Neutral Citation Number: **[2026] EWCOP 45 (T2)**

Case No: 20016618

IN THE COURT OF PROTECTION

Manchester Civil Justice Centre,
1, Bridge Street West,
MANCHESTER

Date: 4th September 2026

Before :

HIS HONOUR JUDGE BURROWS
Sitting as a nominated judge of the Court of Protection at Tier 2

- -

Between :

SALFORD CITY COUNCIL	**Applicant**
- and -	
AR	
(by his litigation friend, LF)	
-and-	
PR & QR (AR's parents)	**Respondents**

- -

AR (Whether restrictions amount to a deprivation of liberty)

- -

India Flanagan (instructed by **the Local Authority**) for the **Applicant**
Hannah Bakshani (instructed by **Irwin Mitchell**) for AR by LF
AR's parents appeared in person

Hearing date: 26th August 2026

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APPROVED JUDGMENT

This judgment was delivered in public, and the proceedings are subject to the Transparency Order dated 29th May 2025. The anonymity of AR must be strictly preserved, and nothing must be published that would identify AR, either directly or indirectly, including by identifying any of the other persons or entities anonymised in this judgment. 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.

HIS HONOUR JUDGE BURROWS:

INTRODUCTION

1. This judgment concerns a young man who I shall call AR. He is diagnosed as suffering from moderate to severe learning disability and autistic spectrum disorder. He is a man of 25 years who lived for most of his life with his parents. However, since May 2025, AR has lived in a placement, initially by way of respite care, but now on a more permanent footing. Although there has been disagreement between the LA and AR's parents in this case, it seems agreed that where he presently lives meets his needs, and I am not being asked to order his return home.

THE ISSUES: RESIDENCE & CONTACT

2. The issues in this case are however still quite complex. His parents wish to have more contact with their son. They want to have that contact at their home. They also want it to include overnight contact. Finally, they wish for that contact to be unsupervised. At the root of the parents' position is a feeling on their part that the LA does not value their place in their son's life. They feel that they are considered to have been responsible for his neglect over a period of time. They feel that the LA are ignoring AR's own wishes and feelings, which they say are that he wants to go home. During the hearing, it became clear to me that AR's parents are not pressing for him to return home to live with them. It seems clear to me that they realise that they would struggle to look after him full time again. In any event, as I have said, they think his needs are being met at the placement.
3. What I have to decide then are two issues. The first is the nature of the contact AR and his parents can enjoy: where it takes place, for how long and how frequently it should, and whether it should be "supervised". Even that last concern is clearer after

today's hearing, however. It seems clear that the LA's position is that AR requires a carer to be with him during waking hours to meet his needs as and when they arise. The need for a person to be with AR when he has contact with his parents is not as a supervisor of contact, as it has been put by the LA, and perceived by the parents. Rather it is to ensure that his needs are met at all times. The dispute has become therefore not so much about whether contact is supervised, but rather whether it needs to be supported by a member of staff, or, as they assert, his parents can provide that support, obviating the need for a stranger to sit in. There are concerns the parents may say unsettling things and may "bicker". The other issue concerning contact is the occasions in the past in which they have been late or have cancelled contact, thus unsettling their son.

4. It is important to be clear about a number of matters before saying anything else about contact.

5. There has not been a finding of fact hearing in this case on the conduct of the parents prior to AR moving into respite and then staying there. It seemed to me that his return to live with his parents, and their contact with him, should properly be considered without the need for a fact find unless that proved necessary. At the last hearing I directed the parents to put forward their positions on the report of the psychological report of Dr Radcliffe who raises a number of concerns over both residence and contact with AR's parents. That report stated that AR required constant access to support across all areas of adaptive functioning and cannot live independently. There was limited evidence that AR was suffering from trauma related issues and/or PTSD. It was, however, of paramount importance that AR is made to feel safe and secure both in himself and in his interactions with staff

members (and his parents). At the last hearing, the parents had not studied Dr Radcliffe's report, and it seemed only fair to allow them a chance to do that, and to ask him any questions if they had them. I also directed that they make a statement setting out their position.

6. I have read the father's statement on behalf of the parents very carefully. The father's statement asserts that AR's difficulties arise from autism, trauma, and misunderstanding by professionals rather than parental neglect. He describes a marked deterioration in AR's behaviour following an incident with a neighbour in May 2025, outlines his own severe health problems, blindness, and physical limitations, and explains how these have affected the family's ability to attend visits and engage with proceedings. He strongly disputes allegations concerning neglect, unsafe living conditions, financial mismanagement, and concerns about AR's mother, while expressing dissatisfaction with the care AR currently receives and maintaining that AR has a strong emotional bond with his parents and wishes to be reunited with them.

7. I have no difficulty in accepting this sincere statement. It is noteworthy that it does not suggest that AR can return to live with his parents. When I asked the father about this today, he was clear that AR wanted to "go home" to visit his parents' house and to be in his old home. There is no suggestion that it is in AR's best interests to return there to live. However, unaccompanied contact, including overnight contact is what they wish. Initially, at the hearing that was a request to start now. By the end it seems to me the request was for the parties to work towards that end.

8. For most of these proceedings the LA's position on contact has been as it is now, and as recorded in the draft order placed before me. It was agreed by AR's litigation

friend on his behalf and the LA. It was not agreed by AR's parents. The details of the proposed contact are:

> "Unless considered otherwise by the Local Authority (and any advocate, if an advocate is appointed at the time of any contact changes):
>
> i. Visits by the parents should take place on the second and last Wednesday of each month;
> ii. Contact between AR and his parents shall continue to be supervised;
> iii. The parents shall telephone the placement at least 24 hours in advance to confirm whether they will be attending the scheduled visit. This will support staff in preparing AR appropriately and will reduce the likelihood of AR experiencing distress arising from unexpected cancellations or uncertainty;
> iv. It is not in AR's best interests for his parents to arrive late for the scheduled contact session. If they arrive later than 30 minutes after the scheduled start for the contact session, the contact session can be cancelled;
> v. Contact should take place at the placement, which shall be reviewed by the Local Authority, and the location of contact may change to contact in the community, if considered appropriate by the Local Authority;
> vi. Contact should not take place at the family home."

9. All that being said, the LA appears to be concerned to ensure that AR's Article 8 rights are respected, not least because they appreciate the importance of his relationship with them to him. For that reason, they propose appointing an advocate for the next twelve months and for there to be quarterly reviews of contact with a view to modifying arrangements in keeping with how AR reacts.

CONCLUSIONS ON RESIDENCE & CONTACT

10. On the basis of all the evidence I have considered, including Dr Radcliffe's report, I am satisfied that AR lacks capacity to make decisions across all relevant issues: litigation, residence, care, contact, and entering into a tenancy and other property and affairs matters.

11. Furthermore, there is no realistic residential option available at the present time. There is no prospect of AR returning to live with his parents at the present time.

12. However, contact, and stays at home are a different matter. There is evidence that AR would like to spend time with his parents, and that is likely to include at their home. At the present time that is not an available option. It seems to me for the reasons given in the evidence, particularly in Dr Radcliffe's report, there is a need to ensure that AR will feel safe and supported in contact. That requires some evidence base of contact taking place when it is arranged, without AR being caused any upset, and for the parties to discuss and work together to plan other types of contact at other venues. That requires engagement between AR's parents and those caring for their son in a way that I sense has not occurred so far. The parents need to demonstrate that the LA can rely on them to engage with those caring for their son. They also need to allow the LA to assess their home to establish whether and how AR can spend time there including overnight stays.

13. None of these types of contact can yet be ruled in. But it is important to be clear that they also cannot be ruled out. I am quite sure, however, that AR's parents place him first as do the LA. That being so, they must work together to progress contact and to make it as fulfilling for AR as it can be.

FURTHER ISSUES: DEPRIVATION OF LIBERTY & THE FUTURE OF THESE PROCEEDINGS

14. I received two high-quality documents from Ms Flanagan for the LA and Ms Bakshani for AR. These were followed by oral submissions in response to my sometimes challenging questioning. We are in the early days following the Supreme Court's recent 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 (which I will refer to as the Northern Ireland case, or the NI case), as Ms Flanagan stated on a number of occasions, noting that we are awaiting "guidance" from the Courts. I am not sure there can be much guidance as to the use of a test that is fact and therefore case specific and multifactorial. It is certainly not my aim (or job) to give guidance. What I ought to do, however, is to explain how I think the NI case impacts on AR.

15. It is important to set the scene by dealing with the basics of the jurisdiction. There is no doubt that decisions made under the Mental Capacity Act 2005 (MCA) by those who are making decisions (D) on behalf of incapacitated people (P) engage a number of rights under the European Convention. In this case, AR's Article 8 rights (to a private and family life) are clearly engaged.

16. However, the drafters of the MCA anticipated that Article 5 would also be engaged on at least some occasions. It is expressly anticipated in s. 4A and s. 4B of the MCA. The provisions of Schedule A1, which have been universally referred to as the Deprivation of Liberty Safeguards (or DOLS) are a statutory code put in place both to define and regulate deprivation of liberty within hospitals and care homes for those over 16. Subject to some uncertainty introduced by the NI case, which I will consider below, the assessment of P against the qualifying requirements decides whether P is deprived of his liberty.

17. For the purposes of the MCA there is no statutory definition of deprivation of liberty. The MCA states at s. 64(5) that "In this Act references to deprivation of a person's liberty have the same meaning as in Article 5 of the Human Rights Convention". In the NI case, the Supreme Court entirely relinquishes definition of deprivation of liberty when they say [206]: "On such a fundamental issue regarding the proper

interpretation of the Convention, it is for the European court to give the lead in laying down the approach to be followed". In other words, not only must the Courts of England and Wales make decisions that are compliant with Article 5, but they must understand what Article 5 is and how it should be applied in accordance with the decisions of the European Court of Human Rights. In NI, the Supreme Court saw the acid test in Cheshire West as frustrating the development of the domestic caselaw by putting in place a simple test that did not recognise the nuances of the Strasbourg jurisprudence.

ARTICLE 5 OF THE EUROPEAN CONVENTION

18. Article 5 in its entirety states:

> 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. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 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. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

19. I have included the entire Article just to demonstrate its scope. That is because if, as the Supreme Court says in the NI case, the paradigm example of deprivation of liberty is the prisoner in his cell, the Article's scope strays some distance from that paradigm, particularly in relation to children and those persons of "unsound mind". The NI case makes it clear that it is only those who are closer to that paradigm that should properly be found to be deprived of their liberty.

20. It is, however, also important to note that the purpose of Article 5 is essentially protective. It ensures procedural protection for those who are vulnerable to arbitrary detention. This may be due to the commission, or the suspicion of the commission of a criminal offence. Or maybe unlawful entry into the country. Or carrying contagious diseases. Or being a vagrant. It also includes dysregulated children and young people, a cohort presently of a significant size. It also includes

those whose unsoundness of mind ranges from the elderly person in a state of advanced dementia, or a person with a severe brain injury, to the floridly psychotic, the suicidally depressed, homicidal psychopaths and the learning disabled or autistic young person.

21. Those Article 5 is designed to protect are various. Hence, although the idea of a paradigm example of deprivation of liberty may appear helpful, it may also lead to highly restrictive regimes in a community setting appearing not to involve deprivation of liberty, because there are no bars on the windows, no 10-metre-high fence around the placement, and the terminology used may reflect a homely setting rather than a penal one.

22. In the NI case the Supreme Court rejected the proposition that the so-called "acid test" should continue to determine every case. Rather, the Court held that the question requires a broader and more contextual evaluation of the realities of the person's situation. The problem is that the ECHR jurisprudence applies Article 5 to 46 signatory Countries, each with different legal traditions, legislative and caselaw histories, differently worded constitutions and civil codes. What emerges from the survey of the ECHR jurisprudence is, not surprisingly, a vast array of different decisions, where the facts are looked at through different domestic legal frameworks.

23. The Supreme Court in the NI case say that it was wrong in Cheshire West. This Court and all others below the Supreme Court now have to follow that decision. At [206] they expressly eschew any obligation they may have felt to give clearer guidance to lower Courts as to how to approach Article 5 now. They say this:

> "We have come to the clear conclusion, with respect, that the majority in Cheshire West erred in their interpretation of the Strasbourg jurisprudence in relation to the meaning of deprivation of liberty in article 5. Moreover, because the jurisprudence of the European court is clear in adopting the multifactorial approach and giving weight to valid consent, this is a further reason why that reasoning should not be followed: see R (Elan Cane) v Secretary of State for the Home Department, above; and R (AB) v Secretary of State for Justice, above, paras 54–59. On such a fundamental issue regarding the proper interpretation of the Convention, it is for the European court to give the lead in laying down the approach to be followed"

24. The Court did, however, identify two distinct, though related, enquiries:

- first, whether there exists objective confinement amounting to a deprivation of liberty; and
- secondly, whether there exists valid consent to the arrangements.

25. In carrying out that evaluation the Court must consider all relevant circumstances, including the restrictions themselves, their practical operation, their purpose, the normality of the placement and the individual's own attitude towards the arrangements.

26. The Court's central conclusion is that:

> "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." (para 53(i))

27. The relevant Strasbourg authorities included (all but one was cited in Cheshire West, I hasten to add):

- Engel v Netherlands (1979-80) 1 EHRR 647.
- Guzzardi v Italy (1981) 3 EHRR 333.
- Storck v Germany (2005) 43 EHRR 6.
- HL v United Kingdom (2004) 40 EHRR 32 (Bournewood).
- HM v Switzerland (2004) 38 EHRR 17.
- Stanev v Bulgaria (2012) 55 EHRR 22 (GC).
- Shtukaturov v Russia (2012) 54 EHRR 27.
- Mihailovs v Latvia [2014] MHLR 87.

28. Taking into account all the matters outlined in the NI case, my approach in this case is as follows.

(A) Relevance of the fact that the setting is not a prison or secure psychiatric hospital

29. The Supreme Court held that this is highly relevant, because the paradigm manifestation of a deprivation of liberty is the prisoner confined in his prison cell. However, there are settings that still involve a DOL that are not prisons (e.g. psychiatric hospitals). The Court in NI criticised Cheshire West for treating someone living in their own home, supported living, foster care or a family home in essentially the same way as someone detained in a prison or psychiatric hospital. The Court reiterated that assessment depends on how close the circumstances are to that

paradigm. Most importantly: "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." (para 193)

30. The Court therefore held that the nature of the environment is a significant factor in deciding whether there is confinement amounting to a deprivation of liberty.

(B) Is the purpose of the placement relevant?

31. The Supreme Court held that purpose is relevant and Cheshire West was wrong to say otherwise. At para 200: "The majority in Cheshire West were wrong to discount the potential relevance of the purpose for which measures of confinement were imposed."

32. The Court reviewed Strasbourg authorities, particularly: Austin v United Kingdom (2012) 55 EHRR 14 (GC) (a “kettling” case) and held that purpose can be critical where the case is distant from the paradigm of imprisonment. The Court explained: "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 (e.g. protective) reasons, the further it may be from that paradigm." (para 130).

33. Thus, purpose is not determinative, but is a factor in the multifactorial assessment.

(C) Relative normality

34. The Supreme Court held that relative normality is relevant and Cheshire West was wrong to disregard it. This issue derives from the Court of Appeal's reasoning in

Cheshire West and MIG & MEG, especially the judgments of Munby LJ and Wilson LJ. Wilson LJ had taken account of "the relative normality of their situation" (para 74).

35. The Supreme Court accepted that Strasbourg jurisprudence recognises the significance of normality. Relative normality is presumably pegged to the characteristics of the individual and the environment and care regime in which they are placed. This comes very close to the approach of Munby, LJ in Cheshire West in the Court of Appeal, and making a comparison between P and the relevant comparator (a person with the same characteristics and needs as P) rather than the ordinary person. It was this approach that was partly responsible for the Supreme Court in Cheshire West focusing on the discriminatory nature of such an approach which appeared to provide the most vulnerable (i.e. the most disabled) with the least protection.

36. This is particularly so when one moves away from the institution. "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." (para 193). Accordingly, the question whether the placement is the kind of place where one would ordinarily expect someone with P's disabilities or care needs to live is an important part of the overall assessment.

(D) Relevance of the protective rather than punitive character of restrictions

37. The Court held that this is plainly relevant. A major criticism of Cheshire West was that it failed to distinguish between restrictions imposed to punish, to incapacitate or to coerce, on the one hand and those imposed to protect, to care for, and to

provide treatment. The Supreme Court repeated that “the purpose of the measure was, therefore, a significant factor" (para 131), and also "The continuous supervision and control to which she was subject were directed to meeting her care needs rather than to making her a prisoner." (para 204).

38. In discussing Austin and Munjaz, the Court repeatedly emphasised that protective measures are further removed from the paradigm of imprisonment. This does not mean benevolent intentions automatically prevent a finding of deprivation of liberty, however. The Court expressly recognised that “even measures intended for the protection of or taken in the interest of the person concerned may be capable of being regarded as a deprivation of liberty." (para 128). However, the protective nature of the measures remains a relevant and potentially weighty factor.

(E) Relevance of objection, acquiescence and consent

39. This is perhaps the most important aspect of the judgment. It is important to recognise that the NI case approached deprivation of liberty in a way that see fluidity between the objective and subjective elements of the deprivation of liberty equation. There is an overlap between these aspects.
40. In NI the Court held that Cheshire West wrongly treated compliance, contentment and absence of objection as legally irrelevant (see [187]).
41. The subjective element remains essential. That subjective element is "an additional subjective element" namely the absence of valid consent. (paras 120, 53(ii)). Capacity and valid consent are different concepts. "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." [53(ii)]. The Court repeatedly stressed that: "Lack of valid consent … is an autonomous Strasbourg concept. It is separate from and not tied to the question of legal capacity in a domestic law context." [201]

42. A person lacking MCA capacity may nevertheless consent for Article 5 purposes. The Court held: "An individual without legal capacity under domestic law, but who is conscious of their environment and has a basic understanding of their living circumstances … who manifests their acceptance of the situation they are in, should have their opinion respected." [53(ii)]. Furthermore: "If an individual is able to, and does, express their wishes and preferences about their living arrangements, and is happy with them, it will ordinarily be difficult to see how they are being coerced." [189].

43. This is important. In Cheshire West it had been accepted by the parties and the Court that because P, MIG and MEG lacked MCA capacity in relation to residence and care, they met the subjective element in deprivation of liberty under Article 5. The Supreme Court in the NI case emphasised that Article 5 consent is conceptually distinct from Mental Capacity Act capacity. A person may lack capacity to determine residence whilst nevertheless possessing sufficient understanding to express contentment with their circumstances. Contrary to what was understood to be the subjective element before the NI case, not least in the way the Act is itself drafted, there is now another type of consent to confinement that an otherwise incapacitous person can give.

44. That is somewhat surprising when one considers the way Parliament itself dealt with the matter when addressing this issue in Schedule A1 (the DOLS) (in 2007, long

before Cheshire West). There, the Mental Capacity Requirement is defined at 15 as:

> The relevant person meets the mental capacity requirement if he lacks capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment.

45. The term “capacity” was always thought to be a reference to the way it is defined in the opening sections of the MCA, and the “principles”. In other words that “capacity” in the DOLS and the wider MCA meant “capacity” as defined in ss. 2 and 3 MCA. However, the Supreme Court has imported into the statute a further interpretative guide for those using it which appears to focus on compliance and non-capacitous agreement with (otherwise known as acquiescence to) restrictions placed upon them.
46. Furthermore, tacit consent, where consent can be implied without it being expressly stated is possible. Based on Mihailovs v Latvia, the Supreme Court held: "if an individual is placed in a secure care home, has de facto understanding of their situation and does not express or manifest any objection … they can be taken to have given tacit consent sufficient to negative the subjective element." [172].
47. However, mere acquiescence may not suffice. The Supreme Court drew a distinction between genuine acceptance, tacit consent and mere acquiescence. The Court warned that “where there is serious doubt, no inference of valid consent should be drawn." [53(v)]. Furthermore, "it may be that if nothing more than mere compliance or acquiescence is a feature of the case, that is not enough." [191].
48. Finally, the capacity point is summarised in [151]:

> "An individual without legal capacity, but who is conscious of their environment and has a basic understanding of their living circumstances in a secure care environment, so that they can in some suitable way express their view about their situation, who manifests their acceptance of that situation, should have their opinion respected when an assessment is made whether they are suffering a deprivation of liberty under article 5."

SUMMARY

49. My summary of the relevant principles are these:

(1) Non-secure environments matter. Living in a family home, foster placement, supported living or ordinary home is highly relevant and may point away from deprivation of liberty.

(2) Purpose matters. Protective and therapeutic restrictions are relevant and distinguishable from punitive confinement.

(3) Relative normality matters. The more the placement and care plan resembles ordinary life for a person in P's circumstances, the less likely it is to constitute a deprivation of liberty.

(4) Protective motivation matters. Although not decisive, restrictions imposed for care and safety rather than punishment weigh against a finding of deprivation of liberty.

(5) Objection and consent matter profoundly. A person may lack decision-specific MCA capacity yet still possess sufficient factual understanding to express valid consent for Article 5 purposes. Genuine contentment, acceptance or tacit consent may negate the subjective element of deprivation of liberty. Mere acquiescence, however, may not suffice.

OBJECTIVE CONFINEMENT

50. The restrictions imposed upon AR are undoubtedly substantial. They are best summarised in the most recent statement by the social worker.

51. The social worker Ms P's evidence was that AR has remained settled and physically well within his current placement. He is up to date with health reviews, his weight is stable, his diet has improved and there have been no recent reports of rectal bleeding. He participates in a wide range of community-based activities, including swimming, adventure golf, social events and meals out, and staff report that he generally enjoys those activities once engaged. Staff further report significant progress in relation to behaviours of concern, including a marked reduction in incidents of faecal smearing since his move to the placement. Overall, Ms P's evidence was that the structured, predictable and supportive environment provided at the placement has had a positive effect upon AR's wellbeing, physical health and quality of life.

52. Ms P identified a number of substantial restrictions arising from AR's care plan. These include 24-hour one-to-one supervision, two-to-one staffing whenever he accesses the community, locked external doors and garden gates, window restrictors, staff-controlled access to the community, continuous supervision, occasional physical redirection, CCTV monitoring and highly structured daily routines. She explained that these arrangements are implemented because of identified risks including aggression towards others, roof-climbing behaviour, electrical safety risks, previous faecal smearing and difficulties coping with changes in routine. In her opinion the restrictions are significant and amount to a substantial degree of supervision and control over many aspects of AR's daily life. However, she considered them to be necessary and proportionate responses to the risks identified

and emphasised that they are implemented through positive behaviour support, consistency, de-escalation and trauma-informed practice rather than through more restrictive interventions.

53. In relation to AR's wishes and feelings, Ms P concluded that the evidence was mixed. AR communicated positive responses both to the idea of living with his parents and to remaining at the placement. Whilst he retains a clear attachment to his parents and may prefer to live with them, there is also evidence that he engages positively with life at the placement, enjoys activities available there and does not consistently request to leave or return home. Some behaviours, such as attempts to access locked exits and his refusal to unpack a suitcase brought from the family home, might indicate an ongoing attachment to his previous living arrangements, although their significance is uncertain. Overall, Ms P considered that the evidence established neither a clear objection to the placement nor a clear acceptance of it, and she therefore advised that any assessment of subjective consent should be approached with caution. Notwithstanding that conclusion, her overall opinion was that, although the restrictions are substantial, they are necessary and proportionate protective measures and that, applying the multifactorial approach identified in the NI case AR is not objectively deprived of his liberty.

54. AR is subject to continuous supervision. He lacks independent freedom to leave. Access to the community is managed by staff. External doors are locked. CCTV is present. At times he may be redirected physically to ensure his safety. Those facts

cannot be minimised. They represent significant interferences with personal autonomy.

55. Nevertheless, the NI case requires the Court to consider more than the existence of restrictions in isolation.

56. In the present case the restrictions are imposed solely for the purposes of care, welfare and protection. There is no punitive element. There is no element of discipline. There is no element of social control in the ordinary sense.

57. Equally significant is the nature of the placement itself. It is not a secure establishment. It is not a hospital. It is not a custodial environment. Rather, it is a supported living placement in which AR engages in activities, accesses the community, forms relationships and is encouraged to live as full a life as his disabilities permit.

58. The evidence demonstrates that the arrangements exist not in order to confine AR but in order to enable him safely to participate in daily life. In my judgment that distinction is of considerable importance in the wake of the Northern Ireland case.

SUBMISSIONS

59. Looking at the skeleton arguments and position statements from Ms Flanagan and Ms Bakshani it is immediately apparent that the Court now has to engage in a much closer scrutiny of AR's living arrangements. Cheshire West required some understanding of the care plan in order to determine whether the Article 5 threshold was crossed, but not much. Now, not only has the Court to consider the care plan, and the restrictions it imposes, but also how that reflects on AR's life. In fact, the Supreme Court in the NI case makes it very clear that it requires a closer

analysis of P's concrete situation, including what it achieves for him as compared with what his situation would be without those restrictions.

60. The way Ms Bakshani for AR specifies the factors I have to consider are as follows (in paragraph 26 of her skeleton argument (referring to the NI case):

    a. The possibilities available to leave the restricted area [121];
    b. The degree of supervision and control over the person's movements [121];
    c. The extent of isolation and availability of social contacts [121];
    d. The purpose of the confinement, although it is not decisive [130]: *"Even measures intended for the protection of or taken in the interest of the person concerned may be capable of being regarded as a deprivation of liberty"* [128];
    e. Context is an important factor in assessing how close a measure is to the paradigm of imprisonment in a cell [119]. In borderline cases, the closeness to the paradigm is relevant [190];
    f. The use of sedative medication [188];
    g. The use of restraint, particularly where this is relevant to a person's objections to the restrictions;
    h. The use of coercion or some externally imposed restriction which prevents the person from exercising their fundamental right to physical liberty [187] and [195];
    i. The relative normality of the arrangements [193];
    j. The effects and manner of the implementation [187]. The degree of understanding an individual has about their circumstances is an important part of their concrete situation [123]; and
    k. Duration, particularly in marginal cases as duration should correspond to the purpose of the restrictions [134].

61. Her submissions (at paragraph 27), which I shall quote in full point towards the sort of approach that will be adopted in this sort of case from now on, and they are something of an object lesson in how such an exercise should be undertaken:

    a. Possibilities to leave the restricted area/ the degree of supervision and control: AR has 24 hour waking one-to-one support with an additional member of staff for community access (it should be noted that AR has responded negatively to attempts to reduce this to one-to-one support). CCTV is in use in communal areas. External doors and gates are locked and

windows are restricted to prevent AR from exiting. AR is unable to leave The placement without support and may only do so at planned times which are arranged by staff. It is understood that if he did leave, he would be returned. Constant supervision is necessary to manage behaviours which include aggression to others and AR' placing himself or others at risk.

b. Isolation and availability of social contacts: AR is able to engage in communal activities with other residents at The placement. This provides social opportunities. However, AR's contact with his parents is restricted. Arrangements for contact, including frequency, location and whether contact is terminated, are not decisions which AR has any control over.

c. The purpose of the confinement: Is to ensure that AR's care needs are met and to provide a highly structured routine. Although routine is beneficial for AR, it is also highly restrictive and results in even minor expressions of his wishes being overruled (an example given is that AR will be encouraged to complete personal care upon waking even if he requests food first).

d. Medication and restraint: Guiding techniques and physical redirection may be used if AR becomes distressed or if he presents as a risk to himself or others. The cause of AR's presentation at these times is not clear and although there has been a reported decline in challenging behaviours, the local authority is unable to point to a reason for this and notes that the behaviours persist.

e. The relative normality of the arrangements, coercion and closeness to a prison cell: It is not unusual for a person with AR' needs to be accommodated in supported living. It is, however, an institutional setting and is materially different from living at home, which AR has done for the majority of his life. There are elements of coercion embedded within AR's care plan in that he is not able to leave and has been prevented from doing so when he has attempted this. AR is also subject to intrusive supervision as he is monitored by CCTV notwithstanding that he is with staff at all times.

f. The effects and manner of the implementation: AR is non-verbal and communicates through signs and gestures. It has not been possible to clearly ascertain whether AR is objecting to the arrangements for his residence and care. Positive behaviour support and behavioural strategies are employed to reduce distress and support emotional regulation. AR's engagement in activities is encouraged by use of preferred foods, objects and activities and he is reported to resist engagement in his routine requiring considerable

> time to encourage him to engage. There is evidence that AR has attempted to open the garden gate and to climb on to the roof. These behaviours have occurred at times of distress but also when AR is calm and the local authority is unable to confirm AR's motivation for these behaviours. AR has also refused to unpack the suitcase of items which he brought from his home. In contrast, there have been improvements in AR's sleep routine, eating habits and incidents of challenging behaviour. The local authority concludes that the evidence as to whether AR is objecting to his residence and care arrangements at The placement is mixed.

g. Duration: The duration of the restriction is indefinite.

62. Ms Flanagan, for the LA responds in line with the social worker's statement I have referred to above. She accepts that AR is subject to 24-hour waking one-to-one support, two-to-one staffing for community access, locked external doors, locked garden gate, window restrictors, physical intervention/redirection, continuous supervision, staff control of access to the community, structured daily routine, prompting and encouragement, Positive Behaviour Support, use of preferred items and activities, management of transitions, CCTV monitoring, highly skilled staff team (rather than family) and, communication support (as part of restrictions). Her submission is that the purpose of these restrictions is to maintain AR's safety and wellbeing and they are necessary and proportionate to the risk currently identified. These are the least restrictive options.

63. She ends her submissions on the objective element with the following paragraph (18) that refers directly to the NI case and its treatment of MEG in Cheshire West:

> "Whilst it is of course acknowledged that no single factor is determinative, and that each case is specific, and needs to be analysed based on the particular care arrangements which apply to the individual concerned; it is noted that as referenced in AGNI, the Supreme Court considered at [204] that MEG in Cheshire West, was not deprived of her liberty (both the subjective and objective components not met), and in relation to the objective element, the Court is understood to have noted:

> i. Her 'living arrangements were as normal as possible in the circumstances, and the continuous supervision and control to which she was subject were directed to meeting her care needs rather than to making her a prisoner. Although she was physically restrained on occasion, that was done for her own protection or for the protection of others, and not with a view to punishing her. Overall, again, her situation was far removed from the paradigm case of confinement in a prison cell".

My conclusion

64. Counsel submit this is a finely balanced case. I am not sure that is right. Looking at the matter globally and adopting the evaluative approach mandated by the NI case, I conclude that AR's circumstances do not amount to objective confinement for the purposes of Article 5.

65. In my judgment, and applying the NI case, the following matters are decisive.

(a) AR suffers from a condition that will always require a significant level of supervision. There is a need in his case to ensure a good level of routine and predictability so as to ensure his relative happiness.

(b) AR will always require restrictions on his movement. He will never be "free to leave" wherever he safely resides, and significant control has to be placed on his movements in and out of his residence.

(c) Management of his behaviour will always require a high level of supervision and control, including when necessary, restraint.

(d) Although he is not at his family home, he is at a place which he is able to treat as his own and to personalise his environment. He is able to make friends, and engage in activities in and out of the placement.

(e) These restrictions are in place for his own good, and are intended to ensure the best outcome for him.

(f) Although his residence at the placement involves restrictions, they are far away from the paradigm of the prisoner in his cell, or, for that matter the mental patient in his secure unit.

(g) These arrangements are relatively normal.

66. One issue I raised in argument was the extent to which his parents' issue with his placement was relevant to the issue of Article 5. The importance of this issue was somewhat diminished by the parents' acceptance that AR should remain where he is. However, there is still a dispute over contact. This raises two issues. First, what if AR's parents had submitted that he ought to come home immediately? The consensus at the bar was that objection from anyone other than P is not relevant to whether P was deprived of his liberty. I accept that, although clearly such an objection can have knock-on effects into the care plan (restrictions on contact, for instance) that can increase the intensity of the restrictions imposed on P. Now that a very wide range of matters need to be taken into account in determining whether Article 5 applies, it is important to recognise that contact is now more significant as a factor when determining whether P is deprived of his liberty.

67. That leads to the second point. There will be restrictions on contact with AR's parents, at least initially. These restrictions are relevant to the issue of deprivation of liberty. However, in the context of this case, it seems to me that contact is able to take place, and the availability of contact may increase in line with the order I make. There may be situations where restrictions on contact with friends and family may be such as to change the character of the placement away from a home and closer to a place of detention. This is, in my judgment, not one of them.

68. The decisive features in this case are the protective purpose of the restrictions, the relative normality of the placement, the extent of community participation and the absence of institutional or custodial characteristics. AR is not deprived of his liberty. Article 5 is not engaged.

VALID CONSENT

69. Strictly speaking, that conclusion makes it unnecessary to determine the second limb of the NI analysis. Nevertheless, given the novelty of the issue and the care with which it was argued before me, I consider it appropriate to express a view.

70. As the Supreme Court said at [151] of the NI case (emphasis added):

> The discussion above assists us to analyse the series of Strasbourg cases which were particularly relied upon by the parties to this reference. The principle which emerges from the authorities is as follows. **An individual without legal capacity, but who is conscious of their environment and has a basic understanding of their living circumstances in a secure care environment, so that they can in some suitable way express their view about their situation, who manifests their acceptance of that situation, should have their opinion respected when an assessment is made whether they are suffering a deprivation of liberty under article 5**. Their subjective attitude, as so expressed, carries significant, indeed usually decisive weight, according to the criteria set out in Storck. Conversely, if such a person manifests a view that they do not accept that situation, that opinion should also be respected and will usually lead to the conclusion (if the objective circumstances indicate that they are detained) that they are subject to a deprivation of liberty.

71. The Supreme Court also made the following comments at [160] when discussing Shtukaturov (emphasis added):

> The [ECtHR] held that there had been a deprivation of liberty under article 5(1). The objective element of the test for deprivation of liberty was clearly made out (the applicant was confined for several months, not free to leave and his contacts with the outside world were seriously restricted). As regards the subjective element, the respondent government maintained that the applicant's detention had been voluntary, because his legal guardian had consented to it, whereas the applicant "referred to his own perception of the situation" (para 107). **The court recognised that the applicant lacked de jure capacity to decide for himself, but found that he was de facto able to understand his situation, as his own behaviour showed, and judged by**

> **reference to that he had not validly consented to his confinement and there had been a deprivation of liberty**: paras 108–109.

72. This approach carries with it some forensic difficulties. Is evidence required as to agreement and disagreement, and can it be challenged? What about the situation where P's position changes from time to time? Who decides? Presumably it's the Court? Nonetheless, it seems to me that a Court, when approaching this expanded definition of the subjective element under the MCA must always err on the side of caution, and provide Article 5 rights if there is any serious doubt that P consents (and is lacking in MCA capacity, of course).

73. This appears to be the view of the Supreme Court in NI. Although the judgment is extremely long, and establishing any succinct guidance is very difficult, there are some passages on this subject that can assist. In the discussion of consent in the ECHR cases (Nielsen, Stanev, HM v Switzerland, DD v Lithuania and HL v UK) paragraph [191] of the NI case is helpful in this regard:

> We recognise that there may be considerable evidential difficulties in ascertaining whether a person who is severely autistic or who has other profound cognitive disabilities is content with and not objecting to their living arrangements. Inevitably there will be a wide spectrum of cases, with cases at one end where eliciting evidence of positive expressions of wishes and feelings about the care placement will be impossible, and at the other end, cases (like MIG's and MEG's in Cheshire West, and the applicant's attitude to the Lielberze home in Mihailovs) where a tacit positive indication of wishes and feelings showing contentment with the arrangements can be ascertained. In the latter cases, such evidence is relevant and should not be excluded from consideration. The cases between the two ends of the spectrum will create varying degrees of difficulty and will require anxious consideration to determine what effect the applicable restrictions are having and what attitude the affected individual has to them. **As we have said, it may be that if nothing more than mere compliance or acquiescence is a feature of the case, that is not enough. If the individual is capable of expressing a view and there is serious doubt about their attitude, no inference should be drawn**.

74. Dr Radcliffe's evidence demonstrates that AR has a moderate to severe learning disability and autistic spectrum disorder which result in profound difficulties in communication, adaptive functioning and independent decision-making. Dr Radcliffe concludes that AR requires constant access to support across all areas of daily living and is presently unable to live independently. Whilst AR is capable of expressing simple likes, dislikes and preferences through his own communication methods, there is no evidence that he possesses a developed understanding of the legal, practical or social arrangements underpinning his placement. Rather, Dr Radcliffe's evidence suggests that AR's experience of the placement is mediated through immediate and concrete matters, such as whether he feels safe, whether routines are predictable, and whether those around him are responsive to his needs.

75. That does not, however, mean that his wishes and feelings are unreal or unreliable. On the contrary, Dr Radcliffe places considerable emphasis upon the importance of understanding and responding to AR's emotional experience. He considers that AR is capable of demonstrating preferences, expressing enjoyment, signalling distress and communicating attachment to important people and places. The evidence therefore supports the proposition that AR's wishes and feelings are genuine and should be accorded significant respect when assessing his welfare. In particular, Dr Radcliffe identifies the importance of ensuring that AR feels safe, secure and emotionally contained within his environment and notes the positive impact which the stability of the current placement appears to have had upon his wellbeing.

76. The more difficult question is whether those abilities amount to the form of understanding required for valid consent as contemplated in the NI case. In my

judgment, Dr Radcliffe's evidence does not clearly establish that they do. Whilst AR is capable of expressing preferences and emotional responses, there is little evidence that he understands the nature of the choice between living at the placement and living elsewhere, the restrictions which operate within the placement, or that he has sufficient appreciation of those arrangements to make an autonomous decision either accepting or rejecting them. His ability to communicate contentment or dissatisfaction is real, but that is not necessarily the same as understanding the nature of the arrangements to which that contentment relates.

77. Accordingly, whilst Dr Radcliffe's evidence supports the conclusion that considerable weight should be given to AR's wishes and feelings, it provides only limited support for a finding that AR is affirmatively consenting to the arrangements in the sense contemplated by the NI case.

78. For all the above reasons, I conclude:

    (a) AR is not deprived of his liberty, and his placement does not engage Article 5 of the ECHR.

    (b) This is because of what I shall refer to as the objective element.

    (c) I do not find in AR's case that he would be able to give valid consent if he were deprived of his liberty.

ARTICLE 8 AND WHETHER A REVIEW IS REQUIRED

79. The parties were all in agreement that AR's Article 8 rights are engaged by the care plan I am asked to approve. The LA, to their credit, recognise that there is a conflict between them, the provider and AR's family. That is something that needs to be kept under review. AR's voice needs to be heard and his interests represented. If

Article 5 applied, of course, there would be an obligation on the LA to bring the matter back before the Court periodically, probably annually: see Salford City Council v J (or Re GJ and BJ) [2008] EWHC 1097 (Fam) Mr Justice Munby.

80. However, in this case, although the Court has no express obligation under the Convention to build a review into the final order, clearly there is a matter left open by the order I propose to make, and AR's rights may still need to be protected by the involvement of the Court.

81. The Supreme Court in the NI case recognised that many individuals who are not deprived of their liberty for the purposes of Article 5 will nevertheless be subject to significant restrictions upon their autonomy and private life. The Court emphasised that such persons are not left without protection. Restrictions upon residence, care, contact and personal autonomy may engage Article 8 ECHR and remain subject to review through the Mental Capacity Act 2005, the jurisdiction of the Court of Protection and the statutory duties imposed upon public authorities. The premise underlying that analysis is that these alternative safeguards provide meaningful protection for those whose circumstances fall short of a deprivation of liberty within Article 5.

82. One of the difficulties with the way the NI case reached the Supreme Court, as a reference from the AG of Northern Ireland, is that the Court was not concerned with a real case, with evidence of how restrictions impacted on actual people, and with a first instance and appellate history of how the law dealt with the problems faced by those vulnerable people, their families and professionals at the "coal face".

83. For instance, one issue in the Cheshire West case that had a profound impact on the approach taken by Mr Justice Baker (as he then was) at first instance is recounted

in the judgment he handed down: Cheshire West & Chester Council v P [2011] EWHC 1330 (Fam) from paragraph [19] onwards.

84. It is, if I may say so, a salient lesson in what happens in the real world.

> "Following that hearing, an extraordinary incident occurred which fundamentally affected the course of these proceedings. A member of staff at Z House drew to the attention of the local authority the fact that, following the hearing, A and at her instigation other members of staff had altered a number of records concerning P's care and treatment. In particular the incident form relating to 2nd April was re-written and other notes changed inter alia to omit references to (a) P attempting to hit members of staff; (b) P attempting to remove his incontinence pad and (c) a member of staff having to hold P while trying to stop him removing the pad. These actions led to disciplinary proceedings for gross misconduct being taken against A and others, leading to dismissal.
> [20] In addition, the discovery of the fact that the records had been re-written after the hearing in July understandably undermined the confidence which the Official Solicitor and M and her representatives had in the local authority's care plan for P. On 19 August, M's solicitor wrote to the local authority seeking full disclosure of the circumstances in which the records had been amended and adding:
>
> > "In the circumstances you will not be surprised that we can have little confidence in any of the documentation which accounts for the care package which P receives. We believe that it is therefore necessary for an independent social worker expert to be instructed to report to the court on the issue of P's best interests in relation to his residence, the care he should receive and the manner of its delivery, and contact with other individuals."

85. Reading that judgment in its entirety is a sobering and educative exercise.

86. In that case, fortunately, proceedings were underway and the LA's solicitor reacted in an entirely correct and admirable way to what was a serious issue concerning the integrity of those providing care. It resulted in Baker, J. instructing an independent social worker to investigate P's care and to make recommendations to the Court.

87. The problem with the removal of Article 5 rights for people like AR, as my judgment will entail, is to ensure how those rights will be kept under review in the absence of

Schedule A1 protections, a r 1.2 representative (perhaps), the periodic review to the Court of Protection, or the entitlement to advocates.

88. In this case, however, the LA has decided to fund an advocate (a Care Act advocate) for a period of 12 months to ensure AR's rights are observed, particularly on contact, but also to ensure that the restrictions are reviewed.

89. This is welcome, particularly as AR's parents are not represented and need to deal with someone who is not representing the LA. They feel excluded from their son's care in these proceedings.

90. The question is what, if anything, is the role for the Court? I think there is no application from the parties that the Court should adjourn this application until near to the end of the 12 months and then restore, perhaps after a round table meeting and further position statements. That would not be attractive to the Court. If there is a need for a review, then the review should be directed, and that probably means directing the LA to bring proceedings in around 12 months time for the Court to review the situation as it then is. The other alternative is to direct that if there is any dispute between the parties in around 12 months time, then the LA should then bring the case back to Court.

91. In this case, I see no reason to order a review. It is not necessary to protect AR's Article 8 rights. Those rights will be protected by the involvement of the LA (with its duties) his family, and his advocate. If before the end of the 12 months it is thought that his rights may be at risk because of there being a dispute over the care plan at that point, then is the time when an application should be made to the Court for the resolution of a dispute.

92. That is the judgment.