

The Court of Appeal explains why a local authority cannot consent to the confinement of a looked after child

02 May 2025  Katie Viggers

The Court of Appeal has recently published its judgment in the case of [J v Bath and North East Somerset Council \[2025\] EWCA Civ 478](#).

This case revolves around a 14-year-old boy, J, who is profoundly disabled, subject to a full care order under the Children Act 1989 (CA 1989) and has a highly restrictive care plan in place.

The local authority applied to the High Court for a deprivation of liberty (DoL) order. However, Mrs Justice Lieven determined that, in exercise of its powers of parental responsibility, the local authority could consent to J's restrictions and confinement. Consequently, a DoL order was not necessary (see [Re J: Local Authority consent to Deprivation of Liberty \[2024\] EWHC 1690 \(Fam\)](#)).

The case was subsequently appealed to the Court of Appeal, where the principal issue was whether Lieven J's decision was correct. The answer was an emphatic "no". We explain why in this briefing.

Background

J is a 14-year-old boy with profound disabilities, including autism, ADHD and Pica. In April 2020, with his parents' agreement, he was accommodated by the local authority in a specialist children's home. A final care order under s.31 CA 1989 was later made. The effect of such a care order is to give parental responsibility to the local authority, which is shared with the child's parent(s), but with the local authority having control over the way parental responsibility is exercised.

J is subject to a restrictive care plan, including window latches in his room, support to go to the toilet, 2:1 support overnight and full supervision when in the garden and in the community. The local authority considered the care plan amounted to a deprivation of J's liberty and so applied to the court for a DoL order.

Initial High Court judgment

In the High Court, Mrs Justice Lieven considered whether there was a deprivation of J's liberty within the meaning of Article 5 of the European Convention on Human Rights (ECHR) ('the right to liberty'), by reference to the case of *Storck v Germany* (App No 61603/00) (2006) 43 EHRR 6. This case found that, for Article 5 to be engaged, the following three elements must be present:

1. The 'objective element': confinement in a particular restricted space for a not negligible length of time;
2. The 'subjective element': there has not been valid consent to the confinement in question; and
3. The deprivation must be imputable to the State.

Mrs. Justice Lieven determined that, whilst the first limb of this test was met in J's case, the second limb might not be met if the local authority could validly consent to his confinement. She concluded that the local authority could, in exercising its parental responsibility, lawfully consent to J's confinement, since the imposed restrictions were essential to ensure his best interests and were required by the State's positive obligations under Article 2 ECHR to protect his life. Given the local authority had the power to consent to J's confinement, no DoL order was required.

Mrs Justice Lieven's decision was also based on the premise that the real purpose of a DoL order is to provide a defence against any future claim for unlawful detention, breach of Article 5 or habeas corpus. She concluded that it was undeniably in J's best interests for him to be deprived of his liberty under the restrictions imposed. Therefore, she considered it "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 DoL order was made. Lieven J questioned the purpose of a DoL order in a case like J's.

Court of Appeal decision

The Court of Appeal overturned Mrs Justice Lieven's decision. It noted that she had focussed on domestic law relating to the exercise of parental responsibility, or possible defences to potential civil litigation, rather than ECHR requirements, which was an erroneous approach.

The Court of Appeal looked at the wording of Article 5 ECHR:

- Article 5(1) ECHR states that no one shall be deprived of their liberty save in... accordance with a procedure prescribed by law.
- Article 5(4) ECHR states that 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.

The Court of Appeal revisited the significant 2004 decision of *HL v United Kingdom* (Application: 45508/99) 40 EHRR 761 (the *Bournewood* case), which clarified that Article 5(1) strictly regulates the circumstances in which one's liberty can be taken away, whereas Article 5(4) requires a review of its legality thereafter. Although *HL v UK* related to an adult, the Court of Appeal said that the distinctive and cumulative protections offered by Article 5(1) and (4) must apply in equal measure to a child.

The notable case of *Cheshire West and Chester Council v P* [2014] UKSC 19 was also considered. This case held that, no matter how benign the intentions of the local authority providing the care may be, the purpose of Article 5 is to ensure that people are not deprived of their liberty without proper safeguards. The Court of Appeal stressed that the decision in *Cheshire West* is binding on all the lower courts, including the High Court.

The Court of Appeal therefore held that, in accordance with *HL v UK* and *Cheshire West*, the State (i.e. local authority) cannot consent to the confinement of a looked after child, as this would circumvent the requirements of Article 5(1) and 5(4) ECHR. A looked after child who is being deprived of their liberty must be afforded the benefit of the checks and safeguards under Article 5(1), or separately (as *HL v UK* makes plain) of access to a formal procedure to review or challenge their detention under Art 5(4). If a local authority could consent to the confinement by the State of a child in its care, that would effectively remove the case from Article 5, thereby avoiding the important protection, safeguards and independent authorisation by a court that would otherwise be required. The consequence would be that the local authority would be "marking its own homework". Further, that a child would have no means of ever challenging their detention for as long as they were subject to a care order, which is in contravention to Art 5(4).

The Court of Appeal held that it was inconsistent with Article 5 for an 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. Therefore, a local authority cannot consent to the confinement of a child in its care and, if a consequent deprivation of liberty arises, a DoL order is required.

Conclusion

This decision will be welcome by many for providing much needed clarification in a complex and often confusing area. In future cases, where a looked after child is being cared for in conditions that amount to a deprivation of liberty, with reference to the three limbed *Storck* test, a DoL order will be required, since the local authority cannot give valid consent to the child's confinement. If you require help or advice as to whether care conditions amount to a DoL, or assistance in making an application to court for a DoL order, please do get in touch.

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