinguish for judges the distinction between restrictions and deprivations, I am entirely happy to admit that I have reviewed my position.

Cheshire West

61. Turning to *Cheshire West*, therefore, it is appropriate to start with Munby LJ's<sup>160</sup> reminder of the reason why it is important to determine whether or not someone is deprived of their liberty. At paragraph 4, he noted that:

*“It will be appreciated that in the light of Baker J's order [declaring it to be lawful and in P's best interests that he continue to reside at the care home in question] the question of whether P's circumstances at Z House involve a deprivation of liberty within the meaning of Article 5 does not go to the issue of the legality of the deprivation of liberty (if such it be), for the order makes lawful anything that might otherwise be unlawful as involving a breach of Article 5. What it does go to is whether P is entitled to the important procedural protections of Article 5(4) and, in particular, to the regular ongoing reviews of his detention (if such it be) mandated by Article 5: see my decisions in Re PS (Incapacitated or Vulnerable Adult) [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, Re GJ, NJ and BJ (Incapacitated Adults) [2008] EWHC 1097 (Fam), [2008] 2 FLR 1295, and Re BJ (Incapacitated Adult) [2009] EWHC 3310 (Fam), [2010] 1 FLR 1373, and, most recently, in this court P and Q v Surrey County Council [2011] EWCA Civ 190, [2011] 2 FLR 583, paras [4], [47].”*

62. We can then pick up the story again at paragraph 16, where Munby LJ cited an extract from the judgment of Baker J which the parties before him “rightly” endorsed as a summary of the jurisprudence “so far as it goes.” That summary is worth setting out in full as it provides a convenient drawing together of many of the threads I have discussed above. In light of the discussion above, though, I propose to set the summary out with a column alongside it with comments thereupon:

*“In determining whether P is being deprived of his liberty, the court must follow the following legal principles.*

<p><i>(1) Section 64(5) of the 2005 Act provides that references to “deprivation of liberty” in the Act have the same meaning as in Article 5(1) of ECHR. Any analysis of whether P has been in fact deprived of his liberty must therefore have close</i></p>	<p>For the reasons set out above, I would suggest that the regard to the ECtHR should, if not be exclusive, at least be very significantly closer than that to decisions of the domestic Courts.</p>
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<sup>159</sup> Contributing to an article with Fenella Morris QC upon the case, published in the JPIL, criticising the judgment, for failing to take sufficient account of the multi-factorial nature of the assessment required. The reader wishing to assess the criticism may access the article at [http://www.39essex.com/docs/articles/FM\\_Deprivation\\_of\\_Liberty\\_250607.pdf](http://www.39essex.com/docs/articles/FM_Deprivation_of_Liberty_250607.pdf). I should emphasise, again, that the views expressed in the present paper are mine alone.

<sup>160</sup> With whom both Lloyd and Pill LJ agreed in short concurring judgments.



<p>regard to the jurisprudence of both the English courts and the European Court on the interpretation of that Article.</p>	
<p>(2) That jurisprudence makes clear that, when determining whether there is a “deprivation of liberty” within the meaning of Article 5 , three conditions must be satisfied, namely (a) an objective element of a person's confinement in a particular restricted space for a not negligible time; (b) a subjective element, namely that the person has not validly consented to the confinement in question, and (c) the deprivation of liberty must be one for which the State is responsible: see <i>Storck v Germany</i> and <i>JE v DE and Surrey CC</i> .</p>	<p>As noted by Munby LJ at paragraph 16, the precise phrase from <i>Storck</i> is, in fact, confinement “to a certain limited place,” rather than “in a particular restricted place.” The ECtHR in <i>Stanev</i> used the latter phrase (paragraph 117); in <i>Austin</i> it used the former (paragraph 45).</p>
<p>(3) When considering the objective element, the starting point is to examine the concrete situation of the individual concerned, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.</p>	
<p>(4) The distinction between a deprivation of, and a restriction of, liberty is merely one of degree or intensity and not one of nature or substance: <i>Guzzardi v Italy</i> ..., <i>Storck v Germany</i> .</p>	
<p>(5) A key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the patient exercise complete and effective control of the person's care and movements: <i>HL v United Kingdom</i>.</p>	<p>The astute reader will note the shift from this being accepted by Munby J (as then was as “<u>the</u>” key factor in <i>JE</i> (paragraph 77) to being accepted by Baker J and then endorsed by Munby LJ as “<u>a</u>” key factor.</p> <p>The precise words of the ECtHR at paragraph 91 of the judgment in <i>HL</i> were that “<u>the</u> key factor in the present case to be that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems on July 22, 1997 to the date he was compulsorily detained on October 29, 1997” (emphasis added). The reader will recall the continuation of paragraph 91 and the concluding words of that paragraph, “Accordingly, the concrete situation was that the applicant was under continuous supervision and control and was not free to leave. Any suggestion to the contrary was, in the Court's view, fairly described by Lord Steyn as “stretching credulity to breaking point” and as a “fairy tale.”</p>



	<p>The phrase was not used in <i>Storck</i> in this context (it was in relation to the subjective element<sup>161</sup>), where it was common ground that the applicant was in a locked psychiatric ward.</p> <p>The phrase was not used in <i>Stanev</i>, although the Court noted that “<i>although the applicant was able to undertake certain journeys, the factors outlined [in preceding paragraphs lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home whenever he wished</i>”: paragraph 128.</p> <p>The ECtHR in <i>DD</i> also identified “<i>the</i>” (not “<i>a</i>”) key factor to be that the applicant was not free to leave: paragraph 146.</p>
<p>(6) <i>So far as the subjective element is concerned, whilst there is no deprivation of liberty if a person gives a valid consent to their confinement, such consent can only be valid if the person has capacity to give it: Storck v Germany.</i></p>	<p>The ECtHR in both <i>Stanev</i> and <i>DD</i> appear to be moving to a potentially more nuanced view of this element in its references to the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation or unable to express a view upon the situation, and its analysis of the actual views expressed by the applicants in question. I will return below to whether there needs to be a reconsideration of this element.</p>
<p>(7) <i>So far as the third element is concerned, regardless of whether the confinement is effected by a private individual or institution, it is necessary to show that it is imputable to the State. This may happen by the direct involvement of public authorities or by order of the court”.</i></p>	<p>For the sake of completeness, the three ways in which a deprivation of liberty can come within the scope of Article 5(1) ECHR were identified by the ECtR in <i>Storck</i> as arising out of: (1) the direct involvement of public authorities in the applicant's detention; (2) a failure to interpret the provisions of domestic law “in the spirit of Art.5” when determining compensation proceedings brought by a detained individual; or (3) by a violation of the State's positive obligations to protect individuals against interferences with their liberty carried out by private persons: paragraph 80.</p>

63. I will return to the question of whether ‘freedom to leave’ should be ‘the’ or ‘a’ key factor. The decision in *Cheshire West* has, though, caused most controversy by its addition to the suite of forensic tools the concepts of purpose and ‘normality.’ At paragraphs 38-39, Munby LJ made very clear why it was that he sought to add to the analytic tools available to the Court:

<sup>161</sup> Paragraph 76, the Court finding that the “*key factor*” was that the applicant had on several occasions tried to flee, had had to be fettered to prevent her absconding and had had to be brought back to the clinic by the police on the one occasion she did escape, such that she could not be taken to have agreed to her continued stay.



*“38 The emphasis upon the concrete situation, the context, is obviously important but in truth it does little more than describe a forensic process. Reference to the degree and intensity of the restriction no doubt gives some indication of the principle in play but it hardly provides a benchmark or yardstick by which to evaluate the circumstances and assess whether or not there is a deprivation of liberty. And the call to examine the facts can too easily lead to the worrying and ultimately stultifying conclusion that the decision in every case can safely be arrived at only after a minute examination of all the facts in enormous detail.*

*39 This cannot be right. There must be something more which enables us to pursue a more focussed and less time-consuming enquiry...”*

64. Munby LJ’s answer was that there was, namely looking to the correct comparator. For the reasons set out below, I am in respectful disagreement with this approach. I am also in respectful disagreement with any suggestion that it is possible to identify classes of individuals who will or will not be subject to deprivations of liberty so as to short-circuit the need to assess the facts of their individual case.<sup>162</sup> Such would be to ignore the consistent reiteration by Strasbourg of the principle that whether an individual is subject to a deprivation of liberty can only be determined by assessment of their concrete situation: in other words, the facts of their specific case. However, I am in entire and respectful agreement with the proposition that we should seek to find a set of simple guiding principles to assist; I seek to develop those principles in Section H below.

65. At paragraphs 49-101 of the judgment, Munby LJ developed with characteristic power the elements of his answer to the conundrum that he posed at paragraphs 38-9 of the judgment. Conveniently, he then summarised those elements at paragraph 102, and I propose to address that paragraph in the same tabular fashion as with paragraph 16 of the judgment. This does mean that I will gloss over – in particular – the detail of the reasoning upon the relevance of purpose, motive and/or intention at paragraphs 60-77 (some of the paragraphs which have caused most controversy). That is not out of any intended disrespect to Munby LJ, but rather because paragraph 102 so expressly provides a summary of the “*aspects of the jurisprudence which are likely to be of significance in the kind of cases that come before the Court of Protection,*” and hence is the paragraph to which those looking for guiding principles will look most carefully.

66. Paragraph 102 provides the following summary of the principles that Munby LJ derived from the jurisprudence (with my accompanying commentary):

<p><i>i) The starting point is the “concrete situation”, taking account of a whole range of criteria such as the “type, duration, effects and manner of implementation” of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity,</i></p>	<p>As noted above, this is – and has to be – a fact-specific analysis for each case. The same point would, I suggest, go to factors (iii)-(ix) below.</p>
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<sup>162</sup> Indeed, I am sure that Munby LJ was not in fact suggesting this, not least because such would be inconsistent with paragraphs 16 and 102 of the judgment, discussed above and below respectively.



<i>not nature or substance.</i>	
ii) <i>Deprivation of liberty must be distinguished from restraint. Restraint by itself is not deprivation of liberty.</i>	
iii) <i>Account must be taken of the individual's whole situation.</i>	
iv) <i>The context is crucial</i>	
v) <i>Mere lack of capacity to consent to living arrangements cannot in itself create a deprivation of liberty</i>	
vi) <i>In determining whether or not there is a deprivation of liberty, it is legitimate to have regard both to the objective “reason” why someone is placed and treated as they are and also to the objective “purpose” (or “aim”) of the placement.</i>	<p>In light of the decision of the Grand Chamber in <i>Austin</i>, I would respectfully suggest that it is now clear that questions of reason and purpose (however characterised) are irrelevant to the question of whether or not there is a deprivation of liberty;<sup>163</sup> they go to the question of whether the deprivation of liberty (if one exists) is justified. I would respectfully suggest that the Grand Chamber did not distinguish between ‘objective’ reasons or purposes and subjective motives or intentions in its analysis of the position.</p>
vii) <i>Subjective motives or intentions, on the other hand, have only limited relevance. An improper motive or intention may have the effect that what would otherwise not be a deprivation of liberty is in fact, and for that very reason, a deprivation. But a good motive or intention cannot render innocuous what would otherwise be a deprivation of liberty. Good intentions are essentially neutral. At most they merely negative the existence of any improper purpose or of any malign, base or improper motive that might, if present, turn what would otherwise be innocuous into a deprivation of liberty. Thus the test is essentially an objective one.</i>	<p>Further, insofar as the Court in <i>Stanev</i> appeared to accept a proposition that it could consider the necessity of the restrictions imposed (whether assessed objectively or subjectively), I would suggest that this is inconsistent with the clear statement of principle of the Grand Chamber in <i>Austin</i> (and was based upon an analysis of a case, <i>Dodov</i>, which was decided in an entirely different context). Moreover, in any event the Court declined to accept that ‘necessity’ was relevant in its consideration of the case before it.</p> <p>In the circumstances, I would respectfully suggest that the dissent of Judge Loucaides in <i>HM</i> remains as powerfully valid as it appeared to Munby J in <i>JE</i> – a dissent which, the reader will recall, which was predicated on the basis that it was irrelevant whether the measure “<i>is intended to serve</i> [i.e. subjective] <i>or actually serves</i> [i.e. objective] <i>the interests of the</i></p>

<sup>163</sup> Indeed, it would appear that Munby LJ may agree. In a passage from a lecture entitled “*Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?*” cited in *CC v KK and STCC* [2012] EWHC 2136 (COP) at paragraph 95 he made these observations about the impact of the Grand Chamber decision in *Austin*:

*“Where does this leave us? And where in particular does it leave the decisions in P and Q and Cheshire West? It is early days and you will understand that I must be careful what I say. A provisional and very tentative view might be that questions of reason, purpose, aim, motive and intention are wholly irrelevant to the question of whether there is a deprivation of liberty; that anything in the domestic authorities (and particular in Cheshire West) which suggests otherwise needs to be reconsidered; that in all other respects P and Q and Cheshire West stand as good law; that none of this affects the correctness of the actual decisions in the two cases; and that none of this is likely to have any decisive effect on the outcome in the general run of cases of the kind with which we are concerned.”*



	<i>person concerned.</i> ”
<i>(viii) In determining whether or not there is a deprivation of liberty, it is always relevant to evaluate and assess the ‘relative normality’ (or otherwise) of the concrete situation.</i>	I have discussed above the Strasbourg authority from which this proposition is derived, <i>Engel</i> , <sup>164</sup> and the extent to which that case provides a sound foundation upon which to draw any principle of general application as to ‘relative normality’ in the context of the disabled.
<i>ix) But the assessment must take account of the particular capabilities of the person concerned. What may be a deprivation of liberty for one person may not be for another.</i>	I would also suggest that an approach predicated upon the ‘particular capabilities’ of the person concerned is difficult to square with Article 14(1) of the UN Convention on the Rights of Persons with Disabilities, which provides that “States shall ensure that persons with disabilities, on an equal basis with others, (a) enjoy the right to liberty and security of person; (b) are not deprived of their liberty unlawfully or arbitrarily... and that the existence of a disability shall in no case justify a deprivation of liberty.” <sup>165</sup>
<i>x) In most contexts (as, for example, in the control order cases) the relevant comparator is the ordinary adult going about the kind of life which the able-bodied man or woman on the Clapham omnibus would normally expect to lead.</i>	
<i>xi) But not in the kind of cases that come before the Family Division or the Court of Protection. A child is not an adult. Some adults are inherently restricted by their circumstances. The Court of Protection is dealing with adults with disabilities, often, as in the present case, adults with significant physical and learning disabilities, whose lives are dictated by their own cognitive and other limitations.</i>	Put simply, Article 14(1) makes clear that what is sauce for the goose must be sauce for the gander. Concepts of ‘relative normality’ and ‘particular capabilities’ provide a mechanism by which the disabled are to be viewed through a different prism than those without disabilities. It is only if ‘liberty’ is given an equivalent value for both that the UK can comply with the provisions of Article 14. That a person suffering from disabilities may not be able to benefit from their liberty is a fundamentally different proposition to saying that they should not be entitled to that liberty. <sup>166</sup>

<sup>164</sup> See paragraph 79 of the judgment in *Cheshire West*. The other authorities cited in the discussion of this point are all domestic authorities.

<sup>165</sup> For a discussion of the place of the Convention in interpreting the provisions of the ECHR, see *Burnip v Birmingham City Council* [2012] EWCA Civ 629, concerning the interpretation of Article 14 ECHR, where Kay LJ (obiter) indicated at paragraph 22 that “[i]f the correct legal analysis of the meaning of Article 14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants. It seems to me that it has the potential to illuminate our approach to both discrimination and justification.” Henderson J did not address the UN Convention; Hooper LJ agreed with both Kay LJ and Henderson J.

<sup>166</sup> See also *CC v KK and STCC* [2012] EWHC 2136 (COP) at paragraph 92 per Baker J:

*“I anticipate that this aspect of the decision in Cheshire West will receive particular scrutiny in the Supreme Court. It has been the subject of academic criticism on the grounds that, insofar as it may permit some people to be denied a declaration of deprivation of liberty in circumstances where others would be entitled to such a declaration, it may be discriminatory.*

I accept that there is an entirely legitimate argument that liberty can only be said to exist in the exercise of it. If accepted, however, this argument leads inexorably (in my view) to the relativist conclusions drawn by Munby LJ in *Cheshire West*, conclusions which for the reasons set out above and elsewhere I suggest lead to fundamentally problematic conclusions as regards respect for the rights of the disabled. I am grateful to Richard Murphy of Solent NHS Trust for discussion of the points in this area; whilst I do not agree with his conclusions, they cannot be said to represent anything other than the fruits of the most careful thought.



	<p>In this regard, I would also suggest that a useful analogy can be drawn with the concept of personal autonomy under Article 8. In <i>Munjaz</i>,<sup>167</sup> the ECtHR stated unambiguously that “<i>the importance of the notion of personal autonomy to Article 8 and the need for a practical and effective interpretation of private life demand that, when a person’s personal autonomy is already restricted, greater scrutiny be given to measures which remove the little personal autonomy which is left.</i>”<sup>168</sup></p>
<p><i>xii) In such cases the contrast is not with the previous life led by X (nor with some future life that X might lead), nor with the life of the able-bodied man or woman on the Clapham omnibus. The contrast is with the kind of lives that people like X would normally expect to lead. The comparator is an adult of similar age with the same capabilities as X, affected by the same condition or suffering the same inherent mental and physical disabilities and limitations as X. Likewise, in the case of a child the comparator is a child of the same age and development as X.</i></p>	<p>Proposition (xii) also strongly suggests that the Court of Appeal considers that very significantly fewer people should be considered to be deprived of their liberty in institutional care than does the Government. In this regard, for instance, I note the Department of Health’s view that some 18,600 applications for assessment for standard authorisations should have been made in the period between April 2010 and March 2011.<sup>169</sup></p>

## F: Cheshire West: a step too far away from the Convention?

67. Whilst fully acknowledging the burdens that the DOLS regime has placed upon social workers/health professionals and the courts, in particular through the absence of a clear definition of what constitutes a deprivation of liberty, I would respectfully submit that this cannot compel a conclusion that the lines should be drawn in such a way as to limit unduly the scope of those falling within the ambit of Article 5. To do otherwise would be to allow the tail of resources to wag the dog of statutory interpretation I must confess to a fear that such concerns explain the approach adopted in *Cheshire West*<sup>170</sup> and what I can only see in that case as a very significant narrowing of the scope of Article 5 from that first suggested by *JE* in response to the *HL* decision.

<sup>167</sup> *Munjaz v United Kingdom*. Application No. 2913/06, decision of 17.7.12.

<sup>168</sup> Paragraph 80.

<sup>169</sup> In fact, only 8,982 applications for assessment were made in that period, of which 4,951 were granted. See the Care Quality Commission’s *Report on the Operation of the Deprivation of Liberty Safeguards in England 2010/1* (<http://www.cqc.org.uk/sites/default/files/media/documents/dols.pdf>), and *Jordans Court of Protection Practice 2012*, paragraphs 6.63.6. See also the discussion at Section I below as to the situation more recently.

<sup>170</sup> See also the decision of the Court of Appeal upon costs in the case ([2011] EWCA Civ 1333, [2012] COPLR 76, where Munby LJ gave as a primary reason for making no order as to costs “*that the reason for and the importance of the appeal was not really at all about how P will be dealt with. The point of major importance for the local authority, and indeed local authorities generally, was how often they have to come back to court in this and other like cases...*” (paragraph 8, emphasis added).



68. Of course, if the approach adopted in *JE* had been unduly simplistic and/or cast the net wider than that required by Strasbourg, then revisiting matters so to recalibrate the approach would be entirely appropriate; that it would also potentially mean that scarce time and money could be saved would be a valuable side-effect.
69. For the reasons developed above, however, I would suggest that the approach in *Cheshire West* represents a fundamental departure from the provisions of the Strasbourg case law, in that the forensic exercise that the Court of Appeal envisages should be followed:
- a. marginalises to the point of irrelevance what Strasbourg identified in *HL* (and has subsequently reiterated in *DD*, *Kędzior* and *Mihailovs* in the specific context of care homes) to be “the” key factor in consideration of the objective element to deprivation of liberty, namely whether the person in question is free to leave the place in question;
  - b. imports considerations of reason and purpose which are on a proper analysis relevant to the question of whether any deprivation of liberty is justified, not to whether there is a deprivation of liberty in the first place;
  - c. imports considerations of ‘relative normality’ for which on a proper analysis support is not found in the Strasbourg case law, and which are incompatible with the provisions of Article 14 of the UN Convention on the Rights of Persons with Disabilities.
70. It is perhaps of some interest to note that in the first reported case subsequent to *Cheshire West* in which a deprivation of liberty was found, *A PCT v LDV, CC and B Healthcare Group*,<sup>171</sup> Baker J, having had his attention drawn to the post-*Cheshire West* Strasbourg case-law, held that in determining whether the objective element is satisfied, the court must have regard to the following factors identified in the case-law:<sup>172</sup>

“(1) whether the person objects to their confinement: see paragraph 25 of the judgment of Wilson LJ (as he then was) in *P and Q v Surrey County Council* (supra);  
(2) the relative normality of the person’s life: see paragraph 28 of the judgment of Wilson LJ in *P and Q* (supra);  
(3) the relevant comparator, having regard to the particular capabilities of the person concerned: see paragraphs 38, 39 and 102 (viii) to (xii) of the judgment of Munby LJ (as he then was) in the *Cheshire West* case, (supra);

<sup>171</sup> [2013] EWHC 272 (Fam).

<sup>172</sup> Paragraph 16.



(4) as part of the overall assessment, the purpose for the placement: see judgment of Munby LJ at paragraphs 60 – 77 and 102 (vi) and (vii) in the *Cheshire West* case, as qualified for the reasons set out in *CC v KK*, *supra*, at paragraphs 94-96;

(5) the extent to which it can be said that the managers of the establishment, in this case WH, exercise complete and effective control over the person in his treatment, care, residence and movement: see the judgments of the European Court in *DD v Lithuania* (*supra*), at paragraph 146 and *Kedzior v Poland*, (*supra*) at paragraph 57.”

71. I would also venture to pray in aid the comments of the Scottish Law Commission of *Cheshire West* in its – July 2012 – discussion paper upon how the Scottish Government could close the *Bournewood* gap.<sup>173</sup> Whilst I would certainly not suggest that the Scottish Law Commission was in any way as critical of the decision as I have been in this paper, I note the following passages from that paper as perhaps suggesting less than whole-hearted endorsement of the approach adopted by the Court of Appeal:<sup>174</sup>

“6.45. ... It is evident that to focus primarily on the physical conditions in which a person lives (including restraint, supervision and freedom to leave premises) is more likely to lead to a conclusion that there is a deprivation of liberty than if additional matters, such as the purpose of the measures adopted and the difference, if any, from lives led by other individuals with similar disabilities, are included. Indeed, on the latter approach, where measures:

- are adopted because of the disability suffered by an individual;
- have the purpose of protecting that individual from adverse consequences of the disability; and
- are measures generally adopted in relation to all those with similar disability,

it is difficult to see how deprivation of liberty would arise at all. On this more contextual approach, what amounts to a deprivation of liberty for one person will not necessarily do so for another.

6.46 By contrast, if the focus is on physical conditions, a given regime will always result in deprivation of liberty of the person to whom it is applied, regardless of any disability from which that person suffers. The difference can be illustrated by contrasting the outcomes at first instance and on appeal in the case of *Cheshire West* and *Chester Council v P*. [...] At first instance, *Baker J*, focusing on the degree of control exercised over *P* by staff, and the nature of the measures applied to him, reached the ‘clear conclusion’ that *P* was being deprived of his liberty.[...] Lest this more objective approach might be thought to reflect negatively on the care given to *P* or on the carers themselves, *Baker J* added:

‘..I make it clear that, in reaching that finding, I am not being critical of the local authority or the staff at *Z House*. In my judgment, it is almost inevitable that, even after he has been supplied with a bodysuit, *P* will on occasions gain access to his

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<sup>173</sup> Available at <http://www.scotlawcom.gov.uk/news/discussion-paper-on-adults-with-incapacity/>. This discussion paper should make required reading for all those concerned with the question of the proper approach to deprivation of liberty, not least because it contains a comprehensive historical and comparative tour d’horizon of the jurisprudence and approaches adopted in other jurisdictions.

<sup>174</sup> In the context of a discussion about whether and how it would be possible to draw up a statutory definition of deprivation of liberty, to which I return. With one exception, footnotes have been removed and replaced with ‘[...]’.



*pads and seek to ingest pieces of padding and faeces in a manner that will call for urgent and firm intervention. Those actions will be in his best interests and therefore justifiable, but they will, as a matter of concrete fact and legal principle, involve a deprivation of his liberty. The reason for attaching that label to those actions is not to stigmatise either P or his hard-working and dedicated carers, but so that all involved with his care recognise the implications of what is happening.'*

6.47 *The Court of Appeal reached the opposite view. The idea that a given set of measures may amount to a deprivation of liberty for a person without disabilities yet not be so for a person with disabilities was expressly acknowledged by Munby LJ. [...]*

6.48 *Widening the inquiry to include the context in which measures are taken can lead to variations between cases that are at first sight surprising. Steven Neary was found to have been deprived of his liberty during periods when the measures to which he was subject were certainly no more restrictive, and arguably less so, than those applied to P, who was declared not to have suffered deprivation of liberty. [...]. Moreover, if P (who was under one-to-one staff observation, wore a special garment and was occasionally tied to his wheelchair) was not deprived of his liberty, of what did his (retained) liberty consist?*

6.49 *One feature which distinguishes these cases is that Steven Neary's father was keen to have him home, whereas in the P case, P's mother was not able to care for her son. Peter Jackson J in the Neary case considered that the nub of the case was Article 8. Focusing on Article 5 risked conflating the question of deprivation of liberty with the primary issue of where Steven should be living. [...]*

6.50 *Indeed, in the Bournemouth case itself, L continued to be detained in hospital during a period when his carers were seeking his return home. Similarly, in JE v DE and Surrey County Council [...] DE could not leave the home where he was living in order to live where and with whom he chose. [<sup>175</sup>],<sup>176</sup>*

72. Further in the same discussion paper, at the conclusion of a discussion relating to the relevance of purpose in light of *Austin*, the Scottish Law Commission noted that:

*“6.60 Were Scots law to develop provisions concerning deprivation of liberty which relied directly on concepts such as the purpose of a measure and the effect of a comparison with another person with similar disabilities in distinguishing deprivation of liberty from the provision of care, there would be a risk that such measures might not accord with Strasbourg case-law on Article 5.”*

73. I noted earlier that we must always remember that the DOLS regime was introduced to close the so-called *Bournemouth* gap – a gap which Parliament understood to encompass not merely those informally admitted

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<sup>175</sup> “Contrast *LLBC v TG* [2006] EWHC 2640 (Fam), concerning care of an elderly person with dementia in “an ordinary care home where only ordinary restrictions of liberty applied” (para 105). The Official Solicitor argued that opposition by family members was not sufficient to change the character of a placement which did not otherwise amount to a deprivation of liberty. *McFarlane J* held that placement in the home did not amount to a deprivation of liberty.” (footnote retained from the original)

<sup>176</sup> At paragraph 6.51, the Scottish Law Commission noted that *HL*, *JE* and *Neary* all concerned “the over-riding of the wishes of the person concerned, or of their family or carers,” and suggested that “it may be that Scots law would benefit from a provision to the effect that, when a family is willing and able to provide a home for a person with incapacity, they should not be prevented from doing so by the person's being placed in residential facilities elsewhere.” I return to this below, but for present purposes am focussed upon the decision in *Cheshire West* itself.



to hospital but also care homes<sup>177</sup> – and that we should always ask ourselves whether any subsequent domestic definition of the term ‘deprivation of liberty’ would encompass Mr L.

74. If he was not captured by such a definition, then I would respectfully suggest that the definition must be lacking. In this regard, it is salutary to remind ourselves of the facts of Mr L’s case as recorded by Strasbourg:<sup>178</sup>
- a. Mr L suffered from autism, and had done since birth, being unable to speak and with limited understanding;
  - b. he was frequently agitated, with a history of self-harming behaviour, and lacking the capacity to consent or object to medical treatment;
  - c. prior to the incident at the day-care centre which had precipitated his admission (as an informal patient) to Bournemouth Hospital (where he had been cared for some 30 years prior to his discharge three years previously), the day-care centre had noted that his outbursts had increased over the previous few months and that he had been finding it increasingly difficult to cope with his environment;
  - d. during his admission he was diagnosed as suffering from a cyclical mood disorder;
  - e. Mr L was compliant during his informal admission, and never attempted to or expressed a wish to leave.
75. In the circumstances, I respectfully suggest that it is appropriate to ask how very different Mr L’s life was at Bournemouth would have been to that of an adult in the community of similar age to Mr L, affected by the same condition and suffering the same inherent mental and physical disabilities. This is particularly so given – I would suggest – that it would be necessary to afflict that comparator with the same cyclical mood disorder and the same upswing in challenging behaviour as afflicted Mr L during the period prior to his

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<sup>177</sup> In this regard, it is perhaps apposite to remind ourselves of the Government’s submission in *HL* (at paragraph 80) that: “a finding that the present applicant was ‘detained’ would mean that the care of incapacitated but compliant persons elsewhere (even in a private house or nursing home) would be considered detention, a conclusion which would have onerous legal and other implications for such patients and for any person or organisation having responsibility for their care and welfare.”

<sup>178</sup> See paragraphs 9; 14; 16 and 29.



admission;<sup>179</sup> that comparator would therefore have required very careful supervision and control so as to ensure his own safety and that of others. I would therefore suggest that there is a very real risk that the definition of deprivation of liberty adopted by the Court of Appeal in *Cheshire West* would exclude Mr L and the *Bournewood* gap would therefore re-open.

## H: Where do we go from here?

76. I have set out above a lengthy analysis of the Strasbourg case-law and a critique of *Cheshire West*. But where can we go from here?
77. The most radical solution is to proceed as it would appear that the Scottish Law Commission may propose, namely to introduce an amendment to the MCA 2005 to put in place a statutory definition of deprivation of liberty as part of potential legislation to bridge the *Bournewood* gap in Scotland.<sup>180</sup>
78. The Scottish Law Commission's preliminary view is that there are two major difficulties with the English approach enshrined in s.64(5) MCA 2005:

*“First, the result is a lack of guidance to those working in the area and, secondly, individual case-by-case assessment appears necessary, with lengthy hearings of evidence and consequent demands on resources. In England, development of guidance has occurred thus far in case-law, with judges perceiving the need for practical principles and endeavouring to articulate what those principles are. We suggest that, in Scotland, it would be preferable to provide more than a general statement that deprivation of liberty has the same meaning as in the Convention.”*<sup>181</sup>

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<sup>179</sup> Alternatively, and by way of illustration of the difficulty of analysis, how precise a comparison is necessary, and how many specific features would be necessary in order to derive a proper comparator? Do those features depend on the length of period of compulsory residence or are we only entitled to take into account life-long features?

<sup>180</sup> Which may not mirror directly the DOLS regime, the Law Commission noting both its complexity and the number of criticisms levelled at its operation: see paragraph 4.30.

*“It is certainly evident on an examination of the Deprivation of Liberty Safeguards that they are complex and that the statutory material and supplementary code are voluminous. It is less evident how a simple scheme which meets the needs of those it is designed to safeguard and is easy to administer could be devised. Common to all comment on the scheme has been frustration at the lack of definition of deprivation of liberty – a problem stemming from the lack of definition in the Strasbourg case-law. That this is a significant practical problem is illustrated by research conducted by the South London and Maudsley NHS Foundation Trust, in which a series of real-life case examples was given to lawyers, psychiatrists, Independent Mental Capacity Advocates and Best-Interests Assessors. [ ] There was little agreement in decision-making:*

*‘Even the lawyers could not agree among themselves, although they were selected for their in-depth knowledge of the subject’.*[ ]

*The question of what is actually meant by "deprivation of liberty" in the context of adults with incapacity recurs throughout all discussions, whether in reports, academic publications or case-law.”*

<sup>181</sup> Paragraph 6.41.



79. The criticisms levelled in that paragraph are undoubtedly well-founded, and also show how prescient were the comments of (inter alia) the Joint Committee on Human Rights during the passage of the MHA 2007. Providing a statutory definition of ‘deprivation of liberty’ would undoubtedly tax the Parliamentary draftsman, but it would provide one way in which to cut the Gordian knot.<sup>182</sup>
80. Pressure is undoubtedly building for Parliament to revisit the DOLS Safeguards (whether in isolation or as part of a wider reassessment of the MCA 2005),<sup>183</sup> and the draft Care and Support Bill would provide a vehicle by which Parliament could (for instance) amend the MHA 1983 so as to include within its scope those otherwise falling into the *Bournemouth* gap. However, whilst such pressure is undoubtedly welcome and may ultimately prove the only way in which to resolve the tangle into which we are now embroiled in satisfactory fashion, I must confess to a suspicion that the appetite for further legislation in this area at this point is extremely limited, perhaps to the point of non-existence. I note in this regard that, even were a revised Code of Practice to be issued to accompany the Deprivation of Liberty Safeguards (a rather easier exercise than introducing an amendment to primary legislation), that would not have the effect of amending the provisions of s.64(5) MCA 2005, nor (as discussed above) could any definition given in the Code be binding upon the courts.
81. In the circumstances, therefore the burden will fall squarely on the Supreme Court, and we are therefore back to seeking to establish before that Court a workable definition of ‘deprivation of liberty’ which includes within its scope those properly deserving of its protection.

## **I: A modest suggestion**

82. It is now time to draw together all the threads set out above, and to move from description/criticism to prescription. In so doing, and following the lead of Wilson LJ (as he then was) in *P and Q*,<sup>184</sup> I expressly

<sup>182</sup> At least until and unless Strasbourg decided to develop its approach to Article 5 in an entirely unanticipated fashion.

<sup>183</sup> See in this regard the letter sent on 15.10.12 by Liberty to the Joint Committee on Human Rights to undertake an inquiry into the position and treatment of individuals under the MCA ([http://www.parliament.uk/documents/joint-committees/human-rights/Liberty\\_on\\_treatment\\_of\\_incapacitated\\_persons.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Liberty_on_treatment_of_incapacitated_persons.pdf)). The letter identifies as a particular problem the ‘restrictive’ judicial interpretation of the extent of application of Article 5 in care home settings.

<sup>184</sup> “4. The practical effect of a conclusion that the arrangements for *P* and *Q* amount to a deprivation of their liberty is to be found in the valuable right provided by paragraph 4 of Article 5. For in that event their right would be to take court proceedings for a decision in relation to the lawfulness of their detention and so it would extend beyond their right, which pursuant to statutory guidance Surrey recognises in any event, to a review, at least annually, on Surrey's part into the continued aptness of the assessment under which their needs are met, including participation in the review by independent advocates on behalf of *P* and *Q*. The paragraph would impose a duty on the court itself periodically, again probably at least annually, to review the continued necessity for the arrangements which deprive them of their liberty, albeit perhaps only on paper unless requested otherwise: see *Re BJ (Incapacitated Adult)* [2009] EWHC 3310 (Fam), [2010] 1 FLR 1373, at [26] – [28]. The court's review would probably again require independent representation of them.

5. I entirely ignore the fact that, were this appeal to be allowed, the vast, if unquantifiable, number of necessary reviews of such a character would surely be beyond the present capacity of the Official Solicitor's department and in particular of the



seek to take into account the demands of the Convention, rather than the demands upon the resources of public authorities and Courts. Whether the proposal that I suggest leads to more or less people being caught by Article 5 (and hence requiring the protection of, inter alia, Article 5(4)) is not, with a respect, a question that should fall for consideration in determining the answer to the dilemma that we are in.

83. Before I turn to address each of the trinity of elements required to establish a deprivation of liberty falling within the scope of Article 5(1), a few words about the position of (1) children; (2) adults being cared for by their family; and (3) adults being cared for in private care homes seem to me to be in order.

#### *Children*

84. It seems to me that one of the reasons that we have tied ourselves into knots domestically in seeking to draw up a satisfactory definition of deprivation of liberty in the context of the MCA 2005 is that the Courts have sought to extrapolate from the position of children to that of incapacitated adults when it is both possible and legitimate to draw a principled distinction between the two.
85. Put another way, it is plainly contrary to common sense to consider that a child<sup>185</sup> would be deprived of its liberty by its parents at home in the ordinary course of events, simply because such a child is not free to leave that home and their parent(s) exercise a high degree of control and supervision over them. The position of an incapacitated adult – at least in a home environment – has at least superficial similarities to that of a child; instinctively, therefore, it would seem equally absurd to consider that such an adult is deprived of their liberty. We are therefore constrained to find ever more elaborate ways in which to identify where the dividing line lies between such a scenario and the ‘paradigm’ case of detention in a cell, so as to maintain a coherent definition of deprivation of liberty which applies equally to children as it does to adults.
86. Those ways, developed in *P and Q, Re A and Re C*<sup>186</sup> and *Cheshire West*, have included considerations of reason, of purpose and – most recently – of ‘normality.’ It is not surprising that such an approach has been adopted, not least because the Court of Protection judges addressing this issue are all vastly experienced Family Division judges who naturally project their expertise relating to children onto that of incapacitated adult. Moreover, I entirely accept that considerations of reason, purpose and normality could provide a

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*Court of Protection. To have an eye to that factor would be to raise to it the wrong end of the telescope. The importance of the right to liberty is paramount (McKay v. UK (2006) 44 EHRR 827, at [301]) and the state's positive obligation to provide the facilities necessary for its effective exercise is absolute.*” (emphasis added).

<sup>185</sup> Any child – i.e. whether or not they have a mental disorder.

<sup>186</sup> [2010] EWHC 978 (Fam) [2010] COPLR Con Vol 10.



basis upon which a definition of deprivation of liberty which applies equally to children and adults could be drawn up.

87. However, I would suggest that this approach has had the – entirely inadvertent – effect of ‘infantilising’ the incapacitated adult and undervaluing both the significance of their autonomy (enshrined within Article 12 of the Convention on the Rights of Persons with Disabilities<sup>187</sup>) and the concept of liberty as it applies to an adult.

88. It is for this reason, and not just so as to seek a simpler way to analyse when an incapacitated adult is or is not deprived of their liberty, that I make the suggestion that follows in the paragraphs below, which proceed on the basis that one can properly say that the concept of deprivation of liberty is not the same for children as it is for adults.

89. I accept that the path outlined above would not be open to me if the Strasbourg jurisprudence upon Article 5 drew no meaningful distinction between minors and adults. However, I venture to suggest both that the jurisprudence does draw a distinction (which is also to be found in the Convention itself<sup>188</sup>), and, indeed, that without the existence of a distinction it is impossible to reconcile the Strasbourg jurisprudence upon incapacitated adults with that relating to children:

- a. as set out above, the *Nielsen* case has struck many commentators (and indeed judges) as unsatisfactory in the apparent weight placed upon the role of the discharge of parental rights in negating what would otherwise objectively have been a deprivation of liberty;
- b. I share this unease; conversely, however, it seems to me that we can legitimately say that the ECtHR was seeking to identify in the judgment that there is a distinction between the concept of ‘deprivation of liberty’ as it applies to an adult as opposed to a child;<sup>189</sup>

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<sup>187</sup> As to which (and as to the extent to which the MCA 2005 more generally satisfies the requirements of the Article), see the article by Senior Judge Lush: “*Article 12 of the United Nations Convention on the Rights of Persons with Disabilities*” in [2011] Eld LJ 61.

<sup>188</sup> See Article 5(1)(d), making express provision for the “*detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*” the autonomous Convention meaning of ‘minor’ is anyone under the age of 18: Clayton & Tomlinson, *The Law of Human Rights* paragraph 10.196, citing *X v Switzerland* (1979) 18 DR 238, EComm HR. NB, this is the only use of the word ‘minor’ in the Convention.

<sup>189</sup> Whether or not that child was suffering from any form of mental disorder: see paragraph 72 of *Nielsen*

“*...Indeed, the restrictions to which the applicant was subject were no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions in which the applicant stayed thus did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated.*”



- c. I should emphasise that I am not saying that the regime to which Kurt Nielsen could not properly be regarded as a deprivation of his liberty; indeed, it seems to me that the Commission rather than the ECtHR were right as to their approach to the facts of that case. Rather, the point I am labouring is that the Court recognised a distinction between adults and children,<sup>190</sup> and that there is such distinction is something we are entitled to take into account;
- d. moreover, as noted above, if there were to be no distinction between adults and children, then it would be logically impossible to reconcile the decisions in *HL* and *DD/ Kędzior* (in particular) with the position pertaining to children:
  - i. as I hope that I have identified in sufficient detail, in those cases the Court identified that the incapacitated adults in question were objectively deprived of their liberty because they were subject to continuous supervision and control such that they were not free to leave, and subjectively could not give valid consent to their placement. Even if we were to take the (entirely appropriate) stance that older children (say, for the sake of argument, 16 and 17 year olds) may be able to express a meaningful degree of compliance as regards remaining at home and there being subject in the usual course to a regime of supervision and control.<sup>191</sup>
    - 1. there must be an age below which such cannot be said; and

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*Regarding the weight which should be given to the applicant's views as to his hospitalisation, the Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of Article 5 (art. 5-1).*

*Nor did the intervention of the police, which would have been appropriate for the return of any runaway child of that age even to parental custody, throw a different light on the situation.*" (emphases added)

<sup>190</sup> Indeed, on one reading of *Nielsen*, it would seem that the Court was suggesting that the situation was not covered by Article 5(1) at all: see the last sentence of the second paragraph of the extract from paragraph 72 cited above. It seems to me that there is nothing inconsistent in the *Storck* decision with this proposition, because, whilst the applicant had been a minor initially, the material deprivation of liberty occurred at a point when she was over 18. I note also in this regard that Munby LJ's detailed exegesis of the position relating to deprivation of liberty of children at home in *Re A and Re C* did not make reference to any Strasbourg case-law relating to the deprivation of the liberty of children other than *Nielsen* and *Storck*. The limited Strasbourg jurisprudence upon Article 5(1)(d) does not assist, because it focuses on the justification under Article 5(1)(d), rather than the existence or otherwise of a deprivation of liberty. See, e.g. *Bouamar v Belgium* (1988) 11 E.H.R.R. 1.

<sup>191</sup> I.e. that their position in this regard is analogous to that of a Gillick-competent child in relation to medical treatment.



2. even in the case of 16 and 17 year olds our law recognises that the High Court may – on the basis of their age alone – take decisions upon their behalf,<sup>192</sup> such that their wishes and feelings cannot be determinative in the same absolute fashion as those of an adult with full decision-making capacity, and their ‘consent’ to remaining at home cannot be said to have the same absolute ability as the consent of an adult to negate what would otherwise be a deprivation of liberty.

ii. as a matter of logic, therefore, without a distinction between the application of the concept of ‘deprivation of liberty’ to children as opposed to incapacitated adults, all children in any form of functioning household would be deprived of their liberty. That that is an absurd result would suggest that we should recognise that the concept of deprivation of liberty has a different meaning as regards those under 18 to adults, rather than that we should seek to tie ourselves into ever more difficult knots striving to maintain an identity between the two concepts.

90. In the circumstances, therefore, it seems to me that we are entitled to proceed on the basis that we can view the position of the incapacitated adult under Article 5 of the Convention<sup>193</sup> as qualitatively different to that of a child (whether or not that child is suffering from a mental disorder), such that we can properly leave the question of what, exactly, would constitute deprivation of liberty in the case of a child to one side.<sup>194</sup>

#### *Adults cared for at home*

91. I would also further suggest that we need to examine whether we can draw any proper conceptual distinction between the situation of an incapacitated adult being cared for in their home by family members<sup>195</sup> and that of an adult cared for in an institutional setting (which for these purposes I would also define as including a placement in a home-like environment where care is provided by non-family

<sup>192</sup> And there is no suggestion that our law in this is inconsistent with the Convention. See (in the context of medical treatment) *Glass v United Kingdom* (2004) 39 E.H.R.R. 15.

<sup>193</sup> And, indeed, under the Convention on the Rights of Persons with Disabilities: contrast Articles 7 (relating to children) and Article 12. Article 7(3) enshrines a right for a child with disabilities “to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.” Article 12(2) provides by contrast that as a starting point, States Parties “shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”

<sup>194</sup> For my part, and for rather different reasons, I would agree with Munby LJ in *Re A and Re C* that a child at home (especially a young child) would have to be subjected to a considerably greater degree of confinement before they could properly be considered to be deprived of their liberty. For the avoidance of doubt, however: (1) I have some considerable doubts as to whether on the facts of those cases the regime imposed upon A (including, in particular, locking her into her room at night) did not amount to a deprivation of her liberty – albeit, to the extent that it was imputable to the State and required justification for purposes of Article 5(1), it was entirely justified; and (2) I consider that the focus would always have to be on the regime itself, and not upon the exercise of parental rights, as it seems to me that it would be impermissible that the latter could negate what would otherwise be a deprivation of liberty.

<sup>195</sup> Either exclusively or, at a minimum, with family members being the predominant providers of care.



members). The (entirely understandable) instinctive reaction of the Courts is that such cannot constitute a deprivation of liberty; again, it is in attempting to explain why this should be so that we have got ourselves into a tangle (not least by seeking to develop concepts of normality, purpose and motive).

92. As with children, a difficulty is Strasbourg has not considered this question directly. As with children, therefore, I suggest that we are allowed – and indeed required – to draw together what assistance we can to identify a coherent principle which is not inconsistent with the decided cases. I should say immediately that it seems to me all but inevitable that Strasbourg would, if asked the question, strive to find a way in which to conclude an adult cared for in their home environment by family members (either exclusively or with the support of paid carers) would not be deprived of their liberty. The problem is how properly to give such an answer.
93. It seems to me that there are two possible ways of approaching this question, focussing on (1) the objective circumstances; or (2) upon the role of State involvement:
- a. for similar reasons as with children, it seems to me that by focussing on objective circumstances our domestic courts have been constrained to develop concepts (normality, purpose, reason and motive) which find no proper place in the Strasbourg jurisprudence. However, whilst it seems to me that it can properly be said (and support identified for the proposition in the Strasbourg jurisprudence) that children are qualitatively different to adults, it is very much more difficult to say that an incapacitated adult is qualitatively different to an adult with capacity. It therefore seems to me that seeking to escape from the coils of Article 5 by reference to the differences in the objective circumstances of an adult living at home compared to an adult subject to a placement by a public authority leads very quickly into a blind alley because (without the addition of concepts which unnecessarily complicate the issue) one reaches a position whereby either far too many or far too few adults are caught by the definition of Article 5 ECHR;
  - b. whilst I admit that my initial reaction when I came to consider this matter afresh was that focussing upon State involvement was not very promising as a route, it seems to me that on a proper analysis of the Strasbourg jurisprudence, we can identify a conceptual route which does allow us to establish a distinction which reflects reality whilst affording proper protection to incapacitated adults. I develop my thesis in the paragraphs which follow, although I recognise (with even greater diffidence than in respect of the thesis set out in relation to children) that seeking to discern a route which is truly satisfying intellectually and philosophically is not easy.



94. In *Storck*, it will be recalled, the ECtHR found that liability under Article 5(1) could arise where “*the State ... violate[s] its positive obligations to protect the applicant against interferences with her liberty carried out by private persons.*”<sup>196</sup> Amplifying this, the Court held that States are “*obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.*”<sup>197</sup> Whilst this statement can undoubtedly be read as a statement of general principle (and has been so treated), it is important to remember the context in which it was made:
- a. the Court in *Storck* was particularly concerned as to the risk of abuse of those in need of psychiatric treatment, and held that the State “*cannot completely absolve itself from its responsibility by delegating its obligations in this sphere [i.e. to secure the rights of their citizens to physical integrity under Article 8 ECHR by providing such treatment] to private bodies or individuals.*”<sup>198</sup>
  - b. upon the facts of the case, the Court found that there was a lack of any effective state control over private psychiatric institutions such as that in which the applicant was detained, and that Germany had breached the positive obligation it owed her to protect her from interferences with her liberty carried out by private persons whilst she was detained in the psychiatric hospital;<sup>199</sup>
  - c. the Court was therefore concerned with the position where a State could – but did not – discharge obligations owed to the individual in question to provide them with psychiatric treatment by way of detention within a State institution. It was also, further, concerned, with a situation where there was “*a great danger of abuse*” given the consequences of detention in a psychiatric hospital;<sup>200</sup>
  - d. even though it was considering the question of the German State’s positive obligations under Article 5, the Court reiterated that it had already found that the State to have been involved in her detention at the private clinic.<sup>201</sup> This was not therefore a case in which Strasbourg was considering the ‘pure’

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<sup>196</sup> Paragraph 89.

<sup>197</sup> Citing in this regard two cases upon positive obligations - *Z v United Kingdom* (2002) 34 E.H.R.R. 3 and *Ilaşcu v Moldova and Russia* (Application No. 48787/99, decision of 8.7.04).

<sup>198</sup> Paragraph 103. It saw this as akin to the position in *Costello-Roberts v United Kingdom* (1995) 19 E.H.R.R. 112 where the United Kingdom was held responsible for the act of a headmaster of an independent school on account of its obligation to secure to pupils their rights guaranteed by Articles 3 and 8 of the Convention.

<sup>199</sup> Paragraph 106.

<sup>200</sup> Paragraph 106.

<sup>201</sup> Paragraph 106, referring back to paragraph 91: “*However, the Court notes that on 4 March 1979 the police, by means of force, brought the applicant back to the clinic after she had escaped. Accordingly, the public authorities became actively involved in the applicant’s placement in the clinic. The Court observes that there is no indication that the applicant’s express objection to returning to the clinic gave rise to any review on the part of the police or any other public authority of the lawfulness of the applicant’s confinement in a private hospital. Therefore, even though the State authorities caused the*



form of the positive obligation that it expressed in the rather stark terms set out in paragraph 89 of its judgment.

95. The Strasbourg Court has subsequently alighted upon the limited nature of State involvement in what would otherwise in this context be a deprivation of liberty falling within Article 5. In *DD*, for instance, it gave as a reason for distinguishing *Nielsen* that the “assistance rendered by the authorities when deciding to hospitalise the applicant was “*of a limited and subsidiary nature*” (§ 63), *whereas in the instant case the authorities contributed substantially to the applicant’s admission to and continued residence in the [state-run] Kėdainiai Home.*” Whether this is, in fact, an entirely proper basis upon which to distinguish *Nielsen* might be debatable, but for present purposes the point is that the Court did seek to draw such a distinction.
96. Further, in the two other cases of which I am aware involving deprivation of liberty at the hands of private individuals, the Court took pains to identify the nature of the State involvement in that deprivation of liberty. Neither of these cases, *Riera Blume v Spain*,<sup>202</sup> and *Rantsev v Cyprus and Russia*,<sup>203</sup> seem to have been considered in any of the domestic cases considering the cases of incapacitated adults (or indeed in the line of Strasbourg jurisprudence relating to incapacitated adults),<sup>203</sup> and they perhaps merit setting out in a little detail for the light that they may shed on the problem before us:
- a. in *Riera Blume*, the applicants were members of a religious sect. Following the intervention of an association formed to fight against sects and on the instructions of the investigating judge, they were taken by police officers to a hotel where they were handed over to their families with a view to recovering their psychological balance. During their 10-day supervised confinement they were subjected to a process of “deprogramming”. They complained, inter alia, that they had been unlawfully deprived of their liberty – it being common ground<sup>204</sup> that, in accordance with the judge’s instructions, the applicants were transferred by Catalan police officers on 21 June 1984 in official vehicles to a hotel about 30 kilometres away from Barcelona. There they were handed over to their families and taken to individual rooms under the supervision of people recruited for that purpose, one of whom remained permanently in each room, and they were not allowed to leave their rooms for the first three days. The windows of their rooms were firmly closed with wooden planks and the panes of glass had been taken out. While at the hotel the applicants were allegedly subjected to a

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*applicant’s detention in the clinic only towards the end of her placement, this engaged their responsibility, as her confinement would otherwise have ended on that date*” (emphasis added).

<sup>202</sup> (2000) 32 E.H.R.R. 632.

<sup>203</sup> Or in *Re A and Re C*, discussed above. The cases were cited in Hackney’s skeleton argument in *TTM v Hackney LBC* [2011] WLR 2873, concerning responsibility for the consequences of an invalid application for admission under the MHA 1983 but were not cited by the Court of Appeal.

<sup>204</sup> See paragraph 13.



“deprogramming” process by a psychologist and a psychiatrist at the association’s request. On 29 and 30 June 1984, after being informed of their rights,<sup>205</sup> they were questioned by CTR, the Assistant Director-General of Public Safety, aided by an official of the Public Safety Department of the Catalan Government, in the presence of a lawyer not appointed by the applicants. On 30 June 1984 the applicants left the hotel;

- b. the Government did not dispute that they had been deprived of their liberty.<sup>206</sup> Nor did it deny that there was no legal basis for the deprivation of liberty. That being said, “*it argued that the measure in issue could not in any circumstances be attributed to the Catalan police officers, as the responsibility was that of the applicants' families, who had organised their reception and detention at the hotel and their supervision.*”<sup>207</sup> It was therefore necessary for the ECtHR “*to consider the part played by the Catalan authorities in the deprivation of liberty complained of by the applicants and to determine its extent. In other words, it must be ascertained whether, as the applicants maintained, the contribution of the Catalan police had been so decisive that without it the deprivation of liberty would not have occurred.*”<sup>208</sup>
- c. having examined the role of the Catalan Police, in particular, in the events of June 1984, “[i]n the light of the foregoing, the Court considers that the national authorities at all times acquiesced in the applicants' loss of liberty. While it is true that it was the applicants' families and the Pro Juventud association that bore the direct and immediate responsibility for the supervision of the applicants during their 10 days' loss of liberty, it is equally true that without the active co-operation of the Catalan authorities the deprivation of liberty could not have taken place. As the ultimate responsibility for the matter complained of thus lay with the authorities in question, the Court concludes that there has been a violation of Article 5(1) of the Convention.”
- d. *Riera Blume* was decided before *Storck*, in which (as we have seen). However, the second case, *Rantsev*,<sup>209</sup> was decided more recently, and cited *Storck*<sup>210</sup> and is thus perhaps of more assistance;
- e. Mr Rantsev’s daughter was a Russian national who arrived in Cyprus and was granted a permit to work as an “artiste” in a cabaret managed by a man identified in the decision as MA. She stayed in an apartment with other young women also working there, but subsequently left, leaving a note that she

<sup>205</sup> The judgment does not make clear what these “rights” were.

<sup>206</sup> Paragraph 27.

<sup>207</sup> Paragraph 31.

<sup>208</sup> Paragraph 32.

<sup>209</sup> Which ranged over much wider territory than that discussed here, raising allegations of breaches of Articles 2, 3, 4 and 8 as well as 5.

<sup>210</sup> Although it was not in this specific context, it is clear that the decision was squarely before the Court.



wanted to return to Russia. MA informed the authorities but Ms Rantseva's name was not entered on the list of persons wanted by the police. Several days later, she was seen and MA called the police seeking her arrest; he went there, apprehended her and took her to the local police station where she was detained for about an hour.<sup>211</sup> The police did not detain her there because she was not in the list of wanted person; the police required that her employer collect her and return her to the police station the next morning. MA collected Ms Rantseva and took her to an apartment belonging to an employee of the cabaret. The next morning, she was found dead on the street below. The Court found that the facts surrounding the stay in the flat were unclear, concluding thus: “[i]n his witness statement to the police, MA denied that Ms Rantseva was held in the apartment against her will and insists that she was free to leave.<sup>149</sup> The applicant alleges that Ms Rantseva was locked in the bedroom and was thus forced to attempt an escape via the balcony. The Court notes that Ms Rantseva died after falling from the balcony of the apartment in an apparent attempt to escape. It is reasonable to assume that had she been a guest in the apartment and was free to leave at any time, she would simply have left via the front door. Accordingly, the Court considers that Ms Rantseva did not remain in the apartment of her own free will.” It therefore found that she was deprived of her liberty both at the police station and during the transfer to and whilst confined at the apartment.<sup>212</sup> The Court therefore turned to the question of whether Cyprus bore responsibility for the deprivation of liberty, finding thus (footnotes omitted):

*“319 Insofar as Ms Rantseva was detained by private individuals, the Court must examine the part played by the police officers and determine whether the deprivation of liberty in the apartment engaged the responsibility of the Cypriot authorities, in particular in light of their positive obligation to protect individuals from arbitrary detention.*

*320 The Court has already expressed concern that the police chose to hand Ms Rantseva into MA's custody rather than simply allowing her to leave. Ms Rantseva was not a minor.<sup>[213]</sup> According to the evidence of the police officers on duty, she displayed no signs of drunkenness. It is insufficient for the Cypriot authorities to argue that there is no evidence that Ms Rantseva did not consent to leaving with MA: as the AIRE Centre pointed out, victims of trafficking often suffer severe physical and psychological consequences which render them too traumatised to present themselves as victims. Similarly, in her 2003 report the Ombudsman noted that fear of repercussions and inadequate protection measures resulted in a limited number of complaints being made by victims to the Cypriot police.*

*321 Taken in the context of the general living and working conditions of cabaret artistes in Cyprus, as well as in light of the particular circumstances of Ms Rantseva's case, the Court considers that it is not open to the police to claim that they were acting in good faith and that they bore no responsibility for Ms Rantseva's subsequent deprivation of liberty in MP's*

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<sup>211</sup> Paragraph 315.

<sup>212</sup> Paragraph 318.

<sup>213</sup> I note that this might be said to represent a further – albeit glancing – indication that the Strasbourg Court views the position of minors differently to that of adults.



*apartment. It is clear that without the active co-operation of the Cypriot police in the present case, the deprivation of liberty could not have occurred. The Court therefore considers that the national authorities acquiesced in Ms Rantseva's loss of liberty.*"<sup>214</sup>

97. Drawing the threads together, therefore, it can be seen that the Court has been at pains to identify State involvement as a precursor to finding that a 'private' detention came within the scope of Article 5, notwithstanding the apparently wide positive obligation imposed by that Article. It is notable that the Court asked itself in both *Riera Blume* and *Rantsev* whether without the "active cooperation" of the State authorities, the deprivation of liberty would have occurred; this approach is consistent with that adopted in both *Storck* and *DD*.
98. In the circumstances, whilst it is proper to note that the Court has never (to my knowledge) had cause to consider a purely 'private' deprivation of liberty for which State responsibility under Article 5 could only arise by virtue of the positive obligation enshrined in Article 5, it seems to me that there is nothing in the Strasbourg jurisprudence which would prevent proceeding on the basis that where an adult is cared for at home in circumstances which amount to a deprivation of their liberty but State involvement is not causative of that deprivation of liberty, then the threshold for such a circumstance to come within the scope of Article 5 can be set relatively high.
99. Put another way, if the only way in which State responsibility for an (objective) deprivation of liberty within the home environment could arise is by virtue of the positive obligation imposed by Article 5, then the Court can properly take a relatively stringent view of what measures are required to afford such an individual "effective protection" and/or what would constitute "reasonable steps" to prevent such an objective deprivation of liberty.<sup>215</sup> In the case of Mrs Rochester,<sup>216</sup> then it might well be thought that those reasonable steps would extend to taking proceedings as to get her unlocked from the attic and transferred to an appropriate psychiatric institution. Conversely, in the case of an adult cared for by family members at home, who is considered to be deprived of their liberty only because (to jump ahead) they are not free to leave, then it might well be thought that Article 5 imposed no necessary obligations upon the State to afford that individual effective protection.<sup>217</sup>

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<sup>214</sup> No argument was advanced that the deprivation of Ms Rantseva in the apartment was lawful, and a finding of unlawfulness was made in this regard (as indeed it was made as regards the initial detention at the police station): see paragraphs 324 and 323 respectively.

<sup>215</sup> Both phrases coming from paragraph 89 of *Storck*.

<sup>216</sup> Whose situation would – it should always be remembered – always fall also to be considered in England and Wales by reference to the common law of false imprisonment.

<sup>217</sup> Other obligations would undoubtedly be imposed upon the State, not least the positive obligation under Article 8 to secure their physical integrity. This would provide a safeguard against a situation in which a person was cared for at home by their family but their well-being was compromised by the quality of that care, i.e. a further safeguard for Mrs Rochester.



100. Conversely, where State involvement is causative of an (objective) deprivation of liberty – most obviously where the State has removed the individual from their home and put them in another location (whether a hospital or a care home – then such a circumstance will fall squarely within the parameters of Article 5. I should note that the same would also apply where the adult is ‘allowed’ by the State to remain in their own home, but the regime of care amounting to a deprivation of liberty there is imposed by State authorities. Again, the State’s involvement would be causative of an objective deprivation of liberty.
101. As set out above, identifying a clear conceptual distinction which gives effect to the – understandable – instinctive reaction that an incapacitated adult cared for at home by their family should not lightly be found to be deprived of their liberty is not straightforward. The route that I have set out above provides one way in which to do so, which seems to me consistent with the Strasbourg jurisprudence; ultimately, though, we will have to look to Strasbourg to provide the answer.

*Adults cared for in private care homes*

102. One further category of people we need also give specific (if brief) consideration are those placed in private care homes by private arrangement, i.e. without any State involvement in the placement. By contrast to the position considered immediately above, an instinctive reaction is more likely to be that such adults are deprived of their liberty than where incapacitated adults are cared for at home. Interesting questions arise as to the extent to which (applying the analysis above) the State would be under any positive obligation to take steps to address the situation, but for purposes of the MCA 2005, it seems to me that these do not fall for consideration for one simple reason. Section 64(6) MCA 2005 provides that “*for purposes of [references to ‘deprivation of a person’s liberty], it does not matter whether a person is deprived of his liberty by a public authority or not.*” It seems to me that this means that it can properly be said that Parliament by enacting this provision should be taken to have assumed State responsibility in respect of all placements in hospitals and care homes, whether State or private, which amount (objectively and subjectively) to a deprivation of liberty. Put another way, it seems to me that wherever (and however) a person is placed in a hospital or care home, they are objectively deprived of their liberty there and are unable to give valid consent to the same, Parliament has deemed that such should be considered to fall within the scope of Article 5(1) for purposes of the MCA 2005.<sup>218</sup>

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<sup>218</sup> This squares with principle, because there is an extensive State system of regulation of hospitals and care homes, such that it would be much more difficult for it to be said that the State could not be aware of deprivations of liberty occurring within those placements than might be the case in respect of private homes. I am grateful to Jonny Landau of Ridouts for discussions in relation to this matter.



103. With that rather extensive preamble, I now turn to address each of the three elements necessary for there to be a deprivation of the liberty of an incapacitated adult, i.e. the objective element, the subjective element, and the requirement that the deprivation of liberty be imputable to the State.

#### The objective element

104. Taking the objective element first, as will perhaps have become obvious from my earlier remarks, I would suggest that, on a proper analysis, the Strasbourg jurisprudence is sufficiently consistent to allow us to identify that the guiding principle in determining whether or not an adult is deprived of their liberty is whether they are free to leave a particular place. All other considerations (in particular, considerations regarding the regime to which they are subject *within* that place) are subsidiary to that ultimate question. If a person is free to leave, then no matter how rigorous or intensive the regime within the hospital setting or the placement, there can be no deprivation of their liberty. Conversely, no matter how ‘light touch’ the regime, if the person is not free to leave then they should be considered to be deprived of their liberty.

105. Lest I be accused of being entirely too simplistic in my approach, I hasten to add that there are a number of qualifications to be attached to this core proposition, all of which I would suggest find their place in the Strasbourg jurisprudence and which ensure that there is an appropriate calibration between the principle and reality:

- a. there is a *de minimis* time element.<sup>219</sup> What would be a ‘non-negligible’ period of time would, I suggest, be context-specific, and I would suggest that the threshold between restriction and deprivation will be crossed more quickly:

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<sup>219</sup> In *Foka v Turkey* (Application No. 28940/95; decision of 26.1.09, the ECtHR stated at paragraph 75:

*“Even if it is not excluded that Article 5 (1) may apply to deprivations of liberty of a very short length (see X v Germany, No.8819/79, Commission Decision of 19 March 1981, Decisions and Reports (DR) 24, pp 158, 161), the Convention organs’ case law shows that this provision was considered not applicable in cases where the applicants’ stay in a police station lasted only a few hours and did not go beyond the time strictly necessary to accomplish certain formalities (see, for instance, Guenat v Switzerland, No.24722/94, Commission Decision of 10 April 1995, Decisions and Reports (DR) 81, pp.130, 134 [a period of approximately 2-3 hours]...”*

See also the passage from *DD* (paragraph 149) cited above where the Court had regard to a period of some 15-30 minutes where the applicant was administered medication and tied down. As noted above, it is unclear precisely the Court had regard to this additional element when it concluded that the entirety of the very much longer period amounted to a deprivation of liberty, but in any event its analysis would suggest that the Court has particular regard to draconian measures. By – domestic – contrast, the Divisional Court in *R(Sessay) v South London & Maudsley NHS Foundation Trust and Commissioner of Police for the Metropolis* [2012] 2 WLR 1071 appeared to accept that requiring a person to wait up to 8 hours in a (locked) suite for assessment for admission under the MHA 1983 would not automatically amount to an objective deprivation of their liberty: see paragraph 58. On the facts of the case, the Divisional Court held that the Claimant (who did not have the material capacity and who had remained in the suite for some 13 hours in total prior to her admission) had been deprived of her liberty throughout the period. The reasoning of the Divisional Court on the wider point – whilst of significant practical benefit to hospital trusts – is not without difficulties.



- i. the more draconian the measures used to require the person to remain at the place in question (for instance, by use of medication or physical restraint<sup>220</sup>); and
  - ii. the smaller the place in which the person is detained. In other words, locking a person in a cell or in the back of a police van is likely to lead to a deprivation of their liberty after a shorter period of time than requiring them to remain at a hospital or in a care home.<sup>221</sup>
- b. a (context-specific) *de minimis* geographical element, where:
- i. the more isolated the placement from the community and the further from the individual's home, the more likely it is that there will be a deprivation of their liberty;
  - ii. whether or not premises are locked or lockable is not determinative;
  - iii. a person can be on a rein which appears superficially extremely long but still be subjected to a deprivation of their liberty. In this regard, for instance, I note that a person subject to a standard authorisation can nonetheless be allowed to return home on 'home leave' but still be subject to 'recall' under the provisions of that authorisation and that such an authorisation contains within it the power to coerce a return if they refuse to return.<sup>222</sup> As a matter of logic, a standard authorisation should only continue for so long as a person is properly to be considered a 'detained resident' for purposes of Schedule A1,<sup>223</sup> but our Courts have – properly – found no difficulty in the concept of a person being so detained but nonetheless being allowed out of the care home for purposes of 'home leave';<sup>224</sup>

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<sup>220</sup> In this regard it should always be recalled that the procedural *Winterwerp* provisions of Article 5(1)(e) do not apply with their customary rigour in the case of emergency (see *Winterwerp v Netherlands* (1979) 2 E.H.R.R. 387 at 39; also *X v United Kingdom* (decision of 5 November 1981, Series A No.46) at paras 41 and 45). In the case of an emergency dictating the restraint and medication of a mentally ill individual, it may very well be the case that such would amount to a deprivation of their liberty even if carried out for a very short period of time but that such would be justified under Article 5(1)(e) even though (for instance) it was carried out prior to objective medical evidence of the mental disorder being obtained.

<sup>221</sup> On the basis that such (and indeed, the use of more draconian measures) would make the sensation of loss of liberty and/or the stress of the situation all the more acute from the perspective of the individual (see by analogy, *Stanev* at paragraph 101 where the Court took into account that the duration of the measures meant that the applicant “*felt the full adverse effect of the restriction imposed upon him.*”)

<sup>222</sup> There is an (unreported) judgment to this effect given by Mostyn J, a summary of which can be found on the 39 Essex Street website at [http://www.39essex.com/court\\_of\\_protection/browse.php?id=2907](http://www.39essex.com/court_of_protection/browse.php?id=2907).

<sup>223</sup> Paragraph 6 of Schedule A1 defines a 'detained resident' as a person detained in a hospital or care home – for the purpose of being given care or treatment – in circumstances which amount to deprivation of the person's liberty.

<sup>224</sup> In this regard, I must express some reservations as to the judgment in *C v KK and STCC* [2012] EWHC 2136 (COP), where the fact that KK spent part of every day at home as a sign that her circumstances did not amount to a deprivation of liberty (see paragraph 102). However, it seems to me that, with respect, this is to ask the wrong question: the question for purposes of



- iv. no matter how long the rein, therefore, key question remains whether the person's departure from the premises is at the sufferance of those in control of those premises;
- c. most importantly, those in authority must be prepared to take steps to give effect to the requirement that the person is not free to leave. In other words, those charged with responsibility for the individual must have in place (or at a minimum, be in a position to and prepared rapidly to take) measures which are aimed at securing that the person does not leave the place in question save with their permission. *HL* and *DD* made clear that those measures can, and frequently do, include supervision and control over the individual whilst they are in the place in question, but I would suggest that measures of supervision and control would not amount to a deprivation of liberty<sup>225</sup> unless they are in the last resort aimed at preventing an unauthorised departure from the premises.

106. I would venture to suggest that it is the last of these qualifications which is the most important, and also provides one of the means by which the Gordian knot into which we have tied ourselves can be cut. Some further comments in this regard are perhaps therefore in order:

- a. I accept that this approach requires us to look at the purpose for which the measures are or would be imposed, but from a different angle to that ruled impermissible in *Austin* and which I have criticised above. In particular, we would not be asking whether the measures were imposed for a therapeutic or beneficent purpose, and hence we would not risk blurring the lines between judging the existence of a deprivation of liberty and justifying it;
- b. precisely what 'freedom to leave' will mean in each case will depend upon the context. For instance:
  - i. in the case of the individual detained in the back of a police van for purposes of transporting them to hospital,<sup>226</sup> the freedom to leave in question is the freedom to leave that van for purposes of going any place than that van;

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Article 5 is whether *KK*'s return was at the gift of those with control over her residence. On the facts, it appears plain that it was (not the least because it was recorded that on one occasion when she said she did not wish to return to the care home after a visit, "her wishes were ignored": paragraph 99). The analysis of this point in *KK* also revolved in large part around the question of the 'normality' of her circumstances which, as discussed above, I would respectfully suggest again is a question which does not arise for consideration in the context of Article 5(1).

<sup>225</sup> But may well require justification as interference with the individual's Article 8 rights.

<sup>226</sup> As in *Sessay*.

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- ii. *mutis mutandis*, the same would apply as regards the case of an individual detained in an ambulance for purposes of transporting them to a care home for purposes of residing there to receive care and treatment;<sup>227</sup>
  - iii. in the case of an adult without the capacity to decide whether to stay in hospital to consent to medical treatment whom the authorities consider must stay in hospital to receive that treatment, then questions of longer term residence will not arise and the focus will simply be upon the freedom to leave that hospital pending the completion of the necessary treatment;
  - iv. in the case of an adult whom the authorities consider should reside at a care home on a sustained basis, then the freedom to leave will be the freedom to reside other than at the care home;
- c. notwithstanding this, I would venture to suggest that the question of whether those charged with responsibility for a person are prepared to take steps to prevent their unauthorised departure is one that can be answered with relative ease in any given situation;<sup>228</sup>
- d. an approach of this nature also helps make clear that the provision of even intensive care, support or supervision in an institution would not itself amount to a deprivation of liberty if those in authority were at any stage prepared to allow the person to leave. In this regard, I note that the Scottish Law Commission in its discussion of the thorny question of the relevance (or otherwise) or purpose and of ‘context’ tentatively suggested<sup>229</sup> that there “*there may be sufficient in the dicta of the Strasbourg Court regarding the importance of context and the positive obligations imposed by Articles 2 and 3, as well as in domestic law requiring the provision of care, to justify a statement [in any statutory definition] that such provision to those who are unable to care for themselves does not in itself amount to deprivation of liberty.*” I would suggest that considerations of purpose and context can go no further than this, and that, if the circumstances under which that care is provided amount to a deprivation of liberty then the individual must be afforded the protections required by Article 5;<sup>230</sup>

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<sup>227</sup> It will be recalled that a standard authorisation cannot be granted to cover a deprivation of liberty arising during the course of transport to a care home or hospital: see *GJ v Foundation Trust, PCT and the Secretary of State for Health* [2009] EWHC 2972 (Fam) [2009] COPLR Con Vol 567 at paragraph 132(11) per Charles J “*The new provisions in the MCA do not cover taking a person to a care home or a hospital. But they can be given before the relevant person arrives there so that they take effect on arrival (see for example para 52 of Sch A1 to the MCA).*”

<sup>228</sup> I accept that, in some circumstances, this may amount to asking an entirely hypothetical question where the individual in question can either formulate no coherent wish to leave or has no physical ability to put such wish into question. However, if those with control of the institution were of the view that (no doubt in their own interests) such individuals should not be allowed to leave without their permission, then the hypothetical will be satisfied. I am grateful to Richard Murphy for provoking further thoughts in this area with his pertinent comments.

<sup>229</sup> Paragraph 6.68, discussing, in particular, *Stanev* and the passage relating to *Dodov* at paragraph 128.

<sup>230</sup> In this regard, and whilst entirely agreeing with the Scottish Law Commission (at paragraph 6.64) that “[i]f the State is obliged under the Convention to provide [...] care and security [those persons at risk because of their mental disorder], it



- e. finally, I note<sup>231</sup> that the definition of deprivation of liberty for which I contend here is one that chimes neatly with the position adopted in another international instrument. In the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT'),<sup>232</sup> Article 4 provides thus:

*“1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 [i.e. a Subcommittee on the Prevention of Torture etc and national visiting bodies respectively] to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.*

*2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”*<sup>233</sup>

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would appear difficult also to conclude that the State is obliged to refrain from taking the necessary measures because of its obligations under Article 5.” I would respectfully suggest that this is to set up a straw man. Where a positive obligation arises to provide care and support to a person at risk because of their mental disorder but that person has to be provided with care and support in a setting from which they are objectively not free to leave, then either:

- (a) they can consent, in which case it does not amount to a deprivation of their liberty; or
- (b) they cannot give valid consent because they do not have the capacity to do so, in which case they will be deprived of their liberty, but such could be rendered lawful – in England – by Court order or authorisation under Schedule A1: see *G v E* [2010] EWCA Civ 822 [2010] COPLR Con Vol 431 at paragraph 57, where the Court of Appeal confirmed that our system is compatible with Article 5(1) ECHR. Importantly, the Court of Appeal emphasised in that case that “*the justification of detention in a case under MCA 2005 is not a medical decision but a decision for the court, to be made in the best interests of the person whom it is sought to detain;*” for ‘court’ substitute ‘supervisory authority’ in the case of those falling within the scope of Schedule A1;
- (c) they can consent, but refuse to do so, in which case compulsory measures under the MHA 1983 would have to be considered.

Moreover, as discussed both in *Cheshire West* and *LBL v PB and P* (discussed further in Section I below), the procedural provisions of Article 5 serve as an important safeguard to ensure that care and support delivered to those without capacity to consent to their placement is delivered in the least restrictive fashion possible. In other words, any tension between Articles 2,3 and/or 8 (insofar as they impose positive obligations upon the State to provide care and support for the vulnerable) on the one hand and Article 5 on the other is a creative tension which operates to the benefit of the individual.

<sup>231</sup> With due thanks to Lucy Series for bringing this to my attention.

<sup>232</sup> <http://www2.ohchr.org/english/law/cat-one.htm>, ratified by the United Kingdom on 10.12.03, the Protocol entering into force on 22.6.06. On its face, the logical consequence of this is that the Subcommittee on Prevention of Torture should be visiting a rather wider range of settings in England and Wales than might conventionally be thought to be the case.

<sup>233</sup> There is, I should perhaps say in the interest of full disclosure, something of a debate as to the precise scope of the settings covered by Article 4(2) and, in particular, what, if anything, turns on the fact that Article 4(2) omits the reference to ‘consent or acquiescence’ contained in Article 4(1) and hence – on its face – would seem to remove from the scope of OPCAT placements which have not been arranged by the State. This debate is discussed in a paper from the University of Bristol Human Rights Implementation Centre available via <http://thesmallplaces.blogspot.co.uk/2012/07/deprivation-of-liberty-and-struggle-for.html>, but in short the position would appear to be that the correct interpretation is that Article 4(1) defines the settings in which a deprivation of liberty may occur, and that Article 4(2) does not qualify this definition.



107. It follows from what I have set out above, that, save in the limited and specific manner set out above, questions of purpose/reason/motive should play no role in determining whether an incapacitated adult cared for in an institution is deprived of their liberty, and questions of ‘normality’ no role at all.
108. I would also venture to suggest that the issues of: (1) whether or not the person in question has somewhere else to go; and (2) whether or not their family members or carers wish them to leave<sup>234</sup> are not factors which weigh in the balance of whether or not they are free to leave a particular place. Both of these are factors which go to whether or not the deprivation of liberty is justified; but in the case of a person unable through incapacity to give the requisite consent I would suggest – again – that the question is whether or not they are free to leave, not what they would do with such freedom if it were granted them. I note in this regard that Mr Stanev would not appear to have had anywhere else to go, but that Strasbourg took this into account in determining whether the deprivation of liberty to which he was subject was justified, rather than whether he was deprived of his liberty in the first place:

*“The Court notes that the applicant was eligible for social assistance as he had no accommodation and was unable to work as a result of his illness. It takes the view that, in certain circumstances, the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty.”<sup>235</sup>*

109. Looking at matters from this angle, I suggest, is the appropriate way in which to proceed given the – inbuilt – power imbalance that always pertains in the case of those falling within the ambit of the DOLS regime.<sup>236</sup>
110. In addition to the other benefits outlined above, I would suggest that the approach that I have set out above allows us to categorise restrictions upon contact more correctly:
- a. there is a tendency to identify control over contact as an aspect of deprivation of liberty.<sup>237</sup> Whilst it is undoubtedly true that those with responsibility for Mr L were identified by the ECtHR as having

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<sup>234</sup> As appears to be suggested by the Scottish Law Commission in its suggestion (at paragraph 6.51 of the discussion paper, following on from the discussion of *Cheshire West, HL* and *Neary* at Section F above) that “[i]t may be that Scots law would benefit from a provision to the effect that, when a family is willing and able to provide a home for a person with incapacity, they should not be prevented from doing so by the person’s being placed in residential facilities elsewhere;” see also in this regard *C v Blackburn with Darwen Borough Council* [2011] EWHC 3321 (COP) [2012] COPLR 350 at paragraph 26(2), distinguishing between a situation in which a person has been removed from a home which is still realistically available and a situation in which a person would like to live in the community “but this is not realistically possible due to the extent of [their] difficulties.”

<sup>235</sup> Paragraph 134.

<sup>236</sup> And – not irrelevantly – consistent with the exhortations towards securing the personal autonomy of those suffering from disabilities enshrined in Articles 12 and 14 of the UN Convention on the Rights of Persons with Disabilities.



control over his contact arrangements in the context of the analysis as to whether he was deprived of his liberty, I would reiterate that it seems to me that, on a proper analysis, the Court’s real concern was with the limitation upon his freedom to leave the hospital, and the limitations upon contact were very much subsidiary to this.

- b. in my view, much the more conceptually satisfactory way in which to approach questions of restrictions upon contact is through the prism of Article 8 ECHR. The ECtHR has recently<sup>238</sup> reemphasised the importance of Article 8 in respect of the detained in psychiatric institutions, and it seems to me that if we separate out questions of control over contact from control over movement we can eliminate a further – and unnecessary – element of complexity from the analytical exercise that must be undertaken in each case.

#### The subjective element

111. Turning now to the subjective element, this has traditionally been viewed as a separate element of the trinity, and irrelevant to the question of whether the objective element is satisfied. However, as noted by the Scottish Law Commission, it may be the case that the lines are being blurred. As the Scottish Law Commission notes in their discussion paper:

*“6.73 The relevance of consent to whether there is a deprivation of liberty at all has not featured to a great extent in any decision of the European Court. But the Court has commented on the possible role of a substitute decision-maker in this context:*

*‘The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned’.*<sup>[239]</sup>

*It would appear that ‘valid replacement’ of the wishes of the person with incapacity would prevent the regime under which he or she is living from being a deprivation of liberty at all. It may therefore be that Scots law could make specific provision for the giving of consent by substitute decision-makers to care of a person with incapacity in conditions which, absent such consent, would amount to deprivation of liberty.”*

112. For my part, I must confess to having some considerable reservations about adopting any such approach in England and Wales:

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<sup>237</sup> See for instance both the *Draft Illustrative Guidance on Bournewood* discussed above and Chapter 2 of the DOLS Code of Practice, both of which identify restrictions upon contact as factors pointing towards there being a deprivation of a person’s liberty.

<sup>238</sup> *Munjaz v United Kingdom*. Application No. 2913/06, decision of 17.7.12.

<sup>239</sup> *Stanev v Bulgaria* at paragraph 130.

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- a. it is not clear to me that the Grand Chamber were, in fact, endorsing the concept of substituted consent as negating the existence of a deprivation of liberty. This would be inconsistent with the approach taken in previous cases, where the Court has been astute to seek to identify whether or not an individual with capacity had consented to the placement.<sup>240</sup> Indeed, in *Stanev* itself, the Grand Chamber expressly identified<sup>241</sup> the applicant's lack of consent to the placement in question as a particular factor pointing to a deprivation of liberty;
  - b. it is also difficult to square the concept of substituted consent with the provisions of Articles 12 and 14 of the Convention on the Rights of Persons with Disabilities and the requirement that they impose to seek to maximise the autonomy of those suffering from disabilities. In particular, it seems to me that there is a very real risk that, unless very carefully circumscribed, the power of one person to consent on behalf of another to a situation which would otherwise amount to a deprivation of liberty is a power which is rife with possibilities for abuse. This is particularly so because it would also remove the vulnerable adult from the ambit and the protection of Article 5 (including, in particular, Article 5(4)<sup>242</sup>), because by definition they would not be deprived of their liberty. Whilst they would – of

<sup>240</sup> Albeit that, as noted above, that required some rather unconvincing intellectual gymnastics in the subsequent discussions of *HM*.

<sup>241</sup> Paragraph 132.

<sup>242</sup> An “important procedural protection,” per Munby LJ in *Cheshire West* at paragraph 4. The importance of Article 5(4) in this context was also emphasised by the ECtHR in *DD* at paragraphs 159 ff, and, in particular, paragraphs 163-4, where the Court said this:

“163. Among the principles emerging from the Court’s case-law on Article 5 § 4 concerning “persons of unsound mind” are the following:

- (a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to bring proceedings “at reasonable intervals” before a court to put in issue the “lawfulness” – within the meaning of the Convention – of his detention;
- (b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;
- (c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; see also *Stanev*, cited above, § 171).

76. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances of the present case, where the applicant’s placement in the Kėdainiai Home was initiated by a private individual, namely the applicant’s guardian, and decided upon by the municipal and social care authorities without any involvement on the part of the courts.” (emphasis added). The same mantra appears in *Kędzior* at paragraphs 75-6.



course – retain their rights under the other articles of the ECHR, only Article 5 contains an express requirement (in Article 5(4)) for the state to provide for review of measures imposed upon them;

- c. it is further difficult to square the concept with the recommendation of the Committee of Ministers of the Council of Europe<sup>243</sup> that: “[m]ember states should ensure that appropriate provisions exist to protect a person with mental disorder who does not have the capacity to consent and who is considered in need of placement and does not object to the placement.” It is not immediately obvious how removing such a person from the scope of Article 5 and hence depriving them of the protections of Article 5(4) is in the spirit of this recommendation;
- d. further, as noted above, the decision in *Stanev* (and indeed those in *Shtukaturvov, DD, Kędzior* and *Mihailovs*) was taken in contexts where the relevant domestic legal provisions were predicated upon a status-based approach to capacity. In such a case, one can understand why it is that the Court might strive to identify a way in which a person who has been declared partially or totally incapacitated could nonetheless be able to give or withhold their ‘consent’ to a placement by way of expressing wishes and preferences, save where such a person was simply unable to do so. However, under the MCA, it is necessary that the specific question be asked whether the person has “*capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being the relevant care or treatment.*”<sup>244</sup> I would suggest that it makes rather less sense in such a case (or in the case of any regime predicated upon a functional approach to capacity) to seek to differentiate between the declared status of the individual and their actual ability to ‘consent’ to a placement.<sup>245</sup> Rather, the question of whether or not the subjective element is satisfied can be equated directly with the question of whether the person has capacity to decide whether to be accommodated in the place in question (and there to be subject to the restrictions which, objectively, amount to a deprivation of their liberty).<sup>246</sup> This approach was adopted in *A PCT v LDV, CC and B Healthcare*

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<sup>243</sup> Recommendation Rec(2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder. The Recommendation is non-binding, but given its origin, it should arguably hold particular sway with the European Court of Human Rights.

<sup>244</sup> Paragraph 15 of Schedule A1.

<sup>245</sup> I am quite aware in saying this that it could be said that I am guilty of seeking to minimise an aspect of the Strasbourg jurisprudence which might not suit my thesis. However, it does seem to me that it is quite proper to draw attention to the very different domestic legal contexts in which the detained individuals lived. The reader will recall that in the specific context of England and Wales (pre-MCA, but where the approach at common law was already based upon capacity being issue specific), the Court found in *HL* that the subjective element was not satisfied where Mr L was “legally incapable of consenting to, or disagreeing with, the proposed action” (paragraph 90). The Court did not use the phrase ‘subjective element,’ which was first used in *Storck*, but it is clear that paragraph 90 was discussing that element.

<sup>246</sup> I.e., for purposes of Schedule A1, a person who meets the mental capacity requirement set down in paragraph 15 is by definition a person who cannot validly consent to the confinement in question, even if they are compliant.



*Group*,<sup>247</sup> Baker J assessing, first, whether the circumstances in which the patient was cared for at a psychiatric hospital amounted objectively to a deprivation of liberty, and then posing the question as to whether she had capacity to consent to her accommodation at the hospital in those circumstances;<sup>248</sup>

- e. at a practical level, any such approach in England and Wales would it seem to me require legislation, rather than judicial interpretation. Neither a donee of a lasting power of attorney nor a Deputy has the power to authorise a deprivation of liberty,<sup>249</sup> (nor would a guardian appointed under the MHA 1983<sup>250</sup>). I would suggest that it would be an unacceptably robust exercise of statutory construction for the Supreme Court to construe s.64(5) MCA 2005 in such a fashion that the careful checks and balances contained in the balance of the Act upon donees and deputies were circumvented by simply providing them with the power to negate what would otherwise be a deprivation of liberty by consenting to the situation. I would suggest that such a course of action could only properly be undertaken by way of a full legislative debate followed by amendment to the MCA 2005 and/or MHA 1983 so as to clarify the circumstances under which substituted consent could be given by a donee, a deputy or a guardian.

- 113. That having been said, the approach – tentatively – suggested by the Scottish Law Commission would provide another way in which to cut the Gordian knot. At least in the case of those individuals who (a) lack the capacity to take the decision as to where to reside for purposes of receiving care and treatment; and (b) are either (i) unable to make their wishes and feelings known at all; or (ii) express those wishes and

<sup>247</sup> [2013] EWHC 272 (Fam).

<sup>248</sup> Paragraph 28. Baker J did not answer the question of whether LDV had this capacity, but rather set down what he considered (on the facts of the case before him) to be the information relevant to that decision.

<sup>249</sup> Section 11 MCA 2005 authorises a donee to restrain P and/or to restrict P's liberty of movement (s.11(5)(b)), subject to certain conditions. S.4A provides that no person may deprive another of their liberty, unless: (1) they are giving effect to an order of the Court; (2) the deprivation is authorised by Schedule A1; or (b) (by s.4B) the deprivation of liberty is necessary for life-sustaining treatment or doing any vital act, but only where there is a question whether about the person is authorised to deprive P of his liberty under the provisions of s.4A. Section 20 contains similar provisions to s.11 in respect of deputies. Paragraph 20 of Schedule A1 provides that there is a 'refusal' for purposes of the 'no refusal' test if deprivation of liberty in a hospital or care home for the purposes of receiving treatment would conflict with a valid decision made by a donee of a power of attorney or a deputy appointed by the Court of Protection, on behalf of the person the deprivation of whose liberty is sought. A donee of an LPA or a deputy can therefore (if the person lacks the requisite capacity) decide where P is to live; they cannot though authorise any deprivation of liberty to which P is subject in consequence of that decision, which must be authorised either by means of Schedule A1 (if in a care home or a hospital) or a Court order.

<sup>250</sup> A guardianship order would, by virtue of the effect of paragraphs 2, 3, and 5 of Schedule 1A, prevent the authorisation of a deprivation of a person's liberty at a place other than that identified in the order. However, as per the MCA Code of Practice paragraph 13.16: "*Guardianship gives someone (usually a local authority social services department) the exclusive right to decide where a person should live – but in doing this they cannot deprive the person of their liberty.*" This approach was endorsed (albeit obiter) in *C v Blackburn with Darwen Borough Council* [2011] EWHC 3321 (COP) [2012] COPLR 350. In this case, Peter Jackson J also suggested (also obiter, but it is suggested correctly) that where there are genuinely contested issues about the place of residence of an incapacitated but resistant adult, they should not be determined either by way of the operation of the guardianship regime or by means of a standard authorisation, but should be submitted for decision by way of an order from the Court of Protection under s.16 MCA 2005.



feelings in a sufficiently inconsistent fashion that they cannot provide a reliable guide to their true views,<sup>251</sup> then it might be said that there is a legitimate basis upon which a decision can be taken by another to consent to the arrangements on their behalf and that such consent should operate *as if* consent was given by P.

114. In other words, in such circumstances, it might properly be said that it would be impossible for those concerned with the care of an adult to know whether on an ongoing basis the individual was content or otherwise with the objective circumstances and therefore whether they were, even if not formally consenting, not objecting to them (and, hence, were therefore not at risk, *inter alia*, of suffering restraint and/or medication so as to overcome those objections). However:

- a. any travel down this route would have to be very cautious, given the fact that Mr L never sought to leave Bournemouth Hospital, never expressed a wish to do so, and was compliant with the regime there, but was found by the ECtHR not to have consented to his admission;
- b. as noted by the Grand Chamber in *Stanev*<sup>252</sup> and reiterated in *DD* and *Mihailovs* (and as enshrined in the MCA<sup>253</sup>), merely because a person lacks the capacity to take a decision does not mean that they are not capable of expressing a wish/feeling or that such wishes and feelings should not be taken into account when reaching a decision upon their behalf. Very considerable care would have to be taken to ensure that it was only persons whose true wishes and feelings cannot be ascertained (either at all or reliably) who could fall within this class of individuals for whom substituted consent could be given;
- c. whilst concerns as to the abuse of a substituted consent power by individuals could be alleviated entirely or very substantially by restricting the use of such power to Courts upon application by public body or individual, this would give rise to its own class of problems.<sup>254</sup> In particular:
  - i. how could a Court – a body bound to act compatibly with the ECHR by virtue of the HRA 1998 – grant a substituted consent without being properly satisfied that such a consent was appropriate? And how could it so satisfy itself without an examination of the facts and also – arguably –

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<sup>251</sup> Which would appear perhaps to be the classes of people whom the Grand Chamber had in mind in the cryptic sentence of paragraph 130 in *Stanev* under discussion when it referred to it sometimes being “*difficult to ascertain the true wishes or preferences of the person concerned.*”

<sup>252</sup> Picking up on *Shtukaturov*.

<sup>253</sup> With the added significance of the decision-specific and functional basis of the MCA 2005, discussed above.

<sup>254</sup> And, whilst not determinative, would also lead to an increase rather than a decrease in demands upon the Court system (whether that be upon the High Court or, more likely, other ranks of the judiciary within the Court of Protection).



whether the position put before it was the least restrictive option available? Would P's interests have to be represented upon such a hearing, and by whom?

- ii. if a Court consented on behalf of P to what would otherwise be a deprivation of their liberty, what obligations would thereby be imposed upon the Court in terms of the review of that consent (presuming, I hope uncontroversially, that it would be unacceptable for a Court to give a 'once for all' consent and thereby remove P from the scope of Article 5 for the potentially indefinite duration of their residence at the particular placement)?

115. In the circumstances, therefore, and whilst I for one will look with very considerable interest at the development of the Scottish proposals,<sup>255</sup> I consider that any principled attempt to cut the Gordian knot should be focussed not on the subjective element, but rather the objective element. Hence my modest (but I hope not Swiftian) proposal above as to strip away the complexities in the approach to the objective element.

#### Deprivation of liberty imputable to the state

116. I have addressed this question in some detail above when seeking to draw a conceptual distinction between the position of adults cared for at home by family members and adults cared for by the State (at home or in a placement of the State's choosing). Whilst the position in relation to adults cared for at home is, I accept, not without difficulties, I would suggest that in every case falling within the provisions of Schedule A1, Parliament has resolved the question of whether there is the requisite State involvement in the placement by virtue of the 'deeming' provision in s.64(6) MCA 2005.

### **I: What do we do (as opposed to what should we do)?**

117. Whatever the Supreme Court (or even Parliament) may do in the fullness of time, the reality is that those on the ground and in the Courts are fixed with the current regime for a considerable period of time to come. Before turning to a suggestion for a pragmatic way in which to proceed, it is perhaps worth reminding

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<sup>255</sup> And also the moves to enact an equivalent to the MCA 2005 in the Republic of Ireland. In this regard I note (with gratitude to Lucy Series for bringing this to my attention) the evidence given to the Houses of the Oireachtas Committee on Justice Defence and Equality by (inter alia) the Irish Mental Health Commission criticising the DOLS regime as a model for the Republic of Ireland to follow. See <http://debates.oireachtas.ie/JUJ/2012/02/22/00003.asp>.



ourselves of the immediate reaction of one (experienced) Best Interests Assessor<sup>256</sup> to the *Cheshire West* decision:

*“I am very grateful to Lucy Series for her enlightening commentary on the Court of Appeal ruling in Cheshire West,<sup>257</sup> but cannot agree with her assertion that the judgement ‘will offer greater clarity as to what circumstances amount to a deprivation of liberty’. In my view it makes the task of distinguishing ‘deprivation of liberty’ from ‘restraint’, which was always tricky, almost impossible, by introducing ‘purpose’ and ‘reason’ into the mix.*

*Whilst the contextual details of the Cheshire West case differ significantly from my own area of practice in acute hospital settings, I am extremely worried about the general point made in the judgement that we should have regard for the objective ‘purpose’ and ‘reason’ why someone is placed and treated as they are in determining whether or not deprivation of liberty is occurring. Realistically, non-legal professionals trying to implement this legislation in practice will struggle to understand the fine distinctions made in the judgement between objective ‘reason’ and ‘purpose’ and subjective ‘motivation’ and ‘intent’.*

*As a best interests assessor, I am no longer confident that I know how to do my job – the objective ‘reason’ or ‘purpose’ of restrictions has always formed, primarily, part of the analysis of the second part of my assessment – to be considered after I have made a determination as to whether the individual is, objectively, deprived of their liberty. I’m now not sure how to make that judgement, if the benign ‘purpose’ of any restraint is to be weighed in the balance alongside other factors such as the intensity and frequency of the restrictions and their impact on the individual concerned. In an acute hospital setting, where the self-evident purpose of interventions is to preserve life and promote the patient’s health and well-being, how severe would any restrictions need to be to warrant a DoLS authorisation? How much weight is to be given to the restraining party’s benign objectives?*

*As a trainer of acute hospital staff, I feel that I no longer know how to explain how they are to identify cases that may amount to deprivation of liberty, when it goes without saying (assuming our hospitals are not over-run with Harold Shipmans and Beverly Allitts) that the objective ‘purpose’ of medical and nursing interventions is always, one would hope, to save life and limb.*

*The problem is that, despite their noble intentions, doctors and nurses do not always know what’s best (even if they think they do!), particularly when it comes to the need to impose restrictions on a patient’s liberty. For example, we had a case where a patient was confined to bed virtually 24/7, ‘in her best interests’, due to the risk of falls – it was only thanks to the DoLS process that the hospital were forced to accept that this restriction could be reduced (and deprivation of liberty thereby avoided) by the provision of increased staffing, to enable the patient more freedom to wander. There is a danger that such patients will no longer be afforded the protective scrutiny of the DoLS scheme, if we are to teach staff that the benign ‘purpose’ or ‘reason’ underlying restrictions may keep them out of the ‘deprivation’ zone.*

*As a non-legal professional endeavouring to keep up to date with the case law in this area of practice, I am dismayed by this judgement, which I feel throws yet more mud into waters that were already murky and difficult to navigate.”*

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<sup>256</sup> Sue Neal, the MCA Implementation Lead for NHS Lancashire, in response to a call from the editors of the 39 Essex Street Court of Protection Newsletter for comments. See the 39 Essex Court of Protection Newsletter for December 2011:

[http://www.39essex.com/docs/newsletters/cop\\_newsletter\\_december\\_2011.pdf](http://www.39essex.com/docs/newsletters/cop_newsletter_december_2011.pdf).

<sup>257</sup> [http://www.39essex.com/docs/newsletters/cop\\_newsletter\\_november\\_2011.pdf](http://www.39essex.com/docs/newsletters/cop_newsletter_november_2011.pdf).



118. For my part, and whilst I can see considerable difficulties for those advising upon and implementing the DOLS on the ground pending the resolution of the appeal in *Cheshire West*, I would respectfully commend to the attention of those in the field the decision of Charles J in *LBL v PB and P*<sup>258</sup> as a way pragmatically to approach matters.

119. In that case, having heard detailed argument as to whether P was deprived of his liberty at the care home in which he was placed, Charles J ultimately declined to rule upon whether P was so deprived. However, at paragraph 64, he went on to say this:

*“...I have concluded that it is not necessary or appropriate for me to address this issue in this judgment on a basis that may well be overtaken by the reserved judgment of the Court of Appeal [in Cheshire West], because:*

- (i) I am quite satisfied that the proposed care plan and regime for P promotes his best interests and such aspects, if any, of it that mean that he is being deprived of his liberty by its implementation should be authorised. Correctly, in my view, no less restrictive regime was suggested.*
- (ii) There is to be a review and until then I consider that a continuation of the present regime, that is an order under s 16(2)(a) of the Mental Capacity Act 2005 (MCA) that insofar as there is a deprivation of P’s liberty under the present care plan/regime it is authorised in his best interests is appropriate in this case because of its history, the position now reached in it and the state of flux in the authorities. (In other cases, and to the same effect, orders have authorised any deprivation of P’s liberty under an identified care plan as being in P’s best interests.)*
- (iii) I have reached this conclusion notwithstanding that my present view is that if the DOLS regime applies, or would apply if there was a deprivation of liberty, it should be used in preference to authorisation and review by the court. That view is based on the points made below.*
- (iv) At present, it seems to me that in the exercise of the welfare jurisdiction and approach under the MCA the most important issue is whether consent or authorisation should be given to a care regime on behalf of a person who does not have the capacity to give consent himself. That question is not determined by whether or not the person is being deprived of his liberty but by an assessment of whether the care regime is in his best interests. This will necessarily include a determination of whether a less restrictive regime would promote P’s best interests and when reviews should take place.*
- (v) I naturally acknowledge that the DOLS regime is predicated on there being a detained resident and thus a person who is ‘being deprived of his liberty’ (para 6 of Sch A1 to the MCA) and that for other reasons under the MCA the determination of that question is or can be said to be relevant or something that should be decided. But the approach of s 4A(3) and (4) which refer to ‘giving*

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<sup>258</sup> [2011] EWHC 2675 (COP) [2012] COPLR 1.



*effect to an order made under s 16(2)(a)' recognises that the crucial issue is the best interests issue and not the question whether there is, or is not, a deprivation of liberty.*

(vi) *Absent argument and knowledge of the approach that the Court of Appeal will take in its reserved judgment, in the Cheshire case it seems to me at present that:*

(a) *there will always be borderline cases on the question whether a person is being deprived of his liberty, and cases in which there will be a deprivation of liberty if identified contingency planning is implemented (involving say restraint) but until this occurs P will not be being deprived of his liberty,*

(b) *in those cases it would be prudent and in accordance with a best interests approach for P, a self interest approach for the care provider and an approach that has regard to the relevant European Convention rights to ensure that:*

(i) *there is no breach of Art 5, and*

(ii) *the regime of care is reviewed to check that it remains in P's best interests and is the least restrictive available regime to bring about that result,*

(c) *the DOLS regime can be applied in such cases of doubt and thus to cover those cases and so the 'what if situation' that a court may differ from the view of the relevant assessors on the application of Art 5 and thus whether there is a deprivation of liberty and there was a need to apply the DOLS regime. Section 3 of the Human Rights Act 1998 (HRA) supports that view,*

(d) *all the qualifying requirements in the DOLS regime (see para 12 of Sch A1 to the MCA) would be appropriate, or at least not inappropriate or preliminary, matters to consider in a best interests consideration and review of a doubtful or 'what if' case, or one in which if certain events occur in an emergency there would be a deprivation of liberty,*

(e) *those requirements, and a best interests consideration within or outside them, will necessarily include a need to consider that the least restrictive available regime is put in place, and they are much easier concepts for assessors and the courts to apply, and*

(f) *those requirements can be applied without the assessor or the court getting tied down in the difficult, time consuming and essentially unnecessary task of deciding whether or not (and if so when) the implementation of the care regime constitutes a deprivation of liberty,*

*and so*

(vii) *there is much to be said for an approach under DOLS and by the court that focuses on best interests and the other qualifying requirements and provides authorisation of a (or any) deprivation of liberty under an identified care regime that is so identified as the least restrictive available regime to best promote P's best interests."*



120. This approach<sup>259</sup> chimes neatly with that taken by Peter Jackson J in *Neary*,<sup>260</sup> where, embarking upon his discussion of the ECHR issues which fell for determination in the case, he had this to say:

*“150. The parties presented the issues in a different order, with the claim under Article 8 following the claims under Article 5. It nonetheless seemed to me during the hearing that the issue that arises under Article 8 represents the nub of the matter. The principles surrounding the right to respect for family life are well understood. They do not owe their origins to the Mental Capacity Act 2005, or even, I would suggest, to the Human Rights Act 1998, and they apply directly to cases where the legitimacy of the removal of a person from a family is in question. There is no automatic precedence between Convention articles. There will of course be cases where a grave breach of Article 5 overshadows consequences in terms of Article 8, but this will not always be so. In the present case, it seems to me that the real issue relates to Steven's absence from his family home, rather than the deprivation of liberty to which he is to some degree or other necessarily subject wherever he lives.*

*151. In saying this, I do not imply that deprivation of liberty issues are unimportant in Steven's case. But by viewing the case primarily through the prism of Article 5 one risks repeating a central fallacy and conflating the secondary question of whether a person is lawfully deprived of his liberty with the primary question of where he should be living.”*  
(emphases added)

121. Taking the guidance contained in these two cases<sup>261</sup> together, it seems to me that, pending further clarification from the Courts, those who are concerned with the question of whether or not there is a deprivation of liberty would be well-advised (a) to err on the side of caution and to bring about ‘precautionary’ applications for assessment and authorisation; and (b) to be astute to the fact that DOLS authorisation should never be used as a method to stifle a true welfare dispute about residence requiring resolution by the Court.
122. I am aware that there is a natural reluctance on the part of those involved in the authorisation procedure (not least because it costs precious money and time) to engage that procedure<sup>262</sup> save where it is absolutely necessary; I am also aware that there continues to be a natural aversion to the idea that a person may be deprived of their liberty, such that ‘precautionary’ authorisations may not appeal. However:

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<sup>259</sup> Which Charles J has recently reiterated, in a somewhat different context, in *AM v (1) South London & Maudsley NHS Foundation Trust and (2) The Secretary of State for Health* [2013] UKUT 0365 (AAC).

<sup>260</sup> *Hillingdon LBC v Neary* [2011] EWHC 1377 (COP) [2011] COPLR Con Vol 632.

<sup>261</sup> Neither of which it seems to me are inconsistent with anything said in *Cheshire West*.

<sup>262</sup> Or to take steps to ensure that care homes engage the procedure where – as is so often the case – the care home is not under the management of the local authority and statutory responsibility for making the application therefore lies in the first instance with the care home.



- a. for the reasons set out at length above, I have some considerable doubts as to whether the approach adopted by the Court of Appeal to deprivation of liberty is an approach which accords with the Strasbourg jurisprudence, and public authorities will no doubt consider very carefully the extent to which they would wish dramatically to narrow the classes of persons whom they will consider to be deprived of their liberty.<sup>263</sup> I should emphasise that I am not for one moment advising or to be taken as advising public authorities to ignore a ruling of the Court of Appeal, simply noting that public authorities will wish to consider very carefully the application of that ruling to the facts of any individual case;
- b. further and in any event, as noted by Charles J, the very exercise of undertaking the assessment procedure stands itself as an important and useful exercise in care-planning and, in particular, ensuring that proper consideration is given to whether the regime in place is the least restrictive available and in P's best interests. It is therefore an exercise which accords both with good care practice and with the requirement to secure P's autonomy under Article 8 ECHR and Article 12 of the UN Convention on the Rights of Persons with Disabilities. It may well be that the outcome of an assessment in any case will be that the person is not deprived of their liberty, such that a standard authorisation is not granted (or renewed) but that does not detract from the importance of having undertaken the exercise in the first place.

## **J: Deprivation of liberty: three further aspects**

123. In the concluding part of this paper, I wish to address – shortly – three further (unrelated) aspects of the concept of the deprivation of liberty as it applies in the context of the MCA 2005: (1) the burden of proof; (2) the concept of residual liberty; and (3) the impact of the decision of the Supreme Court in *Lumba* upon claims for unlawful deprivation of liberty in the case of those detained in care homes and hospitals under the provisions of the MCA 2005.

### The burden of proof

124. One aspect of the decision of Baker J in *Cheshire West* which was not the subject of appeal to the Court of Appeal is his conclusion as to where the burden of proof lies in cases involving a deprivation of liberty. I

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<sup>263</sup> In this regard, it is worth recalling that it would be very difficult to criticise a public authority for 'wrongly' assessing someone to be deprived of their liberty when they are in fact only subject to restrictions upon that liberty, given that the effect of such a decision is that the person will be subjected to greater scrutiny and provided with greater protections than would otherwise be the case. As has been pointed out by a number of commentators (including Paul Barber, in an email to me) best interests assessors cannot recommend the grant of an authorisation unless satisfied that P is in fact deprived of their liberty, and in so doing must apply the law as it stands to the best of their ability. However, it seems to me that it can properly be said that there is such a mismatch between the domestic decisions and those of Strasbourg that a BIA (and anyone else involved in the process) can properly be forgiven for erring very considerably upon the side of caution.



do not know whether the Supreme Court will be invited to pick up the baton in this regard, but for the reasons which follow suggest that such might be appropriate as the position is rather more subtle than that set down in the judgment.

125. At paragraphs 50-2, Baker J reviewed the position as follows:

*“50. There is, however, one further point of law which calls for comment. In his submissions on behalf of the local authority, Mr Allen argued that there is an analogy between claims for false imprisonment and cases like this in which the question arises whether circumstances amount to a deprivation of liberty. Mr Allen draws on this comparison in support of his contention that the court must follow the principle ‘he who asserts must prove’. Specifically, he submits that ‘as it is the other parties (ie the Official Solicitor, on behalf of P, and M) who assert that Art 5 was engaged, it is for them to prove that the circumstances amount to a deprivation, rather than a restriction on liberty’. He goes on to argue that the requisite standard of proof is the balance of probabilities, and that ‘the more serious allegation or its consequences if proven, be stronger must be the evidence to satisfy the balance of probabilities’.*

*51. This argument is robustly rejected by Mr O’Brien on behalf of M, supported by Mr Burrows on behalf of the Official Solicitor. Mr O’Brien describes Mr Allen’s submission on this point as ‘misconceived’. He argues that the Court of Protection is exercising a protective jurisdiction in relation to incapable adults and submits that, whilst rebutting the presumption of capacity must be on the balance of probability, no such burden or standard is provided for in relation to best interests decisions. The question of best interests is primarily an inquiry by the courts, weighing into the balance various factors. No party is under a burden of proof; rather the court, after investigating best interests, decides that issue on a balance of probability.*

*52. I unhesitatingly accept Mr O’Brien’s submission on this point and reject Mr Allen’s contention. The processes of the Court of Protection are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests. It may be that one party or another asserts a fact which, if in dispute, must be proved, to the requisite standards of the balance of probabilities, but the question of whether or not the circumstances as a whole amount to a deprivation of liberty is not one which falls to be determined by application of a burden or standard of proof.”*

126. With respect, I would venture to suggest that the decision of Baker J on this point conflates three questions: (1) whether the person is in fact deprived of their liberty at all; (2) whether that deprivation of liberty is lawful; and (3) whether it is in P’s best interests to reside at the particular place in question subject to the care regime in place at the material time. I would suggest that the true position should be this:

a. as Lord Dyson identified in *Lumba v Secretary of State for the Home Department*,<sup>264</sup>

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<sup>264</sup> [2011] 1 AC 245, at paragraph 53. The case was decided in March 2011, but it does not appear to have been cited to Baker J. See also in this regard the discussion of the correct approach to determining questions of the lawfulness of detention in the



“53... *It is not in dispute that the right to liberty is of fundamental importance and that the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights and/or constitutes the commission of a tort ...*

...

*...All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so ...”*

- b. Lord Dyson’s comments were made in the context of false imprisonment at common law, but I would suggest that the same approach must apply in relation to Article 5(1). I note in this regard that Clayton and Tomlinson note that in claims brought under the HRA 1998, the Court requires a victim to prove a breach of a Convention right on the conventional principle that he who asserts must prove,<sup>265</sup> the burden of establishing justification for interference with Convention rights lying with public authorities,<sup>266</sup>
- c. I would suggest that it would be curious if the burden of proof in establishing a deprivation of liberty differed as between the Court of Protection and the Queen’s Bench Division, in particular because the Court of Protection has the power to grant declarations and damages for breaches of the Convention,<sup>267</sup> and it would be strange if the Court was required to approach the question of whether there was a deprivation of liberty in two different ways depending upon whether it was considering the question by reference to its inquisitorial jurisdiction or in the context of an application for damages for breach of Article 5;
- d. I note that age assessment cases the Courts have accepted that the jurisdictional question of fact (i.e. the age of the individual and hence whether they are not they are a child) is a question which falls for judicial determination and does not give rise to questions of burden of proof.<sup>268</sup> The question of whether someone is deprived of their liberty is also, ultimately, a question of fact, affording of a yes or

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speech of Lord Steyn in the *Bournemouth* case in the House of Lords [1999] 1 AC 458 at 494C-G (Lord Steyn dissented on the question of whether or not Mr L was deprived of his liberty, but the discussion in this passage went to process, not outcome).

<sup>265</sup> Clayton & Tomlinson, *The Law of Human Rights* (OUP, 2<sup>nd</sup> Edition, 2009) at paragraph 6.187.

<sup>266</sup> *Ibid*, citing *Kelly v BBC* [2001] Fam 58, *R(Samaroo) v Home Secretary* (2001) UKHRR 1150 and *R(KB and Others) v MHRT & Anor* [2002] ACD 85.

<sup>267</sup> *YA(F) v A Local Authority* [2010] EWHC 2770 (COP) [2010] COPLR Con Vol 1226.

<sup>268</sup> See, for a very recent summary of the case-law, *TS v LB Croydon* [2012] EWHC 2389 (Admin), where, having reviewed the authorities, in particular *R (CJ) v Cardiff City Council* [2011] EWCA Civ 1590, Fulford J summarised at paragraph 9 the position in such cases as being one in which “*in which the court's duty is to make a factual determination on the basis of the available evidence, untrammelled by any consideration of the burden of proof or presumption in favour of either party. Whether the judge, as the fact finder, accepts any of the competing suggested ages or dates of birth (there are in excess of three in the present case) depends on the overall view he or she forms of the evidence and the viability of the conclusions of the experts.*”



no answer. It might be said, therefore, that the approach taken in such cases should apply by analogy (in a similar vein to that suggested by Baker J). However, it is the particular nature of such cases which has given rise to a departure from the normal rule.<sup>269</sup> Whilst the question of whether or not an individual is a child is fundamental to the existence of certain statutory duties imposed upon local authorities, the question does not – directly – engage that individual’s Convention rights in the same way as does the question of whether or not the individual is deprived of their liberty. Moreover, questions of justification for interference with an individual’s Convention rights (and hence of burdens of proof in establishing justification) do not arise in the context of age assessment cases;

- e. I would therefore suggest that the rule identified by Lord Dyson should apply in the determination (and justification) of the existence of a deprivation of liberty, whether that determination takes place in the Queen’s Bench Division or in the Court of Protection.

127. I should emphasise that I would agree entirely that the question of whether or not a particular state of affairs is in P’s best interests is a question which engages the Court’s inquisitorial jurisdiction, and as such questions of burdens of proof do not arise in the same fashion.<sup>270</sup> However, if the Court is asked to

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<sup>269</sup> See Pitchford LJ in *CJ* at paragraph 22: “I am persuaded that the nature of the inquiry in which the court is engaged is itself a strong reason for departure from the common law rule which applies a burden to one or other of the parties. I gratefully adopt my Lord’s analysis that the High Court is exercising its supervisory jurisdiction and in so doing is applying the rule of law. Neither party is required to prove the precedent fact. The court, in its inquisitorial role, must ask whether the precedent fact existed on a balance of probability.” (emphasis added).

<sup>270</sup> Burdens of proof remain vitally important, however, in the context of cases advanced on the basis of allegations of mistreatment, where it is axiomatic that the person asserting the allegation must be able to prove it upon the balance of probabilities if they are inviting the Court to proceed to make determinations upon the basis it: *LBB v JM, BK and CM* [2010] COPLR Con Vol 779:

“11. It is accepted by all parties and by me that the approach of the court to these allegations is governed by the approach that appears in the speeches of the House of Lords in the case of *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141. The case has two important guide posts so far as trial judges are concerned. The first is to be found in para [2] of Lord Hoffmann’s speech which is in these terms:

*‘If a legal rule requires a fact to be proved, the fact in issue, a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt the doubt is resolved by a rule that one part or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it a value of zero is returned and the fact is treated as not having happened. If he does discharge it a value of 1 is returned and the fact is treated as having happened.’*

*It is common ground in this case that the burden of proof is assumed by the local authority as the party that has made the allegations. It follows from that that insofar as each allegation is concerned, if the local authority succeeds in proving it, then that allegation becomes a matter of fact for all future purposes. If the local authority fails to prove it, that matter cannot be referred to again for any further purposes because in law it did not occur.*



determine whether a person is deprived of their liberty pursuant to a particular care plan, then it seems to me that it is both entitled and required to adopt the conventional approach to the burden of proof.

128. One final remark in this regard is any suggestion that the standard of proof is anything other than the conventional of balance of probabilities cannot be correct.<sup>271</sup>

### Residual Liberty

129. I have addressed the recent decision of the ECtHR in *Munjaz*<sup>272</sup> elsewhere in this paper, and touched upon the concept of residual liberty. However, as the case represents the most detailed discussion so far of this difficult, but important, concept, it is worth dwelling upon it in a little more detail as a stand-alone topic.

130. Readers will no doubt recall the case of Colonel Munjaz, who sought to establish that the seclusion policy adopted by Ashworth Special Hospital was unlawful, inter alia because it represented a departure from the Code of Practice issued under the MHA 1983. The majority of the arguments in the case need not detain us, but I want to focus on the question of ‘residual liberty.’ This concept was most clearly adumbrated by Lord Steyn in his dissenting judgment in the House of Lords, where he identified the concept as a “logical and useful”<sup>273</sup> one, and one not rule out as a matter of principle by the ECtHR.<sup>274</sup> The majority of their

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12. *The second matter, the second guidepost is to be found in the speech of Baroness Hale of Richmond in a highly familiar passage between paras [69] and [73]. It is necessary only to quote from para [70] in which the learned Baroness says this:*

*‘My Lords, for that reason I will go further and announce loud and clear that the standard of proof of finding the facts necessary to establish the threshold under s 31(2) of the welfare considerations in s 1 of the 1989 Act is the simple balance of probabilities neither more nor less. Neither the seriousness of the allegations nor the seriousness of the consequences should make any difference to the serious of proof to be applied in determining the facts. The inherent possibilities are simply something to be taken into account where relevant in deciding where the truth lies.’*

13. *It is common ground between the parties, and I so find, that those principles apply as much to proceedings under the Mental Capacity Act 2005 as they do to proceedings under the Children Act 1989. The reference to the 1989 Act is, of course, to be found because that was the Act with which the House was dealing in the instant case but it is inconceivable and would be wholly inconsistent with all practice for different standards to apply, for example, to the Adoption and Children Act 2002 or, as I find, to the Mental Capacity Act 2005. The determination of facts fulfils exactly the same purpose in each inquiry and, where it is common ground that facts fall to be determined, I approach this case on the basis that the question is whether the local authority have proved these allegations or any of them on the simple balance of probabilities. That is to say it is more likely than not that the allegation is true. None of that do I understand to be seriously contentious as between the parties in this case.”*

<sup>271</sup> Not least as this is the only standard of proof which exists outside the criminal context: see *In re S-B (Children)* [2010] AC 678 at para. 13, confirming and following *In Re B* [2009] AC 11 in the House of Lords’ rejection of the nostrum “*the more serious the allegation, the more cogent the evidence needed to prove it.*”

<sup>272</sup> *Munjaz v UK* (Application No. 2913/06; ECtHR, 17 July 2012).

<sup>273</sup> *R(Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, at paragraph 42.

<sup>274</sup> Relying in so doing upon the admissibility decision in *Bolland v United Kingdom* (Application No. 42117/98).



Lordships, doubting that such a concept did, in fact, exist, concluded that the hospital policy did not permit a patient to be deprived of any residual liberty to which he was properly entitled.

131. Col. Munjaz applied to the ECtHR.<sup>275</sup> The Court – of its own motion – brought to the attention of the parties a case called *Schneiter v Switzerland*,<sup>276</sup> which, although it had been decided before the House of Lords gave judgment in the domestic proceedings, had not been identified by any party before the House. In that case, the Court had found that Article 5 had applied to the applicant’s placement in solitary confinement; unsurprisingly Col. Munjaz identified the case as providing strong support for his contention that seclusion represented an additional deprivation of his liberty requiring a separate justification by the State. The Government sought to distinguish the decision and/or contend it was *Schneiter* was wrongly decided.
132. In its decision, the ECtHR addressed both *Bollan* and *Schneiter* in detail, but concluded that the unusual facts of *Schneiter*<sup>277</sup> meant that it did not consider that:

*“properly considered, Schneiter can be interpreted as laying down a general rule that either solitary confinement or seclusion per se can amount to a further deprivation of liberty, nor as having departed from the approach taken in Bollan, namely that whether or not there has been a further deprivation of liberty in respect of a person who is already lawfully detained must depend on the circumstances of [the] case.”*<sup>278</sup>

133. Importantly, though, the ECtHR has reaffirmed that the concept of ‘residual liberty’ is one that exists under the Convention. In the circumstances, therefore, merely because a person is subject to a standard authorisation providing for the lawful deprivation of their liberty at a care home or a hospital does not mean that those with responsibility for that person necessarily have carte blanche to impose within that home or hospital further restrictions upon that individual if those restrictions amount to a deprivation of the residual liberty enjoyed by that individual.

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<sup>275</sup> In the interests of full disclosure, I acted as second junior on his behalf, led by Nigel Pleming QC and Fenella Morris (now QC).

<sup>276</sup> Application No. 63062/00, Decision of 31.3.05.

<sup>277</sup> Not least that it was possible under Swiss law for Mr Schneiter to appeal against his solitary confinement: see paragraph 64.

<sup>278</sup> In examining the concrete situation, the Court concluded that Col. Munjaz was not subject to a further deprivation of his liberty by being placed in seclusion. It is not altogether easy to reconcile certain of the passages in their discussion (at paragraphs 68-72) with the earlier jurisprudence of the Court; in particular, whilst the Court cited the Grand Chamber decision in *Austin* as reaffirmation of the necessity of examining the concrete situation, it appeared (at paragraph 70) to take account of the fact that seclusion was not punitive but was designed to prevent harm to others, which is flatly inconsistent with the clear conclusion in *Austin* that ‘public interest’ motives are not relevant to determining whether a measure amounts to a deprivation of liberty.



134. As noted above, the ECtHR also emphasised (when looking at the matter through the prism of Article 8) the importance for those who have lost much of their personal autonomy of ensuring that particular scrutiny is given to measures which remove what little personal autonomy they have left.<sup>279</sup>

#### Damages claims

135. Finally, I wish to pass brief comment upon claims arising for breaches of Article 5 in the context of the MCA 2005. I am aware anecdotally of substantial settlements being agreed for breaches of Article 5; a consent order was also recently endorsed by the Court of Protection by which Steven Neary was paid £35,000 damages by the LB Hillingdon (it not being clear, though, from the press reports whether the payment was in respect of the breach of Article 5(1) alone, breaches also having been found by Peter Jackson J of Articles 5(4) and 8).
136. It is important, however, that practitioners are aware of the implications of the decision of the Supreme Court in *Lumba*.<sup>280</sup> Here is not the place for a detailed exegesis of this case, not the least because discerning the precise ratio of the case upon this aspect from the various speeches of the SCJJ is more than usually difficult.<sup>281</sup> In sum, though, the case concerned two foreign national prisoners who had been detained under a “secret” detention policy, but whom the first instance judge had found would both inevitably have been detained under the published policy. The defendant Secretary of State contended that he was not liable for false imprisonment or, if liability did arise, the claimants should recover only nominal damages as they suffered no loss of liberty. This “causation defence” succeeded in part. A majority of the Supreme Court held that the fact that the claimants would have been lawfully detained in any event did not provide a defence to an action for false imprisonment. However, a different majority of the Court held that nominal damages alone fall to be awarded in a case of false imprisonment where an individual could and would have been lawfully detained had the requisite procedures been followed.
137. This case was decided in the field of immigration detention. However, I would suggest that the case is of more general application, such that in any case in which the defendant public authority is able to establish<sup>282</sup> that “*had things been done as they should have been done*,”<sup>283</sup> then the claimant will not usually

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<sup>279</sup> Paragraph 80.

<sup>280</sup> [2011] 1 AC 245, at paragraph 53. The case was decided in March 2011, but it does not appear to have been cited to Baker J.

<sup>281</sup> For a full discussion of the case, the interested reader is directed to my article (co-written with Catherine Dobson, also of 39 Essex Street) entitled “*At what price liberty? The Supreme Court decision in Lumba and compensation for false imprisonment*,” (2012) 4 Public Law 629-638).

<sup>282</sup> It would appear, although not entirely free from doubt, that it is for the public authority to establish this.

<sup>283</sup> To adopt the dicta of Baroness Hale (who heard *Lumba*) in the subsequent case of *R (Kambadzi) v SSHD* [2011] 1 WLR 1299, a case involving a failure of the Secretary of State to carry out regular reviews of the appellant’s immigration detention pursuant to provisions of the relevant rules and the Secretary of State’s own policy: *Kambadzi* at paragraph 22.



be able to establish that they suffered any loss as a result of the deprivation of liberty to which they were subject. They would be entitled to a declaration,<sup>284</sup> but absent – perhaps – proof that the fact of the deprivation of liberty caused the individual to suffer a diagnosable illness (as opposed to mere distress and frustration),<sup>285</sup> it is likely that nominal damages alone will follow.

## K: Conclusion

138. Whilst I have suggested above a way in which we can approach matters in a conceptually cleaner fashion, I do not underestimate the difficulty of drawing the line between what is and is not a deprivation of liberty in the context of care homes and hospitals. It is a decision which will have implications for many of the most vulnerable in society, and it is a decision which merits (and I am confident will receive) the most anxious scrutiny in the Supreme Court. My hope is that the Supreme Court will take a step back towards Strasbourg when it does so.

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<sup>284</sup> A declaration being capable of representing ‘just satisfaction’ and hence adequate compensation for purposes of the requirement imposed by Article 5(5) that be an enforceable right to compensation for a breach of Article 5: see *R (Degainis) v SSJ* [2010] EWHC 137 (Admin) (an Article 5(4)) case).

<sup>285</sup> See in this regard the decision of the Court of Appeal in *R(Sturnham) v Parole Board* [2012] 3 WLR 476, in the context of an appeal by the Parole Board against an award of damages against the Secretary of State (in the sum of £300 for breach of Article 5(4) occasioned by a 6 month delay to the review of the claimant’s case by the Parole Board following an administrative error by the Secretary of State, the WLR headnote summarising the ratio of the case thus:

*“Allowing the Secretary of State’s appeal, that in an article 5.4 delay case the Convention right would ordinarily be vindicated and just satisfaction under section 8(3) of the Human Rights Act 1998 would ordinarily be achieved by the grant of a declaration, the focus of the Convention and of the court being on the protection of the right rather than compensation of the claimant, although if the violation of the right involved an outcome for the claimant in the nature of a trespass to the person (such as where delay occasioned extension of the claimant’s detention or a diagnosable illness) just satisfaction was likely to require an award of damages; but that stress and anxiety alone would not generally attract compensation in the absence of some special feature or features by which the claimant’s suffering had been materially aggravated; that, applying those principles, a declaration would have sufficed in the present case, which was not made exceptional by the possibility that a timely decision might have led to an earlier transfer to open conditions; and that, accordingly, the award of damages should be set aside...”*