Getting in line with Article 5: The Court of Appeal's determination on the judgment of Mrs Justice Lieven in Re J, [2024] EWHC 1690 (Fam).

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The Court of Appeal has just handed down judgment in the appeal case of Re J, heard in the first instance by Mrs Justice Lieven on 25th June 2024.

Its determination serves as a reminder that the "lodestar" when dealing with applications for a deprivation of liberty must, and should always be, Article 5 of the ECHR and the safeguards it provides and HL v UK *(Application: 45508/99)* 40 EHRR 761.

At first instance

The court was concerned with J, a 14-year-old boy with a number of life-long disabilities. J has autism and ADHD. He also has a diagnosis of Pica; an eating condition where the person eats non-edible items. His care needs are such that he is in a specialist children's home, accommodated by the local authority.

The application before Lieven J at first instance was for a Care Order and Deprivation of Liberty Order. The Care Order was agreed by the parents and supported by the Guardian. The only consideration for the Judge was the requirement of the DOL order.

At para. 12 of her judgment, the Judge states that there are two issues on the requirement of a DOLs order:

i. Is there a deprivation of liberty, here, within the meaning of Article 5 of the European Convention of Human Rights, applying the first and third limb of *Storck v Germany* [2006] 43 EHRR 6;
ii. Can the parents and the LA consent to the care that is being provided to J?

In her determination on the first issue, Lieven J, having considered *Cheshire West v P* [2014] AC 896, ruled that the first and third limb of *Stork* had been met.

Lieven J's reference to ***Lincolnshire County Council v TGA & Ors (Deprivation of Liberty Parental Consent)*** [2022] EWHC 2323 (Fam); ***Guzzardi v Italy*** (1980) 3 EHRR 333; ***Re D (A Child) (Deprivation of Liberty)*** [2015] EWHC 3125 and ***Re D (A Child)*** **[2019] UKSC 42** led her to the conclusion that limb (ii) of *Storck* – *"*valid consent" – had not been met, therefore a DOLs order was not required.

The decision at first instance in practice has meant that some local authorities have believed they are able to give valid consent to deprive a child of their liberty when a care order is in place. That determination, according to the Court of Appeal is where the Learned Judge went wrong. In their view, there was *"an absence of connection with those core sources of authority"* [51].

The issue on appeal

The court of appeal had to determine one issue – was Mrs Justice Lieven correct in her analysis of the law?

The short answer: no.

The law

J, is subject to a high level of care and supervision including:

> *[9] "The windows in his room have latches that can only be opened an inch; there is total supervision in the community; if J wants to go to the garden he takes his shoes to the door, the staff support him to go out fully supervised, or direct him to another activity. He is followed to the toilet, to offer support and to ensure he does not defecate on the floor. The property is Pica safe, with all small objects placed safely away from him. At night there are two waking staff to support J and the other two children in the property. He has to wear a harness in the car to prevent him getting into the footwell".*

So, what is the correct analysis? According to the Court of Appeal, when dealing with the question of whether it is necessary for the court to authorise the deprivation of liberty of a child, who is subject to a care order where the LA consents to the child's confinement – that question must be determined in line with the Human Rights Act 1998 and the ECHR.

The starting point is Article 5 of the ECHR and *HL v United Kingdom (Application: 45508/00)* 40 EHRR 761.

Article 5 of the European Convention on Human Rights is clear that:

> *"Everyone has the right to liberty and security of person"*

However, Article 5(d) provides for the:

> *"Detention of a minor by lawful order for the purpose of educational supervision…"*

It is Article 5(d) which is directly applicable to J's case. For Article 5 to be engaged, three well-established elements must be met per *Storck v Germany (App No 61603/00)* (2006) 43 EHRR 6:

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

The importance of *HL v UK* is that it filled the legislative gap in domestic law regarding the deprivation of liberty provisions within the Mental Capacity Act 2005.

Article 5 serves to protect those who are deprived of their liberty by ensuring compliance with proper safeguards – J, in this case, was to be afforded those safeguards under Article 5(1) or a process in court under Article 5(4).

The Court of Appeal are clear:

1) When engaging with a question as that in the first instance, the focus should have been upon Article 5 and the purpose it serves as determined *HL v UK* and *Cheshire West* and **not** what the domestic law has to say about a local authority's ability to provide valid consent.
2) Following those core authorities will always lead to the inevitable conclusion that the State will ***never*** be able to give valid consent in these circumstances.