

Neutral Citation No: [2026] NIFam 23

Ref: HUM13162

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 21/10/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Plaintiff

and

WM

and

KR

and

LR, BY HIS GUARDIAN AD LITEM THE OFFICIAL SOLICITOR TO THE
COURT OF JUDICATURE OF NORTHERN IRELAND

Defendants

[Deprivation of liberty; children; inherent jurisdiction]

Claire MacKenzie (instructed by the Directorate of Legal Services) for the Plaintiff
Sarah Ramsey KC & Lauren MacAllister (instructed by Kristina Murray Solicitors) for the
first Defendant

The second Defendant did not appear and was not represented
Sinéad O'Flaherty KC & Anna McHugh (instructed by the Official Solicitor) on behalf of
the child

HUMPHREYS J

This judgment has been anonymised as it involves a child. The ciphers given to the parents and the child are not their initials. Nothing must be published which would identify the child or his parents.

Introduction

[1] This application concerns a 13-year-old boy, LR, who is the subject of a full care order and who resides in a property owned and managed by the plaintiff Trust. The Trust seeks the leave of the court to invoke the inherent jurisdiction of the court, pursuant to Article 173(2) of the Children (Northern Ireland) Order 1995 (“the Children Order”) and claims declaratory relief in relation to the living arrangements which pertain for LR. An interim order was made in June 2026.

[2] In particular, the Trust seeks a declaration that it may lawfully utilise the following when considered necessary and where any lesser intervention would be insufficient to ensure the best interests of the child:

- (i) Keeping the child under close supervision both in his place of residence and the community, including the provision of 2:1 supervision as deemed necessary;
- (ii) Preventing the child from accessing the kitchen at the residence to prevent access to potential weapons and for health and safety reasons, including keeping the kitchen locked as necessary;
- (iii) Using physical restraint as a last resort to manage and reduce the risk of injury to the child and others.

[3] The first defendant, WM, is LR’s mother and she has been represented and engaged both in these proceedings and other applications made under the Children Order. The second defendant, KR, is LR’s father and has parental responsibility but has stated that he does not wish to participate in this litigation.

[4] This application gives rise to important issues relating to the application of the principles laid down by the Supreme Court in *A Reference by the Attorney General for Northern Ireland* [2026] UKSC 16 (“AGNI”).

The evidence

[5] LR has a diagnosis of autism spectrum disorder, global developmental delay and a moderate to severe learning disability. He is a vulnerable and challenging boy who was made the subject of an interim care order in January 2022. Since then a series of placements have broken down, including a bespoke therapeutic placement outside of the jurisdiction. A full care order was made in October 2022. LR 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. In March 2025 LR was placed in secure accommodation until his release, when he was moved to his current place of residence which is a two bedroom residential property.

[6] Since this placement began there have been improvements observed in LR's presentation. Close 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.

[7] The question for this court to determine is whether this suite of proposed restrictions, properly analysed, amounts to a deprivation of LR's liberty.

Deprivation of liberty

[8] Section 306(1) of the Mental Capacity Act (Northern Ireland) 2016 ("the MCA 2016") provides:

“‘deprivation of liberty’ means a deprivation of liberty within the meaning of Article 5(1) of the Human Rights Convention (and for the purposes of any reference to a deprivation of liberty, it does not matter whether the deprivation of liberty is done by a public authority or not).”

[9] Article 5(1) of the ECHR states:

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

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

[10] In *Storck v Germany* (2005) 43 EHRR 6 (“*Storck*”), the European court held that a deprivation of liberty for the purposes of article 5 has three elements:

- (i) The objective element where the person is confined to a particular restricted space for a material period of time;
- (ii) The subjective element, where there is no valid consent to that confinement; and
- (iii) Attribution of state responsibility, either directly or indirectly, for the confinement.

[11] The MCA 2016 introduced in Northern Ireland Deprivation of Liberty Safeguards (“DOLS”) whereby the deprivation of liberty of a person aged 16 or over, who lacks capacity to consent, in a place where appropriate care or treatment is available can be authorised administratively by a trust panel.

[12] The criteria for authorisation are found in para 10 of Schedule 1 to the MCA 2016:

- (i) Appropriate care or treatment is available for the person in the place in question;
- (ii) Failure to detain the person would create a risk of serious harm to the person or risk of serious physical harm to others;
- (iii) Detention is a proportionate response to the likelihood and seriousness of the harm in question;
- (iv) The person lacks capacity in relation to the detention; and
- (v) It would be in the person’s best interests to be detained.

[13] A trust panel authorisation can last for a maximum of six months and may be extended, following further medical examination and other assessments, initially for six months and then for one year at a time. Short-term detention in hospital can also

be authorised by an appropriate healthcare professional for up to an initial 14 days which can be extended for another 14 days.

[14] Various safeguards are put in place including the requirement for a nominated person to be consulted when best interests are considered and review by the Review Tribunal.

[15] Outwith the statutory scheme, the inherent jurisdiction of the High Court can be invoked to permit deprivation of liberty, particularly in relation to children aged under 16. This is often the case when the chronic lack of secure accommodation facilities means that an application under Article 44 of the Children Order is not feasible.

[16] Section 288(1) of the MCA 2016 requires a code of practice to be issued by the Department of Health. Any such code has statutory force, in that various persons who take decisions in relation to a person who is aged 16 or over and lacks capacity for purposes of the MCA 2016 “must have regard” to it. It was the production of a revised code of practice which precipitated the reference by the Attorney General to the Supreme Court in *AGNI*. It was contended that the revised code was inconsistent with the Supreme Court decision in *Surrey County Council v P; Cheshire West and Chester Council v P* [2014] UKSC 19 (“*Cheshire West*”) in that an individual lacking mental capacity could nonetheless give valid consent to the confinement. Such consent would then obviate the need for any authorisation to be obtained through the MCA 2016 or the inherent jurisdiction of the court.

[17] In *Cheshire West* the Supreme Court held the “acid test” for deprivation of liberty was whether the individual was subject to “continuous supervision and control” and was “not free to leave.” It also proceeded on the basis that an individual who lacks the mental capacity to consent to his or her care arrangements cannot give valid consent (within the ECtHR meaning of this term) to such confinement. The revisions to the code of practice were intended to depart from this approach to the question of valid consent and to recognise that an individual lacking mental capacity could nonetheless give such consent through positive indications of their wishes and feelings. The question for the Supreme Court was whether this Ministerial act, in the form of issuing the revised code, was compatible with article 5 ECHR and therefore lawful under section 24 of the Northern Ireland Act 1998.

[18] The Attorney’s reference was limited to the question of whether *Cheshire West* was correctly decided in line with the relevant Strasbourg jurisprudence in relation to the subjective element. In the event, the court accepted the invitation of the Secretary of State for Health and Social Care, as intervener, to also consider the question of the objective element and whether *Cheshire West* was correctly decided on this issue.

[19] The court found that *Cheshire West* was wrongly decided in light of the relevant Strasbourg jurisprudence and held that:

- (i) The assessment of whether an individual has been deprived of liberty is specific to that particular case and requires a multifactorial assessment of the type, duration, manner and effect of the measure or measures in question;
- (ii) The fact that an individual lacks legal capacity does not mean that they cannot validly consent to their living arrangements so as to prevent these from becoming a deprivation of liberty;
- (iii) There is an overlap between the objective and subjective elements;
- (iv) The effect of restrictions on the individual, including their compliance and the lack of objection if they are capable of objecting or giving tacit agreement, is relevant in assessing the objective element of confinement;
- (v) There will be difficult borderline cases, particularly in the ascertainment of wishes and feelings, where the approach ought to be “practical and realistic.”

[20] The court recognised the very wide range of individuals who are subjected to some form of restriction in their care arrangements, and also the diversity and range of individuals in terms of their ability to communicate their wishes and feelings. The nature of the reference brought before the Supreme Court was necessarily an *ab ante* challenge and therefore the issues were not viewed through the prism of a particular individual or set of individuals. This was a concern expressed by the Official Solicitor and the charity interveners. The court did, however, consider the impact of its decision on the persons who were the subject of the original *Cheshire West* judgment, namely MIG, MEG and P.

[21] MIG was aged 18 at the time of the first instance hearing in the case. She had a moderate to severe learning disability, very limited cognitive ability, problems with her sight, hearing and communication. She was living with a foster mother in a private home who was provided with intensive support in most aspects of daily living. MIG was not on any medication nor was she restrained or locked in. She had never attempted to leave the home by herself and showed no wish to do so, but, if she had done so, her foster mother would have restrained her. MIG attended a further education college daily during term time and was taken on trips and holidays by her foster mother.

[22] MEG, who was MIG’s younger sister, was aged 17 at the time and had mild learning disabilities. She lived with three others in a small NHS residential home for learning disabled adolescents with complex needs. She was of limited cognitive ability and exhibited occasional outbursts of challenging behaviour towards the other three residents. She sometimes required physical restraint and was both prescribed and administered tranquilising medication to control her anxiety. She was not in a locked environment but had one-to-one and sometimes two-to-one support. Continuous supervision and control were exercised to meet her care needs. MEG was accompanied by staff whenever she left the home. She attended the same further

education college as her sister during term time and had a full social life. She showed no wish to go out on her own, and so there was no need to prevent her from doing so, but the judge concluded that if she had tried to leave, she would have been restrained or brought back for her own safety.

[23] P was a 38-year-old man born with cerebral palsy and Down's syndrome who lived in a staffed bungalow with two other residents, near his mother's home. P could walk short distances but otherwise required prompting and help with all activities of daily living, getting about, eating, personal hygiene and continence. He sometimes required intervention, including physical restraint, when he exhibited challenging behaviour but was not prescribed any tranquilising medication. He went to a day centre, hydrotherapy pool, the pub and the shops, and saw his mother regularly although he was unable to go anywhere or do anything without the support and assistance of staff.

[24] In *Cheshire West* the court ultimately held that all three individuals had been deprived of their liberty under article 5 ECHR. In light of the legal position as properly understood, the court concluded:

- (i) In MIG's case, there were sufficient indications of her being happy with her living arrangements to amount to valid consent. Further, her living arrangements were as close to normal as possible and such minimal element of confinement as existed was for her benefit and protection and, as a result, the objective element of confinement was not present. It was found that her situation was "very far removed from the paradigm case of confinement in a prison cell" and she was not therefore subject to a deprivation of liberty;
- (ii) MEG also exhibited sufficient indications that she was happy living in the NHS facility where she was placed as to amount to valid consent to being there. Although she received tranquillising medication, this was not for the purpose of disabling her from forming a view about her living circumstances. She was generally happy to be there, despite occasional upset outbursts. The living arrangements were as normal as possible in the circumstances, and the continuous supervision and control to which she was subject were directed to meeting her care needs rather than to making her a prisoner. Whilst she was subject to physical restraint at times, the court held that was done for her own protection or for the protection of others, and not with a view to punishing her. Again, therefore, it was found that this was far removed from the paradigm case and MEG was not subject to a deprivation of liberty;
- (iii) The position in relation to P was doubtful but no final view was expressed.

[25] The court held that it ought to depart from its previous decision and concluded:

"Cheshire West creates a bright-line test which is too crude in its application and which leads to an over-extensive

interpretation of deprivation of liberty on the basis of a misplaced policy concern that safeguards in relation to vulnerable people have to be provided pursuant to article 5. In our view, this policy-driven approach puts the cart before the horse. A crude application of article 5 cannot be a cure for the problems posed by caring for vulnerable adults with mental health or other cognitive disabilities. Nor is it necessary to adopt that interpretation of article 5 to safeguard the interests of such individuals, since other legal regimes and Convention rights apply in their case.” (para [185])

The policy considerations

[26] As the Official Solicitor has pointed out in argument, there was a policy element to the decision in *Cheshire West*. Baroness Hale commented:

“Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.” (para [57])

[27] In *AGNI*, decided just 12 years later, the same court decided that the policy analysis had entirely shifted:

“The due protection of an individual’s interests does not require that an extended interpretation be given to the concept of deprivation of liberty under article 5, contrary to the opinion of Baroness Hale in *Cheshire West* at para 57. She said that there was a policy reason to adopt an extensive view of deprivation of liberty under article 5 because, having regard to the extreme vulnerability of people like P, MIG and MEG, it was necessary to “err on the side of caution” in deciding what constitutes a deprivation of liberty in cases like theirs, since “[t]hey need a periodic independent check on whether the

arrangements made for them are in their best interests.” But an individual in care has other relevant Convention rights, including most prominently those under articles 2, 3 and 8, which mean that they cannot be left unprotected and without appropriate review of their interests on a continuing basis. In our view, in light of these other protections, the policy reason given by Baroness Hale is overstated. Their interests and rights under those provisions may be capable of being protected effectively in less intrusive ways than under article 5. In any event, that policy reason does not justify the approach Baroness Hale adopted to the assessment of whether a deprivation of liberty exists.” (para [141])

[28] The shift was evidently influenced by the prevalence of deprivation of liberty orders and safeguards in the jurisdictions of the United Kingdom. At para [12] the justices observed:

“The consequences of the decision in *Cheshire West* have been significant. The approach it adopted to deprivation of liberty has had the effect that a significant number of people across the United Kingdom (estimated at over 400,000) with impaired mental capacity and living in health or social care settings are considered to be deprived of liberty for the purposes of article 5 and as requiring legal safeguards applicable by virtue of such deprivation (as distinct from other, different safeguards applicable by virtue of article 8 or other provisions of the Convention or under other parts of domestic law). It is not in doubt that they are a vulnerable group, potentially at risk and in need of protection.”

The cases since AGNI

[29] Since the judgment in *AGNI* was handed down on 2 June 2026, there have been a number of first instance decisions in the courts of England & Wales where judges have sought to apply its principles.

[30] In *Oxfordshire CC v P* [2026] EWCOP 33, P resided in a supported living environment which had locked external doors, sensors on the doors and window restrictors. P was not free to leave unless accompanied by one-to-one support which she requires for all outings, appointments and journeys and this was provided 35 hours per week. There was a sense of relative normality since the property appeared to be a normal dwelling and P was able to go on regular outings and attend local clubs. However, HHJ Owens in the Court of Protection (“COP”) found that she was subject to ongoing supervision and unable to leave the placement without support in place.

There was no physical restraint but she was not able to exercise her autonomy in the placement. It was held that the objective element was satisfied and she was deprived of her liberty notwithstanding the removal from the paradigm of a prison cell identified in *AGNI*.

[31] On the evidence, there was considerable doubt as to whether P validly consented to these living arrangements and in such circumstances no inference of consent should be drawn. The court authorised the continued deprivation of P's liberty.

[32] In *Re Mustafa (A Child)* [2026] EWHC 2159 (Fam) the court was concerned with a 16 year old boy, subject to a full care order, who was living full-time in a regulated specialist school. Deprivation of liberty orders had previously been made, restricting, inter alia, the boy's access to the kitchen, keeping doors locked to prevent absconding, providing for 1:1 support at all times and 2:1 support where necessary. The staff were entitled to use physical restraint where necessary to do so, in a proportionate manner.

[33] The evidence revealed that the boy was happy at school, enjoyed a wide range of activities and was progressing well in his education.

[34] The court found that there was no deprivation of liberty on the basis that the child was content in his placement and any exercise of the power of physical restraint was carried out with consent or pursuant to the school's common law powers. Neither the objective nor the subjective elements were therefore satisfied on the facts.

[35] *Derby City Council v SM* [2026] EWCOP 46 concerned an adult female, with diagnoses of severe learning disability, catatonia, major depression and autism, residing in a supported living placement with a package of care provided by a local service. The level of support provided to her was high – constant 2:1 supervision. The court held that the level of restriction imposed ensured that she was able to go on visits and pursue her interests and that, objectively, she was not deprived of her liberty. Notably, it was held that the fact that the arrangements did not accord with her wishes could not be determinative of the issue.

[36] In *Lancashire County Council v BM* [2026] EWCOP 48, the subject was a 16 year old boy with autism spectrum disorder and a severe learning disability. He was in a solo residential placement where he was not free to leave, there was a minimum 3:1 staffing provision, the doors and windows were locked, certain rooms in the property were inaccessible to him, he was given prescribed medication and physical restraint was used where necessary. This menu of restrictions would incontestably have constituted a deprivation of liberty under the *Cheshire West* approach. However, Judge Burrows found that this was a “finely balanced case”, concluding:

“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.” (para [42])

[37] *Essex County Council v MH* [2026] EWHC 2328 (Fam) concerned a 15 year-old girl who was at very serious risk of harm due to absconding and episodes of self-harm. She was living in a residential placement with restrictions including 24 hour 3:1 supervision, physical restraint if necessary, locked doors and windows and steps to prevent her having access to sharp objects.

[38] Theis J held:

“On any view it is clear the order sought by the local authority that includes up to 3:1 supervision, locked doors and windows in the placement, and the way those restrictions are experienced by ST, which she objects to, means that she is deprived of her liberty.” (para [76])

The factors relevant to the objective element

[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.

[40] What then are the factors which ought to be taken into account in assessing whether a given individual is subject to a deprivation of liberty? In *MH* Theis J identified the following:

- (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.

[41] The learned judge also stated:

“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.”

[42] In *Salford City Council v AR* [2026] EWCOP 45, the court focussed on the following:

- (i) The environment - living in a family home, foster placement, supported living or ordinary home is highly relevant and may point away from deprivation of liberty;
- (ii) The purpose - protective and therapeutic restrictions are relevant and distinguishable from punitive confinement;
- (iii) Relative normality - the more the placement resembles ordinary life, the less likely it is to constitute a deprivation of liberty;
- (iv) Protective motivation - restrictions imposed for care and safety rather than punishment weigh against a finding of deprivation of liberty;
- (v) Objection and consent - genuine contentment, acceptance or tacit consent may negate the subjective element of deprivation of liberty. Mere acquiescence, however, may not suffice.

[43] The correct approach of the court is to carefully scrutinise the circumstances and arrangements pertaining in any given case and give consideration to all the listed factors. This will require reports from the social workers concerned, evidence from parents or other family members, medical evidence if appropriate and, importantly, an appropriate vehicle to receive the voice of the individual concerned. Often this will be through the office of the Official Solicitor, whose team approach these types of issue with scrupulous care.

Determination of the subjective element

[44] In light of *AGNI*, it is no longer legitimate to equate a lack of capacity with a lack of consent to restrictive arrangements. It is now apparent that valid consent to confinement is an autonomous concept, distinct from legal capacity or from the “valid consent” required for the waiver of Convention rights. Provided it goes beyond mere acquiescence, the expressed wishes and feelings of the individual may suffice to dispense with any requirement to seek an authorisation for what would otherwise be a deprivation of liberty.

[45] It will be necessary therefore, in any given case, to embark upon an analysis of what those wishes and feelings actually are. A capacity assessment will not suffice. This will often be a complex exercise since apparent compliance with particular conditions may reflect either genuine contentment or a lack of understanding of the restrictions imposed and the possible alternatives. Professionals are advised, in borderline cases, to be “practical and realistic” but it would come as no surprise if the courts were still called upon to make this type of determination.

[46] The extent to which an appropriate evidential basis will have to be obtained for this assessment of consent remains to be considered. Practitioners in this field will be familiar with the concept of fluctuating consent and there must be a danger of a “snapshot” observation being treated as a definitive answer to the question.

The application to children

[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.

Application to the instant case

[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*.

[51] It is therefore unnecessary and undesirable for the court to determine the subjective element of consent.

[52] In *J v Bath and North East Somerset Council* [2025] EWCA Civ 478, the Court of Appeal in England & Wales held it was not open to the state to avoid the constraints of article 5 of the ECHR by consenting to the confinement of a child subject to a care order. King LJ said:

"Put simply, in order to satisfy the requirements of Art 5, there must be an independent check on the State's power to detain. The local authority is an organ of State which, albeit acting in their best interests, is confining the child. The second limb of *Storck* requires there to be valid consent to that confinement. It is as Ms Roper submitted (see [35] above), inconsistent with Art 5 for that organ of State to 'both create the conditions in which a vulnerable person is confined and then to be able to give valid consent [to that confinement] so as to remove the case from Art 5.'"

[53] The court's analysis in *J* draws heavily on *Cheshire West* but nonetheless represents good law. In this case, the Trust could not give valid consent to LR's confinement if that had met the first limb of the *Storck* test.

[54] In the event, none of the parties dispute that, on the facts of this case, LR has not been deprived of his liberty.

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.

Conclusion

[59] For the reasons outlined, I discharge the interim order and dismiss the Trust's application for declaratory relief.

[60] In doing so, 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.