

Beyond *Cheshire West*: DOLs after *AGNI*

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What is a deprivation of liberty?

- Three components in a DOL (*Storck v Germany* (2006) 43 EHRR 6):
 1. An objective element of confinement to a certain limited place for a non negligible period of time
 2. A subjective element of absence of consent to that confinement
 3. The confinement is attributable to the state
- All three components required for a DOL which engages Article 5 ECHR:

“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:

...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;” – Article 5(1)(d)



The ‘acid test’ – Cheshire West and Chester v P [2014] UKSC 19, [2014] AC 196

- The test refers to whether a person who lacks capacity is deprived of their liberty, namely:
 1. The person is unable to consent to their deprivation of their liberty;
 2. The person is subject to continuous supervision and control; and
 3. The person is not free to leave
- D (A Child) (Deprivation of Liberty) [2019] UKSC 42 at [39]:
- *‘Do the restrictions fall within normal parental control for a child of this age or do they not? If they do, they will not fall within the scope of article 5; but if they go beyond the normal parental control, article 5 will apply.’*



‘AGNI’ [2026] UKSC 16 (i)

- Cheshire West overruled, it was wrong in six aspects:
 1. The acid test is not sufficient alone to show there is a DOL – it may be relevant as part of the multifactorial test set out by Strasbourg but in determining whether an individual is subject to a DOL the court must focus on their concrete situation and take account of the whole range of factors in the particular case, including the type, duration, effect and manner of implementation of the measures in question [184]
 2. It was wrong to conclude that a “person’s compliance or lack of objection” is never legally relevant to the question of objective confinement – there is some overlap between consideration of the objective and subjective elements of a DOL [187 – 192]
 3. The acid test does not take account of the type of setting an individual is receiving care and treatment in – normality of circumstances where an individual is being cared for (eg in their own home or community) is a relevant factor in assessing whether there has been a DOL within the meaning of article 5 [193]



‘AGNI’ [2026] UKSC 16 (ii)

4. The acid test does not take account of the fact individuals might be subject to innate limitations due to physical or medical conditions – it therefore fails to reflect the need for coercion or externally imposed restrictions on an individual that prevents them from exercising their fundamental rights to physical liberty [195]
5. It was wrong to discount the potential relevance of the purpose for which measures of confinement were imposed [200]
6. The approach wrongly equates lack of legal capacity with lack of valid consent – for someone who lacks capacity to make decisions about their care and residence but has basic awareness about those arrangements which is sufficient to allow them to know and communicate whether they are happy/ unhappy with them, this means they can be treated as able to give or withhold valid consent to confinement by an expression of their wishes and feelings [201]



‘AGNI’ [2026] UKSC 16 (iii)

- ‘The question on this reference is directed at and invites consideration only of the subjective element (concerning lack of valid consent to confinement) in article 5. However, the fundamental question is whether the individual has been “deprived of his liberty” as that expression is used in article 5. We agree with the Secretary of State that this requires consideration of all three elements of the deprivation of liberty test taken together. It is not possible to consider the concept of absence of valid consent in isolation.’ [52]
- ‘...Moreover, although the Attorney’s written case suggests that the Revised Code would not apply to mental health hospitals in Northern Ireland, the approach we consider correct in relation to the subjective element of valid consent would, as a matter of logic, potentially affect all settings, including hospitals, care homes, children’s homes, hostels, supported living arrangements and people’s own private homes. This too will require further consideration to ensure appropriate provision is made.’ [53]



‘Deprivation of liberty and children and young people after AGNI’ – Nuffield Family Justice Observatory (i)

- Lack of attention given to implications for children but the question of whether there is a DOL relevant to all ages – Article 5 key safeguard to have a DOL authorised by clear legal process (either s25 CA 1989/ COP under MCA 2005/ High Court inherent jurisdiction/ MHA 1983)
- AGNI raises the threshold for what counts as a DOL (by saying the acid test is not enough to show confinement rather ‘multifactorial assessment’ is required + broadening the circumstances for when a person may give ‘valid consent’) = many people now not entitled to Art 5 safeguards
- It is now difficult to give a precise definition of what amounts to a DOL – range of factors to consider following AGNI – however *Storck* conditions must still be met



‘Deprivation of liberty and children and young people after AGNI’ – Nuffield Family Justice Observatory (ii)

- Questions for practitioners to consider when planning and scrutinising care arrangements:
 1. Confinement question – range of factors to consider, effect of arrangements and any objection of crucial importance, purpose of restriction relevant, must be some form of coercion
 2. Lack of valid consent question – a person can give ‘valid consent’ to their confinement even where they lack capacity, need to pay close attention to the effect of restrictions and a person’s attitude towards them
 3. State responsibility question – likely to be met where an individual is receiving health and/ or social care, applies when a public body is directly responsible and where they (ought to) know of a person’s situation



‘Deprivation of liberty and children and young people after AGNI’ – Nuffield Family Justice Observatory (iii)

- Implications for practitioners working with children and young people:
 1. May need to seek legal advice/ specific training – further case law and legal updates to clarify the impact of AGNI will be essential - AGNI will impact children given the court’s previous determination of whether a child was subject to a DOL was based on *Cheshire West*
 2. Previous focus on ‘supervision and control’ when determining if child confined and comparing to normal parental control – now it is not enough to consider ‘supervision and control’ when deciding if the first *Storck* condition is met, may need to apply multifactorial approach
 3. How does ‘valid consent’ apply – what may influence competence to consent to confinement children under 16? When can parents consent to their child’s confinement, how to ensure the child’s wishes and feelings are taken into account?
- AGNI may lead to fewer children being deemed subject to a DOL: safeguards need to be in place, care plans carefully reviewed and scrutinised – more important when considering whether restrictions are lawful, necessary and proportionate



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

- Mustafa [M] was a 15y/o with Prada Willi syndrome, developmental delay and additional learning needs.
- Moved to live in a residential school in 2021. Resided there full time. The school was a regulated placement.
- Subject to a CO to the LB Brent made in 2022.
- DOLs order made on 17 June 2025.
- LBB sought an extension & most recent extension on 10 June 2026.



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

- DOLs order provided for the following restrictions:
 - locked external doors,
 - kitchen door locked at night,
 - 1:1 care support at all times within home/community,
 - 2:1 support as necessary (inc in the community),
 - kitchen/sharp tools to be kept out of reach and used only under supervision,
 - care support for administration of medication,
 - consent supervision to ensure care needs safely met.



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

LA submissions in respect of M's arrangements focused on:

The 'Concrete Situation'

- M was “integrated” in his placement, not “isolated” within it,
- M consistently described himself as “happy” living at the school, never expressed a wish to leave and never asked to move elsewhere,
- the effect on M [of being in the placement] is overwhelmingly positive,
- some restrictions remain in place [locked external doors, monitoring around food, supervision and administering medication] however the manner in which these are implemented is relevant: nurturing environment, restraint reduction plan, RPI a last resort.



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

Consent

- M may not be Gillick competent, but he possesses a sufficient level of understanding to know whether he is happy or unhappy,
- He is not merely acquiescent,
- Arrangements are protective and supportive in nature,
- M understands, in broad terms, why the arrangements are in place and understands that some interventions are required when there is a risk harm,
- No evidence of medication being used in a manner which suppresses M's ability to express his wishes and feelings,



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

Normality

- M's arrangements need to be viewed in the context of his disabilities and his significant support needs,
- Restrictions are not imposed on an unwilling child, they are practical measures required to enable M to live safely in the context of his needs,
- Overall, the arrangements represent ordinary and necessary features of the specialist care package M requires.

Also noted:

- When M becomes dysregulated he becomes aggressive and destructive, he requires two person RPI to keep himself and/or others safe.



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

CG's Concerns:

- M required a high level of structure, routine, support and supervision,
- There had been 48 records incidents of RPI in just under a year: averaging one every 9-10 days,
- M said he felt “fine” about the restraints, but had previously said that he doesn’t like it,
- Given the nature, frequency and the increase in duration and intensity of the incidents (requiring RPI) may lead to a necessity to renew the DOL order.



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

Court's Conclusions:

Can consent only be given by a Gillick competent child?

“A child who is not Gillick competent may nonetheless have sufficient understanding for their views to be relevant as to whether they consent to aspects of deprivation of their liberty”[39]



Re Mustafa (A Child) [2026] EWHC 2159 (Fam)

Consent or compliance?

What about withdrawal of consent?

- This overlooks the fact that in some cases schools are entitled to use physical restraint on children regardless of their wishes.
- Considered in *FXS (through his father and litigation friend JLM) v Mulberry Bush Organisation Ltd* [2026] EWCA Civ 415.
- s.93 Education and Inspections Act 2006 entitles schools to use 'reasonable force' to prevent a pupil committing an offence, causing injury to themselves or others, or damaging property, prejudicing the maintenance of good order and discipline at the school or among other pupils (whether during a teaching session or otherwise).
- Therefore, either M consents or the school has the power to restrain him pursuant to the above.



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A procedural point:

- Would the inherent jurisdiction be available in the absence of an application?
- This question “must await determination until it is relevant” [17]
- CG cannot apply for legal aid to act as the child’s litigation friend [CPR 21.2: *Re SW and TW (Children: Human Rights Claim: Procedure)* 2017 EWHC 450] (Fam)]
- However, the CG could invite the OS or another interested person (such as a parent) to seek declaratory relief to either the County Court or High Court “to the effect that the local authority was depriving the child of their liberty and that such deprivation would be unlawful unless and until the local authority obtains a DOLs order” [18]



Considerations and Practical Implications

- MIG, MEG and P
- Other examples
- Factors for consideration:
 - Confinement in a cell
 - Consent or acquiescence
 - Interplay of objective and subjective considerations
 - School?
- Impact on applications
- What will happen “on the ground”
- What if my client isn’t happy?



Contact details



Jennifer Swan
Call: 2009

Jennifer Swan worked for a Family law solicitors' firm in the Midlands for several years before joining the Independent Bar. She specialises in all aspects of children law with particular emphasis on public, private and international work.

Jennie acts for Local Authorities, parents, children and intervenors in public law matters, including cases with an international element and where there are allegations of non-accidental injury, sexual abuse and neglect. She has been instructed in connection with the Independent Inquiry into Child Sexual Abuse (IICSA).

Jennie specialises in public law children matters, in which she regularly acts for Local Authorities, parents, children (including competent children) and intervenors. She has experience of serious and complex cases including those with an international element, involving child death, non-accidental injury, factitious induced illness and sexual abuse. She is regularly instructed in contested placement and adoption proceedings. A number of Jennie's cases have involved previous or concurrent criminal proceedings, including against children. She has extensive experience representing vulnerable clients.

Jennie has been instructed on a number of cases in the High Court involving deprivation of liberty and secure accommodation applications in respect of vulnerable young people, including those requiring long term specialist care.

Jennie represents clients at all stages of proceedings, up to and including appeal, and is happy to advise in conference at any time.

Contact details



Victoria Steet
Call: 2024

Victoria Steet is a family barrister.

Before starting pupillage, Victoria worked as a paralegal at a leading family law solicitors firm based in Holborn. In this role Victoria was responsible for her own caseload under the supervision of the Director and Head of Advocacy. She worked predominantly on public law children matters and Family Law Act injunctions, alongside private law children cases.

During her time at the University of Bristol, Victoria volunteered as a caseworker for the Law Clinic on the inquest team. She therefore has experience assisting clients in highly sensitive circumstances.

Furthermore, while studying the BPC Victoria volunteered as a Relevant Persons Representative for an independent advocacy charity based in the South West. This involved advocating on behalf of individuals who lacked capacity and were subject to a DoLS when important decisions were being made about their care. She also volunteered with the National Centre for Domestic Violence and Employment Tribunal Support Service.

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