



Neutral Citation Number: [2017] EWCA Civ 1695

Case No: B4/2016/1257

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
Mr Justice KEEHAN
[2016] EWCOP 8

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2017

Before :

SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE IRWIN

In the matter of D (A Child)

Mr Jonathan Cowen, Ms Anita Rao and Ms Eleanor Sibley (instructed by the local authority) for the appellant Birmingham City Council
Mr Henry Setright QC, Mr Alexander Ruck Keene and Ms Anna Bicarregui (instructed by Cartwright King) for D's litigation friend the Official Solicitor
Ms Victoria Butler-Cole (instructed by the Commission) for the intervener The Equality and Human Rights Commission

Hearing dates: 8-9 February 2017

Approved Judgment

Sir James Munby, President of the Court of Protection :

1. This is an appeal from an order of Keehan J sitting in the Court of Protection dated 15 March 2016, following a judgment handed down on 21 January 2016: *Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129. Permission to appeal was granted by McFarlane LJ on 14 June 2016. The proceedings related to D, who was born on 23 April 1999, and was therefore 16 years old when the matter was heard by Keehan J in November 2015. Similar issues in relation to D had been before Keehan J in the Family Division earlier in 2015 when D was 15 years old, judgment (which was not appealed) having been handed down on 31 March 2015: *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142. In each case, the essential question was whether D was being deprived of his liberty within the meaning of and for the purposes of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. The framework within which Keehan J had to decide both *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142, and the present case, *Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, and within which the issues arising in this appeal fall to be considered, is the analysis of Article 5 set out by the Strasbourg court in *Storck v Germany* (2005) 43 EHRR 96, paras 74, 89, repeated in *Stanev v Bulgaria* (2012) 55 EHRR 696, paras 117, 120, and helpfully summarised in the Supreme Court by Baroness Hale of Richmond DPSC in *Surrey County Council v P and others (Equality and Human Rights Commission and others intervening), Cheshire West and Chester Council v P and another (Same intervening)* [2014] UKSC 19, [2014] AC 896 (*Cheshire West*), para 37:

“... what is the essential character of a deprivation of liberty? ... three components can be derived from *Storck* ..., confirmed in *Stanev* ..., as follows: (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the state. Components (b) and (c) are not in issue here, but component (a) is.”

I shall refer, by way of shorthand, to these three components as *Storck* components (a), (b) and (c); sometimes, as we shall see, they are referred to as *Storck* limbs (1), (2) and (3).
3. Terminological imprecision has, unhappily, bedevilled much of the recent domestic jurisprudence on Article 5. In this judgment I shall use the phrase “deprivation of liberty” to describe the state of affairs where all three components of *Storck* are satisfied, that is, where there is a deprivation of liberty within the meaning of Article 5(1) which therefore engages the State’s obligations under Articles 5(2)-(4). I shall, in contrast, use the word “confinement” to describe the state of affairs referred to in *Storck* component (a).
4. It is also important to remember that a “deprivation of liberty” within the meaning of Article 5 has to be distinguished from a restriction on liberty of movement governed by Article 2 of Protocol No 4.

The facts

5. I shall have to elaborate some of this in due course, but the essential facts can be summarised quite briefly. I take the following account from Keehan J (*Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, paras 10-13). D, as I have said, was born on 23 April 1999. He was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Asperger’s syndrome and Tourette’s syndrome from a very early age. On admission to Hospital B (see below) he was further diagnosed as suffering from a mild learning disability. 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. He would urinate and defecate in inappropriate places. He presented with anxiety and paranoid behaviours. His prescribed medication had limited effects.
6. 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. Hospital B provides mental health services to children and young people aged between 12 and 18. D was admitted to it in October 2013. He lived within the grounds of the hospital and attended an on-site school on a full-time basis. The regime at Hospital B was described by Keehan J in some detail (*Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142, paras 17-18). In summary, to quote Keehan J’s description (*Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, para 15):

“... 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.”

7. The matter came before Keehan J on 9 March 2015; he gave judgment on 31 March 2015. D at that time was still 15 years old. In the light of expert evidence, Keehan J proceeded on the basis that D was *not* ‘Gillick’ competent: *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142, paras 19, 48. The issues which fell for decision arose in relation to *Storck* components (a) and (b). Keehan J’s conclusions (paras 65-66) were as follows:

“65 I am satisfied that the circumstances in which D is accommodated would amount to a deprivation of liberty¹ but for his parents’ consent to his placement there.

66 I am satisfied that, on the particular facts of this case, the consent of D’s parents to his placement at Hospital B, with all of the restrictions placed upon his life there, falls within the ‘zone of parental responsibility’. In the exercise of their parental

¹ In *Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, para 8 (see likewise para 102), Keehan J said of this: “I should have expressed myself more precisely and felicitously by referring to D’s “confinement” at Hospital B (ie the first limb of *Storck*) rather using the phrase a “deprivation of liberty” which, of course only arises if all three limbs of *Storck* are satisfied.”

responsibility for D, I am satisfied they have and are able to consent to his placement.”

He declined (paras 69-70) to express any views as to what the position would be if D moved to a proposed new placement or once he reached the age of 16.

8. On 23 April 2015, D’s sixteenth birthday, the local authority issued proceedings in the Court of Protection. On 20 May 2015, Keehan J, having made declarations that the court had reason to believe that D lacked capacity to litigate these proceedings and to make decisions about his residence and as to his care, including keeping himself safe in the community, made orders for the transfer of D from Hospital B to a residential unit, House A at Placement B. D moved there on 2 June 2015.

9. Keehan J described the involvement of the local authority and of D’s parents as follows (*Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, paras 24-28):

“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 ...

25 ... His parents were, I note, “kept fully informed of the placement process in regular review meetings held at [Hospital B]” ...

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 section 20 of the Children Act 1989 in June 2015.”

10. Keehan J described Placement B and D’s life there as follows (*Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, paras 23, 29):

“23 Placement B is set within its own grounds in 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 four other young people.

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 8.45 am to 2.00 pm. 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 five hours. Currently his parents have been visiting for three hours as D does get increasingly anxious during this time. There have been no significant issues since D’s move to Placement B.”

11. It was common ground, at the final hearing in November 2015, that the circumstances in which D currently resided and was educated constituted an objective confinement which satisfied *Storck* component (a): *Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, paras 4, 6. Keehan J accordingly had to consider two questions: first, whether, as the local authority contended but the Official Solicitor² on behalf of D disputed, D’s parents could consent to his confinement – *Storck* component (b); and, secondly, whether, as the local authority contended but the Official Solicitor disputed, the fact that D resided at his residential unit, under the auspices of section 20 of the Children Act 1989 accommodation to which his parents agreed, meant that his placement and confinement both at the residential unit and at his school were not imputable to the state but rather were at the request of, and with the consent of, his parents – *Storck* component (c).
12. In fact, the Official Solicitor’s submissions went wider (see *Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, para 7), for, as Keehan J put it, the Official Solicitor contended 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 *In re D* was wrong in so far as I held that D’s parents could consent to his confinement in Hospital B when he was under 16 years of age.”

² I should make clear that the Official Solicitor had *not* been involved in the earlier proceedings, D at that time having been represented by Cafcass.

13. Keehan J concluded (1) that the Official Solicitor's proposition (a) was wrong, (2) that his decision in *In re D* was correct, namely that D's parents *could* consent when D was under 16 years of age, (3) that D's parents could *not* consent now that D had attained the age of 16, and (4) that D's confinement was attributable to the state.
14. Before Keehan J, as before us, the local authority understandably stressed that the outcome of this case has significant resource implications for it and for all local authorities nationally. But, the Official Solicitor observed, the emphasis placed on this potential adverse consequence was entirely misplaced. He relied upon the observation of Black LJ in *In re X (Court of Protection Guidance: Deprivation of Liberty Cases) (Nos 1 and 2)* [2016] 1 WLR 227, para 108, 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." He submitted that arguments as to resources had consistently been deployed in favour of rendering nugatory the protections of both the substantive and procedural requirements of article 5 in the context of those with mental disabilities, but none had found favour. Keehan J said (*Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, para 32): "In this respect I entirely accept and endorse the submissions of the Official Solicitor." So, I should add, do I.
15. Keehan J accordingly refused the declaration sought by the local authority, put by it on the basis that D's detention did not amount to a deprivation of liberty, since (i) his parents consented to his confinement, and (ii) D resided at the residential unit under the auspices of section 20 of the Children Act 1989 and had thus been placed by the local authority in accommodation to which his parents had agreed. Instead, he made an order³ which, in material part, provided, pursuant to section 16 of the Mental Capacity Act 2005, that:

"D is to reside and receive care at [Placement B] pursuant to arrangements made by [the local authority] and set out in the Care Plan [dated 12 February 2016 and amended on 8 March 2016]; and the restrictions in place pursuant to the Care Plan amounting to deprivation of D's liberty, such deprivation of D's liberty is hereby authorised."
16. Subsequently, on 23 November 2016, D's placement at Placement B terminated. By an order made the same day, and in materially the same terms as his previous order, Keehan J directed and authorised D's placement and deprivation of liberty at what I shall refer to as Placement C.

The appeal

17. The grounds of appeal dated 22 March 2016 set out three grounds: (1) Keehan J erred in law in finding that a parent cannot consent to arrangements for a child who has attained the age of 16 which would otherwise amount to a deprivation of liberty; (2)

³ I note with weary resignation, although the responsibility for this appears to be that of the court rather than the parties, that this order, as so many others, was headed "In the High Court of Justice Court of Protection". The Court of Protection is *not* part of the High Court, so orders made by the Court of Protection should *not* be headed "In the High Court of Justice": see section 45 of the 2005 Act. Is it too much to hope that, *ten* years after the Court of Protection came into being, this simple truth might be more widely understood and more generally given effect to.

Keehan J erred in law in finding that the arrangements for D were attributable to the state; (3) Keehan J was wrong to find that D was deprived of his liberty “having regard to the procedures which ensure that the arrangements for 16 and 17 year old children, including those who lack capacity, are appropriately monitored.”

18. McFarlane LJ, as I have said, granted permission to appeal on 14 June 2016. By an order dated 16 December 2016 he granted The Equality and Human Rights Commission permission to intervene by way of written submissions, permission to make oral submissions being left to the discretion of the court hearing the appeal.

The hearing

19. The appeal came on for hearing before us on 8-9 February 2017. The appellant local authority was represented by Mr Jonathan Cowen, Ms Anita Rao and Ms Eleanor Sibley, D’s litigation friend, the Official Solicitor, by Mr Henry Setright QC and Mr Alexander Ruck Keene and The Equality and Human Rights Commission by Ms Victoria Butler-Cole, who we invited to make oral submissions. At the end of the hearing we reserved judgment. On 20 February 2017, we sent various questions to counsel which we invited them to consider. Their replies, for which we are grateful, were in each case dated 10 March 2017.
20. The main debate, and much the most difficult point we have to decide, relates to ground of appeal (1), *Storck* component (b). I propose, therefore, to deal with that after I have dealt with ground of appeal (2), *Storck* component (c), and ground of appeal (3).

Article 5: the Strasbourg framework

21. First, however, I need to return to the Strasbourg jurisprudence on *Storck* components (a), (b) and (c), in particular as explained in *Cheshire West*.
22. In relation to *Storck* component (a), *Cheshire West* is fundamentally important for its formulation of the “acid test” of whether *Storck* component (a) is satisfied (see, for example, the judgment of Baroness Hale of Richmond DPSC, paras 48-49, 54), namely:

“whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives.”

As I read her judgment (see paras 40-41), Baroness Hale was using “free to leave” in the sense I had described in *JE v DE* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150, para 115:

“The fundamental issue in this case ... is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses ...”

23. I turn to *Storck* component (b), starting with the difficult, and in many ways controversial, decision in *Nielsen v Denmark* (1988) 11 EHRR 175, where a 12-year-old boy had been 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. I need first to draw attention to this passage in the judgment, para 61:

“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 authorise 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 recognised and protected by the Convention, in particular by article 8. Indeed the exercise of parental rights constitutes a fundamental element of family life.”

24. The essential reasoning of the majority was expressed thus (paras 72-73):

“72 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.

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 ... Indeed, the restrictions to which the applicant 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 in which the applicant stayed thus did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated.

Regarding the weight which should be given to the applicant's views as to his hospitalisation, the Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder

of parental rights, a case which clearly is not covered by paragraph (1) of Article 5 ...

73 The Court concludes that the hospitalisation of the applicant 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. Accordingly, Article 5 is not applicable in the case.”

25. Although, as we have seen, only *Storck* component (a) was in issue in *Cheshire West*, whereas in the present case we are concerned with components (b) and (c), various observations were made in *Cheshire West* bearing on component (b) which need to be set out.
26. I start with Baroness Hale of Richmond DPSC, who said this about *Nielsen v Denmark* (1988) 11 EHRR 175 (para 30):

“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.⁴ As already mentioned (para 4 above) there is no equivalent in English law to parental authority over a mentally incapacitated adult.”

She added (para 41):⁵

“Although *Nielsen* 11 EHRR 175 has not been departed from, it is to be regarded as a case of substituted consent, and thus not fulfilling component (b).”

27. I shall return below to what was said on the point by Lord Neuberger of Abbotsbury PSC and by Lord Kerr of Tonaghmore JSC.
28. In the meantime I turn to *Storck* component (c), elaborated by the Strasbourg court (*Storck*, para 89) as follows:

⁴ For what it is worth it may be useful to refer to what I said on the point in *JE v DE* [2006] EWHC 3459 (Fam), [2007] 2 FLR 1150, para 30: “... it is revealing that both the argument of the Government of Denmark (at para 71) and the judgment of the court (at paras 64, 69, 72 and 73) laid emphasis upon the fact that what was being done to the applicant was being done at the behest of his mother and in what the Government asserted and the court accepted was the responsible exercise of her parental rights. Indeed, what seems to have divided the majority and the minority ... was the question of whether the applicant’s mother was acting properly in the normal exercise of her parental authority or in abuse of her authority. In these circumstances it seems to me that, properly understood, *Nielsen v Denmark* is a case about the proper ambit of parental authority, albeit that it concerned a child placed in a psychiatric institution.” I went on, para 33: “... in *HL v United Kingdom* (2004) 40 EHRR 761, at para 93, ... the court explained its decision in *Nielsen v Denmark* as follows: ‘That case turned on the specific fact that the mother had committed the applicant minor to an institution in the exercise of her parental rights, pursuant to which rights she could have removed the applicant from the hospital at any time.’ That, as I read it, is an authoritative pronouncement by the Strasbourg court itself as to the true basis of the decision in *Nielsen v Denmark*.” This accords with Baroness Hale’s analysis in *Cheshire West*.

⁵ The Official Solicitor submits that Baroness Hale was here merely summarising a submission by counsel and not expressing her own view. I do not agree.

“... 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 Art.5(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 against interferences with her liberty carried out by private persons.”

The present case relates to the first and third aspects. In relation to the third, the court referred (paras 101-102) to the *positive* obligation of the State “to take appropriate steps to provide protection against an interference with those rights either by State agents or private parties”, so as to provide “effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge.”

29. In *Re A and C (Equality and Human Rights Commission intervening)* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363, paras 95-96, I said this:

“95 ... 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 ...; (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 ... 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 ... 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.

96 What emerges from this is that, whatever the extent of a local authority's positive obligations under Art 5, its duties ... are limited. In essence, its duties are threefold: a duty in appropriate circumstances to investigate; a duty in appropriate circumstances to provide supporting services; and a duty in appropriate circumstances to refer the matter to the court."

That analysis was adopted and applied by Charles J in *Staffordshire County Council v K and others* [2016] EWCO 27, [2016] Fam 419, appeal dismissed *Staffordshire County Council v K and others* [2016] EWCA Civ 1317, [2017] 2 WLR 1131.

Article 5: the Strasbourg framework – children

30. At this point, and not least because of the stance adopted by the Official Solicitor (see paragraph 12 above), I propose to address, head-on, a rather basic question to which, astonishingly, there appears to be no simple and clear-cut answer. It can be formulated in this way. Take a typical child say three or eight years old (the precise age is immaterial). By typical, I mean a child subject to no physical or mental disabilities who is, broadly speaking, at the same developmental stage as most children of the same age and who is living with parents at home, without any local authority involvement, in the kind of circumstances in which, broadly speaking, most children of that age are accustomed to live in contemporary Britain. Now such a child is living in circumstances which plainly satisfy the *Cheshire West* "acid test" – the child, to use Baroness Hale's words, "is under the complete supervision and control of those caring for her and is not free to leave the place where she lives." But common-sense would plainly indicate that such a child is *not*, within the meaning of Article 5, deprived of his or her liberty. But – and this is the key question – why not? Is it because (*Storck* component (a)) there is, nonetheless, no confinement? Is it because (*Storck* component (b)) there is, in accordance with *Nielsen*, an effective parental consent? Or is it because (*Storck* component (c)) there is no involvement by the State? The short but incomplete answer, that whatever may be said in relation to *Storck* components (a) and (b), there can be no deprivation of liberty because (*Storck* component (c)) there is no State involvement, although it suffices for the particular case I have postulated does nothing to resolve the more difficult underlying questions, brought into sharp focus if I change the facts slightly.
31. Let us suppose that precisely the same child is living in precisely the same circumstances but with this difference: the child is living with local authority approved foster-parents in circumstances where, for whatever reason (the precise reason is immaterial), the child's own parents either cannot or have not consented to the placement. Now the child is living in circumstances which plainly satisfy the *Cheshire West* "acid test". The State (*Storck* component (c)) is plainly involved. There is (*Storck* component (b)) no question of a *Nielsen* consent, because the child's parents have not consented and, as a matter of domestic law (see below), the foster carers lack the authority to consent. Does it follow that the child is therefore within the meaning of Article 5 deprived of his or her liberty, and, if not, why not?

32. Before seeking to address this question, two observations are perhaps in order. The first is prompted by the undoubted fact that, if the foster-carers have a precisely similar child of their own who is sharing the same life in the foster-care's home, that child would *not* be deprived of his or her liberty. It might be thought curious if, in relation to two such similar children enjoying precisely the same domestic routine, the one is, while the other is not, deprived of liberty within the meaning of Article 5. The other addresses the practical reality, that if local authority foster children do indeed fall within the ambit of Article 5, the implications are, not least in terms of already desperately over-stretched local authority and judicial resources, going to be very profound indeed.
33. To address this question, we have, in my judgment, to return to *Cheshire West*.
34. I have already referred (paragraph 26 above) to what Baroness Hale had to say about *Nielsen*. There is a further passage in her judgment (para 54) to which I should refer:

“If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty. Furthermore, that deprivation is the responsibility of the state. Similar constraints would not necessarily amount to a deprivation of liberty for the purpose of article 5 if imposed by parents in the exercise of their ordinary parental responsibilities and outside the legal framework governing state intervention in the lives of children or people who lack the capacity to make their own decisions.”

35. I go next to Lord Neuberger of Abbotsbury PSC, paras 72-73:

“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). However, it is fair to say that, while this point would apply to adoptive parents, I doubt that it would include foster parents (unless, perhaps, they had the benefit of a residence order). But in the great majority of cases of people other than young children living in ordinary domestic circumstances, the degree of supervision and control and the freedom to leave would take the situation out of article 5.4 ...

73 ... The comparison of the restrictions in the hospital in *Nielsen v Denmark* 11 EHRR 175, para 70 with “a real home” was made in connection with consideration of the contention that the “treatment given at the hospital and the conditions under which it was administered were inappropriate in the circumstances.” The case involved a child, and was decided on the basis that his mother was exercising her article 8 rights

responsibly, in good faith and on the basis of medical advice: see para 71 ...”

36. There is a lengthy passage in the judgment of Lord Kerr of Tonaghmore JSC, paras 77-79, which necessitates substantial quotation:

“77 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.

78 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 similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are – and have to be – applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is – and must remain – a constant feature of their lives, the restriction amounts to a deprivation of liberty.

79 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.”

37. With all respect to their Lordships, it is not immediately obvious just what this all amounts to. In my judgment, however, three things are clear enough from what was said by Baroness Hale of Richmond DPSC and by Lord Neuberger of Abbotsbury PSC:
- i) *Nielsen* is, fundamentally, a case about *Storck* component (b); or, to be more precise, about the proper ambit of *Storck* component (b) and the extent and limit of parental authority, which between them determine whether *Storck* component (c) arises for consideration.

- ii) Whatever its implications in relation to *adults*, a matter which is not before us and which, as we shall see (paragraphs 114, 120, 147-148 below), is not free from difficulty, *Nielsen* is good authority in relation to *children*.
- iii) In accordance with *Nielsen*, there are circumstances in which the consent by a “holder of parental authority” – in domestic terms, someone with parental responsibility – will provide a valid consent for the purposes of *Storck* component (b) to something which is a “confinement” for the purposes of *Storck* component (a). Those circumstances, although “extensive”, are not “unlimited.”

This, of itself, does not provide an answer to the question I have posed (paragraph 31 above). Nor, as it seems to me, does anything said either by Baroness Hale of Richmond DPSC or by Lord Neuberger of Abbotsbury PSC.

38. Insofar as *Cheshire West* provides the answer, it is to be found in the judgment of Lord Kerr of Tonaghmore JSC. He does, in terms and directly, address the situation of what he refers to as a “young” or “very young” child, as distinguished from a “young person” or “teenager.” His analysis (para 78) reflects the reality, previously recognised, as we shall see, by the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112, that although “children are (or should be) subject to some level of restraint”, this “adjusts with their maturation and change in circumstances.” So far as material for present purposes, the kernel of his analysis is to be found in this passage (para 79):

“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.”

This reflects what he had said a little earlier (para 77):

“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.”

The point is picked up later (para 79):

“While they were very young, therefore, MIG and MEG’s liberty was not restricted ... they can – and must – now be compared to children of their own age and relative maturity who are free from disability ...”

39. Without deciding a point which is not before us, I am inclined to think that the effect of this is that, in Lord Kerr’s view, the situation of the “young” or “very young” as he describes it does *not* involve a “confinement” for the purposes of *Storck* component (a), even though such a child is living in circumstances which plainly satisfy the *Cheshire West* “acid test.” *If* this is so, though it is not something we need to decide for the purpose of disposing of this appeal and I express no concluded view, then the

consequence, going back to my question, would be that the child living with foster-carers in their home is therefore *not* within the meaning of Article 5 being deprived of his or her liberty.

The appeal

40. As I have indicated, I propose to deal with grounds (2) and (3) before turning to ground (1).

The appeal: ground (2) – *Storck* component (c)

41. Keehan J’s dismissal (paras 129-135) of the local authority’s contention that D’s confinement was not imputable to the state was brisk. In the first place, he said (paras 131-132):

“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.”

42. Secondly, and referring to the State’s *positive* obligations, he said this (para 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.”

43. The corollary, as he went on to observe, is that:

“the local authority must make an application to the court ... in all cases where 16- or 17-year-old young people are objectively confined in satisfaction of the first limb of the *Storck* test and, of course, where the second limb is satisfied and either the third limb 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*.”

44. Returning to a point he had made earlier, he added (paras 136-138):

“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 ...

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.”

45. I agree with Keehan J, both as to his decision on this point and in relation to his reasoning. To the extent that his reasoning (para 131) differs from that of Mostyn J in *Re RK (Minor: Deprivation of Liberty)* [2010] EWHC 3355 (COP), [2010] COPLR Con Vol 1047, para 43 (see paragraph 97 below), I prefer Keehan J’s analysis to Mostyn J’s. Mr Cowen complains that Keehan J failed to take into account the extent of the informed involvement of D’s parents in the arrangements at Placement B, both before and after D moved there. I do not agree. And in any event, parental involvement sufficient to involve consent for the purposes of *Storck* component (b) is not in any way incompatible with a degree of State involvement sufficient to trigger *Storck* component (c). It merely means that, notwithstanding the State’s involvement, Article 5 will not be engaged.
46. For my part I would therefore dismiss the appeal on ground (2).

The appeal: ground (3)

47. Mr Cowen contends that the procedures under which the arrangements for looked after children such as D are appropriately monitored mean that such a child is not deprived of his liberty. The statutory regime, he submits, contains a comprehensive set of obligations to ensure that the child is properly looked after and that the arrangements are monitored and scrutinised by the allocated social worker, by the IRO and by regular LAC reviews. He asks rhetorically, what of significance will be added to the existing protective measures by an application to the Court of Protection where there is informed parental consent in accordance with section 20. He refers in this connection to various provisions in the Children Act 1989, to the Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959, and to The Children Act 1989 Guidance and Regulations, Vol 2. I need not follow him into the detail, for, in my judgment, granted the premise, the conclusion which Mr Cowen seeks to draw simply does not follow.

48. Mr Cowen accepts that this involves what he calls a “departure from the approach set out by Baroness Hale in *Cheshire West*.” In my judgment, his contention is simply incompatible with the fundamental principles which underpin Article 5, as with the detailed provisions of Article 5 which stipulate the involvement of the court. His reference to the situation where there is informed parental consent is revealing, for it shows an important flaw in the argument. Either the parental consent is effective for the purposes of *Storck* component (b) or it is not – this, of course, is the issue to which I return below. If such consent *is* effective, then *cadit quaestio*, for there will in that event be no deprivation of liberty for the purposes of Article 5. If, on the other hand, such consent is *not* effective, then the matter is left entirely in the hands of the State – the local authority – and Article 5, assuming there is a confinement for the purposes of *Storck* component (a), will be fully engaged. In those circumstances, I agree with what Keehan J said in *In re AB (A Child) (Deprivation of Liberty: Consent)* [2015] EWHC 3125 (Fam), [2016] 1 WLR 1160, para 36 (see further paragraph 111 below):

“... the local authority child care review, chaired by an independent reviewing officer, would not, in my judgment, afford the required safeguards and checks, sufficiently independent of the state.”

49. For my part I would therefore also dismiss the appeal on ground (3).

The appeal: ground (1) – *Storck* component (b)

50. For the purpose of applying the *Nielsen* principle one first has to identify what are the relevant “rights of the holder of parental authority”, and that, in my judgment, is plainly a matter to be determined by the relevant *domestic* law. Understanding of the issues arising in relation to ground (1) therefore requires consideration of our domestic law *before* one can turn to consider the application of Article 5 and the Strasbourg jurisprudence. As will become apparent, the domestic law is far from straight-forward. Detailed analysis, including a certain amount of legal history is, in my judgment, unavoidable.
51. In terms of domestic law, the starting point must be the definition in section 3 of the Children Act 1989 of “parental responsibility”:

“Meaning of “parental responsibility”.

(1) In this Act “parental responsibility” means 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.

(2) It also includes the rights, powers and duties which a guardian of the child’s estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever

description and wherever situated which the child is entitled to receive or recover.”

52. This definition may be contrasted with the definitions of “parental responsibilities” and “parental rights” to be found in sections 1 and 2 of the Children (Scotland) Act 1995: see *Re A and ors (Children: Scottish adoptions)* [2017] EWHC 35 (Fam) paras 11-16. I need not set them out. I make the comparison simply because it brings out a key feature of the English legislation. Whilst in Scotland “parental responsibilities” and “parental rights” are each defined by reference to a free-standing statutory list of specific “responsibilities” or “rights”, and the legislation expressly supersedes the common law, in England “parental responsibility” is defined by reference to “all the rights [etc] *which by law* a parent of a child has in relation to the child (emphasis added).” So, in contrast to the Scottish scheme, where the statutory criteria are self-contained, the English scheme directs attention to the content of what it refers to as “law” – which in context can surely only mean the common law. So, one is inevitably drawn back to the learning in *Hewer v Bryant* [1970] 1 QB 357, with its references, pages 363, 373, 376, to “custody” as a “bundle of rights and duties”, “bundle of rights” or “bundle of powers.”
53. In *Hewer v Bryant* the question was whether the plaintiff in a personal injury action, who had been 15²/₃ years old when injured, was, at the material time, in the “custody” of a parent within the meaning of section 2(2)(b) of the Law Reform (Limitation of Actions, etc) Act 1954. With the answer to that question we are not concerned.
54. The importance of the case for present purposes lies in the extensive analysis of the more general concept of custody undertaken in particular by Sachs LJ. One passage in his judgment, pages 372-373, is of especial significance:

“... among the various meanings of the word “custody” there are two in common use in relation to infants⁶ which are relevant and need to be carefully distinguished. One is wide – the word being used in practice as almost the equivalent of guardianship: the other is limited and refers to the power physically to control the infant’s movements.

In its limited meaning it has that connotation of an ability to restrict the liberty of the person concerned to which Donaldson J referred in Duncan’s case [*Duncan v Lambeth London Borough Council* [1968] 1 QB 747], at p 762. This power of physical control over an infant by a father *in his own right* qua guardian by nature ... was and is recognised at common law; but that strict power (which may be termed his “personal power”) in practice ceases upon the infant reaching the years of discretion. When that age is reached, habeas corpus will not normally issue against the wishes of the infant. Although children are thought to have matured far less quickly in the era when the common law first developed, that age of discretion which limits the father’s *practical* authority (see the discussion and judgment in *Reg v Howes* (1860) 3 E & E 332) was originally fixed at 14 for boys

⁶ At that time, an “infant” was anyone who had not attained the age of majority, at that time 21 years of age.

and 16 for girls (see per Lindley LJ in *Thomasset v Thomasset* [1894] P 295, 298).

... In its wider meaning the word “custody” is used as if it were almost the equivalent of “guardianship” in the fullest sense – whether the guardianship is by nature, by nurture, by testamentary disposition, or by order of a court ... Adapting the convenient phraseology of counsel, such guardianship embraces a “bundle of rights,” or to be more exact, a “bundle of powers,” which continue until a male infant attains 21, or a female infant marries. These include power to control education, the choice of religion, and the administration of the infant’s property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, ... the personal power physically to control the infant until the years of discretion ... It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, namely, such personal power of physical control as a parent or guardian may have.”

To similar effect, Karminski LJ, page 376, said this:

“Physical possession is only one aspect of custody. Other important aspects include governing power to decide the child’s religion and education.”

55. I draw attention to that aspect of “custody” variously described as “the power physically to control the infant’s movements”, the “ability to restrict the liberty of the person” and, more generally, as “physical control” or “physical possession”, and referred to as a “personal power” which “in practice” ceases upon the infant reaching “the years of discretion” or “the personal power physically to control the infant until the years of discretion.”
56. I go back to the earlier authorities. In *The Queen v Maria Clarke (In the Matter of Alicia Race)* (1857) 7 E & B 186, 119 ER 1217, the widowed mother of a ten-year old girl, whose father had been killed on active service during the Crimean War and whose education was being funded by a service charity, brought a writ of habeas corpus against her daughter’s schoolmistress. The girl wished to remain at the school. The decision of the Court of Queen’s Bench is accurately summarised in the headnote:

“[the] Court refused to examine the child and ascertain its intelligence, holding that a guardian for nurture has a legal right to the custody of the ward, irrespective of the wishes of the ward, unless it be shewn that the custody is sought for improper objects, or that the application is not bonâ fide, or that the guardian making the application is grossly immoral. And, in this case, no more appearing than that the father had been a Protestant, and that the mother was a Catholic, and intended to educate the child in her own persuasion, the Court ordered the child to be given to its mother.”

57. Lord Campbell CJ, giving the judgment of the court, said, page 196:

“It is unnecessary to travel through the cases seriatim, as they are all reviewed in *Rex v Greenhill* (4 A & E 624), where the Court laid down the rule that, where a young person under twenty one years of age is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves the infant to elect where he will go, but, if he be not of that age, the Court must make an order for his being placed in the proper custody. Lord Denman, Littledale J, Williams J and Coleridge J all make age the criterion, and not mental capacity, to be ascertained by examination. They certainly do not expressly specify the age: but they cannot refer to seven as the criterion; and there is no intervening age marking the rights or responsibility of an infant till fourteen, when guardianship for nurture ceases, upon the supposition that the infant has now reached the years of discretion.”

58. In *The Queen v Howes* (1860) 3 E & E 332, 121 ER 467, the father of a 15 year old girl who was unwilling to return to him brought a writ of habeas corpus in the Court of Queen’s Bench against one of a number of people who, to adopt the picturesque language of the Chief Justice, had “tried their best to baffle the authority of this Court, and to keep this girl back from her father.” Cockburn CJ, page 336, said:

“The question before us is purely one of law, whether a father is entitled to the custody of a child between the age of fifteen and sixteen, notwithstanding that the child desires not to be in his custody ... Now the cases which have been decided on this subject shew that, although a father is entitled to the custody of his children till they attain the age of twenty-one, this Court will not grant a habeas corpus to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature⁷ has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father’s right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him ... We must order that the girl be given up to her father.”

59. So, once the child has reached “the years of discretion”, he could, to use Lord Campbell CJ’s phrase, “elect where he will go”; prior to that, the child, to use Cockburn CJ’s phrase, “has no discretion to consent to leaving.”

⁷ This was a reference to the Abduction Act 1557.

60. In *Thomasset v Thomasset* [1894] P 295, the court was concerned with the question of whether the jurisdiction of the Probate, Divorce and Admiralty Division (the ancestor to today's Family Division) in relation to a child's custody, maintenance and education ceased when the child reached the age of 16, as Sir Francis Jeune P had held, or whether, as this court held on appeal, it continued until the child reached the age of majority.
61. In addressing this question, Lindley LJ examined the law and practice of the Courts of Common Law and Chancery and of the Ecclesiastical Courts. In relation to the common law, he said this, page 297:

“The principles upon which Courts of Law act in dealing with persons brought up under a habeas corpus are very clearly stated in Coleridge J's judgment in *Rex v Greenhill* (1836) 4 A & E 625, 643: “A habeas corpus proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, and disposes of many cases, namely, that the individual who has been under restraint is declared at liberty; and the Court will direct that the party shall be attended home by an officer to make the order effectual. But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists; and where the child is in the hands of a third person, that presumption is in favour of the father.” The age at which a child is deemed to have a discretion is fourteen in the case of a boy, and sixteen in the case of a girl (see *Reg v Clarke* (1857) 7 E & B 186). The age of sixteen appears to have been adopted by reason of the language used in the statute 4 & 5 Ph & M c 8 relating to the abduction of girls (see *Reg v Howes* (1860) 3 E & E 332). After a child has attained the age of discretion, a Court of Common Law will set it free if illegally detained, but will not force a child against his or her will to remain with his or her father or legal guardian ... It must not, however, be inferred from the decisions referred to above that a father has no legal right to the custody of his child after he or she has attained the age of fourteen or sixteen. The father's right to such custody exists until the child attains twenty-one ... Such right, moreover, was distinctly recognised ... by Cockburn CJ in *Reg v Howes*.”

62. In relation to the Court of Chancery, Lindley LJ continued, page 299:

“... the Court of Chancery exercised the power of the Crown as *parens patriae* over infants, and in exercise of this jurisdiction the power of the Court has always been much more extensive than that possessed by Courts of Common Law under a writ of habeas corpus ... The Court of Chancery has exercised this larger power in aid of fathers and guardians over children who have attained the age of discretion. Thus ... boys over sixteen have been compelled to go to the schools selected by their guardians; and in *Todd v Lynes*, referred to in *Simpson on Infants* (2nd ed p.

145), a boy of seventeen was taken from a monastery and given up to the father. What the wishes of the boy were, however, does not appear. In the exercise of this jurisdiction the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare of the infants.”

He went on, page 300:

“By the Judicature Act, 1873, each Division of the High Court can exercise the jurisdiction of the old Court of Chancery, and by [section 25(1)] it is enacted that, “in questions relating to the custody and education of infants, the rules of equity shall prevail.” This enactment enables all Divisions of the High Court, even on habeas corpus, to regard something more than the strict rights of fathers and guardians, and requires all the Divisions to recognise the cardinal principle on which the Court of Chancery always proceeded, namely, that in dealing with infants the primary consideration is their benefit.”

63. Turning to the powers of the Probate, Divorce and Admiralty Division, Lindley LJ said, page 302:

“In my judgment, the wide discretion conferred on the Divorce Court by the Divorce Acts ... ought to be exercised in each particular case as the circumstances of that case may require; and in exercising such discretion the Divorce Court, which has all the old powers of the Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, and education of infants who, being males, are over fourteen, or who, being females, are over sixteen. I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections of the Divorce Acts on which this case turns can, since the Judicature Acts, at all events, be exercised during the whole period of infancy – that is, until the children, whether males or females, attain twenty-one; although *I do not say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child’s own wishes* (emphasis added).”

64. The other member of the court, Lopes LJ, said this, page 305:

“The basis upon which the decisions are founded is the assumption that the right of the parent to the custody of his child terminates at the age of sixteen. But is this correct? No doubt a writ of habeas corpus could not go to compel a child over the age of sixteen to return to the custody of the parent when such child was unwilling to submit to such custody; but, subject to such unwillingness on the part of the child, I can entertain no doubt

that the parent is entitled to the custody of his child as against anybody detaining the child against its will up to the age of twenty-one. There can, I think, be no doubt that the right of parents to the control and guardianship of their children exists up to the age of twenty-one years, unless the parents have by their own grossly immoral and improper conduct forfeited their rights and abdicated their parental authority.”

65. In the light of this survey, I conclude that Sachs LJ was, if I may respectfully say so, entirely accurate in his analysis (see paragraph 54 above) in *Hewer v Bryant* [1970] 1 QB 357, pages 372-373.

66. In *Hewer v Bryant*, page 369, Lord Denning MR, having referred to the Report of the Committee on the Age of Majority (Cmnd 3342), chaired by Latey J (the Latey Report) which had been published in 1967, described the “legal right of a parent to the custody of a child” as:

“a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.”

This observation anticipated the vitally important decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112.

67. First, however, I must refer to the intervening history.

68. The Latey Report records, paras 77-79, the forceful view of the judges, both the judges of the Chancery Division (who in those days still dealt with wardship) and the judges of the Probate, Divorce and Admiralty Division, as to “how futile and unfortunate it was for the law to try to direct in however fatherly a fashion the lives of those who were quite capable of leading their own.” Hence in part, no doubt, its recommendation, para 134, that the age of majority should be reduced from 21 to 18.

69. A month after this court had given its judgment in *Hewer v Bryant* [1970] 1 QB 357, the Family Law Reform Act 1969 was enacted, giving effect to the recommendations in the Latey Report. The provisions which are relevant for present purposes came into force on 1 January 1970. First, section 1(1) reduced the age of majority from 21 to 18. Secondly, and giving effect to what had been said in the Latey Report, paras 474-484, section 8 provided as follows:

“Consent by persons over 16 to surgical, medical and dental treatment.

(1) The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective

consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.

(2) In this section “surgical, medical or dental treatment” includes any procedure undertaken for the purposes of diagnosis, and this section applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment.

(3) Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.”

70. Against this background, I turn to consider *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112.

71. So far as material for present purposes, the issue in *Gillick* was simple: as a matter of law, did a girl under the age of 16 have capacity to consent to medical examination and treatment, specifically, the provision of contraceptive advice and treatment? Mrs Gillick asserted that the answer to that question was No; that, leaving on one side the role of the court, the matter lay exclusively within the ambit of parental consent; and that the parent thus had, in effect, a power of veto. Mrs Gillick’s contention was upheld by a unanimous Court of Appeal; it was rejected by a majority of the House of Lords (Lords Fraser of Tullybelton, Scarman and Bridge of Harwich, Lords Brandon of Oakbrook and Templeman dissenting). The essential difference between the two views was whether “the age of discretion”, as that expression had been used, for example by Cockburn CJ in *The Queen v Howes* (1860) 3 E & E 332, was, in the case of a girl, fixed at 16 or was to be understood in a more nuanced and flexible way.

72. In the Court of Appeal, both Parker LJ and Fox LJ referred to *The Queen v Howes* (1860) 3 E & E 332. Prominent in their analysis was what Parker LJ referred to, [1986] AC 112, page 128, as Cockburn CJ’s “repudiation of the notion that intellectual precocity can hasten the age at which a minor can be considered to be of sufficient discretion to exercise a wise choice for its own interests and the fixing of a single age.”

73. It is, however, worth observing that, having noted Lord Denning MR’s reference in *Hewer v Bryant* [1970] 1 QB 357 to the parental right as “dwindling”, Parker LJ continued, page 130:

“This it clearly is, if only because a boy of 14 or a girl of 16 can give an adequate consent to being out of its father’s custody or in that of another so as to defeat any claim of the father by habeas corpus to have it back. Furthermore, albeit there may remain until 18 a legal right of control, it may, as the child grows older, be necessary for the parents, because physical control is no longer practical, to seek the assistance of the court to buttress and support the legal right.”

He returned to the same point, page 132:

“... it still seems to be the case that consent of the child is no answer to habeas corpus unless the child has attained the age of either 14 or 16 as the case may be.”

And again, page 134:

“in habeas corpus proceedings someone who has reached the age of discretion may give a consent which will prevent a parent recovering custody.”

74. The speeches of the majority in the House of Lords establish three propositions which are relevant for present purposes.

75. The first proposition is captured in what Lord Fraser of Tullybelton said, page 170:

“... parental 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.”

Lord Scarman said the same, pages 183-184, 185:

“Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child – custody, care, and control of the person and guardianship of the property of the child ... 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.

... The principle is that parental right or power of control of the person and property of his child exists primarily to enable the parent to discharge his duty of maintenance, protection, and education until he reaches such an age as to be able to look after himself and make his own decisions.”

76. The second proposition is captured in what Lord Scarman said, page 184:

“... the common law has never treated [parental] rights as sovereign or beyond review and control. Nor has our law ever treated the child as other than a person with capacities and rights recognised by law.”

Lord Templeman in his dissenting speech said the same, page 200:

“Parental power must be exercised in the best interests of the infant and the court may intervene in the interests of the infant at the behest of the parent or at the behest of a third party. The court may enforce parental right, control the misuse of parental power or uphold independent views asserted by the infant. The court will be guided by the principle that the welfare of the infant is paramount.”

The implications of this can be seen in *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, paras 33, 39:

“33 ... A child’s welfare is to be judged today by the standards of reasonable men and women in 201[7], not by the standards of their parents in 1970, and having regard to the ever changing nature of our world: changes in our understanding of the natural world, technological changes, changes in social standards and, perhaps most important of all, changes in social attitudes.

...

39 ... A child’s best interests have to be assessed by reference to general community standards, making due allowance for the entitlement of people, within the limits of what is permissible in accordance with those standards, to entertain very divergent views about the religious, moral, social and secular objectives they wish to pursue for themselves and for their children ...”

77. In this connection it is also important to note what Dame Elizabeth Butler-Sloss P said in *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377, para 28 (see further paragraphs 86-95 below):

“There is a point ... 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?”

78. This aspect of the teaching in *Gillick* is of particular importance in a case such as the one we are considering, for if, in the nature of things, it cannot define it does at least identify the principles by which one can in any particular situation determine the ambit or extent of parental responsibility – what Keehan J in his judgments has usefully described as the extent of the “zone” of parental responsibility.

79. The third proposition, determinative of the appeal in *Gillick*, was the rejection of the rule that the age of discretion was fixed and the substitution of what it has now become customary to refer to as the acquiring of ‘*Gillick* capacity’. Lord Fraser of Tullybelton expressed the point as follows, pages 171-172:

“It is, in my view, contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child or a young person remains in fact under the

complete control of his parents until he attains the definite age of majority, now 18 in the United Kingdom, and that on attaining that age he suddenly acquires independence. In practice most wise parents relax their control gradually as the child develops and encourage him or her to become increasingly independent. Moreover, the degree of parental control actually exercised over a particular child does in practice vary considerably according to his understanding and intelligence and it would, in my opinion, be unrealistic for the courts not to recognise these facts. Social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance ... It is a question of fact for the judge (or jury) to decide whether a particular child can give effective consent to contraceptive treatment.”

He went on, page 172, to express his agreement with Lord Denning MR’s description of parental authority as a “dwindling right.” Lord Scarman said the same, page 186:

“The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose upon the process of “growing up” fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change ... Unless and until Parliament should think fit to intervene, the courts should establish a principle flexible enough to enable justice to be achieved by its application to the particular circumstances proved by the evidence placed before them.

The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child’s right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.”

80. It will be noted that neither Lord Fraser of Tullybelton (at page 167) nor Lord Scarman (at page 182) treated the question before them as being determined by section 8 of the 1969 Act.
81. In the course of their speeches, Lord Fraser of Tullybelton and Lord Scarman referred to what Cockburn CJ had said in *The Queen v Howes* (1860) 3 E & E 332. Whilst, as I have said, specifically repudiating what Cockburn CJ had said about the age of discretion being fixed, I do not read them as otherwise rejecting his analysis: see Lord Fraser of Tullybelton, page 172, and Lord Scarman, page 187. On the contrary, I read Lord Scarman as approving the fundamentals of Cockburn CJ’s analysis:

“The habeas corpus “age of discretion” cases are ... no guide as to the limits which should be accepted today in marking out the bounds of parental right, of a child’s capacity to make his or her own decision, and of a doctor’s duty to his patient. Nevertheless

the “age of discretion” cases are helpful in that they do reveal the judges as accepting that a minor can in law achieve an age of discretion before coming of full age. The “age of discretion” cases are cases in which a parent or guardian (usually the father) has applied for habeas corpus to secure the return of his child who has left home without his consent. The courts would refuse an order if the child had attained the age of discretion, which came to be regarded as 14 for boys and 16 for girls and did not wish to return. The principle underlying them was plainly that an order would be refused if the child had sufficient intelligence and understanding to make up his own mind.” [The] passage from the judgment of Cockburn CJ in *Reg v Howes* (1860) 3 E & E 332 ... illustrates their reasoning and shows how a fixed age was used as a working rule to establish an age at which the requisite “discretion” could be held to be achieved by the child ... The principle is clear: and a fixed age of discretion was accepted by the courts by analogy from the Abduction Acts (the first being the Act of 1557 ...). While it is unrealistic today to treat a 16th century Act as a safe guide in the matter of a girl’s discretion, and while no modern judge would dismiss the intelligence of a teenage girl as “intellectual precocity,” we can agree with Cockburn C.J. as to the principle of the law – the attainment by a child of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests.”

82. It is also to be noted that, unsurprisingly, attention was given to what had been said in *Hewer v Bryant* [1970] 1 QB 357; indeed, counsel in submissions, page 154, had specifically directed attention to the distinction drawn by Sachs LJ between the “wider” and “narrower” concepts of custody.
83. There is one, final, point of importance for present purposes which is made clear both by Lord Fraser of Tullybelton and by Lord Scarman. What for convenience, and in accordance with settled practice, I shall refer to as ‘*Gillick* capacity’ or ‘*Gillick* competence’ is *not* determined by reference to the characteristic development trajectory of some hypothetical ‘typical’ or ‘normal’ child (whatever those expressions might be understood as meaning). Whether a particular child has ‘*Gillick* capacity’ is determined by reference to the understanding and intelligence of *that* child. The attainment of ‘*Gillick* capacity’ is, and has always been, treated – examples in the reported cases are legion – as being ‘child-specific.’ As Lord Fraser of Tullybelton said, page 172:

“It is a question of fact for the judge ... to decide whether a particular child can give effective consent ...”

Likewise, Lord Scarman’s reference, page 186, to:

“a principle flexible enough to enable justice to be achieved by its application to the particular circumstances proved by the evidence.”

84. This has an important corollary. Given that there is no longer any ‘magic’ in the age of 16, given the principle that ‘*Gillick* capacity’ is ‘child-specific’, the reality is that, in

any particular context, one child may have ‘Gillick capacity’ at the age of 15, while another may not have acquired ‘Gillick capacity’ at the age of 16 and another may not have acquired ‘Gillick capacity’ even by the time he or she reaches the age of 18: cf, *In Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, pages 24, 26.

85. Pausing there to take stock. As of 1985, when *Gillick* was decided, the position in our domestic law in relation to that aspect of “custody” variously described in *Hewer v Bryant* as “the power physically to control the infant’s movements”, the “ability to restrict the liberty of the person” or “the personal power physically to control the infant” and, more generally, as “physical control” or “physical possession” – in other words, the powers with which we are here concerned – can be summarised as follows:
- i) The parental power was precisely as described by Sachs LJ subject only to the substitution, when applying the principles set out by Sachs LJ in relation to the concept of the age of discretion, of the test of what we now call ‘Gillick capacity’ in place of the previous fixed ages.
 - ii) The ambit or extent of parental responsibility, the extent of the “zone” of parental responsibility, in any particular case was to be ascertained by reference to general community standards in contemporary Britain, the standards of reasonable men and women in 1985 (now 2017). To adopt Dame Elizabeth’s words: Are the restrictions being imposed by this parent in this case “within ordinary acceptable parental restrictions upon the movements of a child”?
86. The next important decision is that of this court in *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377. To put this in its historical context, by the time this case was decided, both the Children Act 1989⁸ and the Human Rights Act 1998 were in force; the Strasbourg court had decided *Nielsen v Denmark* (1988) 11 EHRR 175; but the decision in *Storck v Germany* (2005) 43 EHRR 96 still lay in the future.
87. The principal issue in *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 was whether section 25 of the Children Act 1989, governing the use of “secure accommodation”, is compatible with Article 5 of the Convention. At the relevant time, K, who was 15, was subject to an interim care order made in accordance with section 38 of the 1989 Act. In consequence, parental responsibility for K was, by virtue of section 33(3), shared by the local authority and his parents, who (see para 23) consented to him being placed in the secure accommodation.
88. One of the issues which the court had to determine was whether, to adopt the anachronistic language of subsequent authority, the placement of K in secure accommodation amounted to a “confinement” within *Storck* component (a). Unsurprisingly, it might be thought, the court answered this question in the affirmative. It was in this context that all three members of the court expressed views which are relevant for present purposes.
89. Before turning to these passages, I need to emphasise that, as appears from the report, *none* of the earlier cases to which I have thus far referred, with the *sole* exception of

⁸ So the concern of the court was now with statutory “parental responsibility”, as defined by section 3, rather than with common law “custody”.

Nielsen v Denmark (1988) 11 EHRR 175, was referred to in the judgments; indeed, none seems to have cited to the court (this, I might add, is a feature of all the other cases until we arrive at Keehan J's judgment in the present case). Somewhat surprisingly, therefore, as it might be thought, for 15 years or so the courts have been debating this important question of domestic law – what is the ambit of parental responsibility, particularly in relation to the older child? – without any reference either to *Hewer v Bryant* [1970] 1 QB 357 or even to *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112.

90. I start with Dame Elizabeth Butler-Sloss P. She began, para 22, by setting out the submission of K's counsel:

“She recognised that every child was subject to a degree of control and deprivation of free movement. Examples were given such as the child who was told by his mother that he could not go out to the cinema because he had not completed his homework or the child in boarding school with school rules which deprived him of free movement outside the school grounds. She accepted that the right to liberty was not absolute and that some deprivation of liberty did not come within article 5. She argued, however, that it was a question of degree, and the point came at which the restrictions were so inhibiting that it became a breach of article 5. She submitted that in a secure unit, by its very nature, a child was deprived of his liberty.”

She then, para 23, summarised the submission of Mr Neil Garnham, as he then was, appearing for the Secretary of State for Health and the Lord Chancellor:

“Mr Garnham pointed to the approach of the European Court of Human Rights that restrictions upon the liberty of a child need not amount to deprivation of liberty. He submitted that the placing of K in secure accommodation, particularly since it was done with the consent of the parents who still consented to him remaining there, was within the lawful application of parental responsibility and was not a deprivation of liberty within article 5.”

91. The President's response, paras 27-29, was as follows:

“27 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* 11 EHRR 175 ...

28 I recognise the force of the principles set out in ... *Nielsen'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? ...

29 ... it is clear that the purpose of section 25 of the 1989 Act, as set out in the interpretation in the regulations dependent upon it, is to restrict the liberty of the child ... If a parent exercised those powers by detaining a child in a similar restrictive fashion and was challenged to justify such detention, for my part I doubt whether the general rights and responsibilities of a parent would cover such an exercise of parental authority. It might be permissible for a few days but not for nearly two years. A court under our domestic law would be likely to intervene.”

92. I go next to the judgment of Judge LJ, as he then was, in a passage, paras 99-102, which although lengthy merits extensive quotation:

“99 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 into 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 which the law and local authorities should only intervene when the parents’ behaviour can fairly be stigmatised as cruel or abusive.

100 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.

101 By definition, the making of the order means that if accommodation less than adequate for the purpose of restricting liberty is provided, the child is likely to suffer significant harm because there is a history and continuing risk of absconding with a likelihood of significant harm or injury to himself or others. This means that he requires far more supervision and attention than any normal parent could reasonably provide or be expected to provide, and in accommodation which none of them have, that is accommodation provided for the very purpose of restricting a child’s freedom. This is miles away from “grounding” a teenager, or ensuring that a group of teenagers at a boarding school are all back within school bounds by a certain time each

evening, or any other manifestation of normal parental control. If the restrictions necessarily imposed on K for his own safety and that of others were imposed on an ordinary boy of 15, who did not pose the problems requiring a secure accommodation order, in my view, there would be a strong case that his parents were ill-treating him. As it is the local authority have been obliged, as a “last resort”, to seek authorisation to impose restrictions on the boy’s liberty which would otherwise be unacceptable, whether imposed by his parents or anyone else. That, as it seems to me, is the point of the unequivocal statutory language. The purpose is to restrict liberty, and there would be no point in such a restriction or the need for it to be authorised by the court, if it were not anticipated that much more was involved than ordinary parental control. It would have been enough to leave the local authority to exercise its parental responsibilities under section 33(3)(a) of the Children Act 1989 in relation to care, or to provide that the local authority should exercise such parental responsibilities in relation to children it was looking after, or to re-enact section 10(2) of the Child Care Act 1980 in a modified form so that it would read something like: “A local authority shall ... have the same powers and duties with respect to a person who is being looked after by it ... as his parents or guardian would have ... and may ... restrict his liberty to such extent as the authority considers appropriate.”

102 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.”

93. Thorpe LJ took a very different view (para 61):

“I accept Mr Garnham’s first and bold submission that the order ... 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.”

Earlier, however, he had expressed this view (paras 53-54):

“53 ... 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.

54 This reality is, it seems, well recognised in European based law. As was said in *Nielsen v Denmark* ... [quoting para 61].”

94. Putting the matter generally, and leaving on one side some of what Thorpe LJ had said (para 61), there is nothing in this, so far as I can see, fundamentally inconsistent with anything said in any of the key passages in either *Hewer v Bryant* [1970] 1 QB 357 or *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 or, looking to the future, in *Cheshire West*.
95. What *In re K* shows, in my judgment, are two things: first, that many aspects of the normal exercise of parental responsibility that interfere with a child’s freedom of movement do *not* involve a *deprivation* of liberty engaging article 5, even if they may involve a *restriction* on liberty of movement; and, secondly, that parental responsibility cannot justify the imposition of a regime equivalent to that imposed by “secure accommodation”. What the case did not address is whether parental responsibility can justify the imposition of a regime which, falling short of that imposed by secure accommodation, nonetheless satisfies the *Storck* component (a) acid test. That, of course, was not a question which was before the court; it is, of course, the question subsequently resolved (see paragraph 37 above) by *Cheshire West*. The answer, as we have seen, is ‘yes it may’.
96. The remaining cases all post-date the decision in *Storck v Germany* (2005) 43 EHRR 96 and were therefore framed in terms of the three-limb *Storck* analysis.
97. The first case is the decision of Mostyn J in *Re RK (Minor: Deprivation of Liberty)* [2010] EWHC 3355 (COP), [2010] COPLR Con Vol 1047, on appeal *RK (By her litigation friend the Official Solicitor) v (1) BCC (2) YB (3) AK* [2011] EWCA Civ 1305, [2012] COPLR 146. The case involved a young woman aged 17½, but with the mental age of a very young child, who was, with her parents’ agreement, being accommodated by the local authority pursuant to section 20 of the 1989 Act in a care home, KCH. Mostyn J held on the facts that *Storck* component (a) was not satisfied. He continued (para 42):

“I further conclude that the second (subjective) element is not satisfied. RK was placed at KCH by her parents pursuant to a s 20 agreement. They consented on her behalf in circumstances where with a mental age of about 2 years she is obviously incapable of giving her own consent and where her parents have parental responsibility for her. By s 3(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 ECHR in *Nielsen v Denmark* and the minority judgment of Thorpe LJ in *Re K*.”

He added (para 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.”

98. The Court of Appeal upheld Mostyn J’s decision though for different reasons. It agreed with his conclusion that there had been no deprivation of liberty in the sense of no confinement. However, in relation to the other issue (the one with which we are here concerned) it took a very different view (paras 14-15):

“14 The consensus [which emerged at the Bar] is to this effect: The decisions of the European Court of Human Rights in *Nielsen v Denmark* (Application No 10929/84) (1988) 11 EHRR 175, [1988] ECHR 23 and of this court in *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377, [2001] 2 WLR 1141, [2001] 1 FLR 526 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 Art 5 rights of the child and a parent may not lawfully detain or authorise the deprivation of liberty of a child.

[15] This consensus was supported and accepted by the court.”

99. In relation to that, two observations are in order. First, the point went by concession. Secondly, the decision *preceded* the decision of the Supreme Court in *Cheshire West* and what the Court of Appeal accepted is, on the face of it, simply incompatible (see paragraph 37 above) with what the Supreme Court has subsequently said.
100. The next relevant event was the decision of the Supreme Court in *Cheshire West*, which I have already considered. The remaining three cases, all decisions of Keehan J, post-date the decision in *Cheshire West*. They are, in chronological sequence, *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142, *In re AB (A Child) (Deprivation of Liberty: Consent)* [2015] EWHC 3125 (Fam), [2016] 1 WLR 1160, [2016] 2 FLR 601, and his decision in the present case, *Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129. Since we heard argument in the present case, our attention has been drawn to an even more recent decision of Keehan J: *A Local Authority v D, E and C* [2016] EWHC 3473 (Fam).⁹ I take them in turn.
101. In *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142, D was, as we have seen, in a placement which Keehan J found met *Storck* component (a). What is of importance for present purposes is Keehan J’s analysis of the consequential question arising in relation to *Storck* component (b).

⁹ I refer to this case only for the sake of completeness. It concerned a 15 year old boy who Keehan J found was ‘*Gillick*’ competent. He was subject to a regime at a residential unit which Keehan J found amounted to confinement within limb (1) of *Storck* but was, as Keehan J found, capable of consenting and in fact consenting for the purposes of limb (2) of *Storck*. It does not assist us here.

102. Keehan J went through many of the cases I have already referred to, from *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 onwards. He started with *Cheshire West*. Of *RK (By her litigation friend the Official Solicitor) v (1) BCC (2) YB (3) AK* [2011] EWCA Civ 1305, [2012] COPLR 146, he made these telling observations, paras 29-30:

“29 Mr Cowen, who appeared for the local authority in *RK*, submitted that, on further reflection, the concession was wrongly made and the consensus was erroneously achieved. I am told that no authorities were cited to the Court of Appeal in support of the concession. The observations of Thorpe LJ ... and in particular the passage ‘a parent may not lawfully detain or authorise the deprivation of liberty of a child’ were made obiter. With great respect to Thorpe LJ, I doubt the same correctly states the legal position. This bold statement is arguably inconsistent with the views expressed by two of the Supreme Court Justices [Lords Neuberger and Kerr] in *Cheshire West* ...

30 The Court of Appeal referred to the ‘deprivation of liberty of a child’ without any qualifications to the child’s age or maturity. It is obvious that young children will be under the ‘complete supervision and control’ of the parents and ‘will not be free to leave’ the family home without supervision. Such a state of affairs would certainly not amount to a deprivation of liberty. In the premises I do not consider myself to be bound by the observations made in *RK*.”

103. I am not at all surprised to see Keehan J expressing those views. In my judgment, his approach was correct, and precisely for the reasons he gave. On this point, in my judgment, the decision of this court in *Re RK* was not binding on Keehan J and is not binding on us. Even if this was part of the *ratio decidendi*, which is questionable, and even if it can survive the subsequent decision of the Supreme Court in *Cheshire West*, which is highly questionable, the principle in *Regina (Kadhim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955, para 33, would apply to deny it authority.
104. Turning next to *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377, and having set out passages from the judgments of Dame Elizabeth Butler-Sloss P and Judge LJ, Keehan J continued (paras 33-34):

“33 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 ...

34 In my judgment the decision in *Re K* is limited to the interpretation of s 25 of the CA 1989 and the compatibility of that statutory provision with Art 5 of the European Convention. The references to the ambit of parental responsibility were obiter ...”

There is, so far as I can see, nothing objectionable in that.

105. Keehan J went on (para 35):

“The point has been made in the course of submissions that D will be 16 very shortly on 23 April when a different approach and statutory regime applies. Thus once D is 16 years of age any deprivation of D’s liberty would have to be sanctioned by the Court of Protection pursuant to the provisions of the Mental Capacity Act 2005.”

Having referred to section 131 of the Mental Health Act 1983 (see below) and section 8 of the Family Law Reform Act 1969, he continued (paras 38-39):

“38 These provisions are just two examples of where Parliament has chosen, in a number of areas, to draw a distinction between a child and a young person who has yet to achieve his/her majority but who has attained the age of 16 or 17. Thus the legal authority of a parent to consent to the detention or treatment of a 16 or 17 year old is severely curtailed, if not removed.

39 The threshold is attaining the age of 16. The fact that a young person is 16 minus 23 days is irrelevant as far as the effect of those provisions is concerned.”

This, as will be appreciated, is in substance the issue which arises in this appeal. I shall return to it below.

106. Keehan J formulated the essential issue for him as being (para 46):

“whether D’s parents can, in the proper exercise of parental responsibility, consent to his accommodation in Hospital B and thus render what would otherwise be a deprivation of liberty *not* a deprivation of liberty (ie the second limb of the test in *Cheshire West* is *not* satisfied).”

He went on to answer that question in the affirmative, distinguishing (para 47) the circumstances of the child in *Nielsen* and those of D. Indeed, he said that “I have not had regard to the ‘controversial’ majority judgment in *Nielsen* in coming to my decision in this case.”

107. Keehan J explained his decision in a long passage (paras 55-64) that needs quotation at length:

“55 When considering the exercise of parental responsibility in this case and whether a decision falls within the zone of parental responsibility, it is inevitable and necessary that I take into account D’s autism and his other diagnosed conditions. I do so because they are important and fundamental factors to take into account when considering his maturity and his ability to make decisions about his day-to-day life.

56 An appropriate exercise of parental responsibility in respect of a 5-year-old child will differ very considerably from what is or is not an appropriate exercise of parental responsibility in respect of a 15-year-old young person.

57 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.

58 The parents of this young man are making decisions, of which he is incapable, in the welfare best interests of their son. It is necessary for them to do so to protect him and to provide him with the help and support he needs.

59 I acknowledge that D is not now cared for at home nor 'in a home setting'. His regime of care and treatment was advised by his treating clinicians and supported by his parents. They wanted to secure the best treatment support and help for their son. They have done so. It has proved extremely beneficial for D who is now ready to move to a new residential home out of a hospital setting. What other loving and caring parent would have done otherwise?

60 Those arrangements are and were made on the advice of the treating clinicians. All professionals involved in his life and in reviewing his care and treatment are agreed that these arrangements are overwhelmingly in D's best interests. On the facts of this case, why on public policy or human rights grounds should these parents be denied the ability to secure the best medical treatment and care for their son? Why should the state interfere in these parents' role to make informed decisions about their son's care and living arrangements?

61 I can see no reasons or justifications for denying the parents that role or permitting the state to interfere in D's life or that of his family.

62 I accept the position might well be very different if the parents were acting contrary to medical advice or having

consented to his placement at Hospital B, they simply abandoned him or took no interest or involvement in his life thereafter.

63 The position could not be more different here. D's parents have regular phone calls with him. They regularly visit him at the unit. Every weekend D has supported visits to the family home. He greatly enjoys spending time at home with his parents and his younger brother.

64 In my judgment, on the facts of this case, it would be wholly disproportionate, and fly in the face of common sense, to rule that the decision of the parents to place D at Hospital B was not well within the zone of parental responsibility."

108. I respectfully agree both with Keehan J's decision and with his reasoning, both of which, as it seem to me, fit comfortably within the principles to be derived from those parts of *Gillick* and *Cheshire West* to which I have drawn attention. In particular, his analysis of the "zone" of parental responsibility accords with, even if it does not refer in terms to, those aspects of *Gillick* which I have referred to in paragraphs 76-78 above. And for the reasons explained in paragraphs 83-84 above he was right to focus on the specifics of D's particular needs and difficulties when considered his maturity and decision-making capacity.
109. Before coming to Keehan J's decision in the present case, I should, for the sake of completeness, refer to his intervening judgment in *In re AB (A Child) (Deprivation of Liberty: Consent)* [2015] EWHC 3125 (Fam), [2016] 1 WLR 1160. This concerned a 14-year old boy, subject to an interim care order, who had been placed in a residential children's home in circumstances which Keehan J found met *Storck* component (a). The question was whether, given the existence of the interim care order, either the parents or the local authority was entitled to consent for the purposes of *Storck* component (b). Keehan J held that they were not. That, as will be appreciated, is not an issue before us on this appeal.
110. Having (para 25) set out what he had said in *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142, paras 51-61, Keehan J continued, paras 26-28:

"26 Do the same considerations apply when a child is accommodated by a local authority pursuant to section 20 of the Children Act 1989? The only possible answer is they may do. It will all depend on the facts of the individual case. At one extreme, an agreed reception into care of a child, that is beneficial and for a short-lived period, where the parent and the local authority are working together co-operatively in the best interests of the child, may be an appropriate exercise of parental responsibility. Thus it would be appropriate for that parent to consent to the child residing in a place (for example, a hospital) for a period and in circumstances which amount to a deprivation of liberty.

27 At the other extreme, there will be cases where children have been removed from their parents' care pursuant to a section 20 agreement as a prelude to the issue of care proceedings and where the local authority contend the threshold criteria of section 31(2) of the Children Act 1989 are satisfied. In such an event, I find it difficult to conceive of a set of circumstances where it could properly be said that a parent's consent to what, otherwise, would amount to a deprivation of liberty, would fall within the zone of parental responsibility of that parent. This parent's past exercise of parental responsibility will, perforce of circumstances, have been seriously called into question and it would not be right or appropriate within the spirit of the conclusion of the Supreme Court in [*Cheshire West*] to permit such a parent to so consent.

28 Where a child or young person is in the care of a local authority and is subject to interim or care orders, the reasoning in para 27 applies with even greater force, especially when one considers the effect of an interim care order, which includes the power of the local authority to restrict "the extent to which ... a parent ... may meet his parental responsibility for" the child: section 33(3)(b) Children Act 1989, as amended by section 139 of and paragraph 63(a) of Schedule 3 to the Adoption and Children Act 2002."

111. In relation to the power of the local authority to provide consent, he added, para 29:

"Where a child is in the care of a local authority and subject to an interim care, or a care, order, may the local authority in the exercise of its statutory parental responsibility (see section 33(3)(a) of the Children Act 1989) consent to what would otherwise amount to a deprivation of liberty? The answer, in my judgment, is an emphatic "No". In taking a child into care and instituting care proceedings, the local authority is acting as an organ of the state ..."¹⁰

He went on (para 36):

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

¹⁰ Keehan J repeated the point in *Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, paras 35, 101.

112. He resolved the matter (para 37) by making an order under the inherent jurisdiction.

Storck component (b): Keehan J's judgment in the present case

113. Keehan J began his analysis in the present case with *Nielsen v Denmark* (1988) 11 EHRR 175 (*Birmingham City Council v D* [2016] EWCOP 8, [2016] PTSR 1129, paras 39-40). He then noted (paras 41-42) the submissions made by Mr Ruck Keene on behalf of the Official Solicitor that *Nielsen* “is solely concerned with the objective element of confinement and has no relevance to the issue of consent ... [and] 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.”

114. He then (paras 42-52) went through a number of cases, including the decisions of the Strasbourg court in *Koniarska v United Kingdom* (2000) 30 EHRR CD 139, *DG v Ireland* (2002) 35 EHRR 33, *HM v Switzerland* (2002) 38 EHRR 17, *Storck v Germany* (2006) 43 EHRR 6, *Stanev v Bulgaria* (2012) 55 EHRR 22, *Stankov v Bulgaria* (Application No 25820/07, unreported, 17 March 2015), *DD v Lithuania* [2012] MHLR 209, and *Atudorei v Romania* (Application No 50131/08, unreported, 16 September 2014).¹¹ He said this (para 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 European Court of Human Rights 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*.”

He went on (para 55):

“It is submitted that the European Court of Human Rights did not in *Stanev* or *Atudorei*, nor 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* ... the European Court of Human Rights reached the opposite conclusion, namely that a legal guardian could not consent to her adult son's confinement in a social care home.”

No doubt, but it is to be noted that each of these cases involved an adult, not a child.

115. Keehan J then turned (paras 56-62) to a consideration of *In re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377, *RK v BCC* [2011] EWCA Civ 1305, [2012] COPLR 146, and the judgment of Lord Kerr of Tonaghmore JSC in *Cheshire West*. He continued (paras 63-64):

¹¹ As the Official Solicitor helpfully points out, to these authorities there now needs to be added the more recent decision in *Červenka v The Czech Republic* (Application No 62507/12, unreported, 13 October 2016).

“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) section 131 of the 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) section 8 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) section 9(6) of the Children Act 1989 provides that no court may make a section 8 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) section 20(11) of the 1989 Act provides that a 16- or 17-year-old young person may consent to his or her accommodation by a local authority; (e) section 31(3) of the 1989 Act 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) section 2(5) of 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: section 18).”

116. Keehan J then referred (paras 65-67) to the Law Commission Consultation Paper, *Mentally Incapacitated Adults and Decision-making* (1993) (LCCP No 128) and the Law Commission Report, *Mental Incapacity* (1995) (Law Com No 231) which led to the Mental Capacity Act 2005, and then (para 68) to Article 5 of the United Nations Convention on the Rights of the Child.
117. Keehan J then turned (paras 70-93) to consider the submissions of Mr Cowen on behalf of the local authority. He summarised his submissions that the decision of Mostyn J in *In re RK (Minor: Deprivation of Liberty)* [2010] COPLR Con Vol 1047 on the issue of section 20 accommodation survived the decision of the Court of Appeal in *RK v BCC* [2012] COPLR 146 and remains good law; that (para 74):

“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”;

and that (para 75) his decision in *In re D* was correct.

118. Keehan J continued (para 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.”

In support of that proposition, Mr Cowen had relied on *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC112, *In re W (A Minor) (Medical Treatment: Court’s Jurisdiction)* [1993] Fam 64 and *Hewer v Bryant* [1970] 1 QB 357.

119. Keehan J recorded (paras 83-84) Mr Cowen’s acceptance that the various statutory provisions he had referred to (para 64) “permit 16- or 17-year-olds to give full and effective consent in certain situations.” He went on to note Mr Cowen’s further submissions, supported by reference to *In re W (A Minor) (Medical Treatment: Court’s Jurisdiction)* [1993] Fam 64, that “it is notable that in respect of the provisions of section 8(1) of the Family Law Reform Act 1969 and section 20 of the Children Act 1989, the child cannot override the consent of a person with parental responsibility” and that “in respect of any of the statutory provisions referred to ... above, the young person in question must have the capacity to consent ... 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.” Mr Cowen went on (paras 85-86) to submit that “*Nielsen* 11 EHRR 175 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”, a submission which he sought to bolster by reference to what Baroness Hale and Lord Neuberger had said in *Cheshire West*. Thus, he submitted (para 87):

“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, ... his parents may and did consent to his confinement at Placement B.”

120. Keehan J then turned (paras 88-92) to consider Mr Cowen’s second proposition, namely that “substituted consent can be given by a validly appointed representative of an incapacitous person” a proposition which he sought to make good by reference to the decisions of the Strasbourg court in *Stanev v Bulgaria* (2012) 55 EHRR 22 and *Atudorei v Romania* (Application No 50131/08, unreported, 16 September 2014).

Storck component (b): Keehan J’s judgment – analysis and discussion

121. Keehan J's analysis and discussion (paras 94-128) is long and detailed. I can fairly summarise his conclusions as follows.

122. First (paras 98-102) Keehan J rejected the Official Solicitor's contentions 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 and that his decision in *Re D* [2016] 1 FLR 142 was wrong. He said (paras 98-99):

“98 ... I remain satisfied that my analysis of the legal and factual position in that case ... is correct ...

99 In light of the further argument which I read and heard in this case I am fortified in my conclusion ... that the assertion of Thorpe LJ, in *RK v BCC* [2012] COPLR 146 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 European Court of Human Rights decision. There is no support for that proposition in any domestic authority save and except for perhaps *In re K (A Child) (Secure Accommodation Order Rights to Liberty)* [2001] Fam 377. I do not consider that to be either a binding or relevant decision.”

123. For the reasons I have already given (paragraphs 37, 99, 103 above), I respectfully agree with Keehan J as to both his decision on this point and his reasoning. Specifically, I agree that Keehan J was right to reject the Official Solicitor's argument that *Nielsen* goes only to *Storck* component (a). As I have already explained, not least by reference to *Cheshire West*, it is a case on *Storck* component (b).

124. Secondly, however (paras 103-106, 113-115), Keehan J rejected the local authority's contention that the same arguments applied in relation to a young person of 16 or 17 years. I need to set out his reasoning in detail:

“103 ... I am entirely persuaded that Parliament has on numerous occasions, as adumbrated in para 64 ..., 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-year-olds within the remit of the Mental Capacity Act 2005. An incapacitous young person under the age of 16 years is specifically excluded from the provisions of the Act: see section 2(5) (subject to the exceptions referred to in para 64(f) ...).

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 United Nations Convention on the Rights of the Child 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 co-operative 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.

113 The position is ... quite different once a young person attains the age of 16 ... 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 precondition of having a capacity to consent.

115 I am satisfied that young people of 16 or 17 years are entitled to the full protection of their article 5.1 Convention 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.”

125. On this point, in my judgment, Keehan J was wrong in law. I say this for two reasons. First, because his approach does not give effect to the fundamental principle established by *Gillick*: namely that, in this context (see paragraphs 79-85 above), the exercise of parental responsibility comes to an end not on the attaining of some fixed age but on attaining ‘*Gillick* capacity’. In effect, Keehan J would have us go back to the approach of Cockburn CJ and Parker LJ. Secondly, because none of the statutory provisions upon which he relied bears either expressly or by implication upon the matter in hand which, to emphasise the obvious, is to do with the ambit and extent of parental responsibility and nothing else. It was therefore, with great respect to Keehan J, beside the point for him to observe (para 103) that:

“Parliament has on numerous occasions ... 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.”

No doubt, but, I ask rhetorically, “where does that take us?” given the rejection by the House of Lords in *Gillick* of this court's reliance in the same case on what was essentially the same line of thought.

126. As we have seen (paragraph 115 above), Keehan J referred in this connection to seven different statutory provisions: (a) section 131 of the Mental Health Act 1983; (b) section 8 of the Family Law Reform Act 1969; (c) section 9(6) of the Children Act 1989; (d) section 20(11) of the 1989 Act; (e) section 31(3) of the 1989 Act; and (f) section 2(5)

of Mental Capacity Act 2005. The first two, it will be noted, both pre-date the decision in *Gillick*. These provisions fall into three groups. The first group, that is, (a), (b) and (d), enable a 16- or 17-year old to give an effective consent for certain purposes. But, as the *Gillick* jurisprudence shows (see, for example, *In Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 and *In re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64), and as Mr Cowen had submitted to Keehan J (see paragraph 119 above), the ability of the child to consent in accordance with such provisions does not of itself oust a parent's ability to consent in the proper exercise of the parent's parental responsibility. The second group, that is, (c) and (e), impose limitations of the power of the *court* in certain circumstances. They throw no light, in my judgment, on the question of the ambit or extent of parental responsibility. The third, that is (f), and the one on which Keehan J placed particular emphasis, delimits the exercise of powers, whether by the Court of Protection or others, under the Mental Capacity Act 2005 and that again, in my judgment, throws no light on the question of the ambit or extent of parental responsibility. Moreover, and given the contention that, for present purposes, the attaining of the age of 16 is said, without qualification or caveat, to mark a bright-line, it is perhaps revealing to note that, although (a), (b) and (d) do provide for such a bright-line distinction, (c), (e) and (f) in their different ways do not.

127. Given the emphasis placed by Keehan J upon the Mental Capacity Act 2005, it is worth noting two points correctly made by Mr Setright and Mr Ruck Keene in their skeleton argument. First, that in general terms the 2005 Act does *not* make specific provision in relation to those aged 16 or 17. Secondly, and even more important for present purposes, that with only two (in the present context irrelevant) exceptions,¹² the 2005 Act *makes no statutory provision for the role of those exercising parental responsibility*. Precisely so: the matter is left to the common law, in other words to the operation of the *Gillick* principles.
128. In my judgment, in the context with which we are here concerned (see paragraphs 84-85 above), parental responsibility is, in principle, exercisable in relation to a 16- or 17-year old child who, for whatever reason, lacks '*Gillick* capacity'.
129. This point is closely linked with the next; the two were at the heart of the appeal.
130. Thirdly, Keehan J (paras 107-112) rejected the Official Solicitor's argument that his decision in *Re D* involved discriminating against D because of his disabilities, namely his autism and ADHD. He explained why (paras 108-109):

“108 In *Re D*, when considering whether the first limb of *Storck* 43 EHRR 6 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 ... A further important factor is

¹² See sections 27(1)(g) and 50(1)(b).

the extent to which, if at all, a child or young person has the ability and capacity to make decisions for themselves ...

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."

131. But, as we have seen (paragraph 124 above), Keehan J took a different view once D had attained the age of 16. I have already set out part of his reasoning (paras 105-107, 113 and 115). All of this has to be read together with what he said a little later (paras 124-125):

"124 Baroness Hale DPSC in [*Cheshire West*] emphasised that all people, including those with disabilities, are entitled to the protection of the European Convention and in particular to that afforded by article 5. If I were to accede to [the local authority's] 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 *Re D* [2016] 1 FLR 142. 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."

132. As I read all this, there appear to be three strands to Keehan J's reasoning: first (paras 103, 106, 113), that "Parliament has chosen to draw [the] distinction for good and proper reasons"; secondly (para 105), that the international Conventions to which he referred, in particular the United Nations Convention on the Rights of the Child, "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"; and, thirdly (para 124), that he would otherwise be "wrongly discriminating against D on the grounds of his disability."
133. In relation to this latter point it is important to focus on Keehan J's asserted contrast between the position of the 15-year old and the 16-year old D. I have set the relevant

passages out already, but they bear repetition. His reasoning in relation to the 15-year old D was as follows (paras 108-109):

“108 ... The age and maturity of a child or young person are very important factors when considering the extent of parental responsibility ... 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 ...

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.”

His reasoning in relation to the 16-year old D, in contrast, was this (paras 124-125):

“124 ... 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 *Re D* [2016] 1 FLR 142. 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.”

134. So, in the final analysis, it would seem that the distinction drawn by Keehan J was based on the premise that, because of the distinction, as he would have it, drawn by Parliament between the 15- and the 16-year old, and because of what he called the “special status” accorded by Parliament to the 16- or 17-year old, one is no longer, in the case of the 16-year old, within the scope or zone of parental responsibility. The analysis, if I may say so, is compelling, assuming the correctness of the premise; but it collapses if the premise is wrong, as in my judgment it is.
135. I have already considered, and rejected (paragraphs 126-127), the analysis supposedly derived from what Parliament has or has not done. What about the reasoning based upon international Conventions and discrimination law?
136. We were taken, as was Keehan J, to the United Nations Convention on the Rights of the Child (CRC), specifically to Articles 2, 3, 5, 12, 20, 23 and 37. Article 3(1) provides that “the best interests of the child shall be a primary consideration.” Article 3(2) provides that:

“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.”

Article 5 provides as follows:

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as 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, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”

Article 12(1) requires the views of the child to be “given due weight in accordance with the age and maturity of the child.” Article 18(1) provides that:

“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”

Article 23 provides, so far as material for present purposes, that:

“1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.”

Article 37, relating to deprivation of liberty, provides so far as material for present purposes:

“States Parties shall ensure that:

...

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used

only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall ... have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”

137. Ms Butler-Cole helpfully supplemented this by taking us to various official and semi-official reports where these provisions of the CRC have been considered. I need not go into the detail because nothing in these materials detracts from what are, for present purposes, the three key things to be derived from the CRC. The first is the recognition, for example in Articles 3(2), 5 and 18(1), of, to use the language of Article 18(1), the “primary responsibility” of the parents for their child’s care, upbringing and development. The second is the philosophy to be found, for example, in Articles 5 and 12(1), which recognise, to use the language of Article 5(1), the “evolving capacities of the child” and, to use the language of Article 12(1), the need to have regard to “the age and maturity of the child” – precisely the philosophy which, in domestic law, is enshrined in *Hewer v Bryant* and *Gillick*. The third is the fact that nowhere in the CRC or in any of the literature to which we have been taken is any explicit reference made to the different position of the 16- or 17-year old child compared with the 15-year old; there is nothing to suggest that there is some ‘bright-line’ distinction between the 15 and the 16-year old.
138. In my judgment, therefore, there is nothing in the CRC which detracts from or which requires any modification of what I have already said in paragraph 128 above.
139. We were also taken to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), specifically to Articles 3, 4, 5, 7 and 14. Article 3 provides, *inter alia*, that:

“The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

...

(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.”

Article 4(1) provides that:

“States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.”

Article 7, which as Ms Butler-Cole observes closely reflects the provisions of the CRC, provides that:

“1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.”

The reference in Article 7(3) to the child’s “age and maturity” will be noted. Article 14 provides as follows:

“1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.”

140. Ms Butler-Cole referred to the tension between Article 14(1)(b) of the CRPD and Article 5(1)(e) of the European Convention, considered in paras 48-49 of the 2009 *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities*. There is no need for us to explore this perplexing issue any further here.

141. On the basis in particular of the CRPD, Ms Butler-Cole submitted that “a mentally disabled 16-year old must be treated in the same way as a non-mentally disabled 16-year old,” so that if “parental consent to confinement satisfying the objective limb of Article 5 is not permissible for a non-disabled 16-year old, it cannot be permissible for a disabled 16-year old, notwithstanding the different mental capacities of each child.” Ms Butler-Cole’s primary submission is that “parental consent is not valid consent for Article 5 purposes in respect of any 16- and 17-year olds whether *Gillick* competent or not.” That, for reasons I have already explained, I do not accept. Her alternative submission, as finally formulated, is that:

“If parental responsibility includes a power to give valid consent to an objective deprivation of liberty that is imputable to the State, but only in respect of mentally disordered or disabled young people (or only such young people who are not *Gillick* competent), that would violate Article 14 EHCR read with Article 5 and/or Article 8, as well as the provisions of the CRPD and CRC.”

142. Mr Setright indicated that, in broad terms, the Official Solicitor endorsed Ms Butler-Cole’s submissions. He formulated the question as being: If a disabled child is confined in a way that goes beyond that which would ordinarily be expected of a child of that age, then should their confinement in some way be regarded as different and deserving of less scrutiny *because of* their disability? Pointing to what had been said in *Cheshire West* by Baroness Hale (paras 45-46) and Lord Kerr (para 77), he submitted that the answer was No. He also raised, though Ms Butler-Cole had not, the question whether, if a local authority were to rely upon parental consent in such a situation, it would be discriminating against the child in breach of sections 13 and/or 15 of the Equality Act 2010.
143. I have set out these submissions in some detail because they highlight what in my judgment is a central difficulty with the case being put both by Ms Butler-Cole and by Mr Setright. The point can be put in a number of ways. Their analysis simply does not square with the principle, underpinning both our domestic jurisprudence derived from *Hewer v Bryant* and *Gillick* and the provisions of the CRC and the CRPD referring to the child’s “evolving capacities” and “age and maturity”, that the child’s chronological age is not determinative. Their analysis does not explain how one can apply their approach whilst at the same time applying the concept of ‘*Gillick* capacity’. Nor does it explain whether lack of ‘*Gillick* capacity’ is, for the purpose of discrimination law, an aspect of disability (as Ms Butler-Cole’s submissions would seem to suggest). Nor, looking to Lord Kerr’s observations in *Cheshire West*, does it enable one to identify the relevant comparator. Reference to a child’s “age and station” only takes one so far. There is no relevant bright-line age specified either in our domestic legislation (see paragraph 126-128 above) or in either the CRC or the CRPD (see paragraph 137 above). But if, on the other hand, the relevant comparator is the non-disabled child of the same age, what attributes does one attach to that hypothetical child with a view to determining the ambit or zone of parental responsibility? If age alone is not determinative, one is left, I suppose, as a reference point to the characteristic developmental trajectory of some hypothetical ‘typical’ or ‘normal’ child (whatever those expressions might be understood as meaning). But that, as I have pointed out (paragraphs 83-84 above) is simply inconsistent with the learning in *Gillick*.

144. At the end of the day, the answer to this question, in my judgment, is that provided by Keehan J in relation to the 15-year old D (see paragraphs 130, 133 above). *If*, issues of discrimination apart, what is in issue falls within the ambit or zone of parental responsibility – because, expressing the point in terms of domestic law, the child, whether 15- or 16-years old, lacks ‘*Gillick* capacity’ for whatever reason and the parents are acting in a manner treated as being within their parental responsibility – and that is the hypothesis on which the present question arises – then there is no question of discrimination. Putting it more plainly, there is, in my judgment, no question of discrimination where a parent is acting in a manner compatible with the principles laid down in *Gillick* as I have summarised them in paragraph 85 above. There is, in my judgment, nothing in *Cheshire West* which casts any doubt upon the continuing validity of what was said in *Gillick*.
145. In relation to the argument founded on sections 13 and/or 15 of the Equality Act 2010, the answer is that, as already explained, the reason why Article 5 is not engaged in a case such as this is because of the giving by the parents of a consent which domestic law empowers them to give, and which *Nielsen* treats as being effective for the purposes of *Storck* component (b). In other words, the crucial act or decision is that of the parents, not the local authority. It is not, as Mr Setright would have it, a question of the local authority “relying” upon the parents’ consent.
146. In my judgment, therefore, Keehan J was wrong on this point.
147. Fourthly (paras 116-121), Keehan J rejected the local authority’s contention that the Strasbourg judgments in *Nielsen* 11 EHRR 175, *Stanev* 55 EHRR 22 and *Atudorei* 16 September 2014 establish or support the principle of substituted consent. *Nielsen*, as he pointed out, concerned a child and the scope or zone of parental responsibility. The passages in *Stanev* and *Atudorei* relied upon by the local authority had, he said, the character of a chance passing comment and simply could not bear the weight which the local authority sought to place on them. Moreover, he said (para 121):

“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.”

148. While I am inclined to agree with Keehan J on this point, I prefer to express no concluded view, one way or the other, in relation to a point of no little difficulty which does not, in fact, arise for determination in the present case, governed as it is, for the reasons I have given, by *Nielsen*.
149. Finally (paras 126-128), Keehan J rejected the local authority’s contention that the parents’ consent to D being accommodated pursuant to section 20 of the Children Act 1989 was a valid consent to D’s confinement at the residential unit. He disagreed with Mostyn J’s analysis in *Re RK (Minor: Deprivation of Liberty)* [2010] COPLR Con Vol 1047. Furthermore, he said (para 128):

“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.”

150. I agree with Keehan J that the mere fact that a child is being accommodated by a local authority pursuant to section 20 does not, of itself, constitute a parental consent for *Nielsen* purposes to the particular confinement in question. In the first place it needs to be borne in mind that parental consent is not, in law, an essential pre-requisite to a local authority’s use of section 20: see *Williams and another v Hackney London Borough Council* [2017] EWCA Civ 26, [2017] 3 WLR 59. Moreover, even where there is such consent, there remains the powerful point made by Keehan J: to what precisely have the parents consented? That is a matter of fact to be decided in light of all the circumstances of the particular case. Here, as we have seen, Keehan J, found (see paragraph 9 above) that his parents *had* agreed to D’s being placed at Placement B just as he had earlier found (paragraph 107 above) that they had previously agreed to his being placed at Hospital B. I can see no basis for challenging either of those findings of fact.

Conclusion

151. For my part, therefore, I would dismiss the appeal on grounds (2) and (3) but allow the appeal on ground (1).
152. I have read in draft the judgment of Irwin LJ and respectfully agree with it. I am particularly grateful to my Lord for directing us to the fundamentally important judgment of Lord Reed in *Osborn*. The whole of the passage (paras 54-63) to which my Lord has referred merits the most careful consideration by all practitioners, whether in the family courts or in the Court of Protection.

Lord Justice David Richards :

153. I too would dismiss the appeal on grounds (2) and (3), but allow it on ground (1), for the reasons given by the President.
154. In his judgment at paragraphs 30-39, the President addresses and expresses his view on the meaning and application of “confinement” – *Storck* component (a) – in the case of young children. The present case concerns D, who was 16 years old at the date of the hearing before Keehan J. As the President records in his judgment at paragraph 11, it was common ground before the judge and before us that D’s living conditions amounted to confinement, satisfying *Storck* component (a). The issue discussed by the President at 30-39 was not therefore before us and was not the subject of any submissions. In those circumstances, I prefer to express no view on it.

Lord Justice Irwin

155. I agree with the reasoning and conclusions of the President of the Court of Protection, and in particular with his critical conclusions set out in paragraphs 84 and 128 above.
156. It is important to keep in mind two linked contextual matters: the overall purpose and function of the European Convention of Human Rights, and the relationship between the common law and the Convention, in the protection of the rights of the citizen.

157. The ECHR enshrines the rights of the citizen, but its principal purpose and function is the protection of rights by engaging the State. The Convention is not an academic exercise. Key questions in every case where the Convention is invoked are: on the facts, is there an obligation for the State to become involved? Are the domestic laws and procedures apt to engage the State when necessary, and to protect the citizen's rights? But these are questions to be asked and answered of the domestic law, for our purposes the common law.
158. It should be no surprise that the common law has provided the answer here. Although it is not necessary for the decision in this case, I also agree with the President that the question whether there is "confinement" should be approached in the careful way analysed by Lord Kerr in *Cheshire West*, at paragraphs 77 to 79. A three year-old child must be restrained for her own safety if walking near a busy road, or playing near a bonfire. This restraint would be unlawful if exercised over an adult. But it is lawful if exercised by any adult looking after the child. In my view, there is no need for an elaborate analysis of delegated parental responsibility to explain this. In such circumstances, restraint to keep the child safe lawfully could (and normally should) be exercised by any nearby adult. The true analysis is that explained by Lord Kerr. For all present purposes, "confinement" means not simply "confining" a young child to a playpen or by closing a door, but something more: an interruption or curtailment of the freedom of action normally to be ascribed to a child of that age and understanding. In most of the myriad instances in life where children are restrained in one way or another – by being compelled unwillingly to go to school, go to bed at a given time and so forth – there can be no question of their being "confined" so as to fulfil the first limb of the test in *Storck*.
159. Where there is confinement in the sense I have indicated, so that there may be a need for the State to engage to prevent possible abuse, the questions then become whether parental rights (and duties) can justify the confinement, and whether the State may have an obligation, to be discharged by local authorities and perhaps by the courts, to intervene. Excessively cautious or strict parenting, leading, let us say, to a fourteen year-old who is prevented from ever leaving the house save to be transported to and from school by a parent, might be a case of "confinement". Other more extreme examples clearly would do so. Then the issue of whether the confinement is justified may arise. It will be evident that such cases are highly fact-specific and that the State will accord great flexibility to parents in caring for their children. That flexibility must reflect the facts, including the "discretion" of the child.
160. ECHR Article 8 protects family life in this sense too. The ECtHR has clearly been alive to this need for sensitivity in the approach to such a case, as Butler-Sloss P recognised in her remarks in *In re K* (para 27) quoted above in paragraph 91 of the judgment of Munby P. The same is evident in *Nielsen*. In my view the Strasbourg jurisprudence is compatible with a sensible approach to these problems, fully reflecting the complexity and variety of factual situations which arise, and the need for a wide measure of discretion to parents in the upbringing of their children.
161. The reasoning of Munby P in this case represents a classic example of empirical and organic development of the common law. This is an entirely appropriate approach to a legal problem which has been formulated hitherto principally by reference to the European Convention, for the reasons spelled out by Lord Reed in his judgment in

Osborn and Others v The Parole Board [2013] UKSC 61, [2014] AC 1115, paras 54 to 63. As he said in paragraph 62:

“...the starting point [should be] our own legal principles rather than the judgments of the international court.”

And by so approaching the matter, the rights formulated under the European Convention should not, as Lord Rodger put it in *HM Advocate v Montgomery* 2000 JC 111, 117, form “a wholly separate stream in our law; in truth they seek thorough and permeate the areas of our law in which they apply.”

162. For those reasons and in agreement with Munby P, I too would dismiss the appeal on grounds (2) and (3), but allow the appeal on ground (1).