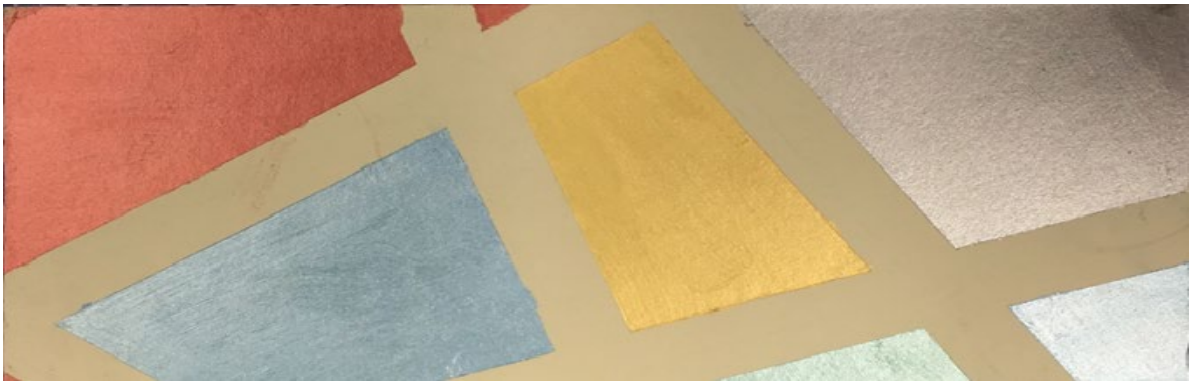


We are aware that not everyone has time or inclination to read all of the cases being delivered at first instance considering the Supreme Court judgment's *AGNI*, especially given, as a number of judges have made clear, the vast majority represent worked examples as opposed to binding decisions in relation to principle.

With huge thanks to Neil Allen, we have therefore set up a running table of cases allowing rapid identification of the types of scenarios being considered, and the results, which can be found here.

For those who want more detail, this annex summarises and comments on those cases relating to deprivation of liberty decided in October 2026. We intended to produce further '*AGNI* annexes' for so long as they appear to be necessary.

A Reports, our case-law summaries, and our guidance notes – can still be found via here.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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Re BM (Deprivation of Liberty) [2026] EWCOP 48 (T2) (HHJ Burrows)

Article 5 ECHR – Deprivation of liberty

Summary

As HHJ Burrows noted at the outset, the question of whether BM, the 16 year at the centre of the application, was deprived of his liberty would have been "entirely straightforward" prior to 2 June 2026,[1] and would have led to the conclusion that BM was deprived of his liberty. HHJ Burrows noted that the Supreme Court in *AGNI*, replacing the "acid test" in *Cheshire West* with "a multifactorial and case specific, and therefore more nuanced, approach" intended that "making decisions of this sort should be capable of efficient, relatively speedy dispatch" (paragraph 1). HHJ Burrows gave a short judgment to set out his conclusions as to why BM was not now to be viewed as deprived of his liberty.

Of interest is the fact that, perhaps picking up on observations that both the decisions in the *Oxfordshire* case and that of *Mustafa* are somewhat difficult to reconcile with *AGNI*, HHJ Burrows noted that:

> *39. I was also referred to Oxfordshire County Council v P & G [2026] EWCOP 33 (T2) and Re Mustafa (A Child) [2026] EWHC 2159 (Fam). In my judgment those authorities are not inconsistent either with NI or with my own decision in Salford City Council v AR. Oxfordshire was principally concerned with whether apparent acceptance of arrangements amounted to valid consent where there was genuine uncertainty concerning the person's understanding of their situation. Mustafa demonstrates that a person who lacks capacity under the MCA may nevertheless possess sufficient practical understanding of their circumstances to provide valid*

[1] Nerdily, it would not perhaps have been straightforward prior to 19 March 2014, when Lady Hale for the majority redefined deprivation of liberty in a way which the Supreme Court in *AGNI* found to be too straightforward.

> *consent for Article 5 purposes.*[2] *The authorities demonstrate that contentment is not the same thing as consent. Equally, valid consent does not require capacity within the meaning of the MCA. The concept lies somewhere between those two positions.*

BM had a complex of cognitive impairments, giving rise to substantial care and support needs. Having analysed the arrangement put in place to meet those needs, HHJ Burrows concluded as follows:

> *40. Weighing all the evidence together, and considering BM's situation as a whole, I have concluded that the arrangements do not amount to a deprivation of liberty for the purposes of Article 5. I acknowledge that this is a finely balanced case. The restrictions are extensive. Their intensity would, prior to the decision in NI, have resulted in a finding of deprivation of liberty. However, the current exercise is not a mechanistic one. The restrictions must be understood in the context of BM's disabilities, the purpose they serve, the life they enable him to live, the relative normality of the arrangements for somebody with his needs and, importantly, his own experience of them.*
>
> *41. I have already referred to the significant restrictions that exist. They include 3:1 staffing, continuous supervision, restrictions on his ability to leave independently, environmental controls and the possibility of restraint. Those are all matters which weigh in favour of a finding of deprivation of liberty. I also accept the force of the ALR's submission that BM is not living the life of an ordinary teenager. He is not in formal education. He has very limited peer interaction and aspects of his life are substantially controlled by others.*
>
> *42. However, those features cannot be viewed in isolation. Similar levels of supervision were required within the family home before his removal into care. They would have to be present wherever BM lives. The restrictions serve a protective and enabling purpose. They are not punitive. They permit BM to live in an environment which he experiences as safe, predictable and supportive. His placement bears little resemblance to detention in any ordinary sense. Unlike ST, BM does not experience the arrangements as oppressive. Viewed as a whole, they are more accurately characterised as an intensive and highly individualised package of disability support than as confinement. Accordingly, I conclude that BM is not deprived of his liberty.*

As in the *AR* case, HHJ Burrows did not then need to go on to consider valid consent to determine whether BM was deprived of his liberty. However, he gave some obiter observations:

> *43. It is therefore unnecessary for me strictly to determine the issue of valid consent. However, because the issue was fully argued before me, I shall record my view. Had it been necessary to determine the point, I would not have found that valid consent had been established. In my judgment consent must retain some meaningful content. It cannot be reduced merely to contentment or compliance. I accept that a person may lack capacity under the MCA whilst nevertheless possessing*

[2] Strictly, *Mustafa* was concerned not with MCA capacity, but *Gillick* competence. My doubts about *Mustafa* are primarily concerned with whether the caselaw supports the proposition that a child lacking *Gillick* competence to consent can necessarily be equated to a person lacking MCA capacity to consent: see further here.

> *sufficient practical understanding of their circumstances to consent for Article 5 purposes, as demonstrated by Mustafa.*
>
> *44. However, I also accept the cautionary approach adopted in Oxfordshire where genuine uncertainty exists regarding whether apparent acceptance truly amounts to consent. In my judgment BM's evidence demonstrates contentment, attachment, trust and acceptance of his lived experience. It does not demonstrate sufficient appreciation of the restrictions themselves or of the arrangements under which he lives. In that respect I regard his circumstances as closer to Oxfordshire than Mustafa. Accordingly, had I concluded that the objective element of confinement was established, I would not have found valid consent proved. However, because I have concluded that the arrangements do not objectively amount to a deprivation of liberty, that issue does not affect the outcome of the application.*

In similar vein to the approach taken in *AR*, HHJ Burrows concluded by considering whether there were further steps that the court needed to take to secure BM's rights:

> *45. Having made that decision, there is one other issue I need to consider, namely BM's Article 8 rights. I am satisfied that BM's Article 8 rights are protected. He is a child subject to a care order. He has a social worker. There are regular meetings at the Local Authority to discuss, evaluate and modify his care plan. The Independent Reviewing Officer (IRO) remains involved in his case. In addition, he will continue to receive support under the statutory leaving-care framework. There is therefore no need for this Court to put in place any scheme of directions for the matter to be brought back before it.*

Comment

It bears repeating that decisions reached at first instance do not set precedent as regards the application of *AGNI*, and are therefore to be regarded as 'worked examples.' However, as was the case in *AR*, this decision is another one which is particularly clear as an example of the type of thinking required.

One particular point of interest is HHJ Burrows' consideration of what steps he could or should take to secure BM's Article 8 rights. He is clearly right that, once seized of a case, the Court of Protection exercising its inquisitorial jurisdiction (and also public body required to act compliant with the ECHR), the court cannot wash its hands of a situation by determining that a person is not deprived of their liberty if there is a real possibility that their ECHR rights will be infringed if the proceedings simply stop. Probing whether (for instance) a Care Act advocate will be available is one course of action. Setting a date for a review is another course of action, although it does bring with it a question that (so far) the courts have not had to address in any reported case, namely whether (a) the Legal Aid Agency will agree to fund representation at such a review; and (b) the person will satisfy the means test for such legal aid. As a child, it is to be hoped that it would be relatively easy for BM to obtain such legal aid (means testing fortunately not applying for legal representation [3]). More broadly, however, for adults, in a community DoL case, the person will never had had non-means-tested legal aid (it being one of the injustices of the

[3] By virtue of Regulation 5(1)(ba) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

current system that those subject to community DoL applications are not eligible for non-means-tested legal aid). But in a case which had been proceeding under s.21A, but where the court has now found that the person is not, in fact, deprived of their liberty (such that the DoLS authorisation must fall away,[4] they would only now be eligible for means-tested legal aid, which may well mean the difference between continuing to have legal representation and no longer having it.

Re PK & MK (Article 8 protections) [2026] EWCOP 52 (T2) (HHJ Burrows)

Article 5 ECHR – Deprivation of liberty

Summary

PK and *MK* were two Ps (twin sisters). The Official Solicitor acted, separately, for both sisters, and argued (in agreement with the .local authority) that neither sister was deprived of their liberty; HHJ Burrows agreed, holding (at paragraph 17) that:

> *There is no doubt that the setting in which PK and MK live is some way from the paradigm place of detention identified by the Supreme Court. It is a place in which both young women are as at home as could be possible for people with their needs and disabilities. They are able to personalise the placement. They are able to enjoy contact with their family there. The purpose of the restrictions upon them is entirely to enable them to receive care in a safe manner. It is a "relatively normal" setting for young women with their level of need. They appear not to object. Clearly there are challenging behaviours at times, but there is no way those are or could be interpreted as objections to their concrete situation or the physical environment of the placement itself. Above all, perhaps, they have each other. They are in the most profound biological and psychological sense each other's closest relative. They appear to enjoy living together and have a unique bond as twins.*

That left Article 8, on which HHJ Burrows invited written submissions. In his judgment, he started the material section by summarising the position in relation to protections outside Article 5 ECHR.

> *29. Unlike Article 5, Article 8 does not explicitly require the involvement of a Court. However, Article 8 issues arise on a very frequent basis within the health and social care sector. The approach taken by the Government in seeking to ensure Article 8 rights are protected has been through a series of legislative provisions, mainly the Children Act 1989 (and related legislation), the Mental Capacity Act 2005, and Care Act 2014.*
>
> *30. The Care Act 2014 provides a substantial framework of protection for vulnerable adults, and particularly for those who lack capacity to make relevant decisions. The scheme is founded on the promotion of wellbeing under s.1, including personal dignity, protection from abuse and neglect, control over day-to-day life, participation in community life, and domestic, family and personal relationships. It requires the involvement of the person concerned and those interested in their welfare in assessment and care planning (ss.9 and 25), mandates continuing review of care and support plans (s.27), provides for independent*

[4] As the person can no longer satisfy the best interests requirement, one aspect of which is that they are a 'detained resident.'

advocacy where individuals would otherwise experience substantial difficulty participating (s.67), and imposes safeguarding duties where abuse or neglect is suspected (s.42).

31. In TDB v London Borough of Haringey [2026] EWCA Civ 1184 (which was handed down as I wrote this judgment), the Court of Appeal emphasised that the Care Act and the Mental Capacity Act 2005 operate together in securing the rights and wellbeing of vulnerable adults, and that issues of capacity, participation, autonomy and the minimisation of restrictions are integral to lawful assessment and care planning. The Court stressed that local authorities must have a clear understanding of an individual's capacity where relevant to the assessment of needs, and that the statutory framework is directed towards ensuring practical and effective protection of the individual's rights, wishes, welfare and participation in decision-making.

32. In TDB, Baker, L.J. considered that wellbeing under s. 1 of the Care Act 2014 cannot properly be assessed without specifically linking P's control over day-to-day life, participation in decision making, family relationships and restrictions on freedom. It is by that mechanism that the rights of vulnerable people are protected under the domestic legislative scheme in England and Wales.

33. Ms Kelly's submission is that there needs to be an independent safeguard and that cannot be achieved where the State (in the guise of the Local Authority) which imposes and operates the restrictions on P and is also the sole judge of their continuing proportionality. This is the principle enunciated in Nikolyan v Armenia (Application no. 74438/14, 3rd October 2019).

34. Much as I hesitate to reject Ms Kelly's submissions on anything related to the Care Act 2014, in so far as she argues for there to be an independent agent involved other than the State, I do reject what she submits.

35. In Nikolyan v Armenia, the ECtHR found a violation of Article 8 where a man had been wholly deprived of legal capacity under a rigid statutory scheme that provided only a binary choice between full capacity and complete incapacity. The Court criticised the absence of any tailored or intermediate measures, the failure to analyse the degree of the applicant's impairment in sufficient detail, reliance upon an outdated psychiatric assessment, and the lack of adequate mechanisms for review and safeguarding against conflicts of interest. The Court emphasised that measures affecting legal capacity and personal autonomy must be proportionate, individualised, supported by effective safeguards, and subject to regular review by a competent authority.

36. In my judgment, however, the relevance of that case to PK and MK is limited. Unlike the position in Armenia, these proceedings do not concern the wholesale removal of legal capacity, nor a statutory regime lacking review mechanisms or safeguards. Rather, PK and MK are protected by the integrated framework of the MCA and the Care Act 2014, including duties of wellbeing, participation, care planning, review, safeguarding and independent advocacy. To that extent, the concerns identified in Nikolyan are largely addressed by the domestic statutory protections available to them.

37. That being said, in TDB, Baker, LJ focused on the need for independent safeguards within the operation of the

> *Care Act. He refers to s. 67 of the Act and the Statutory Guidance (at [43]) which emphasises the need for a Care Act Advocate where there is no suitable family member. He was also concerned by issues of good practice at the coal face amongst professionals. Those concerns related to capacity assessments and are very unlikely ever to be relevant to this case, where incapacity of a profound degree will be permanent.*

On the facts of the cases before him, HHJ Burrows considered that:

> *38. In my judgment, the provisions of the Care Act and the MCA are adequate protections in this case. The situation will likely be different in other cases. In AR, for instance, there was an issue, present at the time of the final hearing that concerned the Court, namely the position of AR's parents towards those managing his welfare and their (the parents') role in his life. The LA there ensured there would be an independent advocate at least for the first year. That may continue. But that is a matter for the Care Act jurisdiction, it seems, and not this Court.*
>
> *39. In this case, there is no doubt that the provisions of the Care Act and MCA apply. It seems to me a Care Advocate will be needed in this case if their mother either does not wish to perform that role, is unsuitable to do so, or (and this seems unlikely) where PK and/or MK do not wish her to perform that role.*
>
> *41. As I understand it MK has a Care Act advocate. In PK's case it is less clear. Both need one, it seems to me. I directed that the LA clarify this by no later than 4 p.m. on 2nd October 2026.*
>
> *42. At the time I completed my draft judgment, I was not persuaded that a further review hearing was required. However, before reaching a final determination on that question, I wished to be satisfied that the practical and effective safeguards upon which I rely are actually in place.*
>
> *43. I therefore said this. The existence of an independent advocate may be of significance. As the Court of Appeal emphasised in TDB v London Borough of Haringey [2026] EWCA Civ 1184, participation, support and independent advocacy form important components of the statutory protection afforded to vulnerable adults under the Care Act 2014. Whilst I do not accept that Article 8 invariably requires independent review by the Court, the absence of independent advocacy may, depending on the circumstances, weaken the practical protection otherwise available. I therefore required clarification of the advocacy arrangements before deciding whether the existing framework provided sufficiently effective safeguards for the Article 8 rights of PK and MK.*
>
> *44. When the draft was returned with corrections and clarification requested the Local Authority confirmed that both young women had been referred to Care Act advocacy. At my request, it was agreed that the Local Authority should refer the matter back to the Court in the event that no such advocacy was to materialise.*

Comment

Three points arise from this judgment:

1. It is well-established in Strasbourg case-law that the implied procedural protections in Article 8 are aimed at giving a person a degree of involvement in decisions affecting their private and family life that is sufficient to protect their interests, the requisite degree of involvement being calibrated to the

circumstances of the case, and the seriousness of the interference with the rights that the article protects.[5] It was this need for English law better to recognise this which motivated both the changes in the Mental Health Act 2025 in relation to compulsory mental health treatment, and the changes proposed by the Law Commission in relation to the operation of s.5 MCA 2005.[6]

2. HHJ Burrows was clearly right to say that the extent to which Article 8 requires a degree of ongoing scrutiny by an external body will depend on the factual circumstances of the case (a difficult issue may well arise here, as noted in relation to the *BM* case as to who would pay for such scrutiny if it has to involve the court)

3. However, where the view has been taken that (1) Article 8 ECHR is engaged such as to give rise for a need for procedural protections; and (2) that need can be met by the involvement of advocacy, I suggest that it is important that the court is clear as to the basis upon which that advocacy is provided. Unless it is clear that there is a statutory power grounding its provision in the case before the court, the latter cannot be satisfied that any procedural protections will be effective to secure the Article 8 ECHR rights that it has identified as being engaged. As desirable as it would be, we have serious doubts as to whether there is the power to appoint a Care Act advocate simply on a 'rights protection' basis. The duties to appoint an advocate under s.67 are limited to specific situations which are not obviously those covered by those envisaged by HHJ Burrows in this case; whilst it is possible to appoint an advocate to meet care and support needs (see s.8(1)(a) Care Act), there will be hoops to jump through to explain how 'rights protection' satisfies the statutory eligibility criteria.

We hope that there can be a judgment soon (whether from HHJ Burrows or otherwise) which can: (1) set out the necessary chapter and verse (provided by the local authority before the court) as to the basis upon which that local authority has appointed a Care Act advocate; and (2) why that chapter and verse satisfies the judge that advocacy will actually be available so as to satisfy them that the court does not need to keep a watching brief on the case so as to satisfy its obligations under Article 8 ECHR.

TW v Worcestershire County Council [2026] EWCOP 54 (T2) (HHJ Tindal)

Article 5 ECHR – Deprivation of liberty

Summary

This is the first reported post-*AGNI* case in relation to a person subject to a DOLS authorisation. TW was in a care home following a period of detention in hospital under s.3 MHA 1983. Section 21A MCA 2005 proceedings had been started in October 2025. For reasons which are not set out in the judgment, those proceedings were still on foot at the time that the Supreme Court handed down its decision in *AGNI*. As HHJ Tindal explained:

> *5. As at the last hearing in early August 2026,* [the local authority] *had still not*

[5] See, in addition to the case cited to HHJ Burrows, *Shtukaturov v Russia* [2012] EHRR 27 and (in relation to a regime much closer to that of England & Wales) *AM-V v Finland* [2017] ECHR 273).

[6] See Chapter 14 of the Law Commission's Mental Capacity and Deprivation of Liberty report.

> *confirmed whether it would determine on the AGNI approach whether the Placement did or did not constitute a deprivation of TW's liberty. The Respondent authority's change of position was confirmed in a determination by its Senior Best Interests Assessor Ms Kirby on 25 August 2026, but there was insufficient time to list the s.21A hearing before TW's standard authorisation expired on 2nd September. I am grateful to the Respondent that at a directions hearing on 25th August, it agreed to renew an urgent authorisation subsequently extended to 15 September, on the basis the Court would at this hearing on 9th September 2026 determine whether TW's Placement care arrangements amounted to a deprivation of her liberty under Art.5 ECHR*
>
> *6. Until the hearing today, I had anticipated the Respondent authority's stance would be to invite me to terminate the urgent authorisation on the basis of Ms Kirby's assessment that TW was not deprived of her liberty. In fact, as I will explain, the authority has taken a broadly neutral stance. On TW's behalf, her ALR's position is that TW remains deprived of her liberty for the purposes of Art.5 ECHR even under the law as clarified in AGNI.*

HHJ Tindal directed himself that it was for the court to decide, itself, whether TW was deprived of her liberty:

> *9. Moreover, as is typical for determining compliance or violation of articles of the ECHR, the Court makes that determination for itself – rather than reviewing on public law grounds the decision of the public authority as to compliance with the ECHR: see, for example, R(Begum) v Denbigh High School [2007] AC 100 (HL). So, my task is purely to decide on the evidence before me, whether TW is currently deprived of her liberty under Art.5 ECHR.*[7]

HHJ Tindal was at pains to explain that the BIA, Ms Kirby, was extremely experienced, but that her assessment was hampered by the fact that she could not engage with TW. The local authority social worker who gave (written) evidence on which HHJ Tindal drew *"very fairly and openly"* reflected a view taken that "*perhaps because Ms Kirby was unable to meet TW herself, that Ms Kirby was unable to understand the full factual picture, so whilst she had reached the clear view that TW was not being deprived of her liberty, the Respondent authority's position before me is neutral*" (paragraph 26). Indeed, the local authority's own counsel took the court through the BIA's assessment explaining, on the basis of the social worker's evidence, how the position was different to that understood by the BIA.

[7] With respect, the analogy with the *Begum* position may not be direct. There was no suggestion that the local authority was not complying with the ECHR; the better argument might be that, as HHJ Tindal also noted, the task of the Court of Protection on a s.21A application is to determine whether the "qualifying requirements" for a person lawfully to be deprived of their liberty under the framework contained in Schedule A1 to the MCA 2005 are satisfied. The "best interests requirement" includes (paragraph 16(2) of Schedule A1) that the person "is, or is to be, a detained resident." A "detained resident" is defined in paragraph 6 of Schedule A1 means 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. So if the circumstances do not amount to a deprivation of liberty, the person is not a detained resident, and hence the best interests requirement is not made out.

HHJ Tindal undertook a review of the law, acknowledging his debt to the judgments of HHJ Burrows, and of the post-*AGNI* cases, noting that he did:

> *50. […] not cite any of these cases (or those since my judgment) as determinative of the present case – all the cases turn on their own facts. Nevertheless, one can start to see a spectrum of examples from cases. At one end are clear examples of no 'deprivation of liberty' on the AGNI approach, such as MIG in Cheshire West (a young person happy in a foster placement) and Mustafa (a young person happy at a special school). Slightly less clear-cut, but still towards the same end of no deprivation of liberty are the cases of people apparently broadly settled in secure units like MEG and PK/MK. At the other end of the spectrum are clear examples of 'deprivation of liberty', such as the two cases before Theis V-P: RF (a person objecting to a secure placement in England well away from his family) and ST (a teenager strongly objecting to a secure unit). Somewhere in between are the more borderline cases where objection was occasional and changeable (SM), or there is neither clear objection nor clear consent – P, AR and BM. The closest on the facts to this case appears to be AR, albeit with the important distinction there of a lack of clear objection to their accommodation, by comparison here to TW's repeated objection to the Placement, even if primarily directed at those external to the home rather than the care staff TW deals with on a day-to-day basis. The important thing is that these cases all illustrate the practical application in individual cases of the precedent set by AGNI.*

The observations made by HHJ Tindal about analysing confinement merit setting out in full:

> *51. The second general point is on the multifactorial assessment of the 'objective element' (or 'confinement') which the Court in AGNI recognised at [183]-[186] is more challenging to apply in practice than the simpler 'acid test' in Cheshire West. It is clear from AGNI and the leading ECtHR cases that there is a multifactorial test and focus on the individual's 'concrete situation' taking account of a whole range of factors, such as the nature, type, duration, effects and manner of implementation of the living arrangements, with no single factor being determinative. Whilst it may be tempting to search through AGNI for a clear 'touchstone', the Court were anxious not to replace one flawed 'acid test' with another. Therefore, it is necessary in each case to examine and weigh all the relevant circumstances.*
>
> *52. Having said that, the change in AGNI from Cheshire West – whilst substantial – should not be over-stated. The Court in AGNI did not say the two 'acid test' factors of 'continuous supervision and control' and 'not free to leave' were irrelevant. On the contrary, they were clearly relevant, simply not exclusively relevant. As the Court in AGNI explained at [184]:*
>
> > *"[I]t may well be that an individual cannot be subject to a deprivation of liberty under Art.5 without the acid test being met, but this is not sufficient. To determine whether an individual is subject to such deprivation, a Court must focus on their concrete situation and must take account of the whole range of factors in the particular case, including the type, duration, effect and manner of implementation of the measures in question."*
>
> *In other words, the Supreme Court in AGNI came close to saying the two Cheshire West 'acid test' factors are*

necessary but not sufficient for 'confinement'. Clearly, it may be unlikely (albeit not impossible) for arrangements which were not a deprivation of liberty on the Cheshire West approach to suddenly become a deprivation of liberty on the AGNI approach. However, arrangements which were a deprivation of liberty on on the Cheshire West approach may still be so on the AGNI approach, provided they not only involve the two Cheshire West 'acid test' factors, but also other factors which on balance cumulatively amount to 'deprivation of liberty' on the AGNI approach. Even if some people like MIG and MEG would no longer be assessed as 'deprived of liberty' on the AGNI approach, there may be some people, like RF and ST, who were and remain deprived of liberty. So, previous DoLS assessments of someone's placement, even though applying the Cheshire West 'acid test', are still relevant to (but not determinative of) new assessments on the AGNI approach.

53. Moreover, whilst all the ECtHR cases on Art.5 ECHR – from Mafia house arrest to immigration detention to protest 'kettling' – assess the individual's 'concrete situation' and 'taking into account the whole range of factors in the particular case, including the type, duration, effect and manner of implementation of the measures in question', typically the most useful guidance can be drawn from ECtHR cases in the mental capacity field. Reading carefully through the ECtHR's 14 decisions in that field discussed in AGNI at [149]-[182], certain factors more specific to mental capacity regularly recur. In my original oral judgment, I quoted AR at [60] where HHJ Burrows endorsed the list of such factors Counsel before him had drawn up. Since my oral judgment, HHJ Burrows himself in BM adopted Theis V-P's similar but more authoritative list of such factors in ST [66]-[67]. She suggested

> *"An evaluation of the overall nature and effect of the arrangements in place is now required in determining whether measures amount to a deprivation of liberty when viewed in their full context. Relevant considerations for the Court to take into account in undertaking this evaluation can include: (i) the degree of control exercised over that person; (ii) the extent to which their movements are restricted; (iii) the opportunities available to maintain relationships; (iv) participation in ordinary circumstances; (v) the duration of the arrangements; (vi) the purpose and necessity of the arrangements; [and] (vii) whether less restrictive alternatives exist … Part of that evaluation should include the individual's own experience of the arrangements including matters such as their wishes and feelings, level of contentment and any signs of objections to the arrangements." (my italics)*

As Theis V-P was at pains to stress there (as I have italicised), this list is not exhaustive, yet one can imagine it may appear as a useful list of 'signpost headings' in DoLS assessments and judgments. Nevertheless, they will also need to consider any other relevant circumstances (e.g. 'relative normality') before standing back and reaching an all-round assessment (not too dissimilar an intellectual exercise from the s.4 MCA 'balance sheet').

54. However, returning to my original judgment, without in any way detracting from the importance of such a full 'multifactorial assessment' of all relevant circumstances, I would highlight the potential significance of 'coercion' as animating various other

relevant factors in that assessment, stressed by the Supreme Court in AGNI at [195] quoted above. For example, the presence or absence of 'coercion' is likely to be relevant to the degree of control and freedom, the purpose of such arrangements (see AGNI at [130]) and their 'relative normality' and (dis)similarity to an ordinary home or prison cell (AGNI at [193]). Moreover, in AGNI at [187], the Court rejected the view in Cheshire West that 'compliance or lack of objection' was only relevant to 'valid consent', but not to confinement':

> *"…The effect of restrictions on an individual is liable to differ according to whether they are content with or object to their living arrangements, and it is therefore relevant to consider the effect of the living arrangements on them… If an individual objects to the arrangements, this is likely to result in conflict. There may be arguments, attempts to leave a particular place, expressions of a wish to leave, or conduct showing a wish to leave. The resulting stress for the individual in having their objections overruled may lead to suffering and result in the use of physical force or physical restraint. These features of the individual's concrete situation are likely to be clear indicators that they are being confined, in the sense of suffering a deprivation of liberty. **The necessary element of coercion is present because the individual is being compelled to live somewhere they do not want to live**. Conversely, the absence of objections is likely to result in an absence of conflict which is equally capable of being relevant. If the arrangements for an individual's care and treatment accord with their known wishes and feelings, and they are happy with them, it may be difficult to conclude that they are subject to a deprivation of liberty. There is unlikely to be any element of coercion present in that situation." (my* [emphasis])
>
> *55. In short, if someone actively objects to their placement – particularly if that leads to conflict and unhappiness, or even potentially physical restraint – there is clearly an element of coercion as they are being compelled to live somewhere they did not want to live, which points towards 'confinement'. By contrast, if someone is actively happy in their placement, that would not only point towards 'valid consent', it would also point against their being 'confined' at all because they would not experience any element of coercion. So, in MIG, MEG and Mustafa, it was their broad (if not unqualified) acceptance of their respective placements which underpinned their protective and caring purpose, 'relative normality' and lack of coercion, so they were not 'confinements' in the first place, even aside from the evident 'valid consent' to them. Likewise, in the more borderline case of AR, the absence of objection could not constitute AR's valid consent to the placement, but it weighed against his 'confinement'. In SM, objection was occasional and changeable, so could not itself change a placement that was not a deprivation of liberty into one that was. By contrast, in RF, clear and consistent objection pointed strongly towards 'confinement'. So, clear and consistent objection is not determinative but a significant factor: generally and in this case.*

HHJ Tindal, having made observations about valid consent (especially – rightly – that the issue is not so much about the concept, but about assessing it) and state imputability, then came on to safeguards in the absence of deprivation of liberty, again in comments which merit reproduction in full:

61. My final general observation is that in AGNI at [10], the Supreme Court stressed the importance that deprivation of liberty under Art.5 ECHR is not the 'be-all and end-all' of protections available to incapacitated adults and Art.8 ECHR is also relevant. As they said:

> *"…[I]ncapacitated adults have the protection of Article 8 … in the event of interference with their right to respect for private, family and home life (see for example, Hillingdon LBC v Neary [2011] 4 All ER 584…). The right to respect for private life may require that their views are sought and taken into account, where they are able to express an opinion about the circumstances in which they are living. There are also other safeguards in the MCA: ss.1(5), 1(6), 4, 6, 35-41 and 44. Decision-makers in England and Wales were (and continue to be) required to have regard to the Code of Practice issued pursuant to the MCA 2005, and the MCA requires them to act in the individual's best interests. Support plans for the provision of, and arrangements for, care and accommodation by local authorities after a community care assessment are expected to be subject to at least annual reviews. In addition, local authorities are under a duty to investigate any safeguarding issues that may arise in a residential placement and like NHS bodies and placement providers, owe duties of care to service users at common law."*

62. Here it is important to refer to s.6 MCA cited by the Supreme Court there (along with s.5). s.5 MCA in essence renders someone ('D') not liable in law for the lack of someone (P)'s consent to D's acts in connection with P's care and treatment if D reasonably believes P lacks capacity and it will be in P's best interests for that act to be done. s.6 MCA excludes D's acts intended to restrain P unless D reaonably believes it is necssary to avoid harm to P and such restraint by D of P is proportionate to the likelihood of P suffering harm and its seriousness. 'Restraint' is defined in s.6(4) as using or threatening to use force or to secure the act to which P resists, or restricting P's 'liberty of movement', whether or not P resists.

63. This 'restriction of P's liberty of movement' in s.6 MCA is clearly intended to mean something different than P's 'deprivation of liberty' governed under s.64 MCA by Art.5 ECHR. As the Supreme Court said in AGNI at [118]-[119], the ECtHR draws a distinction between 'deprivation of liberty' under Art.5 and mere 'restriction of liberty', although this is a distinction of degree or intensity, not nature or substance. In fact, the reason the ECtHR draws this precise distinction is to differentiate between the stricter applicability of Art.5 ECHR with 'deprivation of liberty', from 'restriction of liberty' to which there is a qualified right in a different provision of the ECHR (Art.2 Protocol 4) not incorporated in the UK.

64. However, whilst people in the UK cannot therefore claim that a mere 'restriction of liberty' under Art.2 Pt 4 ECHR (as opposed to a 'deprivation of liberty' under Art.5 ECHR) by a public authority breaches s.6 Human Rights Act 1998 ('HRA'), they can certainly claim such arrangements 'restricting their liberty' disproportionately 'interfere with their private and/or family life' under Art.8 ECHR, as in Neary. As also discussed in AGNI at [10], they may also claim in common law for battery (for restraint), or false imprisonment (with a wider meaning than deprivation of liberty in Art.5: Jalloh v SSHD [2021] AC

> *262 (SC)).*[8] *So, there is no shortage of legal safeguards for people lacking mental capacity whose liberty is restricted not deprived in care settings. Indeed, local authorities who in the wake of AGNI precipitately assess people previously subject to DoLS as not 'deprived of their liberty' on the AGNI test and curtail standard authorisations may take the risk they are wrong and have violated Art.5 ECHR; or even if Art.5 does not apply, they may still violate Art.8 ECHR if placements are disproportionate interferences with private and/or family life (as in Neary).*
>
> *65. Nevertheless, a commonly-voiced anxiety amongst 'DoLS practitioners' is that theoretical legal rights are inadequate protection against these risks, because people who lack mental capacity to decide residence may well also lack litigation capacity and more practically may have no realistic access to Court without the RPR appointed with DoLS authorisations and who can challenge them under s.21A MCA. The Court of Protection has been invited to continue to 'supervise' the best interests of people previously under DoLS authorisations by fixing 'reviews' or appointing advocates. As I noted in my oral judgment, HHJ Burrows discussed this in AR and decided it was unecessary to list a 'review' having found Art.5 did not apply, as the authority there had funded an 'IMCA' advocate for AR. I would add in this finalised judgment that since I gave my oral judgment, HHJ Burrows returned to that issue in more detail in PK and MK at [18]-[43], which I would encourage practitioners to read. In brief summary, HHJ Burrows observed there that unlike with 'DoLS' for deprivation of liberty under Art.5 under Sch.A1 MCA, the state had not introduced a bespoke regulatory scheme for Art.8 under the aegis of the Court of Protection. Instead it had chosen to protect and reflect Art.8 rights in other legislation – not just the HRA, but the amended Children Act 1989, other parts of the MCA and the Care Act 2014. He noted the relationship between the latter two for adults lacking capacity had recently been discussed by the Court of Appeal in TDB v Haringey LBC [2026] EWCA Civ 1184. HHJ Burrows noted the discussion of safeguards in the MCA and Care Act, such as IMCAs and Care Act Advocates, to protect Art.8 rights of those lacking capacity but not deprived of their liberty under Art.5, which may avoid the need for ongoing supervision by the Court of Protection.*

Applying *AGNI* to the facts of the case before him, HHJ Tindal did so in what he acknowledged was "perhaps an unusual reverse order" (paragraph 66), having observed that "[o]f course, as HHJ Burrows said in *AR*, it is ordinarily better to consider confinement before consent, to focus on *what any consent is to*. However, that is not an inflexible rule. This case is all about confinement – the objective criteria – and it helps, at least in this case, in reaching the right answer on that to deal with the other criteria first."

Doing so, it was easy to dispose of the question of state imputability: the Placement and TW's care plan had always been commissioned and

[8] An issue with false imprisonment in this zone is that, as noted by the Law Commission in its report upon Mental Capacity and Deprivation of Liberty (see paragraph 15.44) it has been understood to date that it would not apply to a person who did not express or manifest (by their actions) a desire to leave their accommodation, or was not aware that they would be prevented from leaving if they attempted to do so: see *R v Bournewood Community Mental Health NHS Trust* [1998] UKHL 24, [1999] 1 AC 458 at 486 per Lord Goff.

monitored by the state in the form of the Respondent authority (and was co-funded by it and the NHS as 'aftercare' under s.117 MHA).

Turning to 'valid consent,' HHJ Tindal considered that:

> *68.* […] *there is clearly no valid consent by TW to her living arrangements at the Placement, whether or not they amount to 'confinement' under the objective criteria. This case is far clearer than P and AR because here, as I have explained, TW has consistently objected to the Placement, even if she has sometimes (not always) complied with carers and some activities within the home. TW's view has consistently been for the past 18 months that she wants to return home to live with her mum. Ms Kirby's attempt to distinguish between a desire to go home and consent to the day-to-day care in the Placement is, in my view, an over-subtle approach that is neither practical nor realistic (c.f. AGNI at [53(v)]) for someone with limited understanding like TW. Indeed, in this case (unlike in AR and P), the opposite inference of a clear absence of valid consent can be drawn, as TW has so consistently expressed, in particular to external professionals coming to see her, that she not only wants to return home with her mother, but is actively unhappy with various aspects of the Placement, even if she does not always express it to staff there. Therefore, there is, in my view, clearly no valid consent to any confinement in this case.*

HHJ Tindal therefore turned to the:

> *69.* […] *crucial objective element of 'confinement' in this case. To use the expression so often used in Strasbourg, the type, duration, effect, and manner of implementation of TW's living arrangements are that this is a care package for TW as a disabled person lacking capacity to decide her residence at a specialist care home following her discharge 18 months ago from psychiatric hospital (which was clearly 'confinement'). It is not short-term or temporary, but a long-term and potentially permanent placement unless the Court of Protection deciding TW can return home to live with her mother as she so obviously wishes. The Placement is a particular restricted space and has lasted a considerable period of time, may continue to do so and involves TW living somewhere she does not want to live. Whether that is enough for that to cross the line to amount to a deprivation of liberty, in my judgment, depends upon the multifactorial assessment, but with particular focus on the factors of relevance in the mental capacity field.*
>
> *70. I start with the factors which point against TW being deprived of her liberty. First and foremost, I agree with Miss Haines that as in AR and many other cases, the purpose of the Placement in this case is therapeutic and protective, not punitive. Secondly, I accept the Placement is 'relatively normal' for people with TW's needs and disabilities, even if not for non-disabled people. As the Court said in AGNI at [198] and [199], 'liberty means the same thing for everyone … it means physical liberty, including the freedom to go where one pleases', which is not discriminatory against those who are disabled because the comparison must be with those in a relevantly similar position. In my judgment, the Placement is relatively normal for someone relatively similar to TW, even though it is not a home environment. However, 'relative normality' is a relatively weak factor as TW has largely withdrawn from usual activities even for someone with her disabilities: she does not leave the Placement even with staff, she rarely engages in activities, she is frequently withdrawn and contact with her mother*

is highly restricted (due in part to her mother's own behaviour).

71. On the other side of the balance, TW is under continuous supervision and control. Whilst supervision is not physically present continuously does not mean it is not there continuously, since TW is continuously monitored and indeed regularly interrupted by staff – for the best therapeutic reasons, but the point is the staff have control, not TW. The care plan – including restraint – is there to be engaged if there is an escalation in TW's behaviour. Indeed, that was the view of Ms Whitehouse in February 2025 even before it was amended to include restraint, as the staff have always known where TW is, she has 1:1 staff in the day, 1:3 during the night, and staff always available to step in during an emergency; and TW's room is constantly monitored for staff to intervene, including coming in if necessary.

72. Likewise, for the same reasons as Ms Whitehouse concluded in February 2025, TW is not free to leave the Placement. The difficulty with Ms Kirby's more recent analysis that if TW simply left the Placement she would not be stopped, is that the care plan would simply not operate in that way. The care plan is clear that TW is not free to leave the Placement without staff. The fact that it does not mandate physical restraint if TW tries to leave the Placement does not mean she is free to leave it. There are several practical and physical impediments: locked windows, locked gates and so on, which would make it difficult for her to do so, and in any event, the staff would persuade TW to stay and even prevent her from leaving if she tried, so that she does not have a voluntary choice to leave. Therefore, as Ms Whitehouse found, the Cheshire West 'acid test' is met, but as I say, that is a possibly necessary but certainly not a sufficient condition for 'confinement' under Art.5 ECHR, especially when balanced against the Placement's therapeutic purpose and relative normality I have noted.

73. However, as Ms Chisholm argued, whilst there has been no actual physical restraint of TW in the Placement because of the skill of staff in managing TW's episodes of emotional dysregulation so far, the fact her care plan makes provision for such restraint if necessary; and for regular antipsychotic medication which staff encourage her to have, in my judgment is another factor pointing towards 'deprivation of liberty'. This is not so much because TW is medicated to prevent objections, but rather because it explains why her objections or dysregulation are reduced only by her good relationship with some particular staff from whom she does usually accept her medication (but not always e.g. in January 2026). It is striking that TW presents totally differently to those external to the Placement, whether from the Respondent authority, or the RPR or ALR, or professionals like Dr Parvez. So, the medication and risk of restraint written into the care plan weighs in favour of 'confinement'.

74. However, as Miss Haines said, this case is finely balanced but really comes down to one consideration – TW's objection to the Placement. I accept, as said by the Supreme Court in AGNI at [195] that there must be a 'necessary element of coercion'. However, as the Court also said at [187] as I quoted earlier, if an individual objects to the arrangements, that is present because they are being compelled to live somewhere they do not want to live. In my judgment, that is the position with TW. Like the applicant in Mihailovs, discussed in AGNI at [170]-[172], TW is capable of expressing objections to her

placement in a restricted care home. However, whilst Mr Mihailovs objected to one care home (which did amount to a deprivation of liberty) but consented to another care home when he moved where he had more freedom (which did not amount to deprivation of liberty), TW has consistently objected to the Placement to external professionals and visitors. Whilst she has not done so regularly to staff (but has on occasion), this is a reflection of their skill in managing TW's emotions, as I have explained. Accordingly, TW may not be so resistant that she has tried to escape or that she has needed to be physically restrained, but routinely and regularly, especially to external professionals, TW is clearly expressing her experience of coercion in being required to stay in the Placement where she does not want to live; and of not being allowed to live with the person she wants to live with, her mother AW. In short, TW is experiencing coercion by being forced to live in the Placement when she does not wish to do so. Therefore, whilst to the external observer, this Placement may be very far from the paradigm of confinement in a prison cell, to TW this clearly feels like a prison cell, even if she gets on well with and is compliant to some of the 'warders'. It clearly feels to TW like she is being kept there against her will and like she is not being listened to, hence her fairly forthright views expressed regularly to professionals, whether responsible for the Placement or not. In those circumstances, whilst I agree with Miss Haines this is a borderline case, I am satisfied that it does tip over the line into a true deprivation of liberty under Art.5 ECHR, not only because of TW's objection, but on a balance of all relevant factors I have described.

HHJ Tindal considered the alternative that, if he was wrong in determining that TW was deprived of his liberty:

75. […] *this is clearly a case where the restrictions amount to an interference under Art.8 ECHR with TW's liberty and both her private and family life where the Court may have a role in monitoring the Placement's proportionality, as discussed in AR (and since my judgment, in PK and MK). However, unlike those cases, as this case is not brought to an end by my decision, there is no need for an advocate to be appointed under the MCA or Care Act. Indeed, even if I had found Art.5 ECHR did not apply, the case would have continued under s.16 MCA to determine the 'best interests' decision of whether TW should stay at the Placement or return home to live with her mother and accordingly the Court would have been able to review the proportionality of the Placement under Art.8 ECHR on an ongoing basis. However, as it stands, my conclusion is that there is still an Art.5 ECHR deprivation of liberty, so I maintain the urgent authorisation. Whilst Ms Harrison and her colleagues may want to consider this, what I anticipate is likely to happen is that another standard authorisation will be requested and issued. There is obviously time before the urgent authorisation expires next week to do so.*

Comment

As HHJ Tindal was at pains to point out, this judgment is not a precedent. It is, however, a judgment which stands alongside those of HHJ Burrows in showing a judge seeking faithfully to track through the application to *AGNI*. His overview of the 'spectrum' of cases decided between July and mid-October 2026 is particularly helpful. His observations about the necessity of an element of coercion being present are undoubtedly faithful to *AGNI* and indeed (and more importantly) to the Strasbourg caselaw. And his observations about pre-*AGNI*

DoLS assessments focusing on the 'acid test' as being relevant to (but not determinative of) new assessments on the *AGNI* approach are very helpful.

Whilst we understand why HHJ Tindal looked to the 'valid consent' limb here first, what it might be said that he was actually doing was looking to "P's understanding and perception of the circumstances." That understanding and perception was for him, and, in many other cases will also be, crucial in identifying whether the arrangements give rise to the necessary element of coercion to satisfy the objective element (and, in most cases where the subjective element is satisfied, will also give a rather rapid answer to the question of whether the person is consenting, given the inherent unlikeliness of a person consenting to something to which they perceive as coercive). But starting with valid consent does, wesuggest, risk losing focus on what the person is being asked to consent to.

One final point relates to procedure. On the face of the judgment, it is not entirely clear as to the basis upon which it was proper for the managing authority to grant itself an urgent authorisation for two reasons. The first is that it is not clear how the situation was "sudden and unforeseen" (the normal use for urgent authorisations, according to paragraph 6.2 of the DoLS Code of Practice). The second is that, by the time that the urgent authorisation was granted, the BIA had already indicated that she considered that TW was not deprived of her liberty. It is therefore unclear how it could be said that the managing authority was required to make an application for a standard authorisation (a precondition for the self-grant of an urgent authorisation: see paragraph 76 of Schedule 1 to the MCA 2005). It may well be that there is more to the story in respect of both aspects that meet the eye.

NHS Leicester, Leicestershire and Rutland ICB v AA & Ors [2026] EWCOP 56 (T1) (Tribunal Judge Sharron, sitting as a Tier 1 Judge of the Court of Protection)

Article 5 ECHR – Deprivation of liberty

Summary

Whilst this judgment has no precedent value, as a judgment by a Tier 1 judge, it is a judgment which carries with it the weight of practical experience, Tribunal Judge Sharron being a fee paid judge alongside her practice as a Court of Protection barrister.

AA was a young man aged 26, with learning disabilities, epilepsy and diabetes; he was non-verbal. He lived in a supported living placement, and at paragraph 15, TJ Sharron summarised the restrictions to which he was subject as including the following:

> *a. AA is required to live at the supported living placement. He is not able to choose to reside or stay overnight elsewhere;*
>
> *b. AA receives 2:1 support day and night (with waking night staff). He is under eyesight observations during the day with observations every 15 minutes at night;*
>
> *c. There is a bed sensor in place;*
>
> *d. The front door of the property is locked as are windows and gates; [C4]*
>
> *e. If AA were to attempt to leave the property unaccompanied, he would be brought back; [C4]*
>
> *f. There is a lap strap on AA's wheelchair;*
>
> *g. When travelling child safety locks are activated on the vehicle; [C4]*

h. AA's access to the kitchen is supervised and AA's food is stored in a locked cupboard; [C1072]

i. AA's food shopping is undertaken by staff in line with AA's dietary needs; [C1072]

j. AA's dietary intake is strictly controlled;

k. AA is accompanied by staff whenever he leaves the property. AA is offered a choice of activities that have been risk assessed as being appropriate by staff;

l. AA has been prescribed Risperidone since 03.10.25 which was introduced as a response to the severity of AA's headbanging and self-injurious behaviour;

m. AA's contact with his family is restricted in accordance with the contact orders in place and is supervised by staff;

n. AA is not able to visit the family home;

o. AA does not have access to his own money which is kept in a locked safe at the placement; [C572]

p. Physical restraint is authorised in AA's positive behaviour support plan, including:

i. Escorting, rear-view escort, and single-hand wrist grab release; [C803]

ii. Straight arm hold, double cup fist hold, 'other authorised safeholds in line with PMVA training and DoLS authorisation. [C803]

The ICB responsible for AA's care arrangements contended that AA was not deprived of his liberty, TJ Sharron summarising the ICB's position thus:

28. The ICB submits that the objective element of a deprivation of liberty is not met, as AA's arrangements are as close to normal as possible, the purpose of any restrictions is protective (rather than coercive) and examples of AA displaying challenging behaviour are attributable to his condition rather than being indicative of objection. The ICB points to the fact that incidents of headbanging and self-injurious or aggressive behaviour have declined considerably over the last 12 months and that there has only been one incident of restraint since April 2026. The ICB acknowledges that Risperidone has been prescribed since October 2025, but highlights that it is being administered at the lowest possible therapeutic dose. AA is described by others at various times as being 'happy' or 'settled' and the ICB points to the fact that AA can recognise pictures of his home, and will point to it, if he wants to come home when he is out in the community.

29. Mr Fullwood invited the court to find that examples of challenging or self-injurious behaviour are either 'sensory seeking' or forms of 'communication'. I am quite content to accept, based upon the evidence, that AA's challenging or self-injurious behaviour is either sensory seeking, or a form of communication. Where such behaviour is a form of communication, however, I have found it more difficult to be clear as to what AA is expressing through such communication.

The Official Solicitor on AA's behalf agreed that AA was not deprived of his liberty, her argument being summarised thus:

34. […] *In essence, it is contended that AA is not objectively confined, on the basis that the arrangements are relatively normal for him, the purpose of the restrictions is protective, and the degree and intensity of the restrictions is*

> *not sufficient to cross the line into confinement. It is further submitted that AA's challenging behaviours should be seen as part of his presentation, rather than evidence of objection, and that he appeared happy/content at the placement when his representatives have visited.*
>
> *36.* […] *In response to oral submissions from Ms Hampshire [on behalf of AA's father], Ms Pudney, on behalf of the Official Solicitor agreed that the restrictions on family contact, and the fact that the placement prevented AA from living with his family, were relevant factors to consider. However, Ms Pudney submitted that this did not tip the overall balance of the restrictions in favour of a deprivation of liberty arising on the facts.*
>
> *37. There is no reference within the Official Solicitor's analysis as to the significant role that Risperidone appears to have played in addressing what were extremely high levels of self-injurious behaviour that AA was displaying, within the last 12 months. This is an issue which has troubled the court, when it comes to assessing what AA's experience of his care arrangements may be.*

TJ Sharron noted that, because of the way in which the case had evolved, the Official Solicitor had advanced her written position before sight of materials from AA's parents which made the positive case that their son was deprived of his liberty.

In determining whether AA was deprived of his liberty, TJ Sharron directed herself by factors identified by Theis J at paragraphs 66-67 of *Essex County Council* v *MH & GH & ST* [2026] EWHC 2328 (Fam).

Three aspects of TJ Sharron's judgment are of particular wider interest.

First, TJ Sharron's analysis of the fact that Risperidone was administered as part of AA's daily regime. As she noted at paragraph 54, directing herself by reference to paragraph 188 of *AGNI* (in which the Supreme Court identified that "[t]*he administration of medication (including antipsychotic drugs or tranquilisers) is likely to be highly relevant in supporting the existence of the objective element of confinement because it suppresses the ability and freedom to express wishes and feelings*":

> *The administration of Risperidone, as part of this daily regime, which is not being used to treat an underlying core disorder but to suppress behaviours that challenge, is in my view also significant, both in relation to whether there is objective confinement, as well as what can be interpreted about AA's wishes and feelings from his current presentation.*

Second, TJ Sharron's analysis of AA's 'participation in ordinary circumstances':[9]

> *65. As set out above, the only place that AA is going to is the Range. It is positive to see that AA is now starting to leave the placement for some time each day, but I accept the submission of the family that AA is not participating in the types of activity that other young people of his age may do, including people with learning disabilities and autism. AA is not, for example, attending college, a day centre, or any groups where he comes in to contact with peers. AA sees his family at his placement, and they can accompany him to the Range, but he is*

[9] *NHS Leicester, Leicestershire and Rutland ICB v AA & Ors* [2026] EWCOP 56 (T1).

not able to go and spend time with his family at their homes, or to be part of family gatherings, as most people of his age would do.

66. Linked to the above is the issue of relative normality. In my view, great caution needs to be applied when considering what constitutes relative normality for an individual who is subject to high levels of restriction. It is tempting to draw the conclusion that just because a person is assessed as requiring a particular level of support in one setting, that this must be what is normal for anyone in their position. However, behaviour can be greatly impacted by environment and most people who practice within the Court of Protection will have experience of someone who has moved environment, and who has suddenly required a lot fewer (or indeed perhaps more) restrictions. AA's parents submit that AA's current life is not relatively normal for him, and that prior to his hospital admission and discharge to his current supported living placement, AA was accessing lots of different activities and had travelled on holiday to lots of countries. This is a submission with some force and was not challenged, in terms of the evidential background, by the other parties.

67. Many young people with autism and learning disabilities participate in a much greater range of ordinary activities than AA (attending education, day centres, or group activities). Whilst it is clear that those responsible for AA's care hope that, over time, AA's life will move in that direction, at this juncture, AA's day to day existence is much narrower than many people in a similar situation enjoy, and he is isolated from the outside world. This is a factor which, in my view, taken together with the other restrictions on him, weighs in favour of confinement.

Third: TJ Sharron's analysis of AA's "experience, level of contentment and signs of objection":

74. AA is not capable of communicating verbally and therefore he is unable to articulate his wishes and feelings, and his behaviour must be interpreted for an indication of what he is experiencing. In the early part of AA's placement, he was demonstrating high levels of head banging and self-injurious behaviour. I do not think any party would seriously suggest that AA's behaviour between June 2025 (following admission) to November 2025, was not indicative of objection, and nobody did suggest that. Indeed, the ICB relies on the fact that there has been a dramatic reduction in headbanging incidents, as evidence of AA being more settled and happy at the placement.

75. The fact that someone is <u>happier</u>, does not mean, however, that they are happy/content with the arrangements, or that they would choose them if they were given a choice. AA's parents believe AA would want to come back to the family home if given a choice; in the absence of it being an available option, AA's views have not been sought on this (for example, by showing him pictures of the two options) and so it is not possible for the court to know what AA's response to this would be.

76. It is pleasing to note that AA now appears to be much more settled, that he is engaging with staff, and starting to go out daily. I readily accept that some of AA's challenging/self-injurious is likely to be sensory related or to be a communication of frustration regarding day to day

matters (rather than to signify objection more generally).

77. However, there are significant features of AA's presentation which have given rise to serious doubt in my mind, as to whether AA is genuinely content with the arrangements in place, or whether his behaviour is communicating objection. I identify the following significant question marks regarding what can be interpreted about AA's experience of his arrangements:

i. The fact that AA's high levels of self-injurious behaviour reduced suddenly following the administration of Risperidone from 03 October 2025 onwards. The dose of the medication has been reduced, however, the therapeutic effect of the medication appears to have been maintained. I do not know whether AA's current behavioural presentation would be maintained if the medication was stopped altogether, and this has not been tried. It is hard to reliably interpret what AA's behaviour is communicating, in circumstances where he is subject to medication which can suppress objection and the ability and freedom to express wishes and feelings;

ii. It is acknowledged in the evidence that AA is likely to perceive the restrictions in place around food as giving rise to a loss of control which may make him agitated/aggressive; [C1258]

iii. The fact that AA continues to display self-injurious or aggressive behaviour which has no obvious trigger. The attendance note of Mr Chapman dated 27 August 2026 records 4 incidents of self-injurious or challenging behaviour between 27 July and 24 August 2026, where no trigger was identified [C159]. One of these involved an attack on a member of his care staff whilst travelling in a car, and the other three involved self-injury. I was informed that AA punched a hole in the wall on 28 August 2026 and in the month of September (up to the date of the hearing) there had been 4 incidents (although I am unaware of whether these were accounted for in terms of known triggers);

iv. AA's parents are in regular contact with him and they spend sustained periods of time with him throughout the week. They both consider that unexplained challenging behaviour is AA communicating that he is not happy about something, and this is, in my view, consistent with AA's PBS.

v. There appears to be a consensus that AA enjoys contact with his family. AA's mother submits that AA is happy during contact but gets agitated when it is time for contact to end. I do not fully understand how AA experiences the restrictions on contact and how this impacts him overall.

vi. AA is reported to be spending long periods of the day in bed/asleep when his family are not there. It is not clear to me if this is evidence of withdrawal, or that AA or is not content, or whether there is some other reason for it.

78. I have considered carefully what the Supreme Court said in AGNI at § 191 as follows:

'191. We recognise that there may be considerable evidential difficulties in ascertaining whether a person who is severely autistic or who has other profound cognitive disabilities is content with and not objecting to

> *their living arrangements. Inevitably there will be a wide spectrum of cases, with cases at one end where eliciting evidence of positive expressions of wishes and feelings about the care placement will be impossible, and at the other end, cases (like MIG's and MEG's in Cheshire West, and the applicant's attitude to the Lielberze home in Mihailovs) where a tacit positive indication of wishes and feelings showing contentment with the arrangements can be ascertained. In the latter cases, such evidence is relevant and should not be excluded from consideration. The cases between the two ends of the spectrum will create varying degrees of difficulty and will require anxious consideration to determine what effect the applicable restrictions are having and what attitude the affected individual has to them. As we have said, it may be that if nothing more than mere compliance or acquiescence is a feature of the case, that is not enough. If the individual is capable of expressing a view and there is serious doubt about their attitude, no inference should be drawn.'*
>
> *79. Having anxiously considered a whole range of evidence about AA's presentation, I do have a serious doubt as to what AA's experience of his care arrangements is, and whether he is genuinely content, or whether he is objecting to all or part of his arrangements.*

TJ Sharron concluded that:

> *81. AA is objectively confined. Whilst there is no hierarchy of factors, in AA's case, the factors that I find weigh heavily in reaching this view, are the degree of control exercised over all aspects of his day to day life, his lack of participation in ordinary activities, including activities that were previously normal for him, and would be relatively normal for other young people in his position, the restrictions in place on contact and family life, and the regular use of behaviour suppressing medication. In terms of AA's wishes and feelings, as set out above, there is a mixed picture and I am left with serious doubt as whether AA is genuinely content or whether he objects to some or all of the arrangements. I therefore do find that there is an objective deprivation of liberty, and I am satisfied that AA is not able to provide valid consent for the same.*

There was no suggestion that, if AA was objectively confined, that he could validly consent to such confinement given his level of cognitive impairment; as his confinement was clearly imputable to the state, he was therefore to be seen to be deprived of his liberty, and TJ Sharron made an appropriate order providing authority for this, noting, at paragraph 82 that:

> *People who lack capacity are inherently vulnerable and amongst them, those who are unable to speak, are the most vulnerable of all. Whilst I recognise that the determination the court must ultimately make is a binary one, it is important, in my view, to acknowledge those cases where there is genuine uncertainty, and it is appropriate to err on the side of caution.*

Comment

Whilst not binding, we would suggest that TJ' Sharron's observations about normality – and what is normal for that person (requiring evidence as to what this means) – are particularly pertinent. Similarly, her analysis of AA's behaviour is, we suggest, a very useful worked example of the care that is required when analysing the wishes and feelings of a person

who does not communicate verbally. That is not to say that lack of verbal communication automatically means that a person is incapable of expressing wishes and feelings, but it does mean that additional care is required in establishing them with the reliability required by *AGNI*.

A Health and Social Care Trust v WM & Ors [2026] NIFam 23 (High Court (Northern Ireland) (Humphreys J))

Article 5 ECHR – Deprivation of liberty

Given that the *AGNI* case started with a devolution reference from Northern Ireland, it is of interest that – so far – there have been no reported cases from that jurisdiction applying the case. One reason for this that the Northern Ireland DoLS framework applies more broadly than the Anglo-Welsh one (so the 'community DoL' cases heard by the Court of Protection largely do not arise), and that challenges to authorisations under that framework are heard by the Review Tribunal, which does not publish its judgments. However, we now have a Northern Ireland High Court decision which considers *AGNI*, in the form of the decision of Humphreys J in *A Health and Social Care Trust v WM & Ors* [2026] NIFam 23. The case concerned a 13-year-old boy, LR, who was the subject of a full care order and who resided in a property owned and managed by the Trust.

LR had a diagnosis of autism spectrum disorder, global developmental delay and a moderate to severe learning disability. Humphreys J described him (at paragraph 5) as a "*vulnerable and challenging boy* [… who] *has a history of violent and aggressive behaviour towards staff and other residents. In particular, he makes makeshift weapons and threatens to kill or stab other people. Between August 2024 and March 2025, LR physically assaulted staff 69 times and other young people on 13 occasions*." A move to his current placement had led to improvements in LR's presentation, although "[c]*lose supervision is still required, normally on a 1:1 basis but at times this is required to be 2:1. Restrictions around his access to the kitchen are required for health and safety reasons. Physical restraint was used on one occasion in April 2026*."

Before determining whether those restrictions gave rise to confinement and hence a potential deprivation of liberty, Humphreys J set out a detailed exegesis of the law as it had evolved before and after *AGNI*, taking into account decisions up to and including that of Theis J in *Essex County Council v MH* [2026] EWHC 2328 (Fam). He noted that:

> *39. The contrast between the decision in BM and that in ST is illustrative of the difficulties first instance judges have in the application of the multifactorial approach set out in AGNI. The absence of a bright line rule means that different judges can and will reach different decisions in very similar cases. Each case is, of course, fact specific, but it is important in this area, relating as it does to the care of some of society's most vulnerable individuals that the law is clear and predictable. Many decisions around the well-being of those individuals affected are made by social workers and other professionals who are not judges or lawyers but wish to ensure that those concerned are provided for in the safest, most appropriate and lawful manner.*

Humphreys J identified the two 'checklists' of factors identified in *MH* and *AR*.

In relation to children, Humphreys J observed that:

47. In Re A-F (Children) [2018] EWHC 138 (Fam) Sir James Munby set out his "rule of thumb" in relation to Cheshire West as it applied to children:

> *"Inevitably, one has to proceed on a case-by-case basis, having regard to the actual circumstances of the child and comparing them with the notional circumstances of the typical child … the best I can do, by way, I emphasise, of little more than 'rule of thumb', is to suggest that:*
>
> *(i) A child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of Storck component (a);*
>
> *(ii) A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion;*
>
> *(iii) Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion."*

48. The subject matter of AGNI concerned adults, defined for this purpose as those aged 16 or over. Although children under 16 therefore fell outside the direct subject matter of the reference, the Supreme Court's exposition of the autonomous meaning of deprivation of liberty under article 5 is not age-specific. In my judgment the same principles must inform the assessment of whether the arrangements imposed upon a child amount to a deprivation of liberty, whilst recognising the distinct legal and factual circumstances of childhood. It remains to be seen whether the rule of thumb identified in Re A-F continues to have utility.

On the facts of the case before him, Humphreys J considered that:

> *49. The restrictions in place in relation to LR are supervision, access to the kitchen and physical restraint where necessary. He lives in a residential setting with his own bedroom, and the restrictions imposed on him are relatively modest and are for his own well-being. They are not punitive in nature. Physical restraint has only been used once this year. He attends school and a local youth club. There are no particular activities which he is prevented from doing. He appears generally content in his placement although there have been issues with the other resident.*
>
> *50. Considering these factors cumulatively, I am satisfied that they amount to restrictions upon LR's liberty but not a deprivation of it. The degree of supervision is substantial but responsive to need, rather than being constant. The environmental restriction relates to one part of the home. Physical restraint is an exceptional feature of his care. LR participates in education and community activities and he generally regards the placement as his home and is content to remain there. The purpose and practical effect of the arrangements are to enable LR to live safely in the community rather than to confine him. The arrangements remain far removed in degree and intensity from the paradigm of the prison cell identified in AGNI.*

Although Humphreys J considered that it was "*therefore unnecessary and undesirable for the court to determine the subjective element of consent*," he did note that he considered that, whilst the (English) Court of Appeal's analysis in *J v Bath and North East Somerset Council* [2025] EWCA Civ 478, drew heavily on *Cheshire West*, it remained good law such that (applying its

principles, given that it does not have direct effect in Northern Ireland), it would not have been possible for the Trust to have consented to any confinement to which LR was subject.

Humphreys J then took the opportunity to express (obiter) views about the impact of *AGNI*:

> *55. The Supreme Court in AGNI emphasised that vulnerable individuals who do not meet the threshold for deprivation of liberty still enjoy protection in the form of their article 2, 3 and 8 ECHR rights. One must question whether the protection afforded by the other relevant Convention rights is real or illusory. There is no equivalence between the regular supervision of the court and the steps required to enforce such rights. It is important to recognise that many children in the care system are the offspring of vulnerable adults, who suffer from mental health or substance abuse problems, or themselves lack capacity. They may simply not be able to make complaints or bring proceedings in relation to violation of their children's rights.*
>
> *56. Any child who is the subject of a care order will engage with the Looked After Child ('LAC') review process. This is an important statutory safeguard but is not equivalent to independent judicial oversight. It is therefore a real concern that vulnerable children may be the subject of unwarranted restrictions in their lives without regular, effective and independent review.*
>
> *57. Equally, many vulnerable adults do not have a means of communicating concerns about their ongoing restrictions or treatment. There must be a danger of a "once and for all" approach being taken to consent which does not allow for changes of mind and circumstance. It is to be hoped that the forthcoming revised Code of Practice addresses some of these important issues.*
>
> *58. There is no longer a bright line rule or an "acid test." Whilst the outworkings of AGNI may result in many fewer people ultimately being made the subject of deprivation of liberty orders or safeguards, there will be a very significant body of work to be undertaken to assess individuals whose arrangements may fall into this category.*

Having in consequence of his analysis above reached the view that the Trust's application should be dismissed, Humphreys J then set out a point which is frequently misunderstood in relation to the cases that are being decided in relation to AGNI:

> *60. I emphasise that the factual conclusion reached in this case should not be treated as establishing that materially similar restrictions will necessarily fall outside article 5. The ratio of AGNI requires a case-specific assessment of the particular individual's circumstances and the nature, duration, manner and effect of the measures in question. Such scrutiny is important to ensure that vulnerable adults and children do not unjustifiably lose the protection which the law otherwise affords them.*

ZZ (Deprivation of Liberty in the Public Interest) (No. 2) [2026] EWCOP 57 (T2) (HHJ Burrows)

Article 5 ECHR – Deprivation of liberty

Summary

In *ZZ (Deprivation of Liberty in the Public Interest) (No. 2)* [2026] EWCOP 57 (T2), two questions

arose: (1) was *ZZ* deprived of his liberty; and (2) in circumstances where the primary reason for the relevant restrictions were to secure the public interest, was any deprivation of liberty to which he was subject justified? The judgment is the latest in a long-running saga which has been to Tier 3 and back (see *Local Authority A v ZZ* [2024] EWCOP 21), concerning a man with a constellation of impairments and presenting significant risks to others).

As to the first question, HHJ Burrows had little hesitation in reaching the conclusion that *ZZ* was deprived of his liberty:

> *11. The question is not determined solely by reference to continuous supervision and control or freedom to leave, as under the last test the Supreme Court gave us, in P v Cheshire West and Chester Council [2014] UKSC 19, but by consideration of the person's concrete situation viewed as a whole. Relevant factors include the degree of restriction imposed, the extent of coercion, the person's wishes and feelings, the question of consent beyond that defined by the MCA, and whether the arrangements fall within the sphere of relative normality for a person in that individual's circumstances.*
>
> […]
>
> *12. Applying that approach, I am satisfied that the arrangements imposed upon ZZ are highly restrictive. Almost every aspect his life is regulated and controlled. There is supervision of his movements, his communications are monitored, his relationships with others are controlled. He is severely restricted in his use of technology. In short, he is unable to exercise the degree of personal autonomy that an ordinary adult in the community would normally enjoy.*
>
> *13. I do not consider these arrangements can properly be characterised as falling within the sphere of relative normality. Whilst regard must be had to ZZ's individual circumstances and needs, a substantial proportion of the restrictions are imposed because of the risk he presents to others and the need to protect the public. Their purpose is not solely to provide care and support. In that respect the present case bears a close resemblance to Y County Council v ZZ* [not the same *ZZ* as the one being considered here] *[2013] EWCOP 463, in which Moor J recognised the relevance of restrictions imposed for the protection of others when considering whether a deprivation of liberty arose.*
>
> *14. I have also considered carefully whether ZZ consents to the arrangements.*
>
> *15. I accept that ZZ frequently presents as cooperative and that he has engaged positively with professionals involved in his care. He has achieved significant progress. Certain restrictions have been reduced over time, and he has expressed approval at some aspects of the current placement.*
>
> *16. However, the evidence demonstrates that ZZ wishes to enjoy substantially greater autonomy than is presently available to him. He wishes to possess his own key and to enjoy greater freedom in his relationships, communications and daily life. What he ultimately wants, not surprisingly, is to live a more normal and independent*

existence. His compliance with the current arrangements reflect an acceptance of present reality rather than genuine agreement with the restrictions themselves.

17. Whilst the objective and subjective elements of deprivation of liberty overlap, it is still appropriate to deal with them separately, provided that one does not lose sight of that overlap, which I do not.

18. When dealing with the objective element of deprivation of liberty, I have to consider how the restrictions imposed upon ZZ are experienced by him. In other recent cases much has turned on this since the NI case now requires the Court to focus on how P experiences the circumstances in which they are placed. There has been a number of Tier 2 judgments and one very recent exceptionally clear Tier 1 judgment (NHS Leicester, Leicestershire & Rutland ICB v AA (& others) [2026] EWCOP 56 (T1) (TJ Sharron) in which this is addressed. At the present time, there is also a judgment from Mrs Justice Theis, in Essex County Council v ST [2026] EWHC 2328 (Fam).

19. The only Tier 2 judgment I will mention is that of His Honour Judge Tindal in TW v Worcestershire County Council [2026] EWCOP 54 (T2). At [55] when the Judge summarises his approach to the objective element he says this:

> *In short, if someone actively objects to their placement - particularly if that leads to conflict and unhappiness, or even potentially physical restraint - there is clearly an element of coercion as they are being compelled to live somewhere they did not want to live, which points towards 'confinement'. By contrast, if someone is actively happy in their placement, that would not only point towards 'valid consent', it would also point against their being 'confined' at all because they would not experience any element of coercion. So, in MIG, MEG and Mustafa, it was their broad (if not unqualified) acceptance of their respective placements which underpinned their protective and caring purpose, 'relative normality' and lack of coercion, so they were not 'confinements' in the first place, even aside from the evident 'valid consent' to them. Likewise, in the more borderline case of AR, the absence of objection could not constitute AR's valid consent to the placement, but it weighed against his 'confinement'. In SM, objection was occasional and changeable, so could not itself change a placement that was not a deprivation of liberty into one that was. By contrast, in RF, clear and consistent objection pointed strongly towards 'confinement'. So, clear and consistent objection is not determinative but a significant factor: generally and in this case.*

20. ZZ falls somewhere between the different categories in Judge Tindal's classification. ZZ is in a position where life outside an institutional environment is a welcome one. It is clear he would rather be where he is than someone more restricted. This is also the situation in cases concerning those who are discharged from detention under the Mental Health Act 1983 (MHA), including those who are restricted patients placed on conditional discharges. They accept the new restrictions; but what option do they have? ZZ is in the same position. He knows that he is better off where he is than in a more restricted environment,

and for that he is grateful. However, it is clear he would rather have greater freedom. For that reason, his position is closer to that of mere acquiescence rather than actual agreement.

21. For all those reasons I am quite sure he is objectively deprived of his liberty.

22. Moving on to the subjective element. Compliance, acquiescence and resignation should not be confused with consent. Even if ZZ possesses the ability to provide valid consent to these arrangements, for the reasons outlined above, I am not satisfied that he does in fact do so. Rather, he accepts the arrangements because he recognises that they presently exist and because he sees no alternative. That is not the same as giving genuine consent to them. The subjective element identified in NI is therefore established.

23. Looking at the matter in the round, I am satisfied that both the objective and subjective elements required by Article 5 ECHR are present. The restrictions are extensive and pervasive. They are maintained in significant part because of the risk ZZ presents to others. They substantially curtail his autonomy and freedom of action. They do not fall within the sphere of relative normality. Furthermore, I am not satisfied that ZZ validly consents to them.

24. Other judgments refer to the third limb for deprivation of liberty, namely, state attribution. It is clear the State is explicitly involved in the restrictions imposed on ZZ. In any event, it seems to me that when a set of restrictions are to be approved by this Court, State attribution is automatically triggered: see A LA in Yorkshire v SF (by her litigation friend, the Official Solicitor) [2020] EWCOP 15, Cobb, J. at [28] .

25. I therefore conclude that ZZ is deprived of his liberty within the meaning of Article 5 ECHR.

The next question, however, was whether any such deprivation of liberty could be justified. As HHJ Burrows put it at paragraph 27 "[c]*an it be in a person's best interests to have significant restrictions imposed upon him for the protection of the public?*"

The short answer was yes:

28. I am entirely satisfied that the present arrangements remain in ZZ's best interests. They represent the least restrictive means presently available of meeting his needs whilst managing the significant risks identified by the professional evidence.

29. I derive particular assistance from the reasoning of Moor J in Y County Council v ZZ and of Mrs Justice Lieven in Birmingham City Council v SR; Lancashire County Council v JTA [2019] EWCOP 28.

30. The SR case was concerned with conditionally discharged MHA patients, which ZZ is not. The important part of that judgment for present purposes, however, is at [29] where Lieven, J. (as she then was) says this, approving Moor, J.:

> *The issue as to whether a patient can be detained because s/he poses a risk to the public, and it is said to be in his/her best interests to be detained for that reason, was considered by Moor J in Y County Council v ZZ [2013] COPLR 463. Moor J recognised that the purpose of the restrictions on P's liberty was*

to address, prevent and control P's sexual urges and he said at [49];

> *"I have come to the clear conclusion, for all the reasons given by the various doctors, that it is lawful as in Mr ZZ's best interests to deprive him of his liberty in accordance with the local authority care plan, pursuant to schedule A1 of the Mental Capacity Act 2005. I make that declaration. In doing so, I am following the advice of the expert professionals who know Mr ZZ so well. Indeed, the Official Solicitor accepts, on his behalf, that I should do so. I make it clear to Mr ZZ that I have no doubt that the restrictions upon him are in his best interests. They are designed to keep him out of mischief, to keep him safe and healthy, to keep others safe, to prevent the sort of situation where the relative of a child wanted to do him serious harm, which I have no doubt was very frightening for him, and they are there to prevent him from getting into serious trouble with the police."*

31. Indeed, in relation to the same P, with the same restrictions, Mr Justice Peter Jackson (as he then was) reached the same decision in Re N (Deprivation of Liberty) [2016] EWCOP 47.

32. Then at [40], her Ladyship goes on:

> *"Equally, I have no doubt, and there is no dispute or any potential for a dispute, that it is in both patients' best interests that they should be cared for and accommodated in the community settings proposed. In reaching this conclusion I take fully into account their wishes and feelings, which in both cases are that they are allowed to live in the proposed placements."*

33. I would add that in DY v A City Council & An NHS Trust [2022] EWCOP 51, Judd, J. explicitly approved Lieven, J. in SR [20].

34. My conclusion follows on from that of the above cases, which are binding on me. The fact that the arrangements serve an important public protection function does not detract from their benefit to ZZ himself. It is plainly in his interests that he should be protected from reoffending, from exposure to criminal sanction and from the serious consequences that would inevitably follow were those risks to crystallise.

35. In those circumstances I am satisfied that his deprivation of liberty is necessary, proportionate, lawful and in ZZ's best interests.

Comment

The observations made by HHJ Burrows at paragraph 30 are particularly interesting to read in light of the coming into force of the provisions of the Mental Health Act 2025 providing for conditional discharge into circumstances of deprivation of liberty. ZZ's circumstances are indeed very like a number of people who are conditionally discharged and whose circumstances amount to a deprivation of liberty. For the reasons set out here, there is a real ambiguity about what, exactly, those provisions do, an ambiguity really does require resolution. If the operation of those provisions both create the restrictions giving rise to deprivation of liberty and at the same time authorise them, is separate Court of Protection authority required for the person with impaired decision-making capacity?

Whilst HHJ Burrows is clearly correct to identify himself bound by the interpretation of the Tier 3 judges as to the operation of 'best interests,' Alex at least is duty-bound to say what he said before, namely that this does feel a particularly Orwellian conception. However, as – even if the LPS does come in – they will not include the honesty suggested by the Law Commission about taking account of public protection, we will remain fixed with this fiction for the foreseeable future.

Re B (A Child: Complex Needs: Deprivation of Liberty) [2026] EWHC 2789 (Fam) (High Court (Family Division) (Henke J))

Article 5 ECHR – Deprivation of liberty

Summary

Re B (A Child: Complex Needs: Deprivation of Liberty) [2026] EWHC 2789 (Fam) represents a clear and detailed consideration and application of *AGNI* to those under 16. It represents the first in what Henke J (the lead judge for the National DoL list) has said will be the number of decisions relating to children and young people whose cases she heard in that list. The specific child in question, B, was 9, with diagnoses of Autism Spectrum Disorder and Global Developmental Delay and presented with complex behavioural, emotional and developmental needs. She had a detailed Behaviour Support Plan and an Education, Health and Care Plan ("EHCP"). She attended a school providing specialist provision for children with additional learning needs. She also received regular respite care from a specialist provider whose staff are trained in trauma-informed care and autism awareness. The parties agreed that her circumstances did not give rise to a deprivation of liberty; they also broadly, but with one significant exception, agreed as to the law. That exception was whether, if B was confined, the local authority (as holder of a care holder relating to her) could consent to that confinement so as to take her circumstances out of Article 5 ECHR.

Henke J reminded herself that *AGNI* applied to those aged 16 and over; the question for her was how it applied to those under 16. In a paragraph echoing that of Mr Recorder Jack in *Re Mustafa* [2026] EWHC 2159 (Fam), she held (at paragraph 24) that:

> *Following AGNI, it is clear that "valid consent" for determining whether there is a deprivation of liberty is an autonomous concept, distinct from legal capacity under domestic law and consent to waive Convention rights. A person who lacks capacity to decide their living and care arrangements may nevertheless understand and accept them sufficiently to prevent those arrangements amounting to a deprivation of liberty. I consider that this applies equally to children. The question is not whether the child has legal capacity or is Gillick competent, but whether they are aware of their environment, have a basic understanding of their circumstances and can express a view. The weight given to that view will depend on the child's age, maturity and understanding.*

She then continued:

> *25. For children aged 16 or 17, it has been settled by Supreme Court authority that parents cannot provide valid consent to the confinement of the child by the state — Re D [2019] UKSC 42, 1 WLR 5403 applied. There is, however, a line of authority that parents may provide valid consent to the confinement by the State of children under 16 years old if they lack capacity to consent themselves, as such a decision may fall within the zone of parental responsibility. Recent*

> *examples are found in East Riding of Yorkshire Council v The Mother, The Father and L [2026] EWHC 181 (Fam) and Medway Council v The Father and O [2026] EWHC 236 (Fam). The issue of whether those authorities survive AGNI does not arise in this case, as B's parents play no part in her life.*
>
> *26. In this case, the local authority holds parental responsibility for B under a final care order — s 33 CA 1989 applied. The issue is whether it is open to a local authority to provide valid consent within the meaning of Storck (b). In J v Bath and North East Somerset Council & Ors [2025] EWCA Civ 478, paras 49–50, the Court of Appeal held that a local authority cannot validly consent to the confinement of a child in its care. Mr Krumins submitted that Re J was substantially based on Cheshire West and, following AGNI, should no longer bind this court. He invited me instead to follow the reasoning of Lieven J at first instance: under s 33 of the Children Act 1989, a local authority exercises parental responsibility for a child subject to an interim or final care order and should therefore be able to consent as a parent could for a child under 16. Mr Krumins reminded me that there were safeguards such as child-in-care reviews and independent reviewing officers. He argued that the local authority's positive obligations under Articles 2 and 3 could justify a deprivation of liberty where it was necessary and proportionate to detain a person to protect them from the harms covered by Articles 2 and 3.*

Henke J did not agree and after a close reading of J held that, notwithstanding its reliance upon *Cheshire West*, its core reasoning remained good, and that (at paragraph 31): "[t]o *permit the State, in the form of the local authority, to consent to the confinement by the State of an individual would drive a coach and horses through the purpose of Article 5*." She also had little truck with the arguments based upon Articles 2 and 3 ECHR:

> *32. As to Mr Krumins' arguments which rely on the positive obligations of the local authority, the State, under Articles 2 and 3, there appear to me to be two different arguments put forward. The first is that, if the State is satisfied that it needs to confine someone to meet its positive obligations under those Articles, then it can provide valid consent to that confinement. However, that begs the question: can the State provide valid consent to the confinement by the State of an individual? The answer is "no", for the reasons already given. The second argument is "justificatory": the State accepts that there is a deprivation of liberty under Article 5, but argues that it is justified by the State having to comply with its positive obligations under Articles 2 and 3. The problem with that argument is that "Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds" — paragraph 88 of Khlaifa v Italy [GC], no. 16483/12, 15 December 2016 applied. Articles 2, 3 and 5 may intersect, but they cannot be balanced against each other. They are not qualified rights. The only permissible grounds upon which an individual can be deprived of their liberty are set out within Article 5 itself.*

She also then considered the decision of Sir James Munby in *Re A-F*, where restrictive care arrangements were considered in the context of the child's age. She held that that analysis was framed by *Cheshire West* and the now-overruled reasoning of Lord Kerr (applying a comparator approach based upon the child's age). Rather:

34. […] *I agree with Mr Jones KC that whether or not a child is being deprived of their liberty must now be assessed in accordance with AGNI. I consider that the task following AGNI is to look at the concrete situation of the individual child. The relative normality of the child's circumstances and the purpose of the restrictions imposed are both relevant to the required multifactorial assessment. The rights granted by the ECHR are universal and apply to all equally. As the Supreme Court stated at paragraph 198:*

> *198. This does not result in "liberty" in article 5 meaning something less for those who, because of their impairments, are unable to enjoy that liberty. Nor does it mean that their human rights are in any way different from, or less than, those of an able-bodied person of sound mind. Liberty means the same thing for everyone. As explained in Engel, it means physical liberty, including the freedom to go where one pleases. For those who are unable to do this because they are unconscious, in a minimally conscious state, or so profoundly disabled that they cannot conceptualise leaving let alone physically achieve this, they are not being prevented by a third party from doing something and are not being deprived of anything. The state may in some circumstances be subject to positive obligations (as the Secretary of State accepts) to take reasonable steps to prevent a deprivation of liberty, by, for example, providing a wheelchair or other aid to enable the individual to leave. But that is a wholly different point.*

Helpfully, Henke J then set out a set of 'legal principles' at paragraph 36 drawn from the authorities she had reviewed:

> *(i) The starting point for any analysis must be the child's specific or "concrete" situation. The analysis must be multifactorial and should include consideration of the child's lived experience.*
>
> *(ii) When considering the objective component and whether a child is confined, there must be a focus upon the situation of the individual child, the nature and duration of the restrictive care arrangements in place, the purpose of the restrictions, their effects upon the child concerned, and the manner in which they are implemented by the child's carers. Any restrictions in place should be considered both individually and cumulatively when assessing their impact upon the child concerned.*
>
> *(iii) An individual, including a child, can be deprived of their liberty even if living in the community or their own home. However, if an individual is living in their own home, in accordance with their wishes and feelings, it makes it less likely that the individual is being subject to a deprivation of liberty within the meaning of Article 5. Put another way, the restrictions imposed need to be more severe or extensive to amount to such a deprivation, such as, for example, a combination of restraint, medication, and seclusion.*
>
> *(iv) The age of the child and their relative normality are relevant as part of a multi-factorial approach rather than direct comparators. Each case should be considered its own facts.*
>
> *(v) The purpose of the restrictions is relevant but not determinative.*

(vi) When considering the subjective component, consent in this context is distinct from legal capacity and the concept of Gillick competence. A child who does not have legal capacity may nevertheless understand their living arrangements and may be able to express a meaningful view about them. The weight given to that view will vary with the child's age, maturity and awareness of their situation. Absence of objection may, in some cases, be evident from the absence of conflict, but in others compliance and acquiescence will not be enough. Clear objection by an older child, including repeated attempts to leave, may strongly indicate a deprivation of liberty. Where there is serious doubt, no inference of valid consent should be drawn.

(vi) The local authority cannot consent to the deprivation of liberty of a child in its care whether under an interim or final care order.

(vii)The objective and subjective elements overlap and should not be compartmentalised. Compliance, the absence of objection, the relative normality of the placement, and the protective purpose of the measures may all bear upon the assessment.

(ix) Where, after assessment, the deprivation of liberty is obvious, a local authority will need to apply under s 100 CA 1989 for permission to invoke the inherent jurisdiction and, if permission is granted, seek authorisation of that deprivation of liberty. Where the position is finely balanced and the local authority considers that the restrictions may amount to a deprivation of liberty, the local authority should bring the case before the court for independent scrutiny. In such cases, the local authority should apply for permission under s 100 CA 1989 to invoke the inherent jurisdiction to seek the court's authorisation to deprive that child of their liberty.

On the facts of the case before her, and whilst the restrictions on B went beyond those expected in relation to a 9 year old:

> *45. I stand back and consider B's concrete situation and the nature, cumulative effect and purpose of the restrictions. Having done so, I agree with the local authority and B's Children's Guardian that they do not amount to a deprivation of liberty. Storck (a) and (b) overlap in this case. There is no confinement. B is happy and content with her lived experience. Article 5 is not engaged; no court authorisation is required and the proceedings are dismissed.*

Comment

The clear statement by Henke J that the logic of *J* remains valid notwithstanding the demise of *Cheshire West* is very helpful and, with respect, clearly correct. It is perhaps of some interest to note that, although not directly in issue before her, she appeared to proceed on the basis that it was obvious that *Re D* was still good law as regards the ability of parents to consent to the confinement of children aged 16 and over. Whereas *J*'s rationale can be seen to stem directly from Article 5 ECHR, it is not so obvious that *Re D* does, as opposed to being filtered through a *Cheshire West* prism. I do therefore anticipate that there may be an argument advanced in due course by the (non-local authority) parent of 16-17 year old that they should be seen as able to consent to the confinement of that child, and those who wish to maintain the position established in *Re D* will need to be prepared to meet that argument.

The guidance given by Henke J as to the approach to be taken to local authorities with

responsibility for children in their care where deprivation of liberty may be in play is also important. One would hope that a similar approach will also be taken in relation to the operation of the provisions to be introduced into s.25 Children Act 1989 by s.13 Children's Wellbeing and Schools Act 2026, requiring an application for authorisation to be made where the proposed restrictions in the relevant accommodation may amount to a deprivation of liberty.

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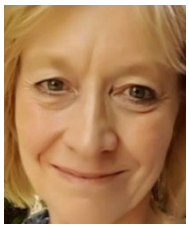
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Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his website.

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If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity My Life Films in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Our next edition will be out in December. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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