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Case No: FD25C41225

IN THE HIGH COURT OF JUSTICE,
FAMILY DIVISION,
NATIONAL DEPRIVATION OF LIBERTY LIST.

Royal Courts of Justice
Strand, London, WC2A 2LL
20/03/2026

IN THE MATTER OF THE SENIOR COURTS ACT 1981
IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

AND IN THE MATTER OF B, A CHILD

B E T W E E N: -

SALFORD CITY COUNCIL

Applicant

-V-
THE MOTHER

First Respondent

- V-

THE FATHER

Second Respondent

-V-

B (A CHILD ACTING BY HER GUARDIAN)

Third Respondent

IN RE B (A CHILD: COMPLEX NEEDS: DEPRIVATION OF LIBERTY)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

(Mr Matiss Krumins instructed by Manchester City Council Legal & Democratic Services, solicitors for the Applicant)
(Mr Michael Jones KC and Miss Janice Wills instructed by Temperley Taylor, solicitors

for the Respondent)

Hearing dates: 7 July 2026

JUDGMENT

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THE HONOURABLE MS JUSTICE HENKE

Henke J:

Introduction

1. Towards the end of the last term, I heard several cases in the Deprivation of Liberty List. In each case, the issue was whether the child or young person concerned was being deprived of their liberty. I gave my decision in each case with brief reasons but reserved judgment. This is the first of those reserved judgments.

The Relevant Background Facts

2. This case concerns a child whom I shall call B. B is nine years old. She is a loving and happy child. She has diagnoses of Autism Spectrum Disorder and Global Developmental Delay and presents with complex behavioural, emotional and developmental needs. B has a detailed Behaviour Support Plan and an Education, Health and Care Plan ("EHCP"). She attends a school providing specialist provision for children with additional learning needs. She also receives regular respite care from a specialist provider whose staff are trained in trauma-informed care and autism awareness.

3. B came to the attention of children's services shortly after her birth. She was initially removed from her parents' care and placed in foster care. When she was approximately ten months old, she was placed, under a final care order, with an extended family member whom I shall call C. B has had no meaningful contact with her parents since then and regards C as her mother. B communicates verbally and by using Makaton. In her EHCP dated September 2025, B described her life and her wishes and feelings as follows:
"I live with my mummy C and my big brother D. I call C my mummy because she looks after me and keeps me safe. I love my home — I have my own bedroom where I sleep with my Lion BaBa, my spotted blanket, and my dummy. I always have my night light on because it helps me feel calm.

At 6 o'clock, I have my yoghurt and my medicine, then I get a bath or shower — I love splashing and playing in the water!
At 7 o'clock, I get into bed. Mummy sings nursery rhymes and reads me a Mr Men story. She gives me a cuddle and kiss and says goodnight. I sometimes call out for hugs or juice after she leaves, and she comes back. In the night, I sometimes wake up and walk around the house. I don't always know how to stay safe, so mummy helps me with that. I'm also allergic to cats and dogs — they make my eyes itchy and sore.
I'm really happy living with mummy C and D. I feel safe and cared for. I don't want to move — this is my home. I like my routines and when things stay the same. Mummy helps me when I'm sad and plays with me too.
I want to keep going to the park, do my crafts, play with D, and go to respite. I like how things are now, and I want them to stay that way."

4. B requires intensive and close supervision at all times, both at home and in the community. Her behaviour is unpredictable and can escalate rapidly, creating risks to herself and others. At home, C supervises her on a 1:1 basis, with occasional support from C's adult son, D. At times, B wears reins within the home to prevent her from running away, entering unsafe areas or engaging in dangerous behaviour, including throwing objects, damaging property and climbing in unsafe places. C assists B with every aspect of self-care, including toileting, bathing and personal hygiene. For her safety at night, B has been provided with a robust bed, a waterproof mattress, a sensor mat and a motion alarm.

5. At school, B is taught in a class with a high adult-to-child ratio and receives support with her self-care needs. The school is secure, with fob-controlled doors and gates, and its staff are trained in trauma-informed approaches. B may hit, kick, scratch or spit; throw objects; urinate or remove her clothing; display sexualised behaviour, including exposing herself and using explicit language; and experience emotional dysregulation and unpredictable outbursts. To keep B safe and reduce risk, the school uses the following measures:
   • Close 1:1 adult supervision throughout the day, particularly during transitions and group activities.
   • 1:1 sensory-based learning and play-based engagement to regulate B's emotions and reduce distress.
   • 2:1 support outside the classroom when B is dysregulated, enabling her to settle in a quieter space.

6. In the community, C uses a buggy in public places to prevent B from running away, assaulting members of the public or damaging property. B enjoys travelling by public transport and is accompanied by C on a 1:1 basis. If B is unsettled, transport by car may require two adults. At home, the front and rear doors are locked, the kitchen is secured by a keypad lock, and restrictors are fitted to the upstairs windows. These measures prevent B from gaining access to hazardous or sharp objects at night and protect her from leaving the property or falling from a window. B does not understand those risks. Reins are used in the community because she has no awareness of danger and might run into traffic; she may also hit or kick members of the public. During respite care, B is supervised on a 2:1 basis at all times.

Procedural History

7. On 30 October 2025, the local authority issued a C100 application seeking permission to invoke the inherent jurisdiction of the High Court and to apply for an order authorising the deprivation of B's liberty.

8. On 28 November 2025, HHJ Wright, sitting pursuant to section 9(1) in the Deprivation of Liberty List, granted the local authority permission to invoke the inherent jurisdiction and made an order in the following terms:

13. It is lawful and in the best interest of B that the local authority Salford City Council is permitted to deprive B of her liberty at the home of her Kinship Foster Carer, C, pursuant to article 5 ECHR and accordingly such deprivation of liberty is authorised until 11.59 pm on 5 January 2026 (later extended to 13 January)

14. The deprivation of liberty sought by the local authority and permitted by the court is necessary to avoid breaching B's ECHR Article 2 and 3 rights, the least restrictive and most proportionate response to the risk of harm which arises and may include:

a. The external doors and garden gate, of C's home ('the home') are locked and there are restrictors on the upstairs windows of the home, and B is not able to leave of her free own will;

b. Additional adaptations to the home include pin code locks of kitchen and utility room access, solid doors, a lock for the boiler cupboard and a taller garden gate and fence;

c. There is a 1:1 ratio of supervision at all times. A 2:1 ratio of supervision may be implemented in the community and dependent on the activity, if required;

d. B's contact outside the home is supervised at all times;

e. B's respite care, provided by a specialist provider trained in trauma informed care and autism awareness, may be supervised on a 2:1 basis at all times;

f. B's education provider, currently X special School, may supervise B on a 1:1 basis at all times, and a 2:1 basis if required or when accessing the community. B's movement within the school may be restricted and physical safety measures implemented in specific areas of the school and during travel. Staff are trained in CPI Safety Intervention, which includes the use of reasonable force when necessary. The policy is: physical intervention is a last resort, minimum amount of force for minimum time required, to be used only when de-escalation strategies have failed, ongoing communication between the staff and B throughout the incident to communicate what is happening and when intervention will end, and any incident where such physical intervention is used is recorded in the Physical Intervention Record Form and reported to the school's leadership team;

g. When travelling by car B may be supervised on a 1:1 basis and a 2:1 basis if required. A harness may be used when travelling. School and respite providers may support with 2:1 supervision during transport;

h. B may be supported for her self-care and personal hygiene routines;

i. B may sleep in a 'safe space bed' during periods of sleep;

j. Reins may be used within the home;

k. A buggy with a secure locking mechanism may be used when outside of the home.

These provisions in place for B are necessary, the least restrictive and a proportionate response to the risks of harm which arise.

15. In depriving B of her liberty, the local authority is directed to use the minimum degree of force or restraint required only in circumstances that these are necessary. The use of such force/restraint is lawful and in her best interests provided always that the measures are:

a. The least restrictive of B's rights and freedoms;

b. Proportionate to the anticipated harm;
c. The least required to ensure B's safety and that of others; and
d. Respectful of B's dignity.

9. The application returned to the List on 13 January 2026, when HH Furness KC, sitting pursuant to section 9(1) in retirement, made a further order in similar terms. The application was reviewed on 17 April 2026 by Her Honour Judge Barlow, sitting pursuant to section 9 in the List. She again made declarations and orders authorising the deprivation of B's liberty. On this occasion, the court found that:
• B's care and living arrangements amounted to a deprivation of liberty;
• She lacked capacity to consent to those arrangements due to Autism Spectrum Condition and Global Developmental Delay;
• The restrictions imposed were necessary, proportionate and the least restrictive available to protect her Article 2 and 3 rights.

   The order made by HHJ Barlow authorised the deprivation of B's liberty in terms materially similar to those previously ordered. It remained in force until 11.59 pm on 15 May 2026.

10. On 13 May 2026, the application returned for further review, this time before Recorder Basu KC, sitting as a Deputy High Court Judge. He made a further order in similar terms and listed the matter before me on 19 June 2026. At that time, it was listed before me because there was uncertainty about B's placement and an issue concerning respite care.

11. On 2 June 2026, the Supreme Court handed down judgment in *A Reference by the Attorney General for Northern Ireland of a devolution issue under paragraph 34 of Schedule 10 to the Northern Ireland Act 1998* [2026] UKSC 16 ("*AGNI*").

12. On 19 June 2026, the application came before me. My order of that date recorded my concern about delay: the application, issued in October 2025, had not been timetabled for a final hearing. I therefore gave directions to facilitate a final hearing and extended the existing order until then. In light of the recent decision in *AGNI*, it was necessary first to determine whether B's arrangements amounted to a deprivation of liberty. I directed the local authority and B, through her Children's Guardian, to file skeleton arguments by 4.00 pm on 6 July 2026 addressing:

   a. the impact of *AGNI* on the facts of this case and its interaction with the Children Act 1989;

   b. whether, in light of that analysis, B's current arrangements amount to a deprivation of liberty;

   c. if so, whether those arrangements remain necessary, proportionate and in B's best interests;

   d. the relevance of prescribed medication and whether it may amount to sedation;

   e. how *AGNI* applies to a child living in a family setting, including a kinship foster placement;

   f. how *AGNI* applies where a child is subject to a care order, including consideration of *J v Bath and North East Somerset Council & Ors* [2025] EWCA Civ 478 and the meaning of consent in the Convention context; and

g. if the court determines that there is no deprivation of liberty, the lawfulness of the local authority's use of unregistered respite provision.

The Hearing Before Me

13. The application was heard on 7 July 2026. The local authority was represented by Mr Matiss Krumins, and B, through her Children's Guardian, was represented by Mr Michael Jones KC and Miss Janice Wills. I am grateful to counsel for their invaluable assistance.

14. At the hearing before me, both parties agreed that, in the circumstances of her case, B was not being deprived of her liberty and that further court authorisation was not required. There was general agreement on the law. The only point upon which they fundamentally disagreed was whether the ratio in *J (through his Children's Guardian) v Bath and North East Somerset Council and others (Article 39/Mind and other intervening) [2025] EWCA Civ 478* bound me. Mr Krumins argued that Re J could no longer be relied upon; Mr Jones KC argued to the contrary.

The Relevant Legal Framework

15. I begin by reminding myself of Article 5.

"Article 5 – Right to liberty and security
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.
2 …
3 …
4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5 …"
(underlining mine).

16. *Storck v Germany (2005) 43 EHRR 96* continues to apply. It has been reiterated and endorsed by the Supreme Court in *AGNI*. Accordingly, I remind myself that a deprivation of liberty has three elements:

    a. The objective element of a person's confinement to a certain limited place for a not negligible length of time (known as the objective element).

    b. Whether the person consented to the confinement in question (known as the subjective element).

    c. The confinement must be imputable to the state.

17. Before the Supreme Court's decision in *AGNI*, the court's approach to deprivation of liberty was that set out by the majority in *Surrey County Council v P; Cheshire West and Chester Council v P* [2014] UKSC 19 ("*Cheshire West*"). In *AGNI*, the Supreme Court reconsidered what amounts to a deprivation of liberty for persons aged 16 or over who lack capacity under domestic law to decide where they should live and what care they should receive, and whose community arrangements amount, or may amount, to confinement. The court examined the relevant Strasbourg jurisprudence and the correctness of *Cheshire West*, which it overruled. As the Supreme Court stated in *AGNI* at paragraph 183:

    "The Strasbourg jurisprudence to which we have referred confirms that the European court has continued to apply the multifactorial test in determining when an individual is deprived of liberty and provides a clear indication of the nature and extent of restrictions that are required before a "person of unsound mind" will be found to be detained in the relevant sense in a psychiatric hospital or social care institution. It has never adopted an acid test, either generally or in the more limited context of the living arrangements for those who lack legal capacity

    ……..
    Strasbourg jurisprudence and departed from the long-standing multifactorial approach to determining when a person is deprived of liberty. We respectfully consider that the majority decision in Cheshire West was wrong in the following respects."

18. At paragraphs 52–56 of the lead judgment in *AGNI*, Lord Sales and Lady Simler, with whom Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Stephens and Lady Rose agreed, summarised the court's conclusions. Paragraphs 52 and 53 are particularly relevant and are reproduced below:
    52. The question on this reference is directed at and invites consideration only of the subjective element (concerning lack of valid consent to confinement) in article 5. However, the fundamental question is whether the individual has been "deprived of his liberty" as that expression is used in article 5. We agree with the Secretary of State that this requires consideration of all three elements of the deprivation of liberty test taken together. It is not possible to consider the concept of absence of valid consent in isolation. As we explain below (para 126), "valid consent" for these purposes is distinct from consent to an infringement of Convention rights as required for a waiver of rights. Valid consent in the present context is an aspect of the assessment whether the relevant parts of article 5 predicated on there being a deprivation of liberty are applicable at all. In that context the starting point must be to identify to what an individual is or is

not consenting, and that inevitably requires consideration of the objective element, regarding the circumstances of the confinement.....

53. For the reasons explained in detail below, we would answer the referred question in summary as follows:
(i) The starting point in assessing whether someone has been deprived of liberty within the meaning of article 5 is the specific situation of the individual concerned, and the assessment is multifactorial, with account taken of a whole range of factors including the type, duration, effects and manner of implementation of the measure in question. This was the approach set out in Engel v The Netherlands (1979–80) 1 EHRR 647 ("Engel") and Guzzardi v Italy (1981) 3 EHRR 333 ("Guzzardi") and it has been consistently applied by the European court since then, and in many different contexts, including the one with which we are here concerned. The judgments of the European court show that no single factor is determinative.
(ii) In addition to the objective element of confinement in a restricted space for a significant period, an individual will only be considered to be deprived of liberty if, as an additional subjective element, they have not validly consented to the confinement in question (Storck). Valid consent is therefore a powerful factor in the assessment. It is an autonomous concept and not to be equated with the concepts of consent for the purpose of waiver of rights under the Convention or of legal capacity in domestic law. The fact that an individual lacks legal capacity to decide on their living and care arrangements does not necessarily mean that they are de facto unable to understand and consent to those arrangements in a manner that prevents those arrangements from becoming a deprivation of liberty (see Stanev, HL and the other judgments of the European court considered below). On the contrary, an individual without legal capacity under domestic law, but who is conscious of their environment and has a basic understanding of their living circumstances so that they can express their view about their situation, who manifests their acceptance of the situation they are in, should *have their opinion respected when an assessment is made of whether they are deprived of liberty under article 5.*
(iii) Although the objective and subjective elements of deprivation of liberty are often considered sequentially by the European court in its assessment of an applicant's specific situation, there is an overlap. The requirement to take account of the "type" and "effects and manner of implementation" of the measure in question means that the assessment of the objective element can take account of the specific context and circumstances of restrictive measures that are different from the paradigm of confinement in a cell.
(iv) The approach of the European court means that the effect of restrictions on an 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. The relative normality of the placement is also a relevant factor in this assessment. Similarly, in situations that are far from the paradigm of confinement in a cell, the purpose for which a measure has been taken is a factor to be considered.
(v) The European court has recognised that the process of assessing whether there has been a deprivation of liberty is no easy task in some contexts and may give rise to difficulties, especially in borderline or marginal cases. Equally, it may sometimes be difficult to ascertain the true feelings or preferences of vulnerable individuals who do not have mental capacity to decide on their living arrangements. The approach should be practical and realistic. Where there is serious doubt, no inference of valid consent should be drawn.

(vi) It follows from the analysis of the Strasbourg jurisprudence in section 8 below that, in setting out the acid test, the majority decision in Cheshire West departed from the longstanding multifactorial approach to determining whether a person is deprived of liberty within the meaning of article 5 and is wrong (as we explain in section 9 below).
(vii) For the reasons given in section 3 above, we have concluded that the 1966 Practice Statement should be applied and that Cheshire West should be overruled.

19. The Supreme Court expressly considered the possibility of a deprivation of liberty in a person's own home or in the community: see paragraphs 13 and 54. It accepted that even a domestic setting may involve a deprivation of liberty. At paragraph 55, the court said:
We do not assume that because an individual is cared for in a community setting, their care arrangements are necessarily less restrictive than in a psychiatric hospital, nor that an individual subject to restrictive care arrangements would inevitably object to them or indicate that they were not happy to live in the particular setting. .....

20. At paragraph 193, the court observed:
'And although the majority in Cheshire West discounted the point, because it had not been argued, we think it is noteworthy that the European court in HL focused on the applicant's position in the hospital (finding that to involve a deprivation of liberty), by contrast with his position when being cared for in the community (which the court did not suggest would involve such deprivation). This does not mean that an individual living in their own home could never be subject to a deprivation of liberty. <u>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 would need to be more severe or extensive to amount to such a deprivation, such as, for example, a combination of restraint, medication, and seclusion</u>.' [underlining mine for emphasis]

21. The starting point is the person's "concrete situation", also described as their "specific situation" or "specific situation in reality": see paragraph 118.
119. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance: Guzzardi, para 93; Stanev, para 115; De Tommaso, para 80; Creanga, para 91; Ilias and Ahmed, para 212. Where there are a number of restrictions involved in the treatment of an individual, it is necessary to consider them "cumulatively and in combination" to assess their overall effect on the individual: Guzzardi, para 95; De Tommaso, para 80. The context in which the measure is taken is an important factor in assessing how close the measure in question is to the paradigm of deprivation of liberty, which is confinement in a prison cell: De Tommaso, para 81. In Guzzardi the European court found, on balance, that there was a deprivation of liberty in relation to a preventive measure involving confinement of a mafioso on a tiny island, who was subject to strict and constant supervision, including an almost complete impossibility for him to make social contacts. But in cases involving other forms of preventive orders including special supervision, night curfews and so on, it has held that there was no deprivation of liberty: De Tommaso, paras 84–89.

22. The purpose of the measure is relevant, although not determinative. At paragraphs 130 and 134, the Supreme Court said:

*130. The general jurisprudence of the European court makes it clear that the statement in Creanga, para 93, has to be read with reference to the particular context described in that paragraph (presence at a police station for questioning) and that in other, more marginal situations, the purpose for which a measure has been taken is a factor to be taken into account. When assessing whether there is a deprivation of liberty, the required focus on the "concrete situation" of the individual and "the realities of the situation", taking account of the type of measure in question, means that it is in fact relevant to have regard to the purpose of the measure, even though this is not decisive by itself: see, eg, Munjaz v United Kingdom [2012] MHLR 351 ("Munjaz"). In Munjaz, having regard to the general guidance referred to above, periods of preventive seclusion for safety reasons of a patient detained at the secure psychiatric hospital at Ashworth were held not to amount to a deprivation of liberty. The purpose of the seclusion measure was treated as a significant factor: para 70 ("it is clear that seclusion, though coercive, was not imposed on the applicant as a punishment ... the aim of seclusion at the hospital is to contain severely disturbed behaviour which is likely to cause harm to others"). Indeed, it is difficult to see how, in more marginal or borderline cases, the purpose of the measure could fail to be a potentially relevant factor, albeit not decisive in itself. If a restrictive measure is imposed with the aim of punishment or coercion against someone's will, it will more closely approximate to the paradigm of imprisonment in a prison cell. Conversely, if it is imposed for different (eg protective) reasons, the further it may be from that paradigm. [*underlining mine for emphasis].*

*134. Accordingly, in the marginal cases which arise in that area, to determine whether such confinement amounts to a deprivation of liberty or a restriction on liberty of movement, it is again the case that relevant factors include the purpose of the application of the measures in question (that is, in that context, the purpose of the legal regime which is applied to the applicants and whether the duration of confinement corresponds to that purpose). ..... [*underlining mine for emphasis]

23. I remind myself that *AGNI* concerned adults aged 16 or over in the context of the Mental Capacity Act 2005. The question for me is how its analysis applies to children, particularly those under 16.

24. 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.

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.

27. Mr Krumins' argument requires a consideration of what the Supreme Court overruled in *AGNI*. Helpfully, the Supreme Court in *AGNI* set out the six key points that were wrong in *Cheshire West*.
    1. The application of the acid test is not sufficient by itself to show that there is a deprivation of liberty according to the Strasbourg jurisprudence. Instead, 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. [184-186]
    2. It was wrong to conclude that a person's compliance or lack of objection is never legally relevant to the question of objective confinement. [187-192]
    3. The acid test takes no account of the type of setting where an individual receives care and treatment and draws no distinction between the position of an individual in, say, a category A prison or a high security psychiatric hospital on the one hand, and a person supported to live as independently as possible in their own accommodation or in their family home. [193-194]
    4. The acid test takes no account of the innate limitations to which an individual may be subject by reason of their own physical or mental condition. The Strasbourg jurisprudence reflects the need for coercion or some externally imposed restrictions on an individual that prevent them from exercising their fundamental right to physical liberty. [195-199]
    5. It was wrong to discount the potential relevance of the purpose for which measures of confinement were imposed. [200, 130-134]
    6. It was wrong to equate lack of legal capacity with lack of valid consent (as part of the subjective element of the article 5 test). Valid consent is an autonomous Strasbourg concept that is separate from and not tied to the question of legal capacity in a domestic law context. [201-205]

28. The leading judgment in *J* was given by the then President, McFarlane P. At paragraph 46, he said:
"Turning to the substance of the appeal itself, I am clear that the question of whether it is necessary for the court to authorise the deprivation of liberty of a child who is the subject of a care order, where the local authority consents to the child's confinement, must be determined in accordance with the Human Rights Act 1998 in a manner that is compatible with the ECHR. Rather than analysing matters through the lens of the domestic law relating to the exercise of parental responsibility, or possible defences to potential civil litigation, it is the structure imposed by ECHR, article 5 that must be applied. In this regard, the lodestar is the decision in 2004 of the ECtHR in HL v United Kingdom (2004) 40 EHRR 32 ("HL v UK").".

29. It is *HL v UK* that is viewed as the lodestar, not *Cheshire West*. The key point taken from *HL v UK* by McFarlane P is set out in paragraph 48:
"Although HL v UK relates to an adult, the underlying emphasis on the essential purpose of article 5 and the importance of the distinctive and cumulative protections offered by article 5(1) and (4), must apply in equal measure to a child." (underlining mine).

30. The ratio of *J* is then found in paragraphs 49-50.
"49. I have already set out Baroness Hale DPSC's conclusion at para 56 of Cheshire West (para 39 above), holding that, no matter how benign the intentions of the care-providing local authority may be: "the purpose of article 5 is to ensure that people are not deprived of their liberty without proper safeguards, safeguards which will secure that the legal justifications for the constraints which they are under are made out". The decision in Cheshire West is binding on this court, as it was on the learned judge. It is a decision that naturally flows from the ECtHR's judgment in HL v UK, and it is determinative of the issue in this appeal. A child in the position of J in the present case, must be afforded the benefit of the checks and safeguards under article 5(1), or separately (as HL v UK from para 125 onwards makes plain) of access to a process in court under article 5(4).
50. The effect of the judge's decision, where a local authority consents to the confinement by the state of a child in their care, would be to remove the case from article 5, thereby avoiding the important protection, safeguards and independent authorisation by a court that would otherwise be required. Irrespective of whether it may be said that, as a matter of domestic law, a local authority may give valid consent if they hold parental responsibility under a care order, HL v UK and Cheshire West make it plain that it is simply not open to the state, through the local authority, to avoid the constraints of article 5. As Baroness Hale DPSC stated: "In the end, it is the constraints that matter.""

31. Clearly, *J* does rely on *Cheshire West* as determinative of the issues before that court. However, the question is which of the propositions in *Cheshire West* were determinative. The relevant propositions can be found in the first sentence of paragraph 49. First, it does not matter how benign the intentions of the local authority, the State, are. The purpose of confinement by the State is irrelevant. The second relates to the purpose of Article 5 itself, namely, to ensure there are proper safeguards to secure that the legal justifications for the constraints are made out. Following *AGNI*, the purpose of the confinement is relevant to any consideration of whether a person is being deprived of their liberty. However, the reasoning based on the purpose of the

confinement does not, in my judgment, go to the heart of *J*. It is the purpose of Article 5 itself, the second proposition, which goes to the heart of the reasoning in *J* — see paragraphs 48, 50 and 52. That reasoning holds good. To 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.

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.

33. Lastly, but by no means least, in argument, both counsel drew the court's attention to the approach of Sir James Munby in *Re A-F (Children) (No 2) [2018] EWHC 2129 (Fam)*, where restrictive care arrangements were considered in the context of the child's age:

43. '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 of (to use Lord Kerr's phraseology) the same "age", "station", "familial background" and "relative maturity" who is "free from disability". Recognising that this does scant justice to the very thoughtful submissions I have had, in particular from Ms Heaton and Ms Burnell, 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.

That said, all must depend upon the circumstances of the particular case and upon the identification by the judge in the particular case of the attributes of the relevant

comparator as described by Lord Kerr.'

34. Sir James Munby's analysis in *Re A-F* was framed by *Cheshire West* and Lord Kerr's now-overruled reasoning. 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.

35. The multifactorial assessment will be straightforward in some cases and difficult in others. Where a deprivation of liberty is obvious, or the assessment is finely balanced, the local authority should apply under s 100 of the Children Act 1989 for permission to invoke the inherent jurisdiction and, if permission is granted, seek authorisation. Where the facts show that the child is not deprived of liberty, as in this case, no such application is required.

Legal Principles

36. Having reviewed the authorities, I draw the following principles from them:

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 dobt, no inference of valid consent should be drawn.

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

viii. 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.

My Decision with My Reasons

37. I turn to B's circumstances. It is accepted that any confinement would be imputable to the State - Storck (c); the issues are whether Storck (a) and (b) are met. My task is to make a multifactorial assessment. I must consider the type, duration, effects and implementation of the measures. I must remember that the objective and subjective elements overlap. The purpose of the restrictions is relevant but not determinative.

38. B is 9 years old. Most 9-year-olds, if not all, will have their freedom restricted to a certain extent. If they live near a busy road, they are unlikely to be allowed out of their home without supervision and the doors to their home may be locked to prevent them leaving without adult supervision. They may have set bedtimes. If learning to swim, they are likely to have adult supervision whilst doing so. When travelling by car, they will use a seat belt and may still have a booster seat. They are, however, unlikely to be restricted by reins and restraint is likely to be used only rarely and only if they have put themselves or others in immediate danger. The restrictive measures set out in paragraph 39 go beyond the everyday restrictions of a 9 year old.

39. The restrictions on B's freedom can be summarised as follows:
    i) The external doors and garden gate of B's home may be locked, there may be restrictors on the upstairs windows of the home, and B may be prevented from leaving of her own free will;
    ii) PIN code locks may be used to restrict access to the kitchen and utility room and the boiler cupboard may be locked;
    iii) There is 1:1 ratio of supervision at all times which may extend to 2:1 at home and in the community, dependent on the activity;
    iv) B's contact outside the home may be supervised at a ratio of up to 2:1 at

up to all times;
v) B's respite care, provided by SPACE employees, may be supervised on an up to 2:1 basis at up to all times;
vi) B's education provider, currently a Special School, may supervise her on an up to 1:1 basis at up to all times, and on an up to 2:1 basis if required or when accessing the community;
vii) B's movement within the school may be restricted and physical safety measures may be implemented in specific areas of the school and during travel. Only staff trained in CPI Safety Intervention may use reasonable force but only when necessary. Physical intervention is a last resort, to be used only when de-escalation strategies have been tried and have failed; the minimum amount of force for the minimum time required is to be used;
viii) When travelling by car, B may be supervised on an up to 2:1 basis, if required. A harness may be used when travelling. School and respite providers may support B with up to 2:1 supervision during transport;
ix) B may be supported with her self-care and personal hygiene routines;
x) B may be provided with a 'safe space bed' in which to sleep;
xi) Reins may be used within the home or, if necessary to ensure B's safety, in the community;
xii) A buggy with a secure locking mechanism may be used when B is outside of the home.
xiii) A sensor alarm and a pressure mat may be located outside B's bedroom door.

40. B is a child in care and C is her registered, paid foster carer, but from B's perspective this is her family home. She loves C, regards her as her mother, sees D as her big brother and looks to them for comfort, care and safety. She is happy at home and school. The arrangements have the relative normality of family life. At home, B can move around the ground floor. Locks restrict access to the kitchen, utility room and boiler, while external doors and windows are secured to prevent her encountering hazards or leaving unsupervised. A sensor alarm and pressure mat alert C and D if she leaves her bedroom at night; they do not confine her there. C, with occasional help from D, supervises B at home and in the community. That supervision arises from their natural and enduring family relationship and enables B to access life outside the home safely; without it, her activities would be more restricted.

41. When B travels with C, she uses a secure buggy which B likes and which enables her to access the community safely. When dysregulated, B travels by car with 2:1 supervision and a harness. Reins are used in the community and school playground to prevent her running into danger while allowing her to move around. These measures restrict her freedom but protect her and others.

42. B's specialist school meets her needs and manages her behaviour under her Behaviour Support Plan, with physical intervention as a last resort. She was restrained on only three occasions in the preceding 12 months, each in response to an emergency and by appropriately trained staff. This accords with the Department for Education guidance, Restrictive Interventions, including use of reasonable force in schools (April 2026), which states at page 6:
All members of school staff have a legal power to use reasonable force in certain circumstances. To prevent or stop a pupil from:

1. causing injury to themselves or others
2. committing a criminal offence
3. damaging property
4. causing disorder among pupils at the school, whether during a teaching session or otherwise

In B's case, restraint at school has been rare, used only as a last resort to prevent injury and in accordance with government guidance. She is not restrained at home, where C considers her Behaviour Support Plan effective.

43. SPACE provides respite support by supervising B's access to activities and the community. B likes her carers, who are familiar to her. SPACE is not currently registered with CQC or Ofsted. However, it does not require registration to support and supervise B whilst she accesses activities and the community, provided that it does not provide any personal care for B in her home- paragraphs 4.10–4.14 of the Department for Education's Short Breaks: Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks (April 2010) applied.

44. Since May 2026, B has been prescribed melatonin Teva XL and 25 microgram clonidine hydrochloride tablets for inconsistent sleep. Her sleep has reportedly improved significantly: she now falls asleep between 8 pm and 9 pm and sleeps until morning. The medication manages sleep rather than behaviour and is not used for sedation.

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.

46. That is my judgment.