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Case No: COP 12673015

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2016

Before :

THE HONOURABLE MR JUSTICE KEEHAN

- -

Between :

BIRMINGHAM CITY COUNCIL	**Applicant**
-and-	
D	
(BY HIS LITIGATION FRIEND, THE OFFICIAL SOLICITOR)	**First Respondent**
-and-	
W	**Second Respondent**

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- -

Mr Jonathan Cowen, Miss Victoria Flowers, Miss Anita Rao and Miss Eleanor Sibley (instructed by **Birmingham City Council**) for the **Applicant**
Mr Alexander Ruck Keene (instructed by **Cartwright King Solicitors**) for the **First Respondent**

Hearing dates: 16 and 17 November 2015

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Judgment

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

Mr Justice Keehan:

Introduction

1. I am concerned with one young person D who was born on 23 April 1999 and he is therefore 16 years of age. In these proceedings D is represented by the Official Solicitor as his Litigation Friend.

2. D's mother is W, the Second Respondent, and his father is M. They both play a very close and important role in D's life. They are loving and dedicated parents. The issues I have to determine relate solely to legal issues based on legal submissions. In those circumstances, neither parent, quite understandably, has been present or represented at this hearing. My ultimate decision will have a bearing on D's legal status but will have no effect on his day to day life.

3. This judgment should be read with the judgment I gave in the case of *Trust A v X and A Local Authority* [2015] EWHC 922 (Fam) (hereinafter referred to as *'Trust A v X'*).

Application and Issues

4. The local authority issued this application in the Court of Protection on 23 April 2015. It is conceded that the circumstances in which D currently resides and is educated constitute an objective confinement which satisfies Limb One of *Storck v Germany* [2006] 43 EHRR 6 in determining whether D is deprived of his liberty.

5. The local authority submits, however, that Limbs 2 and 3 are not satisfied and accordingly D is not deprived of his liberty. Its arguments are essentially based on two grounds namely:

    a) D's parents may consent to his confinement, thus that which might otherwise result in a deprivation of liberty, does not; and

    b) D resides at his residential unit under the auspices of s20 Children Act 1989 accommodation to which his parents agreed. Therefore his placement and confinement both at the residential unit and his school are not imputable to the state but rather are at the request of, and with the consent of, his parents.

6. The Official Solicitor accepts and agrees that the circumstances of D's confinement satisfy Limb 1 of *Storck*. He submits, however, that:

    a) D's parents cannot consent to his confinement now that he has attained the age of 16 years; and

    b) that notwithstanding that D is looked after by the local authority pursuant to s20, the circumstances of his confinement are plainly and clearly imputable to the state via the acts of the local authority. The residential unit and the school D attends are paid for by the authority. Moreover, the local authority took the lead in identifying this establishment and devised and/or approved the regime by which D is cared for in the residential unit and in school.

7. The Official Solicitor goes further and contends that;

a) no parent in any circumstances may consent to the confinement of their child, whatever their age, in circumstances which absent a valid consent would amount to a deprivation of liberty; and

b) on that basis my decision in *Trust A v X* was wrong insofar as I held that D's parents could consent to his confinement in Hospital B when he was under 16 years of age: see paragraphs 52-66 of that judgment.

8. Whether I accept those submissions or not, I do accept that I should have expressed myself more precisely and felicitously by referring to D's 'confinement' at Hospital B (ie Limb 1 of *Storck*) rather using the phrase a 'deprivation of liberty' which, of course only arises if all three Limbs of *Storck* are satisfied (eg paragraphs 52 and 65 of *Trust A v X*).

9. I am immensely grateful to counsel for the detailed written submissions I have received and for the helpful oral submissions they each made to supplement the former.

Background

10. D was diagnosed with Attention Deficit Hyperactivity Disorder, Asperger's Syndrome and Tourette's Syndrome from a very early age. On admission to Hospital B in October 2013 he was further diagnosed as suffering from a mild learning disability.

11. D's parents struggled for many years to care for him in the family home. He had significant difficulties with social interactions. His behaviour was challenging; he was observed to be physically and verbally aggressive. D would urinate and defecate in inappropriate places. He presented with anxiety and paranoid behaviours. All of this had a marked adverse effect on D's younger brother R. D's prescribed medication had limited effects.

12. In March 2012 D was referred to his local Child and Adolescent Mental Health team. His treating psychiatrist made a referral to Hospital B who agreed to admit D informally for multi disciplinary assessment and treatment.

13. Hospital B provides mental health services to children and young people aged between 12 and 18. D lived within the grounds of the hospital. He attended an on site school on a full time basis.

14. His parents and brother visited him at the unit on a regular basis. D frequently spoke to his parents on the telephone. He enjoyed home visits usually at a weekend for up to six hours but he was supervised at all times.

15. Dr K, D's treating consultant at Hospital B, provided the court with a report in which he set out the restrictions to which D was subjected. In summary the external door to the unit was locked, D was checked on by staff every half an hour or so and he sought out the staff at other times. His school was integral to the unit. If D left the site for relevant activities he was accompanied by staff on a one to one basis. Accordingly he was under constant supervision and control.

16. D was assessed by Dr K as not being 'Gillick' competent to consent to his residence and care arrangement or to any deprivation of liberty.

17. Dr K considered it inappropriate to use the provisions of the Mental Health Act 1983 to place D under section. It was not necessary to detain D in order to treat him.

18. In August 2014 the clinical team led by Dr K agreed that D was fit to be discharged from hospital to a residential placement. There had been considerable delay in identifying a suitable residential unit for D.

19. On 31 March 2015 I handed down judgment in the case of *Trust A v X*. I found that D's confinement at Hospital B satisfied the objective requirement of Limb 1 of *Storck*, but I found that in the proper exercise of his parents' parental responsibility for this young person, then aged 15, they could consent to his confinement at Hospital B. Thus I was not satisfied that D was deprived of his liberty.

20. The local authority issued these proceedings in the Court of Protection on 23 April 2015.

21. On 20 May 2015, with the consent of the parties and on the basis of the medical evidence before me, I made declarations that the court had reason to believe that D lacks capacity to litigate these proceedings, to make decisions about his residence and, to make decisions as to his care, including keeping himself safe in the community. I further made orders for the transfer and placement of D from Hospital B to House A residential unit ('House A').

22. D moved into House A at Placement B on 2 June 2015.

23. Placement B is set within its own grounds in the England. In addition to the main house there are 12 self-contained residential units on the site each with its own fenced garden. D resides at House A with three other young people of a similar age. The educational facility D attends is on the Placement B site. He is taught in a class with 4 other young people.

24. The local authority took the lead in finding a suitable alternative placement for D once it had been decided in August 2014 that he was fit to be discharged from Hospital B. As I have already mentioned, there was a considerable delay in identifying a suitable unit. It is not material to the issues I have now to determine to consider the reasons for that delay.

25. In any event by early March 2015 Placement B was identified as a potential suitable placement for D. He was offered a placement there on 15 April. His parents were, I note, "kept fully informed of the placement process in regular review meetings held at [Hospital B]". Further the social worker, HK said in his statement of 18 May 2015 that:

> "D has complex needs and it was essential that the local authority proceeded carefully so as to ensure that the right placement was found; that is a placement that the local authority considered would meet his needs and would be acceptable to his parents. A significant amount of work has

> been required by the local authority in order to ensure that a placement was found for D which the local authority considered was the right placement for him and I believe that, having regard to the matters referred to above, the local authority has proceeded to arrange a new placement for D within a reasonable time-frame. "

26. The choice of Placement B, the regime that D would experience when he moved there and the drawing up of his personal care plan were led by the local authority's social work team in consultation with D's treating clinicians and with the staff at Placement B. His parents agreed to the same and recognised that such a placement was in D's welfare best interests.

27. I note that D's placement at Placement B is funded exclusively by the local authority.

28. D's parents agreed to him being accommodated by the local authority pursuant to s20 1989 Act in June 2015.

29. As at Hospital B, D is under constant supervision and control. His life at Placement B, is described as follows:

> "D has his own bedroom. All external doors are locked and D is not allowed to leave the premises unless it is for a planned activity. D receives one-to-one support throughout his waking day, and at night, the ratio of staff to students is 2:1. He is not initially allowed unaccompanied access to the community.
>
> D attends school every weekday from 8:45am to 2pm. He then eats his lunch on return to House A. He will then get changed and partake in leisure activities. Currently every Thursday afternoon D attends swimming and will eat his dinner outside of House A with staff.
>
> House A has all entrances and exits to the building locked by staff. When wishing to go out into the garden D needs to request a staff member to open the door. These doors are sometimes left open when there is a group leisure activity in the garden.
>
> D will be having contact with his parents each Saturday for up to 5 hours. Currently his parents have been visiting for 3 hours as D does get increasingly anxious during this time. There have been no significant issues since D's move to Placement B."

The Official Solicitor's Submissions

30. The Official Solicitor observes that the local authority rightly identifies that the outcome of this case has significant resource implications for this and all local

authorities nationally. But, submits the Official Solicitor, the emphasis placed on this potential adverse consequence is entirely misplaced. He relies upon the observation of Black LJ in *Re X (Court of Protection Practice)* [2015] EWCA Civ 599 at paragraph 18 that:

> "pressure on resources and even considerations of increased delay are not material to a determination of whether there are adequate safeguards to satisfy Article 5."

31. The Official Solicitor submits that arguments as to resources have consistently been deployed in favour of rendering nugatory the protections of both the substantive and procedural requirements of Article 5 (1) in the context of those with mental disabilities. None have found favour: *Re X*, *HL v UK* [2005] 40 EHRR 32 and *Cheshire West and Chester Council v P* [2014] AC 396.

32. In this respect I entirely accept and endorse the submissions of the Official Solicitor.

33. It is advanced by the Official Solicitor that:

> "the complex interplay of rights that are in play in relation to those who are under 18 is perhaps most neatly summed up at paragraph 19.48 of the 2015 Mental Health Act 1983 Code of Practice:
>
> > The child's right to liberty under Article 5 ECtHR, which should be informed by Article 37 of the United Nations Convention on the Rights of the Child
> >
> > The parents' right to respect for the right to family life under Article 8 ECtHR, which includes the concept of parental responsibility for the care and custody of minor children, and
> >
> > The child's right to autonomy which is also protected under Article 8 ECtHR.
>
> In seeking to reach a principled way in which to address the balance between these three, it is vitally important to remember the implications for a child of a finding that they are not deprived of their liberty. In particular, the child will therefore be deprived of the rights to:
>
> > Challenge the lawfulness of their detention before an independent tribunal pursuant to Article 5(4); and
> >
> > In the context of a deprivation of liberty which – as here – is on the basis of the child's mental disorder, of a regular review of whether the nature and severity of that disorder warrants continued detention, pursuant to Article 5(1)(e) read together with Article 5(4).

> In other words, the child will lose the right to the "*periodic independent check on whether the arrangements made for them are in their best interests*" that Lady Hale identified in *Cheshire West*[8] as necessary in the case of those individuals with disabilities in the position of P, MIG (who at the time of the proceedings before Parker J was 17) and MEG (who was 18), "*as a recognition of their equal dignity and status as human beings like the rest of us*." "

34. The issue was raised as to whether a local authority with parental responsibility for a child could consent to arrangements for a child which would otherwise amount to a deprivation of liberty of a child. The Official Solicitor submitted it could not. I agree.

35. In a recent decision I made clear that a local authority who had parental responsibility for a child, by virtue of an interim care order or a care order, could not consent to the confinement of a child which would otherwise amount to a deprivation of liberty: see *A Local Authority v D and othrs* [2015] EWHC 3125 (Fam) at paragraphs 26-29.

36. The Law Commission in its consultation paper on Mental Capacity and Deprivation of Liberty, has expressed its concerns about the current state of the law in this area. It noted:

> "The remit of our review extends to considering whether young people (not children aged 15 or younger) should fall within our proposed protective care scheme. This would enable deprivations of liberty to be authorised for such people, as well as provide oversight arrangements for their care and treatment. Arguably, the present law introduces unjustifiable inequalities amongst age groups, and potentially places young people at a distinct disadvantage compared to those over 18. The development of human rights law has contributed to the increasing recognition of the need to give greater weight to the views of young people. This is beginning to be reflected in law in relation to the admission of young people under the Mental Health Act. We provisionally consider that the deprivation of liberty of those aged 16 and 17 should come under our scheme. We do not consider that the alternative provisions, such as section 25 of the Children Act, provide an adequate basis for dealing with 16 and 17 year olds who satisfy the "acid test". […].
>
> It is also a matter of concern that judicial confidence is being placed in the "zone of parental control" which remains a poorly understood and ill-defined concept. It is a concept introduced in the 2008 version of the Mental Health Act Code of Practice and was renamed the "scope of parental responsibility" in the current version. It is emphasised that whether a particular

> intervention can be undertaken on the basis of parental consent will need to be assessed in the light of the particular circumstances of the case, and practitioners will need to consider a range of factors. These include the age, maturity and understanding of the child or young person. The implication of the case law is that a young person who lacks capacity may be left without the protections guaranteed by article 5 as a result of this concept. We would welcome further views on the appropriateness of the concept of parental control in relation to young people, and evidence of how it is being used."

37. I agree with those views and concerns. I expressed the same sentiments in *Trust A v X* and in *A Local Authority v D and Othrs*.

38. The Official Solicitor submits I was wrong in my decision in *Trust A v X* having regard to various decisions of the ECtHR and in light of the majority decision in *Cheshire West.*

39. In *Nielsen v Denmark* [1988] 11 EHRR 175 a 12 year old boy was detained in a psychiatric hospital from September 1983 to 30 March 1984. The majority of the court found and decided that:

    a) the hospitalisation of the child was taken by the mother in her capacity as holder of parental rights; and

    b) Article 5 was therefore not applicable in so far as it is concerned with deprivation of liberty by the authorities of the state.

40. During the course of judgment the majority of the court observed at paragraphs 61-73 that:

> "It should be observed at the outset that family life in the Contracting States encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorize others to impose, various restrictions on the child's liberty. Thus the children in a school or other educational or recreational institution must abide by certain rules which limit their freedom of movement and their liberty in other respects. Likewise a child may have to be hospitalised for medical treatment. Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognized and protected by the Convention, in particular by Article 8 (art. 8). Indeed the exercise of parental rights constitutes a fundamental element of family life

> (see the R v. the United Kingdom judgment of 8 July 1987, Series A no. 121-C, p. 117, para. 64).
>
> Article 5 (art. 5) therefore is not applicable in so far as it is concerned with deprivation of liberty by the authorities of the State, but the question remains, however, whether the Article is applicable in the circumstances of the present case in regard to such restrictions on the applicant's liberty as resulted from the exercise of the mother's parental rights…
>
> …The Court is satisfied that the mother, when taking her decision on the basis of medical advice from her family doctor and from Professor Tolstrup, had as her objective the protection of the applicant's health (see paragraphs 15 and 19-20 above). This is certainly a proper purpose for the exercise of parental rights…
>
> The Court accepts, with the Government, that the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the State to provide safeguards against abuse. However, it does not follow that the present case falls within the ambit of Article 5 (art. 5). The restrictions imposed on the applicant were not of a nature or degree similar to the cases of deprivation of liberty specified in paragraph 1 of Article 5 (art. 5-1)….

41. Mr Ruck Keene submits that *Nielsen* is solely concerned with the objective element of confinement and has no relevance to the issue of consent. *Nielsen* was decided, of course, before the ECtHR formulated the three limb deprivation of liberty test in *Storck*.

42. Furthermore he says that the law has developed since *Nielsen* was decided and a different approach is taken to, and a greater emphasis placed on, the personal autonomy of young people. Thus *Austin v Commissioner of Police of the Metropolis* [2009] 1 AC 564, Lord Walker observed at paragraphs 45 that:

> "Many of these article 5(1)(e) cases also raise issues as to express or implied consent (to admission to a psychiatric ward or old people's home). Some of the earlier cases seem questionable today insofar as they relied on "parental rights" (especially *Nielsen*, which was a nine-seven decision that the admission to a psychiatric ward of a twelve-year old boy was not a deprivation of liberty, because of his mother's "parental rights"). *Storck* has, I think, sent out a clear message indicating a different approach to the personal autonomy of young people (although the unfortunate claimant in that case was 18 years of age at the time of her compulsory medication in a locked ward in the clinic at Bremen, for which she was made an exceptionally large award for non-pecuniary loss)."

43. In *re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam), Lord Justice Munby, as he then was, said at paragraph 161:

> "Indeed, I have my doubts, for *Nielsen*, on this point, is widely perceived today as being questionable. And in saying this I emphasise that I have in mind not only my own observations in *JE v DE (By his Litigation Friend the Official Solicitor), Surrey County Council and EW* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150, but more importantly the views of various scholars and of Lord Walker of Gestingthorpe in *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] AC 564, at para [45]. As Mr Sherman asks rhetorically, why should the law in its application of Article 5 distinguish between two young persons who are, and always will, function in essentially the same way and at the same level just because one is under while the other is over the age of majority? But these are not matters I need to consider further, and it is better, as it seems to me, to leave them to be considered in a case where, unlike here, the point actually arises; that is, in a case where there is, the *Nielsen* point apart, a deprivation of liberty."

44. In relation to the Official Solicitor's submissions on the interplay of Art 5 and Art 8, I was taken to a number of decisions of the ECtHR including *Koniorski v United Kingdom* [2000] 30 EHRR CD 139 where the court held that:

> "The Court recalls at the outset that in *Nielsen v Denmark* it found that Article 5 was not applicable to the hospitalisation of the applicant as that hospitalisation was a responsible exercise by the applicant's mother of her custodial rights in the interest of the child (paras 61-73). That reasoning cannot be transposed to the present case as, although the local authority had custodial rights over the applicant by virtue of the care order which was still in force, the orders placing the applicant in secure accommodation were made by the courts – the Birmingham Magistrates Court on 23 November 1995 and the Sutton Coldfield Magistrates Court on 23 February 1996 (varied by the High Court on 18 March 1996). There is no question of the respective courts having custodial rights over the applicant, and so Article 5 applies in the present case. "

45. In *DG v Ireland* [2002] 35 EHRR 33 the court found that:

> "The Court recalls that in its *Nielsen v Denmark* judgment, it found that Article 5 was not applicable to the hospitalisation of the applicant as that hospitalisation was a responsible exercise by the applicant's mother of her custodial rights. That reasoning cannot be transposed to the present case as the orders

> placing the applicant in St Patrick's were made by the High Court, which court did not have custodial rights over the applicant. Article 5 therefore applies in the present case. "

46. In *HM v Switzerland* [2004] 38 EHRR 17 the ECtHR found that the placement of an elderly woman in a 'foster' home did not amount to a deprivation of her liberty. The court stated that the starting point when considering whether there had been a deprivation of liberty must be the specific situation of the individual in the specific situation of the individual concerned and account must be taken of a whole range of factors. The court then concluded that:

> "Bearing these elements in mind, in particular the fact that the Cantonal Appeals Commission placed the applicant in the foster home in her own interests in order to provide her with the necessary medical care, as well as satisfactory living conditions and hygiene, and also taking into consideration the comparable circumstances of the case of *Nielsen v Denmark*, the Court concludes that in the circumstances of the present case the applicant's placement in the foster home did not amount to a deprivation of liberty within the meaning of Art.5 (1), but was a responsible measure taken by the competent authorities in the applicant's interests. Accordingly, Art 5(1) is not applicable in the present case. "

47. In relation to this controversial decision Baroness Hale in *Cheshire West* said at paragraph 28:

> "This reference to the benevolent purpose of the placement is inconsistent with the later Grand Chamber decisions of *Creanga v Romania* [2012] 56 EHRR 361, para 93, and *Austin v United Kingdom* [2012] 55 EHRR 359, para 58. There it was stated that an underlying public interest motive
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> > "has no bearing on the question whether that person has been deprived of his liberty… The same is true where the object is to protect, treat or care in some way for the person taken into confinement, unless that person has validly consented to what would otherwise be a deprivation of liberty" (para 58)."

48. In *Storck v Germany* [2006] 43 EHRR 6 there is the first reference to the tripartite test of a deprivation of liberty. The court observed that:

> "71. The Court recalls that, in order to determine whether there has been a deprivation of liberty, the starting point must be the specific situation of the individual concerned and account must

> be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.
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> 74. However, the notion of deprivation of liberty within the meaning of Art.5(1) does not only compromise the objective element of a person's confinement to a certain limited place for a not negligible length of time. Individuals can only be considered as being deprived of their liberty, if, as an additional subjective element, they have not validly consented to the confinement in question. The Court notes that in the present case, it is disputed between the parties whether the applicant had consented to her stay in the clinic.
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> 89. The Court recalls that the question whether a deprivation of liberty is imputable to the State relates to the interpretation and application of Art.5(1) of the Convention and raises issues going to the merits of the case, which cannot be regarded merely as preliminary issues. It agrees with the parties that in the present case, there are three aspects which could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. First, the deprivation of liberty could be imputable to the state due to the direct involvement of public authorities in the applicant's detention. Secondly, the State could be found to have violated Art5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of Art 5. Thirdly, the State could have violated its positive obligations to protect the applicant interferences with her liberty carried out by private persons."

49. In *Stanev v Bulgaria* [2012] 55 EHRR 22 the court distinguished the case before the court from *Nielsen* in the following terms, at paragraph 122 and 130:

> "122. …The Court considers that the restrictions complained of by the applicant are the result of various steps taken by public authorities and institutions through their officials, from the initial request for his placement in an institution and throughout the implementation of the relevant measure, and not of acts or initiatives by private individuals. Although there is no indication that the applicant's guardian acted in bad faith, the above considerations set the present case apart from *Nielsen*, in which the applicant's mother committed her son, a minor, to a psychiatric institution in good faith, which prompted the Court to find that the measure in question entailed the exercise of exclusive custodial rights over a child who was not capable of expressing a valid opinion.
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> 130. As to the subjective aspect of the measure, it shou dbe noted that, contrary to the requirements of domestic law, the

> applicant was not asked to give his opinion on his placement in the home and never explicitly consented to it. Instead, he was taken to Pastra by ambulance and placed in the home without being informed of the reasons for or duration of that measure, which had been taken by his officially assigned guardian. *The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those another person acting in the context of a protective measure and that* it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the Court has already held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehended his situation. In the present case, domestic law attached a certain weight to the applicant's wishes and it appears that he was well aware of his situation. The Court notes hat at least from 2004, the applicant explicitly expressed his desire to leave the Pastra Social Care Home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored and to be released from his guardianship." (emphasis supplied).

50. In *Stonkov v Bulgaria* [2015] 42 ECtHR 276 the applicant lacked legal capacity because he suffered from schizophrenia. His mother was appointed legal guardian and thereafter arranged for the applicant to the placed in a social care home for people with mental disorders. Notwithstanding that he had been so placed by his legal guardian, the ECtHR found a breach of Art 5(2). The court found that his circumstances in the care home was a confinement to which he had not consented and which was imputable to the state and was, therefore, an unlawful deprivation of his liberty.

51. In *DD v Lithuania* [2012] MHLR 209 the court again distinguished the factual matrix of the case before it from *Nielsen* as follows:

> "148. As to the facts in *Nielsen*, the other case relied on by the Government, the applicant in that case was a child, hospitalised for a strictly limited period of time of only five and a half months, on his mother's request and for therapeutic purposes. The applicant in the present case is a functional adult who has already spent more than seven years in the Kėdainiai Home, with negligible prospects of leaving it. Furthermore, in contrast to this case, the therapy in *Nielsen* consisted of regular talks and environmental therapy and did not involve medication. Lastly, as the Court found in *Nielsen*, the assistance rendered by the authorities when deciding to hospitalise the applicant was "of a limited and subsidiary nature" (§ 63), whereas in the instant case the authorities contributed substantially to the applicant's admission to and continued residence in the Kėdainiai Home."

In relation to the third limb of *Storck*, namely imputability to the state, the court said:

> "151. Lastly, the Court notes that although the applicant's admission was requested by the applicant's guardian, a private individual, it was implemented by a State-run institution – the Kėdainiai Home. Therefore, the responsibility of the authorities for the situation complained of was engaged (see Shtukaturov, cited above, § 110)."

52. In *Atudorei v Romania* [2014] ECtHR 947 once more the court distinguished the case of *Nielsen* and observed:

> "134. The Court further notes that in *Nielsen v Denmark* 28 November 1988 67 Series A no. 144, the applicant was an under-age child, hospitalised for the strictly limited period of only five and a half months, at his mother's request and for therapeutic purposes. The applicant in the present case was a fully functioning adult. Furthermore, in contrast to instant case, the therapy in *Nielsen* consisted of regular talks and environmental therapy and did not involve medication. Lastly, the Court found in *Nielsen* that the assistance rendered by the authorities on the applicant's hospitalisation was "of a limited and subsidiary nature", whereas in the instant case the authorities appear to have contributed substantially to the applicant's admission to the hospital and her continued hospitalisation.
>
> 135. As to the subjective aspect of the measure, the Court notes that at the time of her hospitalisation the applicant was of an age and that there is no evidence in the file that she lacked legal capacity to decide matters for herself. However, according to the information received by the Government on 16 October 2010 from the management of the Sapoca Psychiatric Hospital, and notwithstanding the applicant's statement that she was told by the medical staff that she had signed the hospitalisation papers, Dr I obtained the informed consent for the applicant's hospitalisation and treatment from the applicant's mother on account of the applicant's clinical condition (see paragraph 24 above). In this context the Court considers that it is reasonable to assume that the applicant did not directly consent to her hospitalisation and treatment."

53. These last three cases are relied on by the Official Solicitor to make two important points:

a) these are the only cases where the ECtHR has alluded to the concept of substituted consent;

b) it is implicit, if not explicit, from the quoted passages above that the court in each of those considered *Nielsen* in terms of the objective First Limb of the *Storck* test before then turning to consider the subjective Second Limb of *Storck*, namely a valid consent. In this latter context no reference is made to *Nielsen*.

54. Mr Ruck Keene referred me to the Scottish Law Commission's report No 240 on Adults with Incapacity. In respect of the issue of substituted consent by a 'surrogate' decision maker the Commission noted at paragraphs 3.56 and 3.57 that:

> "3.56 The Discussion Paper also contained three questions based on a comment by the European Court in the *Stanev* case:
>
> > "The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned."
>
> 3.57 The reference to 'valid replacement' had led us to wonder if it might be possible to construct provisions of domestic law based on the premise that consent by a surrogate decision maker (an attorney or guardian) prevents a given set of restrictions from amounting in law to deprivation of liberty. This would occur because the 'valid replacement' would constitute consent. Thus, the subjective requirement before there can be a deprivation of liberty, according to the jurisprudence of the Strasberg Court, would not be met."

The Commission concluded as follows at paragraph 3.59:

> "We did not receive any responses which favoured development of provisions based around this observation form the European Court of Human Rights. Having reflected further on the matter, we do not think it would be sensible to base recommendations on this isolated passage from the European Court. In practice, it would have no real effect on guardians, since guardianship would probably require to include an appropriate power (perhaps 'to consent to residence in conditions which would otherwise amount to a deprivation of liberty'). Little would be gained by such a provision, and confusion would be likely. In the longer term, if models of supported decision-making become more established in the domestic laws of the Member States of the Council of Europe, it may be that the European Court of Human Rights will explore the extent, if any, to which the subjective element of deprivation of liberty (consent by the person) can fit with these other models, but that will take time to address and develop."

55. It is submitted that the ECtHR did not in *Stanev* or *Atudorei*, nor has it in any other reported decision, determine whether a 'surrogate' decision maker (eg an appointed personal representative) could give a valid consent to the confinement of an incapacitous person which, absent that consent, would amount to a deprivation of liberty. Indeed in *Stankov* (see paragraph 50 above) the ECtHR reached the opposite conclusion, namely that a legal guardian could not consent to her adult son's confinement in a social care home.

56. Mr Ruck Keene then took me to a number of domestic authorities on the issue of consent in respect of the Second Limb of the *Storck* test. First I was referred to *Re K* [2001] Fam 377. This was a decision made before the ECtHR's decision in *Storck*. On the issue of parental consent to the confinement of a child or young person, Dame Elizabeth Butler-Sloss P said at paragraphs 27 and 28:

> "It is clear that not every deprivation of liberty comes within the ambit of article 5. Parents are given a wide measure of discretion in the upbringing of their children. This was recognised by the European Court in *Nielsen v Denmark* II EHRR 175, 191-192 para 61, the case of a child committed to a psychiatric ward at the request of his mother…
>
> I recognise the force of the principles set out in the decisions in *Nielsen's* case. *Nielsen's* case and *Family T's* case. There is a point, however, at which one has to stand back and say; is this within ordinary acceptable parental restrictions upon the movements of a child or does it require justification? In *Guzzardi v Italy* [1980] 3 EHRR 333,362-363, the court said:
>
> > "92. The court recalls that in proclaiming the 'right to liberty', paragraph 1 of article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion… In order to determine whether someone has been 'deprived of liberty' within the meaning of article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.
> >
> > 93. The difference between deprivation of and restriction upon liberty is none the less merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of article 5 depends." "

57. In his, in part dissenting, judgment Thorpe LJ observed at paragraphs 53 and 61 that:

> "The analysis emphasises that plainly not all restrictions placed on the liberty of children constitute deprivation. Obviously parents have a right and a responsibility to restrict the liberty of their children, not only for protective and corrective purposes, but also sometimes for a punitive purpose. So acting they only risk breaching a child's article 5(1) rights if they exceed reasonable bounds. Equally parents may delegate that right and responsibility to others. Every parent who sends a child to a boarding school delegates to the head teacher and his staff. A local authority may even send a child to a school that provides 52-week boarding facilities. Then restrictions on liberty imposed by the school do not amount to a breach of the pupils rights under article 5(1) unless the school betrays its responsibilities to the family.
>
> For these reasons I accept Mr Garnham's first and bold submission that the order of 30 June did not breach K's article 5 rights since the deprivation of liberty was a necessary consequence of an exercise of parental responsibility for the protection and promotion of his welfare. I am not deterred by Mr Ryder's skeleton: "It is accepted that the purpose of secure accommodation is to restrict liberty" and his subsequent rejection of the opportunity to adopt Mr Garnham's submissions."

58. Lord Judge said at paragraphs 99,100 and 102:

> "Mr Garnham's first submission on behalf of the Secretary of State for Health was that K had not been deprived of his liberty for the purposes of article 5. The local authority had simply exercised parental responsibility for him in his own best interests. There was some interesting discussion about the way in which parents restrict the movements of their children from time to time by, for example, putting young children to bed when they would rather be up or "grounding" teenagers when they would prefer to be partying with their friends, or sending children to boarding schools, entrusting the schools with authority to restrict their movements. All this reflects the normal working of family life in which parents are responsible for bringing up, teaching, enlightening and disciplining their children as necessary and appropriate, and into whish the law and local authorities should only intervene when the parents' behaviour can fairly be stigmatised as cruel or abusive.
>
> It is not necessary to deal with any argument that such parental behaviour might constitute an interference with a child's liberty, or contravene his "human rights". No such absurdity was advanced. What however does arise for decision is whether what I have described as normal family life goes anywhere near

> what the local authority is empowered to do by a secure accommodation order.
>
> In short, although normal parental control over the movements of a child may be exercised by the local authority over a child in its care, the implementation of a secure accommodation order does not represent normal parental control."

59. The Official Solicitor submits that the observations of Dame Elizabeth Butler-Sloss and of Lord Judge, that a parent cannot consent to the confinement of their child in circumstances which would amount to a deprivation of a child's liberty, is correct and it is the approach I should adopt.

60. I was next referred to the case of *RK v BCC, YB and AK* [2011] EWCA Civ 1305. The Court of Appeal said at paragraph 14 that:

> "The consensus is to this effect: The decisions of the European Court of Human Rights in *Neilson v Denmark* [1988] 11EHRR 175 and of this court in *Re K* [2002] 2WLR 1141 demonstrate that an adult in the exercise of parental responsibility may impose, or may authorise others to impose, restrictions on the liberty of the child. However restrictions so imposed must not in their totality amount to deprivation of liberty. Deprivation of liberty engages the Article 5 rights of the child and a parent may not lawfully detain or authorise the deprivation of liberty of a child. "

61. I interpose to observe that neither *Nielsen* nor *Re K* are authority for the proposition set out in the final sentence in paragraph 14 of *RK* namely, "a parent may not lawfully detain or authorise the deprivation of liberty of a child". There is no decision of the ECtHR or domestic authority directly and explicitly, on the issue of parental consent to the confinement of a chid in circumstances which would otherwise amount to a deprivation of liberty and in particular asserting that a parent cannot consent to the same. I entered the same caveat in respect of my decisions in *Trust A v X* and *A Local Authority v D and Othrs.*

62. I was referred to the judgment of Lord Kerr in *Cheshire West* where he considered the issue of the confinement of children and young people. At paragraphs 76-79 he said:

> "While there is a subjective element in the exercise of ascertaining whether one's liberty has been restricted, this is to be determined primarily on an objective basis. Restriction or deprivation of liberty is not solely dependent on the reaction or acquiescence of the person whose liberty has been curtailed. Her or his contentment with the conditions in which she finds herself does not determine whether she is restricted in her liberty. Liberty means the state or condition of being free from external constraint. It is predominantly an objective state. It

> does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity.
>
> The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in *fact* circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.
>
> All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of a similar age, their liberty is – and must remain- a constant feature of their lives, the restriction amounts to a deprivation of liberty.
>
> Very young children, of course, because of their youth and dependence on others, have – an objectively ascertainable- curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because they can- and must – now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty."

He concluded in respect of the Second Limb of *Storck* as follows at paragraph 81:

> "The subjective element in deprivation of liberty is the absence of valid consent to the confinement in question: see para 117 of *Stanev.* This must be distinguished from passive acquiescence to the deprivation, particularly where that stems from an inability to appreciate the fact that one's liberty is being curtailed. In para 118 (c) the court said that deprivation of liberty occurs when an adult is incapable of giving his consent to admission to a psychiatric institution, even though he had never attempted to leave it. And as Baroness Hale DPSC has pointed out (in para 24 of her judgment) the court also said in para 119 that the right to liberty was too important to be lost simply because a person had given himself up to detention,

> especially where he is legally incapable of consenting to or disagreeing with it. ”

63. The Official Solicitor’s primary position is that a parent cannot consent to a confinement of their child in circumstances which would amount to a deprivation of liberty. If I am not persuaded by that submission, his secondary position is that there is an important distinction to be drawn between children and young people who are aged 15 and younger and those young people who are aged 16 and 17.

64. In support of this submission he refers me to a number of statutory provisions which draw a distinction between those who have attained the age of 16 and 17, but have not yet achieved their majority, and children and younger people. Thus:

    a) s131 Mental Health Act 1983, provides that a capacitous patient aged 16 or 17 years of age may consent or not consent, as the case may be, to the making of arrangements including admission to a hospital for treatment for a mental disorder;

    b) s8 of the Family Law Reform Act 1969 provides that a minor who has attained the age of 16 years may give consent to any surgical, medical or dental treatment which shall be as effective as it would be if he were of full age;

    c) s9(6) Children Act 1989 provides that no court may make a s8 order which is to have effect for a period which will end after the child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional;

    d) s20(11) Children Act 1989 provides that a 16 or 17 year old young person may consent to his or her accommodation by a local authority;

    e) s31(3) Children Act 1989 provides that a care order or a supervision order may not be made in respect of a child who has reached the age of 17 (or 16 in respect of a child who is married);

    f) s2 (5) Mental Capacity Act 2005 provides that, the powers under the act are exercisable in respect of a person who has achieved the age of 16 years but not those who are under the age of 16 (this is subject to exceptions, immaterial for present purposes, eg the Court of Protection can exercise powers over a child of 15 or below in relation to their property and affairs where the court considers it likely that the material incapacity will continue past their majority: s.18).

65. I was referred to the Law Commission Consultation Paper No 128, Mentally Incapacitated Adults and Decision – Making and the Law Commission’s Report No 231, Mental Incapacity, which led to the 2005 Act. In both the Consultation Paper and the report the issue was whether the Act should be confined to those who were 18 or over or whether it should be extended to include those who were 16 years or over. The final recommendation, as was enacted, was to support the latter option.

66. The Consultation Paper set out the basis for including 16 and 17 year olds within the provision of the proposed new legislation in paragraphs 3.4-3.6:

> "Although the Court of Protection has jurisdiction to deal with the property and affairs of a minor it rarely exercises that jurisdiction. It was an important aspect of the Children Act 1989 that disabled children were brought firmly into the general law relating to children. However, whilst a "child" for its purposes is a person under 18 no care or supervision order can be made in relation to a child of 17 (or 16, if married); public protective intervention is therefore unavailable to those aged 17 (or 16, if married). In the private law field, orders can only be made or continued once a child has reached 16 if there are "exceptional" circumstances (which would clearly include incapacity).
>
> The principle of normalisation would suggest that an incapacitated person should be placed in the same position as any other person of the same age. It would satisfy both this principle and the philosophy of the Children Act to leave private disputes about the administration of property or the care or welfare of incapable minors to be resolved under the Children Act scheme, and make any new jurisdiction available only to those aged 18 and over. This, however, would leave an undesirable one (or two, if married) year gap during which public intervention to protect an incapacitated minor would only be available under the surviving inherent jurisdiction. One solution is to differentiate between the ages for public and private intervention under the new jurisdiction. The other is to have one age, namely 16, as the qualifying age for the new jurisdiction but accept some overlap between it and child law. The difficulty with this is the existing parental responsibility (and the courts' powers) to make at least some decisions on behalf of at least some children up to the age of 18.7 Can it then be acceptable to have two jurisdictions applicable in the same case which may employ different definitions of capacity, different procedures, and different principles of intervention? An alternative solution would be to allow public law intervention under the Children Act 1989 in respect of incapacitated children.
>
> We tend to think that any overlap will not produce difficulties in practice. Further, if there were a properly defined jurisdiction for decision-making on behalf of mentally incapacitated adults, it might be more appropriate in principle for 16 and 17 year olds to be considered under that jurisdiction rather than as if they were young children. Hence we provisionally propose that:

> 1. The new jurisdiction should extend to persons aged 16 and over."

67. The Report explained the reason for recommending that the provisions of the legislation should apply to those aged 16 or over as follows:

> "Although the focus of our project has always been ***adults.*** who lack decision-making capacity, we provisionally proposed in our 1993 consultation papers that any new jurisdiction should apply to those aged 16 and over. We explained that a number of the statutory provisions in the Children Act 1989 do not apply to those in the 16-18 age group, or only apply in "exceptional" circumstance. For some purposes in the health care field, patients aged 16 and 17 are treated as if they were of full age.' On a practical level, respondents confirmed that both statutory and voluntary sector service agencies tend to have special arrangements for those aged 16 and over, with an emphasis on preparations for independent adult life, making suitable long-term provision if necessary. It is often not at all appropriate simply to continue to offer services designed to support younger children within their families. If continuing substitute decision-making arrangements are needed by someone aged 16 or 17 it may well be because that young person lacks mental capacity and not because he or she is under the age of legal majority. In cases where legal proceedings are required, ***so*** that disputes can be resolved or legally effective arrangements made, it would be wasteful to require two sets of legal proceedings to be conducted within a short time period where it is obvious that the problem which has to be resolved will not disappear when the person concerned reaches 18. Respondents, including those who specialise in work with young adults with mental disabilities, supported our proposal to bring those aged 16 and over who lack mental capacity within the new statutory scheme. Most agreed that the resultant overlap with the Children Act 1989 and the inherent jurisdiction of the High Court would pose no great problems in practice.
>
> ***We recommend*** **that the provisions of the legislation should in general apply to those aged 16 and over.** (Draft Bill, clauses l(2) and 36(2).)"

68. This approach to young people who have attained 16 or 17 years accords with the provisions of the United Nations Convention on the Rights of the Child. In particular Article 5 provides that:

> "State parties shall respect the responsibilities, rights and duties of parents or, where appropriate, the members of the extended family or community as is provided for by local custom, legal guardians or other persons legally responsible for the child, to

> provide, in a manner consistent with the evolving capacities of the child, direction, guidance in the exercise by the child of the rights recognised in the present Convention."

69. The approach to older young people chimes with the views of Lord Kerr in *Cheshire West* set out in paragraph 62 above.

The Submissions of the Local Authority

70. The local authority submit that the decision of Mostyn J in *Re RK (Minor: Deprivation of Liberty)* [2010] COPLR 1047 on the issue of s20 accommodation survived the decision of the Court of Appeal in *RK v BCC* [2012] COPLR 146 and remains good law. In the course of his judgment Mostyn J said:

> "31. Obviously a local authority discharging its duty under s20 has to keep its charges safe. It owes them a clear and important duty of care. Were it not to do so it would be liable to be sued for negligence. But as a matter of principle the discharge of that duty of care is not going to give rise to a deprivation of liberty if the child's parents can remove the child from the accommodation at any time under s20(8). If the child's parents decide not to remove him and the safeguarding of the child involves an actual confinement then it would be hard to say that the third element is satisfied, namely imputation to the State. Rather, the confinement will have been at the behest of the parents.
>
> 32. Both Mr Lock and Mr O'Brien argue that the question is not to be decided by reference to what they call 'legal niceties'. They say that the matter is to be examined *de facto* rather than *de jure*. I disagree. I consider that examination of the 'measure in question' involves asking first and foremost what is the legal basis for the confinement. If the legal basis is truly voluntary then it is very hard, indeed impossible, to see, that there has been an actual confinement at the behest of the State.
>
> 33. That said, I will find later in this judgment that even on the footing argued by Mr Lock and Mr O'Brien, there has been no deprivation of liberty here. But my primary decision is that, given the terms of s20 (8), the provision of accommodation to a child, whether aged 17 or 7, under s20 (1), (3), (4) or (5) will not ever give rise to a deprivation of liberty within the terms of Art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. If the child is being accommodated under the auspices of a care order, interim or full, or if the child has been placed in secure accommodation under s25, then the position might be different, but that is not the case here."

71. The protected party in *RK* was a 17 ½ year old young woman who suffered from autism, ADHD and severe learning difficulties. She had a mental age of about 2 years.

72. Mr Cowen relies on this decision to support the local authority's contention that Limbs 2 and 3 of *Storck* are not satisfied in this case. The local authority argue that the fact that the parents consented to her being accommodated pursuant to a s20 agreement means they have thereby consented to her confinement which might, absent that consent, have amounted to a deprivation of her liberty. Furthermore, because the accommodation and confinement of the young woman was at the behest of the parents, it cannot be said that confinement was or is imputable to the state within the meaning of Article 5.

73. Mr Cowen emphasises the passage in *RK* where Mostyn J observed at paragraph 33:

> "But my primary decision is that given the terms of s20 (8) the provision of accommodation of a child, whether 17 or 7, under 20 (1), (3), (4) or (5) will not ever give rise to a deprivation of liberty which in the terms of Article 5 [of the Convention]."

74. The local authority further submits that there is clear authority, European and domestic, to support the propositions that:

    a) a parent may in the exercise of their parental responsibility consent to the confinement of their child, such a consent falling within the 'zone of parental responsibility'; and

    b) substituted consent may be given for the confinement of a patient by an individual authorised to act on their behalf.

75. The local authority submits that my decision in *Trust A v X* is correct and it supports my finding that parents, on the specific facts of that case, could consent to the confinement of their child and, therefore, that the Second Limb of the *Storck* test was not satisfied.

76. The local authority seeks to persuade me that it is within the zone of parental responsibility for parents of a 16 or 17 year old child who lacks capacity, to consent to his confinement.

77. In order to make good that submission Mr Cowen relies on a number of authorities. First it is settled law that parental responsibility continues up to and until a child's 18th birthday; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. The principle that parental responsibility extends to children aged 16 or 17 was accepted by the Court of Appeal in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction*) [1992] 4 All ER 627.

78. Second it is well established that 'parental responsibility' exists for the benefit of the child, not the parent and that it exists to enable parents to perform their duties of

protection and maintenance toward the child. Thus in *Gillick* Lord Fraser said at page 170:

> "[P]arental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child and towards other children in the family"

79. Further Lord Scarman observed at page 184:

> "The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child. The principle has been subjected to certain age limits set by statute for certain purposes: and in some cases the courts have declared an age of discretion at which a child acquires before the age of majority the right to make his (or her) own decision. But these limitations in no way undermine the principle of the law, and should not be allowed to obscure it. "

80. Third, it flows from the principle that parental responsibility exists for the benefit of children that the scope of parental responsibility will differ according to a child's level of maturity and his or her ability to look after him/herself. In *Hewer v Bryant* [1970] 1 QB 357 Lord Denning said at page 369:

> "[T]he legal right of a parent to the custody of a child ends at the 18th birthday; and even up till then, it is a dwindling right which the Courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice."

81. Thus the local authority submits that as a child grows in maturity and his/her ability to make decisions for him or herself grows, so parental control should recede, and the scope of parental responsibility should narrow, to enable this to happen. So long, however, as it remains the case that a child is incapable of making decisions for him/herself, the need for parental control, in the exercise of parental responsibility, will remain.

82. Mr Cowen relies on the dicta of Lord Donaldson MR in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* (see above) where at pages 437-438 he said:

> "Adolescence is a period of progressive transition from childhood to adulthood and as experience of life is acquired and intelligence and understanding grow, so will the scope of the decision-making which should be left to the minor, for it is only

> by making decisions and experiencing the consequences that decision-making skills will be acquired. As I put it in the course of the argument, and as I sincerely believe "good parenting involves giving minors as much rope as they can handle without an unacceptable risk that they will hang themselves."

83. The local authority accepts that the various statutory provisions referred to in paragraph 64 above, permit 16 or 17 year old to give full and effective consent in certain situations. It submits, however, that it is notable that in respect of the provisions of s8(1) FLRA 1969 and s 20 CA 1989, the child cannot override the consent of a person with parental responsibility. Thus Lord Donaldson MR said in *Re W (A Minor) (Medical treatment: Courts Jurisdiction)* at page 84:

> "(6) No minor of whatever age has power by refusing consent to treatment to override a consent to treatment by someone who has parental responsibility for the minor and a fortiori a consent by the court. Nevertheless such a refusal a very important consideration in making clinical judgments and for parents and the court in deciding whether themselves to give consent. Its importance increases with the age and maturity of the minor".

84. It is further submitted that in respect of any of the statutory provisions referred to in paragraph 64 above, the young person in question must have the capacity to consent. Thus it is said that if Parliament has drawn a distinction between 16 and 17 year olds, and those who are younger, it has also drawn a distinction between those who have capacity and those who do not.

85. Moreover it is submitted that *Nielsen* is authority for the proposition that a parent with parental responsibility can provide a valid consent to their child's confinement which would otherwise amount to a deprivation of liberty. Mr Cowen relies on observations of Baroness Hale in *Cheshire West* that the judgment in *Nielsen* "would appear therefore…to turn on the proper limits of parental authority in relation to the child [paragraph 30]". Later she said *Nielsen* "is to be regarded as a case of substituted consent and thus not fulfilling component (b) [ie Limb 2 of the *Storck* test] [paragraph 41]".

86. I was referred to Lord Neuberger's observations in *Cheshire West* at paragraph 72:

> "In the case of children living at home, what might otherwise be a deprivation of liberty would normally not give rise to an infringement of article 5 because it will have been imposed not by the state, but by virtue of what the Strasbourg court has called "the rights of the holder of parental authority", which are extensive albeit that they "cannot be unlimited" (see Nielsen v Denmark (1988) 11 EHRR 175, para 72, a decision which, at least on its facts, is controversial, as evidenced by the strength of the dissenting opinions)."

87. Thus the issue is not whether a parent can give consent in respect of their child but rather what is the extent of the zone or scope of parental responsibility. On the facts of this case, and especially in light of D's lack of capacity to consent in his own right, the local authority submits his parents may and did consent to his confinement at Placement B.

88. In support of its second proposition, namely that substituted consent can be given by a validly appointed representative of an incapacitous person, the local authority relies on the passages quoted from *Cheshire West* in paragraphs 47 and 62 above. Furthermore it relies on the two other decisions of the ECtHR, namely *Stanev v Bulgaria and Atudorei v Romania.*

89. In *Atudorei* the ECtHR during the course of the judgment stated:

> "136. In addition, the Court notes that there is no evidence in the file that the applicant's mother was appointed to act as her legal representative. Moreover, given the continual conflicts between the applicant and her parents, and in the absence of any express procedural safeguards provided by Law no. 487/2002, in force at the relevant time, with regard to the appointment of personal representatives, or of any explicit evidence that the applicant had appointed her mother as her personal representative at the time of her hospitalisation, the Court is not convinced that the applicant's mother acted as the applicant's personal representative. Consequently, the Court cannot accept that the applicant validly consented either directly or indirectly to her hospitalisation or treatment. The prosecutor's order of 27 September 2005 is not sufficient to persuade the Court to the contrary."

90. The local authority contends that, on the basis that the court observed that in the absence of any explicit evidence the patient had appointed her mother as her personal representative and therefore the court could not accept that the patient had consented, directly or indirectly, to her hospitalisation, it follows that the court was endorsing the principle that substituted consent could provide valid consent as required by Limb 2 of the *Storck* test.

91. It is submitted that this proposition is supported by an observation of the ECtHR in *Stanev* at paragraph 130 when it stated:

> "The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure…".

92. Thus it is said that a combination of the decision in *Nielsen* and the quoted passages from the judgments in *Atudorei* and *Stanev,* results in the conclusion that the ECtHR has endorsed the principle of substituted consent to provide a valid consent to a confinement of an adult.

93. This outcome, says the local authority, provides a proportionate and pragmatic route to cases which might otherwise be deemed a deprivation of liberty and necessitate applications to the courts at a substantial expense to local authorities and other public bodies.

Discussions and Analysis

94. When considering the parties' respective submission I have had well in mind the judgment of Baroness Hale in *Cheshire West*. In relation to the ECtHR decision in *Nielsen*, she said at paragraphs 30 and 41:

> "The Court did not refer in its assessment in any of these later cases to *Nielsen v Denmark* (1988) 11 EHRR 175, which concerned a 12 year old boy placed in a children's psychiatric unit by his mother (who alone had parental responsibility for him). The court held, by a majority of nine to seven, that he had not been deprived of his liberty. The restrictions to which he was subject were "no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions . . . did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated" (para 72). Hence his hospitalisation "did not amount to a deprivation of liberty within the meaning of article 5, but was a responsible exercise by his mother of her custodial rights in the interest of the child" (para 73). The seven dissenting judges considered that placing a 12 year old boy who was not mentally ill in a psychiatric ward for several months against his will was indeed a deprivation of liberty. It would appear, therefore, that the case turns on the proper limits of parental authority in relation to a child. As already mentioned (para 4 above) there is no equivalent in English law to parental authority over a mentally incapacitated adult. In any event, the Strasbourg court was not deterred from finding a deprivation of liberty in the cases of *Stanov, DD, Kedzior* and *Mihailovs* by the fact that the placements were arranged by the person who had been appointed legal guardian of the applicant.
>
> Freedom to leave in this sense was the crucial factor, not only in *HL v United Kingdom*, where the complainant was placed in a hospital, but also in *Stanev v Bulgaria*, where the complainant was placed in a care home, as were the complainants in *DD v Lithuania, Kedzior v Poland,* and *Mihailovs v Latvia.* In each of these, the court's focus when considering the confinement question was on whether the complainant was "under the complete supervision and control of the staff and not free to

> leave". The fact that these were social care settings with relatively open conditions was no more determinative than had been the open hospital conditions in *Ashingdane.* In these more recent cases, *HM v Switzerland*, another care home placement, has consistently been distinguished because of the complainant's willingness to be in the home, rather than because of the conditions within the home. Although *Nielsen* has not been departed from, it is to be regarded as a case of substituted consent, and thus not fulfilling component (b)."

In respect of individuals who lacked the capacity to consent to their placement she noted at paragraph 31 that:

> "In all these cases, the applicant lacked the legal capacity to consent to the placement. In *Shtukaturov v Russia* 54 EHRR 962, decided in 2008, the applicant had been placed in a psychiatric hospital at the request of his legal guardian, which in Russian law was regarded as a "voluntary" admission. Although he lacked the *de jure* legal capacity to decide for himself, this did not necessarily mean that he was *de facto* unable to understand his situation (para 108). Indeed, he had evinced his objections. The subjective element of lack of consent was made out (para 109). The court took the same view in *DD* (para 150) and in *Kedzior* (para 58). Thus it appeared to give some weight to the objections of a person who lacked legal capacity when deciding that the subjective element was made out despite the consent of the person's legal guardian. But in *Mihailovs*, the court seems to have gone further. In relation to one of the care home placements, the court held that there was a deprivation of liberty, because although the applicant lacked legal capacity he subjectively perceived his compulsory admission there as such a deprivation (para 134). In relation to a later placement, however, he did not raise any objections or attempt to leave and the court concluded that he had "tacitly agreed" to stay there and thus had not been deprived of his liberty (paras 139, 140). In contrast, of course, in *HL v United Kingdom*, the patient was deprived of his liberty in the hospital despite his apparent compliance."

95. Baroness Hale considered the relevance of the benefit to the individual concerned of a particular placement when determining whether there had been a deprivation of liberty, when she said at paragraph 42:

> "In none of the more recent cases was the purpose of the confinement – which may well have been for the benefit of the person confined – considered relevant to whether or not there had been a deprivation of liberty. If the fact that the placement was designed to serve the best interests of the person concerned meant that there could be no deprivation of liberty, then the

> deprivation of liberty safeguards contained in the Mental Capacity Act would scarcely, if ever, be necessary. As Munby J himself put it in *JE v DE* [2007] 2 FLR 1150, para 46:
>
> 'I have great difficulty in seeing how the question of whether a particular measure amounts to a deprivation of liberty can depend upon whether it is intended to serve or actually serves the interests of the person concerned. For surely this is to confuse . . . two quite separate and distinct questions: Has there been a deprivation of liberty? And, if so, can it be justified?'
>
> This view has been confirmed by the rejection in *Austin v United Kingdom* 55 EHRR 359, para 58, with specific reference to the care and treatment of mentally incapacitated people, of any suggestion by the House of Lords in *Austin v Comr of Police of the Metropolis* [2009] AC 564 that a beneficial purpose might be relevant (and see also *MA v Cyprus* (Application No 41872/10), 23 July 2013 and *Creanga v Romania* 56 EHRR 361)."

96. At paragraph 46 she expressed the clear view that a right not to be deprived of one's liberty applied to everyone, in these terms:

> "Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focussed right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."

97. In relation to the need for there to be a periodic independent check on those individuals who are deprived of their liberty regardless of whether they lack the capacity to consent Baroness Hale concluded at paragraphs 56 and 57 as follows:

> "In the end, none of these suggested distinctions is satisfactory. Nor, in my view, should they be. It is very easy to focus upon 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. If P, MIG and MEG were under the same constraints in the sort of institution in which Mr Stanev was confined, we would have no difficulty in deciding that they had been deprived of their liberty. In the end, it is the constraints that matter.
>
> Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us."

98. The Official Solicitor seeks to persuade me that a parent can never consent on behalf of his/her child to a period of confinement which absent a valid consent would amount to a deprivation of liberty. I regret to conclude that I am not persuaded that that is a correct proposition in law. Furthermore, I am not persuaded that my decision in *Trust A v X* was wrongly decided. I remain satisfied that my analysis of the legal and factual position in that case, when D was 15 years of age, is correct; I refer, in particular to paragraphs 27-34 and 51-64 of that judgment.

99. In light of the further argument which I read and heard in this case I am fortified in my conclusion, expressed in paragraphs 29 and 30 of *Trust A v X*, that the assertion of Thorpe LJ, in *RK v BCC and Others* that 'a parent may not lawfully obtain or authorise the deprivation of liberty of a child' is not supported by the decision in *Nielsen* nor in any other ECtHR decision. There is no support for that proposition in any domestic authority save and except for perhaps *Re K (A Child) (Secure Accommodation Order Rights to Liberty)*. I do not consider that to be either a binding or relevant decision, for the reasons I gave in paragraphs 33 and 34 in my judgment in *Trust A v X* namely :

> "The observations of both Butler-Sloss P and Judge LJ were made and must be read in the context of the provisions of a secure accommodation order which is recognised to be a draconian order. It must be granted sparingly and only where,

> of course, the statutory criteria of s25 (1) (a) and (b) 1989 are satisfied namely:
>
> … unless it appears—
>
> (a)that—
>
> (i)he has a history of absconding and is likely to abscond from any other description of accommodation; and
>
> (ii)if he absconds, he is likely to suffer significant harm; or
>
> (b)that if he is kept in any other description of accommodation he is likely to injure himself or other persons.
>
> In my judgment the decision in *Re K* is limited to the interpretation of s 25 CA 1989 and the compatibility of that statutory provision with article 5 of the Convention. The references to the ambit of parental responsibility were obiter. In any event I do not derive any assistance from the decision and observations made in *Re K* in deciding whether D's parents on the facts of this case were entitled to consent to his detention in Hospital B."

100. I remain of the view that in appropriate circumstances, such as in the case of *Trust A v X* a parent may give a valid consent to the confinement of their child of 15 years and younger in what would otherwise amount to a deprivation of liberty.

101. I set out in *A Local Authority v D and othrs* the limitations of the circumstances in which a parent could give a valid consent, especially where the child was accommodated by a local authority pursuant to s 20 CA 1989 or was the subject of an interim, or final care order. I made it clear that a local authority in whose favour an interim care order or care order had been made could never give a valid consent to a confinement which would amount to a deprivation of liberty.

102. Although I do not accept the Official Solicitor's submission that my decision in *Trust A v X* was wrong, I do accept, as I acknowledged earlier in this judgment, that I could and should have expressed myself more felicitously and precisely. Thus in paragraph 52 I should have said in the first sentence that 'I am wholly satisfied that D lives in conditions which satisfy the First Limb of the *Storck* test', rather than how I then expressed myself namely 'which amount to a deprivation of his liberty'.

103. The local authority seeks to persuade me that the arguments I accepted in *Trust A v X* in respect of a 15 year old young person apply with equal force to a young person of 16 or 17 years. I regret I do not agree. I am entirely persuaded that Parliament has on numerous occasions, as adumbrated in paragraph 64 above, chosen to distinguish the legal status of those who have not attained the age of 16 years, those aged 16 and 17 and, finally, those who have attained their majority.

104. I am particularly persuaded by the fact that Parliament chose to include incapacitous 16 and 17 years within the remit of the Mental Capacity Act. An incapacitous young person under the age of 16 years is specifically excluded from the provisions of the Act: see s 2(5) (subject to the exceptions referred to in paragraph 64 (f) above).

105. In the premises, and whilst acknowledging that parents still have parental responsibility for their 16 and 17 year old children, I accept that the various international conventions and statutory provisions referred to, the UNCRC and the Human Rights Act 1998, recognise the need for a greater degree of respect for the autonomy of all young people but most especially for those who have attained the age of 16 and 17 years. Accordingly, I have come to the clear conclusion that however close the parents are to their child and however cooperative they are with treating clinicians, the parent of a 16 or 17 year old young person may not consent to their confinement which, absent a valid consent, would amount to a deprivation of that young person's liberty.

106. I do not regard such a distinction to be arbitrary. Parliament has chosen to draw that distinction on a number of occasions for good and proper reasons.

107. Before I leave this issue I ought to deal with a matter raised by the Official Solicitor to the effect that in my decision in *Trust A v X* I had discriminated against D because of his disabilities, namely that he was diagnosed with autism and ADHD. I have no hesitation in rejecting that submission.

108. In *Trust A v X* when considering whether the First Limb of *Storck* was satisfied, I applied a completely objective test in which D's disabilities were of no consideration at all. When considering the Second Limb of *Storck* and the zone and scope of parental responsibility there were a wide number of factors to be considered. The age and maturity of a child or young person are very important factors when considering the extent of parental responsibility; see the observations of Lord Neuberger at paragraphs 72 and 73 and of Lord Kerr at paragraphs 77 to 79 in *Cheshire West*. A further important factor is the extent to which, if at all, a child or young person has the ability and capacity to make decisions for themselves; thus in *Trust A v X* I observed at paragraph 57 that:

> "The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. The decision to keep an autistic 15 year old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility. "

109. Thus, D's diagnosed conditions, were a very material factor in determining which decisions fall within the zone or scope of parental responsibility. D's limited ability to make decisions on his own behalf was a material factor in determining the scope or zone of parental responsibility.

110. On the facts of *Trust A v X* , especially the loving and caring relationships that his parents had with him and the close working relationship they enjoyed with D's medical and other professions., I considered their decision to consent to D's confinement in Hospital to be a proper exercise of parental responsibility. To have held otherwise would, in my judgment, have resulted in unwarranted and unnecessary state interference in D's and his parents' family life.

111. The position in *Trust A v X* is to be contrasted with the factual matrix in *A Local Authority v D and othrs* where I came, on the facts of that case, to a contrary conclusion.

112. Those comments apply to all children under the age of 16.

113. The position is, however, quite different once a young person attains the age of 16. As set out earlier, Parliament has drawn a distinction between these young people and those children who are under the age of 16. This distinction is not based on an explicit pre-condition of having a capacity to consent.

114. In *Cheshire West* Lord Kerr noted that:

> "Liberty means the state or condition of being free from external constraint. It is predominantly an objective state. It does not depend on one's disposition to explicit one's freedom. Nor is it diminished by one's lack of capacity. " (paragraph 76)

115. I am satisfied that young people of 16 or 17 years are entitled to the full protection of their Article 5(1) rights irrespective of their capacity to consent to their treatment or their living arrangements. In the premises I reject the submissions made on behalf of the local authority that the parent of an incapacitous 16 year old may consent to their confinement, which would otherwise amount to a deprivation of liberty, because that young person is unable to consent to the same.

116. The local authority asserts that the judgments in *Nielsen*, *Stanev* and *Atudorei* establish or support the principle of substituted consent. I disagree. First the decision of the ECtHR in *Nielsen* is seen as a controversial decision (see Lord Neuberger in *Cheshire West* at paragraph 72). That decision should be confined to the facts of that case. I find no part of the judgment proposes or endorses the principle of substituted consent in relation to a confinement which, absent a valid consent, would amount to a deprivation of liberty. The case concerned a child and the scope or zone of parental responsibility.

117. Second, there is just part of one sentence in *Stanev* upon which the local authority relies in support of this submission namely:

> "The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned."

118. That is it. The issue of substituted consent is not mentioned anywhere else in the judgment. If the ECtHR in *Stanev* were propounding the principle of substituted consent in relation to Article 5 and deprivation of liberty cases, one would have expected a far more detailed and considered examination of the same. The passage relied upon by the local authority has the character of a chance passing comment. The part of this one sentence simply cannot bear the weight which the local authority seeks to place on the same.

119. The passage relied on by the local authority in the case of *Atudorei* is as follows*:*

> "136. In addition, the Court notes that there is no evidence in the file that the applicant's mother was appointed to act as her legal representative. Moreover, given the continual conflicts between the applicant and her parents, and in the absence of any express procedural safeguards provided by Law no. 487/2002, in force at the relevant time, with regard to the appointment of personal representatives, or of any explicit evidence that the applicant had appointed her mother as her personal representative at the time of her hospitalisation, the Court is not convinced that the applicant's mother acted as the applicant's personal representative. Consequently, the Court cannot accept that the applicant validly consented either directly or indirectly to her hospitalisation or treatment. The prosecutor's order of 27 September 2005 is not sufficient to persuade the Court to the contrary."

120. My remarks made above in respect of the decision in *Stanev* apply with equal force to the decision in *Atudorei*. All the ECtHR decided was that it was "not convinced that the applicant's mother acted as the applicant's personal representative". That decision does not support a contention that if the applicant's mother had been appointed her personal representative she could have given a valid consent to the applicant's hospitalisation or treatment.

121. Even if I am wrong in my interpretation of the decisions in *Stanev* and *Atudorei* and they are authority for the principle of substituted consent there is no consideration in either judgment of:

a) the categories of personal representatives who may give a substituted consent;

b) the circumstances or conditions in which a valid 'substituted' consent may be given; or

c) the limits or extent of a substituted consent.

122. In any event I am satisfied, especially in light of the ECtHR decision in *Stankov* (see paragraph 50 above), and the submissions of the Official Solicitor on this issue, which I accept, that the parent of a 16 or 17 year old child cannot give a substituted consent on behalf of their child to his confinement which absent a valid consent would be in breach of Art 5(1).

123. Whilst acknowledging the special provisions Parliament has enacted in respect of 16 and 17 year old young people, the local authority submits that:

a) D is incapcitious, by reason of his disabilities, and unable to provide a valid consent to his accommodation or confinement;

b) thus his parents must be able to step in and consent on his behalf.

I do not agree.

124. Baroness Hale in *Cheshire West* emphasised that all people, including those with disabilities, are entitled to the protection of the Convention and in particular to that afforded by Article 5. If I were to accede to this submission I would be wrongly discriminating against D on the grounds of his disability. When considering the Second Limb of the *Storck* test, namely the issue of consent, it would be wholly wrong not to recognise the special status accorded by Parliament to 16 and 17 year old people in D's case. It would be wholly inappropriate not to do so on the grounds that by reason of his disabilities he cannot consent. I am satisfied, precisely because of his disabilities and vulnerability, that it is vital that D is accorded the same status as a 16 year old without any disabilities and to afford him the full protection of Article 5.

125. I draw a distinction between my approach to the issue in this case and my consideration of D's disabilities in *Trust A v X*. In the later case I was concerned with the scope or zone of the exercise of parental responsibility of D's parents. In my judgment D's disabilities were an important, indeed essential, factor in determining what was a proper exercise of parental responsibility by these parents for this child.

126. Moreover the local authority submit that in any event the parents' consent to D being accommodated pursuant to s20 Children 1989 is a valid consent to D's confinement at the residential unit where he resides. They rely in large measure on the first instance decision of Mostyn J – *YB v BCC, AK and RK* [2010] EWHC 3355 (COP) when he said at paragraph 42:

> "42.I therefore conclude that the first (objective) element of the test is not satisfied in this case. I further conclude that the second (subjective) element is not satisfied. RK was placed at KCH by her parents pursuant to a s20 agreement. They

> consented on her behalf in circumstances where with a mental age of about two years she is obviously incapable of giving her own consent and where her parents have parental responsibility for her. By s3(1) of the Children Act 1989 parental responsibility is defined as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property". In my opinion that extends to giving the necessary consent under the second element. In this regard I specifically follow and agree with the decision of the ECtHR in Nielsen v Denmark and the minority judgment of Thorpe LJ in Re K. "

127. I have the greatest respect for Mostyn J. It is, therefore, not without some hesitation and considerable regret, that I do not agree with his conclusions expressed above. Nor do I agree with his 'primary decision' in *RK* that:

> "…..my primary decision is that, given the terms of s20(8), the provision of accommodation to a child, whether aged 17 or 7, under s20(1), (3), (4) or (5) will not ever give rise to a deprivation of liberty within the terms of Art 5 of the European Convention on Human Rights."

128. Taking a pedantic approach the word 'consent' does not appear in s 20. The words used are 'objects' (s 20(7)) or 'agrees' (s20 (9), (10), (11)). Be that as it may, the 'consent' is to the child being accommodated. It cannot be inferred that that consent means that those with parental responsibility have consented to whatever placement the local authority considers, from time to time, appropriate. Further and, in any event, for the reasons given in paragraph 105 above, I am satisfied that a parent cannot consent to the confinement of their 16 or 17 year old child in circumstances which satisfy the objective First Limb of the *Storck* test.

129. The local authority also relies on *RK* in support of its submission that D's confinement is not imputable to the state, the Third Limb of the *Stock* test. In addition to the passage of Mostyn J's judgment set out in paragraph 108 above, it also relies on his conclusion at paragraph 43 that:

> "43.I further conclude that the third element is not satisfied. RK's placement at KCH is at the behest of her parents. It cannot be imputed to the state. "

130. Once more I respectfully do not agree.

131. The mere fact that D's parents could at any stage object to his continued accommodation and remove him from the residential unit does not, in my judgment, provide a definitive answer to the test of imputability to the state. If that were to be

the case, it would on the facts of this case, completely ignore the fact that this local authority identified the unit, assessed D's needs and care regime, approved the package of care proposed by the unit and the regime under which D would reside there and the fact that it pays all the costs of his placement and education at the unit.

132. In no sense at all could this set of circumstances be considered a purely private arrangement with no state involvement. The role of the local authority in establishing and maintaining D's placement is central and pivotal. To reach a contrary conclusion would be perverse.

133. I note that in the case of *C v A Local Authority* [2011] COPLR Con Vol 972 Ryder J, as he then was, did not consider that the mere fact of s20 accommodation rendered a confinement not to be a deprivation because of s20 parental consent or non imputability to the state.

134. Even if I am wrong in my analysis in paragraphs 103 - 134 above, I accept the Official Solicitor's submissions that even if D's confinement was a purely private affair, the state has a positive obligation under Article 5 (1) to protect him. In support he relies principally upon the decision of Munby LJ, as he then was, in *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam) where at paragraph 95 he said:

> "For present purposes I can summarise my conclusions as follows. Where the State – here, a local authority – knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of liberty, then its positive obligations under Art 5 will be triggered.
>
> (i) these will include the duty to investigate, so as to determine whether there is, in fact, a deprivation of liberty. In this context the local authority will need to consider all the factors relevant to the objective and subjective elements referred to in para [48] above;
>
> (ii) if, having carried out its investigation, the local authority is satisfied that the objective element is not present, so there is no deprivation of liberty, the local authority will have discharged its immediate obligations. However, its positive obligations may in an appropriate case require the local authority to continue to monitor the situation in the event that circumstances should change;
>
> (iii) if, however, the local authority concludes that the measures imposed do or may constitute a deprivation of liberty, then it will be under a positive obligation, both under Art 5 alone and taken together with Art 14, to take reasonable and proportionate

> measures to bring that state of affairs to an end. What is reasonable and proportionate in the circumstances will, of course, depend upon the context, but it might for example, Mr Bowen suggests, require the local authority to exercise its statutory powers and duties so as to provide support services for the carers that will enable inappropriate restrictions to be ended, or at least minimised;
>
> (iv) if, however, there are no reasonable measures that the local authority can take to bring the deprivation of liberty to an end, or if the measures it proposes are objected to by the individual or his family, then it may be necessary for the local authority to seek the assistance of the court in determining whether there is, in fact, a deprivation of liberty and, if there is, obtaining authorisation for its continuance."

135. I am satisfied that D's case falls within category (iv) identified by Munby LJ in *Re A and C*. The circumstances of D's confinement are necessary and in his welfare best interests but that does not prevent them amounting to a deprivation of liberty. Accordingly the local authority must make an application to the court to determine whether D is deprived of his liberty and if so, to obtain authorisation for its continuance; as I find it must do in all cases where 16 or 17 year old young people are objectively confined in satisfaction of Limb 1 of the *Storck* test and, of course, where Limb 2 is satisfied and either Limb 3 is satisfied because the local authority is directly responsible for the confinement or the local authority knows or ought to know of a private confinement and is under the positive obligation identified by Munby LJ in *Re A and C*.

136. I reject the assertion of the local authority that I should not draw this conclusion because of the potential adverse resource implications of local authorities having to make numerous applications to the Court of Protection. I very much prefer and accept the contrary submissions of the Official Solicitor that:

> "The principle of 'pragmatism' prayed in aid at paragraphs 108-110, derived from the decision of House of Lords in *Austin* is one upon which very little weight can properly be placed where the European Court of Human Rights in the subsequent application by Ms Austin made clear that pragmatism has no place in the determination of whether an individual is deprived of their liberty, which must be considered by reference to the standard principles derived from previous case-law: see paragraphs 58-9. It needs also to be recalled that *Austin* arose in a very different context; the governing principles that apply in the instant case (that of deprivation of liberty for purposes of providing care to a boy with substantial mental health problems) must be those derived from *Cheshire West*. "

137. The issue of the resource implications is a matter for the local authority and, ultimately, the Government; it is not, should not and, in my judgment, cannot be a relevant consideration for this court.

138. The protection of the human rights of those with disabilities or the vulnerable members of our society, most especially in respect of the protection afforded by Article 5 (1), is too important and fundamental to be sacrificed on the altar of resources.

Conclusions

139. I am not persuaded by the Official Solicitor's submissions that my decision in *Trust A v X* was wrong. Indeed, having reconsidered the issues raised in that case in the light of the submissions I have read and heard in this case, I am fortified in the decision I made.

140. I am not satisfied that the ECtHR has clearly and explicitly recognised the concept of substituted consent in the context of the confinement of adults and potential deprivations of liberty. There is no domestic authority which endorses such a concept in this context.

141. I very much doubt that Baroness Hale intended her reference to 'substituted consent' (see paragraph 85 above) to form the foundation of a proposition that a parent could consent to the confinement of their 16 or 17 year old son or daughter. In my judgment it does not do so.

142. Accordingly for the reasons I have given I am not persuaded that a parent can consent to the confinement of a child who has attained the age of 16. Such a consent falls outside the zone or scope of parental responsibility.

143. I do not accept that the accommodation of a young person pursuant to s20 CA 1989 could never amount to a deprivation of liberty. Further, and in any event, by consenting to D being accommodated by the authority pursuant to s20 CA 1989, his parents could not and were not consenting, explicitly still less implicitly, to his confinement at his residential unit.

144. The local authority was intimately involved in D's placement at and confinement within the residential unit. Accordingly I am in no doubt that D's confinement is and was imputable to the state, thus satisfying the Third Limb of *Storck.*

145. In any event, I accept a public body, as an organ of the state, is under a positive obligation to protect the rights accorded by Article 5(1). Therefore this local authority was and is obliged to protect D's Article 5(1) rights. This obligation requires the local authority to apply to the court to (i) determine whether D is deprived of his liberty and (ii) so, to seek authorisation for its continuance.

146. The protection of D's Article 5(1) rights must not and, in my judgment, cannot be overridden by – as contended by the local authority – consideration of the resource implications for state bodies including this local authority.

147. The local authority invites me to give general guidance on the issue of the deprivation of liberty of young people. I accept the submission of the Official Solicitor that it would be imprudent and, most probably, unhelpful for me to do so. I decline to give any general guidance in light of:

a) the judgment of the Court of Appeal in *Re X (Court of Protection Practic*e) [2015] EWCA Civ 599; and

b) the fact that cases of confinement and/or deprivation of liberty are highly fact specific.