IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Honourable Mrs Justice Lieven
In The High Court of Justice Family Division FD24C40148

Neutral Citation Number: [2025] EWCA Civ 478

Case No: CA-2024-001796

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2025

Before:

SIR ANDREW MCFARLANE
[President of the Family Division]
LADY JUSTICE KING
and
LORD JUSTICE SINGH

- -

Between :

J **[through his Children's Guardian]**	**Appellant**
- and -	
Bath and North East Somerset Council [1] **M [2]** **F [3]**	**Respondents**
Article 39/Mind [1] **The Children's Commissioner for England [2]** **The Secretary of State for Education [3]**	**Intervenors**

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Sophia Roper KC and Libby Harris (instructed by **Daniel Woodman Solicitors**) for the **Appellant**
Lorraine Cavanagh KC and Tanya Zabihi (instructed by **Bath and North East Somerset Council**) for the **First Respondent**
Sophie Smith-Holland (instructed by **RWK Goodman Solicitors**) for the **Second Respondent**
Sorrel Dixon (instructed by **Lyons Davidson Solicitors**) for the **Third Respondent**
Alex Ruck Keene KC (Hon), Arianna Kelly and Eleanor Leydon (instructed by **Carolyne Willow (Article 39) and Alice Livermore (Mind)**) for the **First Intervenor**
Stephen Broach KC, Jake Thorold and Santosh Carvalho (instructed by **Leigh Day Solicitors**) for the **Second Intervenor**

Joanne Clement KC and Samuel Willis (instructed by the **Government Legal Department**) for the **Third Intervenor**

Hearing date: 5th February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29th April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Andrew McFarlane:

1. This is an appeal from a decision of Mrs Justice Lieven given on 25 June 2024 with respect to a profoundly disabled 14 year old boy ['J'] ([2024] EWHC 1690 (Fam)). Lieven J held that, in circumstances where J was subject to a full care order under the Children Act 1989, s 31 ['CA 1989'], and where it was beyond dispute that J needed to be looked after in such a way that his liberty was restricted to a degree sufficient to engage ECHR, Art 5, but where both of J's parents and the local authority consented to that restrictive regime, there was no need for the High Court to make an order authorising the deprivation of J's liberty ['a DOLs order']. The sole issue on appeal is whether Lieven J was correct in her legal analysis or, as all the parties assert, she was wrong and a DOLs order was necessary.

2. J has a number of long-standing, and life-long, disabilities including profound autism and ADHD. He also has been diagnosed with Pica, which is an eating condition in which the individual tries to swallow non-food items. J's parents struggled over the years to care for their much loved son. Ultimately, they agreed that he required full-time specialist care and, from April 2020, J was accommodated by the local authority with the parents' agreement under CA 1989, s 20. J is well settled in a specialist children's home, and, as Lieven J stated, there is every reason to believe that he receives very high quality care there.

3. More recently, the local authority was concerned that J's parents, from time to time, failed to engage with the social workers and those providing J's care. The local authority issued care proceedings and, by agreement, at the hearing before Lieven J, a final care order under CA 1989, s 31 was made. The major consequence of any care order is that it gives parental responsibility to the local authority, which is shared with the child's parent(s), but with the local authority having control over the manner in which parental responsibility is exercised [CA 1989, s 33(3)].

4. Under the European Convention on Human Rights, Art 5, 'Everyone has the right to liberty and security of person' and 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. In the six 'cases' that then follow in Art 5 (a)-(f), it is (d) which has particular application to a young person in J's circumstances:

> '(d) the detention of a minor by lawful order for the purpose of educational supervision …'.

5. It is well settled (see *Storck v Germany (App No 61603/00)* (2006) 43 EHRR 6) that for Art 5 to be engaged, the following three elements must be present:

   i) The 'objective element': confinement in a particular restricted space for a not negligible length of time; and

   ii) The 'subjective element': there has not been valid consent to the confinement in question; and

   iii) The deprivation must be imputable to the State.

6. The care plan for J is for him to remain in his current home for the remainder of his childhood, and it is the regime in the home, as it applied to J, which triggers the need to consider the making of a DOLs order.

7. Having heard submissions, and in a reserved judgment, Lieven J concluded that it was lawful for the local authority, in the discharge of its parental responsibility, to consent to the continued restriction of J's liberty, so that limb (ii) of *Storck* was not met and a DOLs order was not required. This court was told that the point of law taken by the judge had not been raised by any of the parties in their submissions, and that counsel attending the hearing had had to do their best on the day to address the issue when it was raised by the judge.

8. The detail of the restrictions contained in J's day-to-day regime are set out in summary in Lieven J's judgment (paragraph 9). Although Lieven J considered that there was an argument that J's confinement arose from his profound disability, rather than from the actions of the State, she concluded that:

> 'in the light of the caselaw, and in particular *Cheshire West v P* [2014] AC 896, I do not think that it is open to a court of first instance to reach that conclusion.'

Lieven J therefore accepted that limbs (i) and (iii) of *Storck* were satisfied and the court's focus was confined to the question of valid consent under limb (ii), which the judge identified as 'whether the parents and the local authority, if a care order is made, can give consent to any deprivation of liberty'.

9. Lieven J commenced her analysis by focusing on the purpose of a DOLs order in a case such as the present [paragraphs 16 and 17]:

> 'In practice the real purpose of a DOLs order is to provide a defence against any future claim for unlawful detention or breach of Article 5, by making a declaration that any deprivation (within the terms of the order) would be lawful. In theory at least, a DOLs order would also provide a defence to a claim for habeas corpus. However, that exposes the oddity of requiring a DOLs order in a case such as this. There is no possible dispute that it is in J's best interests for him to be deprived of his liberty in accordance with the restrictions imposed in the order.
>
> In principle if the *Storck* criteria are met then the deprivation of liberty is a breach of Article 5 and in all probability an unlawful detention at common law. However, in reality the consequences of such a breach, in a case such as J's, are extremely limited. That is relevant because in my view it exposes why the local authority in J's case can consent to the deprivation of liberty.'

10. Lieven J considered that it was 'inconceivable' that a writ of habeas corpus would be granted to release J from the children's home, or that he would be awarded damages for unlawful detention, if no DOLs order were made. The judge therefore concluded that 'it is therefore quite difficult to see what the point of a DOLs order is on the facts of a case like J's'.

11. At paragraph 19, the judge accepted the need to ensure that safeguards are in place and that court oversight of the process may be required as Art 5 provides that any deprivation of liberty must be 'in accordance with a procedure prescribed by law', but

she held that 'the need for a legal process … cannot itself be relevant to the substantive content of the right' so that, if the local authority is able to give valid consent, there was no need for a DOLs order 'whatever the possible benefits of "safeguards" of a court process'.

12. The judge then moved on to hold, relying upon *Re H* [2020] EWCA Civ 664 and *Re C (Child in Care: Choice of Forename)* [2016] EWCA Civ 374, that the 'test' for whether a local authority could make a decision or grant consent with respect to a child in their care was whether the consequences of the decision were 'of great magnitude' to the child.

13. In her judgment, the judge did not do more than refer to *Re H* and *Re C* by name. *Re H* arose because a baby's parents objected to their child receiving routine vaccinations. The baby was the subject of a care order and the question was whether the local authority could, using the parental responsibility bestowed on it by CA 1989, s 33, overrule the parents and give consent for vaccination. With reference to 'magnitude', King LJ (with whom the other members of the court agreed), said (paragraph 27):

> '… local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in *Re C (Children)* [2016] EWCA Civ 374; [2017] Fam 137 (*Re C*), the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child.'

14. King LJ went on to quote from her judgment in *Re* C in which she identified a cohort of cases which had been brought before the court under the inherent jurisdiction for 'court approval of a course of action [thought] 'to be of *too great a magnitude* to be determined without the guidance of the court, and without all those with parental responsibility having an opportunity to express their view as a part of the decision making process' [emphasis added].

15. In *Re C*, King LJ was satisfied that, where a local authority sought to prevent a mother from registering her child's birth with a particular forename, the decision was 'life affecting' and to a degree which:

> 'potentially involves such a serious invasion of the Article 8 rights of the mother that I am satisfied that the court should invoke its inherent jurisdiction in order that it may either sanction the local authority's proposed course of action as in the interests of the children or, alternatively, to refuse to sanction it as for example being in breach of Article 8.'

16. In her judgment in *Re H*, King LJ was clear that (paragraph 30):

> 'In *Re C* therefore it was held that:
>
> > i) Certain decisions are of such magnitude that they should not be determined by a local authority without all those with parental responsibility having an

> opportunity to express their view to a court as part of the decision-making process; …'

17. At paragraph 31 of her judgment, Lieven J identified the question in the present case arising from *Re C* and *Re H* thus:

> 'Although that case [*Re H*] concerned a very different issue to the present, namely the giving of vaccinations, there is no obvious reason why the core test should not be the same. Namely, is the decision that the LA is being asked to make under s.33(3)(b) "of such magnitude" that it cannot be made by the LA, but rather must be made by the Court.'

18. In *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 3125 (Fam), which Lieven J referred to as *Re D (No 2)*, Keehan J had held that a local authority that held parental responsibility for a child under the age of 16 years under a care order could not consent to the deprivation of that child's liberty. Keehan J explained his decision at paragraph 29 of his judgment in *Re D (No 2)*:

> 'Where a child is in the care of a local authority and subject to an interim care, or a care, order, may the local authority in the exercise of its statutory parental responsibility (see s.33(3)(a) of the Children Act 1989) consent to what would otherwise amount to a deprivation of liberty? The answer, in my judgment, is an emphatic "no". In taking a child into care and instituting care proceedings, the local authority is acting as an organ of the state. To permit a local authority in such circumstances to consent to the deprivation of liberty of a child would (1) breach Article 5 of the Convention, which provides "no one should be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law", (2) would not afford the "proper safeguards which will secure the legal justifications for the constraints under which they are made out", and (3) would not meet the need for a periodic independent check on whether the arrangements made for them are in their best interests (per Lady Hale in *Cheshire West* at paragraphs 56 and 57).'

19. At paragraph 23 of her judgment, Lieven J correctly summarised Keehan J's concern that the local authority is an organ of the State, and thus the State is depriving the child of their liberty and there is therefore a need for a procedure prescribed by law, proper safeguards and period reviews. However, Lieven J considered that Keehan J's analysis conflated two separate issues. She accepted that the restrictions on J, in the present case, are imposed by the State, but, in direct contrast to Keehan J, she went on to observe that 'that does not mean that the local authority, acting as the corporate parent under s 33 CA, cannot consent to that deprivation'. Put another way, Lieven J said that because limb (i) of *Storck* may be met, that does not mean that limb (ii) is necessarily met, because there may be valid consent granted for the limb (i) confinement.

20. The judge relied upon authority at High Court level that, as a matter of law, the parent of a child may consent to the deprivation of liberty of their child under the age of 16 years, and, where that is so, the need for a procedure prescribed by law, with proper safeguards and reviews does not arise. She therefore identified 'the key question' as being 'the scope of the local authority's power to consent to a child's deprivation of liberty', observing that:

> 'The assumption that the local authority cannot consent appears to have flowed from what was said in the Supreme Court, particularly by Lady Hale in *Cheshire West* at [24] about the importance of decisions around deprivation of liberty.'

The judge then recorded that Baroness Hale JSC had referred to *Guzzardi v Italy* (1980) 3 EHRR 333 in which it was held that the right to liberty was too important for it to be lost for the single reason that the person may have given himself up to be taken into detention.

21. Lieven J then referred to her own earlier judgment in *Lincolnshire County Council v TGA (Deprivation of Liberty: Parental Consent)* [2022] EWHC 2323 (Fam), in which, at paragraph 53, she had concluded that it was not obviously apparent why deprivation of liberty cases should be treated differently from important medical decisions concerning children:

> '53. Lady Hale distinguished *Gillick* at [24] in *Re D* on the grounds that it concerned medical treatment and not deprivation of liberty, which as a matter of fact is undoubtedly correct. However, I am not convinced that for under 16 year olds that distinction is critical to the principles that should apply in this case. In terms of the importance of the decision in question, the decision on medical treatment can be fundamental to the child's life. In the most extreme cases it can determine whether the child lives or dies. If a parent consents to the treatment, then in the case of a non-*Gillick* competent child, that can lead directly to their death or to life changing medical treatment, simply on the basis of parental consent. The decision as to medical treatment can therefore be just as important, and just as much an intrusion into the child's human rights, as any decision relating to Article 5'.

22. Lieven J continued at paragraphs 54 to 57 of her judgment in the *Lincolnshire* case to record that it was not clear to her why a different approach should be taken to issues of deprivation of liberty to that taken with respect to decisions over serious medical treatment.

23. At the conclusion of her judgment, having set out CA 1989, s 33 in full and her view [at paragraph 31 quoted at paragraph 17 above] that there is no obvious reason why the 'of such magnitude' test should not apply to DOLs cases as it does to other important decisions, Lieven J brought her analysis to a close in succinct terms:

> '32. There is no doubt, as Lady Hale said, and is clear from *Guzzardi*, that the removal of an individual's liberty is a significant infringement of their human rights and an important decision. However, in this, as in every other aspect of human rights law, context is all and it is necessary to consider the facts of the individual case.
>
> 33. The approach that the LA can never exercise its powers of parental responsibility under s.33(3)(b) to grant valid consent for a deprivation of liberty rests on the proposition that a deprivation of liberty is necessarily a decision of such magnitude as to require the role of the court. Although logically that conclusion might flow from what Lady Hale said in *Cheshire West* and *Re D*, neither of those decisions concerned the scope of parental responsibility in respect of children under the age of 16, let alone the scope of s.33(3)(b) in decisions concerning children of that age and deprivation of liberty.

> 34. Further, if one applies the test to the facts of J's case, it is in my view clear that the decision to deprive him of his liberty is an inevitable one, which no reasonable court or parent would depart from. One way of testing this proposition is to consider what would happen if the LA, or those authorised to look after J, i.e. the Children's Home, did not put in place the restrictions sought. They would very obviously be in breach of their duty of care to J, given his known vulnerabilities and the manifest risks to his safety if he was allowed to leave the home unsupervised. In reality it is the obligation of any responsible carer of J to place restrictions upon him in order to keep him safe. Therefore, far from the restrictions amounting to a serious infringement of his rights that no LA could lawfully consent to, they are restrictions essential to ensuring his best interests, and indeed required by the State's positive obligations under Article 2 ECHR to protect his life. In those circumstances in my view they fall within the LA's statutory powers in s.33 CA.
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> 35. Therefore the decision to "deprive him of his liberty" is not in my view a decision of such magnitude as to fall outside the LA's powers, but rather an exercise of their statutory duties to him. In my view the LA have the power to consent to the restrictions and therefore to the deprivation of his liberty, and no DoLs order is needed.'

Submissions on appeal

24. In contrast to the position as it was before the judge, this court has had the benefit of considered submissions focussed on the central point of law from each party. In addition, we have had the benefit of submissions by Ms Joanne Clement KC, on behalf of the Secretary of State for Education, submissions from Mr Alex Ruck Keene KC (Hon) and Ms Kelly on behalf of Article 39 and Mind, and submissions from Mr Stephen Broach KC on behalf of The Children's Commissioner.

25. Pausing there, it is impossible not to observe that, where a judge thinks it necessary to raise an important point of law which has not been raised by any of the parties, there is likely to be real benefit in adjourning the case to allow the parties to take stock and make considered submissions on the issue. In the present case there was, sadly, no urgency at all in determining matters. J's arrangements had been settled for some time and were not going to change. By pressing on in the present case, Lieven J did not have the benefit of the full submissions that this court has received, and simply had to rely upon the arguments that counsel had, without warning, been able to marshal before her on the day. Where, as here, the consequence of the decision is likely to impact upon many other cases, the need to adopt a more comprehensive analysis by requiring detailed submissions focussed upon the point that the judge raises will be a pressing one.

26. As each party or intervenor was at one in submitting to this court that the judge's decision was wrong, it is not necessary to rehearse the detailed arguments individually put forward. We are genuinely grateful to each for the thoroughness and clarity of their contributions.

27. For my part, Ms Clement's submissions on behalf of the Secretary of State are of particular assistance, and I propose to set these out in some detail.

28. Ms Clement made two basic submissions. The first was that the judge's approach would have the result that the child is denied all protections under Art 5, and would mean that an organ of the State, that has itself deprived the child of liberty, or arranged for the same, could provide itself with consent to those arrangements. Whilst the judge was correct in her approach to domestic law, she fell into error in not understanding the additional restriction placed upon a local authority by Art 5.

29. Ms Clement's second submission was that the reason why a local authority cannot itself provide valid consent is as set out in her first submission, it is not because a natural person with parental responsibility could not provide that consent. Ms Clement submitted that a parent with parental responsibility can provide relevant consent under Art 5 for a child under 16 years who lacks *Gillick* competence, provided the restrictive regime is in the child's best interests and the decision falls within the 'zone of parental responsibility' (relying on *Nielsen v Denmark* (1988) 11 EHRR 175). Ms Clement drew a distinction between a natural person with parental responsibility, who has rights protected by Art 8 of the ECHR, and a local authority, as an organ of the State, which cannot itself have Convention rights. In *Nielsen* the ECtHR's decision was firmly based upon the parent's Art 8 rights to family life [see paragraph 61]. The court determined, albeit at a time prior to its decision in *Storck*, that the child was not deprived of his liberty because his mother's decision permitting hospitalisation 'was a lawful exercise of parental powers under Danish law', so that Art 5 was not applicable to the case.

30. In support of her first, and primary, submission, Ms Clement characterised the judge's approach as one that was contrary to principle and would undermine the very essence of Art 5, the key purpose of which is to prevent arbitrary or unjustified deprivations of liberty by the State. It was submitted that it is not surprising that the approach taken by the judge is without precedent either in Strasbourg or domestic jurisprudence. Going further, Ms Clement asserted that the whole premise of the Supreme Court's decision in *Re T (A Child)* [2021] UKSC 35 was that a care order did not provide the local authority with power to confine the 15 year old child, T.

31. T was the subject of a deprivation of liberty order made by the High Court. On appeal, the Supreme Court upheld the jurisdiction of the High Court to make such orders and to have done so in the case of T. At the conclusion of her analysis, Lady Black, with whom the other members of the court agreed, said:

> '120. Turning to the requirement in section 100(4)(a) that leave may only be granted if the desired result could not be achieved through another form of order, this is satisfied, it seems to me. Mostyn J was not satisfied that T's consent was authentic and likely to endure so this is not a case in which to consider the impact of more robust consent of a *Gillick*-competent 15-year-old child. *The court's authorisation was undoubtedly required in this case for any deprivation of her liberty*. An application under section 25 could not be made because no approved 'secure accommodation' was available for T (as to which I will say more later), and *there was no means by which the local authority could seek the authorisation it required other than under the inherent jurisdiction*. ...' [emphasis added]

Miss Clement submits that, if the decision in the present case is correct, then there would be no need for any local authority to apply for a DOLs order where they hold a care order for the child.

32. In making her second submission on behalf of the Secretary of State, Ms Clement takes issue with a number of the parties to the appeal who assert that, as a matter of law, a parent with parental responsibility for a child under the age of 16 years cannot consent to the confinement of their child (and therefore a local authority cannot be in a better position than a parent in this regard). The Appellant, in making that argument, relies upon the Supreme Court's decision in *Re D (A Child)* [2019] UKSC 42, but Ms Clement submits that *Re D* related to a child who was over the age of 16 years and that the Supreme Court was clear that the position of a child under that age did not arise in that case and that the court had not heard argument on the issue.

33. Whilst understanding the conflicting submissions made by the parties on the question of whether a parent may give valid consent, in the terms of Art 5, to the confinement of a child under the age of 16, I am clear that that issue of law does not require determination in this appeal. Nothing that I say in this judgment is intended to express any conclusion on the point.

34. Given the high level of agreement, the submissions of the other parties can be summarised more shortly.

35. For the Appellant child, Ms Sophia Roper KC, leading Ms Libby Harris, relied upon the following grounds of appeal:

    i) Failure to have regard to the requirements of Art 5 for there to be some independent check or balance on the exercise of the State's power to detain. It is inconsistent with Art 5 for an organ of the State to both create the conditions in which a vulnerable person is confined and then to be able to give valid consent so as to remove the case from Art 5.

    ii) Failure to give any, or any adequate, reasons for departing from established authority.

    iii) Taking account of, and relying upon, legally irrelevant matters such as the benevolent purpose of the placement, the unanimity of parents and professionals as to it being in J's best interests, the unlikelihood of a claim for damages and the power of a local authority to consent to other interventions in J's life.

    iv) Failure to consider that the result of the decision was that the local authority could increase the degree of restriction placed on J, or move him to alternative accommodation, without the agreement of his parents or any other scrutiny.

36. In their written submissions, Ms Roper and Ms Harris sought to establish that consenting to the confinement of a child under the age of 16 years was beyond the scope of any parental responsibility (whether held by a parent or local authority). For the reasons that I have already given, the question of the scope of a parent's parental responsibility is not relevant to the present appeal and will not be considered in this judgment. In advance of the oral hearing it was agreed by all parties that the court should not address the issue in the present case which accordingly allowed us to reduce the time of the hearing to one rather than two days.

37. In the course of her submissions, Ms Roper referred to the decision of Keehan J in *Re D* [2015] EWHC 922 (Fam) in which it was held that the parents of a 15 year old child,

who lacked *Gillick* competence, could consent to what would otherwise be a deprivation of his liberty in the proper exercise of their parental responsibility. In *Re D* the question of whether the local authority could also provide relevant consent under Art 5 was not considered. In contrast, in *Re AB (A Child) (Deprivation of Liberty: Consent)* [2015] EWHC 3125 (Fam), again before Keehan J, the judge addressed the local authority's position square on at paragraphs 29 and 36:

> '29. Where a child is in the care of a local authority and subject to an interim care, or a care, order, may the local authority in the exercise of its statutory parental responsibility (see s.33(3)(a) of the Children Act 1989) consent to what would otherwise amount to a deprivation of liberty? The answer, in my judgment, is an emphatic "no". In taking a child into care and instituting care proceedings, the local authority is acting as an organ of the state. To permit a local authority in such circumstances to consent to the deprivation of liberty of a child would (1) breach Article 5 of the Convention, which provides "no one should be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law", (2) would not afford the "proper safeguards which will secure the legal justifications for the constraints under which they are made out", and (3) would not meet the need for a periodic independent check on whether the arrangements made for them are in their best interests (per Lady Hale in *Cheshire West* at paragraphs 56 and 57).'

> '36. … When the court makes a care order it hands over control of the child to the local authority such an authorisation would not, and could not, afford the necessary degree of safeguards and periodic, independent checks required by the provisions of Article 5 of the Convention. For these purposes, the local authority child care review, chaired by an independent reviewing officer, would not, in my judgment, afford the required safeguards and checks, sufficiently independent of the state.'

38. Keehan J's decision in *Re AB* on this point was endorsed by Sir James Munby P, sitting in the High Court, in *Re A (Children) (Care Proceedings: Deprivation of Liberty)* [2018] EWHC 138 (Fam) at paragraph 12(i). Ms Roper submitted that the law was correctly stated on this point in these two authorities. To hold otherwise would, she submitted, remove a case where a local authority had consented from the independent scrutiny and system of periodic checking that would otherwise be required under Art 5. The consequence would be that the local authority would be (to use ordinary language) 'marking its own homework'. In contrast to the position under Art 5(4), where there is a requirement to bring proceedings before a court for a speedy review, it was submitted that the effect of Lieven J's decision was that the child J had no means of ever challenging his detention for as long as he was subject to a care order (and not subject to proceedings under the Mental Capacity Act 2005). Art 5(4) is in the following terms:

> '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.'

39. In advancing ground (iii), Ms Roper directly challenged the judge's description of the real purpose of a DOLs order being to provide a defence to potential claims on the basis that, whilst that may be a collateral benefit, the purpose of a DOLs application is to ensure compliance by the State with Art 5, as stated by Lady Hale in the *Cheshire West* case [2014] UKSC 19 [paragraph 56]:

> 'It is very easy to focus on the positive features of these placements for all three of the appellants. The local authorities who are responsible for them have no doubt done the best they could to make their lives as happy and fulfilled, as well as safe, as they possibly could be. But 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: in these cases, the law requires that they do indeed lack the capacity to decide for themselves where they should live and that the arrangements made for them are in their best interests. It is to set the cart before the horse to decide that because they do indeed lack capacity and the best possible arrangements have been made, they are not in need of those safeguards. …. In the end, it is the constraints that matter.'

40. The appeal is supported by J's parents. We received full written submissions from Ms Victoria Butler-Cole KC and Ms Sophie Smith-Holland, on behalf of the mother, and from Mr Nick Goodwin KC and Sorrel Dixon, on behalf of the father.

41. For the respondent local authority, Ms Lorraine Cavanagh KC, leading Ms Tania Zabihi, joined with the Secretary of State in focussing on the issue of whether 'the State as the detainee authority can authorise its own detention of a child' so as to bring the circumstances of the case outside the scope of Art 5. If a local authority were able to consent to detention that it had itself arranged, this would leave the child with none of the essential protections required by Art 5.

42. For the Children's Commissioner for England, intervening, Mr Stephen Broach KC, leading a team of counsel and solicitors, stressed that the judge's decision removed the important supervisory function of the court in DOLs proceedings and failed to reflect the importance of children being involved in, and having their voices heard in, any decisions involving their care, or provide a forum in which that voice could be heard.

43. For joint intervenors Article 39 and Mind, Mr Alex Ruck Keene KC (Hon) drew attention to the safeguards that are key elements in the statutory schemes for secure accommodation under CA 1989, s 25 and detention under the Mental Health Act 1983. ECHR, Art 5 applies equally to all, including children, and the purpose of any confinement is irrelevant to the need for its requirements to be met. In supporting the appeal, Mr Ruck Keene and Ms Kelly pointed to the danger of a case, such as the present, where the detention was for an entirely benevolent purpose and was supported by all the key players, creating a precedent for all cases where a local authority has a care order, where the underlying circumstances may be very different.

Discussion and conclusion

44. Before turning to the substance of the appeal, it is helpful to be clear as to the language that applies to cases such as the present. The conventional word used to describe the circumstances in limb (i) of *Storck* is 'confinement', whereas 'deprivation of liberty' is the term used to describe a situation in which all three limbs are met and Art 5 is engaged [see Sir James Munby in *Re A* [2018] at paragraph 9]. It follows (as Ms Roper helpfully submitted) that what is being consented to in limb (ii) is confinement under limb (i) and not the overall deprivation of liberty. At a number of points in her judgment, the judge described the situation where limbs (i) and (iii) of *Storck* were satisfied as establishing that there is a deprivation of liberty [paragraphs 12, 15, 17, 26 and 33] and

that the question is whether there is valid consent to that deprivation of liberty. In doing so the judge seems to have approached the question of consent under limb (ii) as a separate, and subsequent, step rather than as part of the overall, three-limb, evaluation, before which it can be said that there is an Art 5 deprivation of liberty, as required by *Storck*.

45. Taking that point to the next stage, the exercise for the court in a DOLs application is to determine, if the circumstances do establish that there has been (or is to be) a deprivation of liberty that engages Art 5, whether the court should authorise it 'in accordance with a procedure prescribed by law' [Art 5(1)] and where the subject individual has been 'entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court' [Art 5(4)].

46. 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, Art 5 that must be applied. In this regard, the lodestar is the decision in 2004 of the ECtHR in *HL v United Kingdom (Application: 45508/99)* 40 EHRR 761.

47. *HL v UK* concerned an adult who had, for many years, been resident at Bournewood Hospital as a consequence of autism and profound mental handicap. Following a deterioration in his behaviour during a period of home leave, he was admitted to hospital informally and, because of his apparent compliance, no proceedings were taken to detain him under the Mental Health Act 1983. Despite the benevolent motive underlying the care of the hospital, and the clear need for him to be cared for in a restricted regime, the ECtHR held that the circumstances amounted to a breach of Art 5 and that there had been a denial of access to any formal procedure for review or challenge of the care regime on his behalf. Having noted the striking lack of any procedures for his admission and continued retention in the hospital [paragraph 120], the court observed:

> '121. As a result of the lack of procedural regulation and limits, the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit: as Lord Steyn remarked, this left 'effective and unqualified control' in their hands. While the court does not question the good faith of those professionals or that they acted in what they considered to be the applicant's best interests, the very purpose of procedural safeguards is to protect individuals against any 'misjudgments and professional lapses' Lord Steyn, at para 49 above).'

And the court went on to conclude:

> '123. The government's submission that detention could not be arbitrary within the meaning of art 5(1) because of the possibility of a later review of its lawfulness disregards the distinctive and cumulative protections offered by paras 1 and 4 of art 5 of the Convention: the former strictly regulates the circumstances in which

> one's liberty can be taken away whereas the latter requires a review of its legality thereafter.
>
> 124. The court therefore finds that this absence of procedural safeguards fails to protect against arbitrary deprivations of liberty on grounds of necessity and, consequently, to comply with the essential purpose of art 5(1) of the Convention. On this basis, the court finds that there has been a violation of art 5(1) of the Convention.'

48. Although *HL v UK* relates to an adult, the underlying emphasis on the 'essential purpose' of Art 5 and the importance of the 'distinctive and cumulative protections' offered by Art 5(1)+(4), must apply in equal measure to a child. The importance of *HL v UK*, and the court's finding against the UK, is that it was following that decision that the DOLs provisions within the Mental Capacity Act 2005 were enacted in order to fill the lacunae ('the Bournewood Gap') in domestic law that had been identified by the court in Strasbourg. Baroness Hale described the position at paragraph 19 of *Cheshire West*:

> 'In cases under the Human Rights Act 1998, the courts have frequently to consider how far their duty, in section 2(1), to 'take into account' the jurisprudence of the European Commission and Court of Human Rights ('the Strasbourg court') goes. That problem does not trouble us in this case. Section 64(5) of the Mental Capacity Act states that: 'In this Act, references to a deprivation of a person's liberty have the same meaning as in article 5.1 of the Human Rights Convention.' As the object was to avoid the violation identified in *HL* 40 EHRR 761, it seems clear that we are expected to turn to the jurisprudence of the Strasbourg court to find out what is meant by a deprivation of liberty in this context.

49. I have already set out Lady Hale's conclusion at paragraph 56 of *Cheshire West* [paragraph 40 above], holding that, no matter how benign the intentions of the care-providing local authority may be, 'the purpose of Art 5 is to ensure that people are not deprived of their liberty without proper safeguards, safeguards that 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 Art 5(1), or separately (as *HL v UK* from paragraph 125 onwards makes plain) of access to a process in court under Art 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 Art 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 Art 5. As Lady Hale stated: 'In the end, it is the constraints that matter'.

51. The judgment below does not refer to *HL v UK* or to the relevant passages in this context in Lady Hale's judgment in *Cheshire West*. The absence of connection with those core

sources of authority may explain the judge's difficulty in seeing 'what the point of a DOLs order is on the facts of a case like J's'.

52. It follows that Keehan J was entirely correct to hold, as he did, in *Re D (No 2)* that the answer to this central question is 'an emphatic "no"', and that Lieven J's analysis in the present case, was in error. That error, in short, was to focus on whether, as a matter of domestic law, a local authority may provide 'valid consent' in order to avoid engaging limb (ii) of *Storck*. If, instead, the focus had been, as it should have been, upon the overarching purpose of Art 5, as determined by *HL v UK* and *Cheshire West*, the inevitable conclusion would have been that, irrespective of the domestic law relating to parental responsibility, the State can *never* give valid consent in these circumstances.

53. At the conclusion of the oral hearing on the 6 February 2025, we announced our decision which was that the appeal was allowed for reasons which would be set out in these reserved judgments. On the 6 February, we made a DOLs order in terms agreed between the parties and remitted the case to be reviewed by the relevant Designated Family Judge on 14 March 2025.

Lady Justice King:

54. I agree that the appeal must be allowed for the reasons given by the President of the Family Division.

55. The judge focused her analysis at paragraph 31 of her judgment by reference to the cases of *Re C* and *Re H* namely as to whether 'the decision that the LA is being asked to make under s 33(3)(b) is "of such magnitude" that it cannot be made by the LA, but rather must be made by the Court'. With respect to the judge that in my view is a false comparator. Those cases relate to issues which represent such a serious invasion of the Article 8 rights of parents who share parental responsibility with the local authority, or put another way are 'of such magnitude', that the local authority should not exercise their statutory power to limit the parents' right to exercise their parental responsibility without the parents first having the opportunity to express their views to a court.

56. Those cases are about the profound impact upon the Article 8 rights of a parent who continues to share parental responsibility with a local authority which has no Article 8 rights. They are not concerned with cases where ECHR, Art 5 is engaged. Where, as here, the *Storck* test is met and there is a deprivation of liberty then, for the reasons given by the President, I agree that, in circumstances such as these, a breach of Art 5 may only be avoided by the making of a deprivation of liberty order.

57. 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.'

Lord Justice Singh:

58. I agree that this appeal must be allowed for the reasons given by the President of the Family Division. I add a few words of my own only because of the importance of the issues. This case provides a powerful example of the way in which human rights issues can arise in any legal context. The Human Rights Act 1998, and the Convention rights to which it gives effect in domestic law, constitute the overriding legal framework for the determination of such issues, in whatever jurisdiction they arise. It is important that sight should not be lost of that framework, and the values which underlie the fundamental rights which it seeks to protect, whatever the context in which those issues arise.