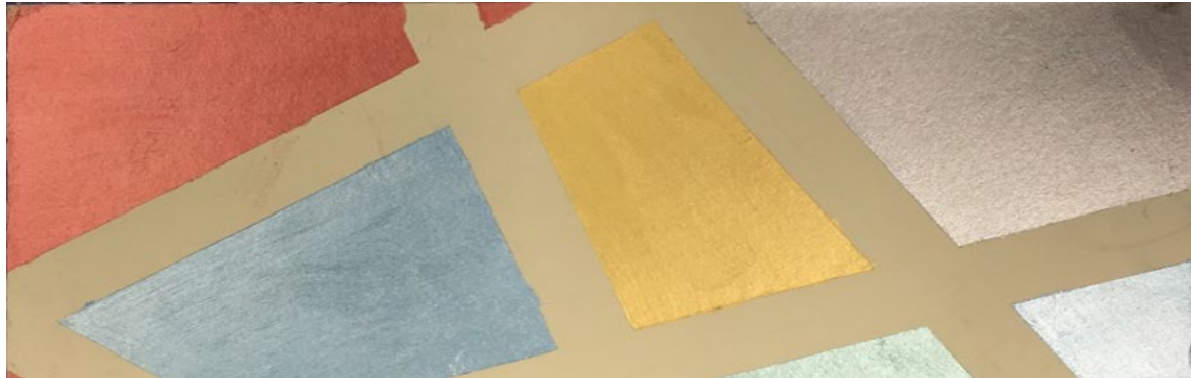




Welcome to the October 2026 Mental Capacity Report. Highlights this month include:

- (1) In the Health, Welfare and Deprivation of Liberty Report: capacity, presumptions and the Care Act 2014; and the most comprehensive first instance 'run' at AGNI so far;
- (2) In the Property and Affairs Report: deputies and direct payments, and the Court of Protection and the validity of wills;
- (3) In the Practice and Procedure Report: the AGNI effect starts to show in the statistics;
- (4) In the Mental Health Matters Report: HSSIB's investigation into mental health care in the emergency department;
- (5) In the Children's Capacity Report: desperate deprivation of liberty and consenting to confinement;
- (6) In the Wider Context Report: Anglo-Welsh legal differences and asserting your own capacity;
- (7) In the Scotland Report: what listening to children tells us about listening to adults.

A reminder that that whilst Chambers have launched a new and zippy version of our [website](#) which may look unfamiliar, all the content that you might need – our Reports, our case-law summaries, and our guidance notes – can still be found via [here](#).

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The picture at the top, "Colourful," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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### Capacity, presumptions and the Care Act 2014

*R (TDB) v London Borough of Haringey (Mind intervening)* [2026] EWCA Civ 1184 (Court of Appeal (Bean, Baker and May LJ))

*Other proceedings – judicial review*

#### Summary<sup>1</sup>

T was 25 with diagnoses of autism, ADHD, a speech and language disorder and personality disorder. In October 2024 his solicitor wrote to the local authority about his long-standing difficulties with relationships and sexual boundaries, and asked for input from a psychologist and from learning disability and autism specialists. The Care Act needs assessment completed on 13 December 2024 recorded that “*T lacks capacity in understanding relationships/sexual relationships and boundaries of relationships*,” although this information came from the placement provider; the assessor had not assessed capacity herself (paragraph 19).

The legality of the Care Act assessment was challenged principally because no capacity assessment had been undertaken before his

needs assessment was completed. This was originally dismissed ([2025] EWHC 2014 (Admin)) because the assessors had proceeded on the basis that T lacked capacity about healthy sexual relationships, T was “*entitled to the important presumption of capacity*,” and nothing suggested cause for concern about his capacity “*to make a specific decision after appropriate support has been offered*.”

The Court of Appeal allowed the appeal. Baker LJ (with whom May LJ and Bean LJ agreed) held:

*... whenever there is a reason to doubt the capacity of a person whose needs for care and support are being assessed under the Care Act, a capacity assessment under the MCA must be carried out by an appropriately qualified professional before the Care Act assessment of needs is completed.*  
(paragraph 91)

This was “*clear from the provisions of the Act itself as well as the guidance*” (paragraph 92). Well-being under s.1(2) (control over day-to-day life, participation, personal relationships) cannot be evaluated without considering capacity; the s.1(3) matters require “*a clear understanding of*

<sup>1</sup> Tor, Alex and Annabel having been in this case, they have not contributed to this note.

*the individual's capacity to make decisions in the various domains in which his well-being is under consideration;*" ss.9(5)(c), 11 and 25(3) refer to capacity expressly; the regulation 3 duties in the Care and Support (Assessment) Regulations 2014 depend on it; and paragraphs 6.32 and 10.63 of the Statutory Guidance reinforce the point (paragraphs 93–97). The capacity assessment must comply with ss.1–3 MCA and with paragraphs 4.34, 4.35, 4.38 and 4.42 of the Code of Practice (paragraph 98).

On the facts, there was clear evidence of incapacity in at least one respect, cited in the assessment itself, and *"plainly reason to believe"* that T might lack capacity in other areas (paragraph 100). Baker LJ agreed with the argument advanced on T's behalf that the positive behaviour support response was *"not a proper assessment of need nor an adequate analysis of how to meet it:"* without a capacity assessment the local authority could not judge whether that level of support was appropriate (paragraph 101).

Baker J rejected the argument that there was no decision for T to make (and no need to consider his capacity): his relationships, contact with others and internet use were all in issue (paragraph 103). And the duty to arrange independent advocacy under s.67 of the Care Act did not remove the need to assess capacity; s.67 is about involvement in the Care Act assessment process, and *"has no relevance to the question whether the individual has capacity to make decisions about aspects of his life"* (paragraph 104).

Neither the presumption in s.1(2) MCA nor the practicable steps principle in s.1(3) is *"a reason for deciding not to assess capacity when it is in doubt"* (paragraph 105, endorsing Swift J in *Royal Bank of Scotland plc v AB*). Baker LJ added that the decision not to assess may have been influenced by the view that T did not have a

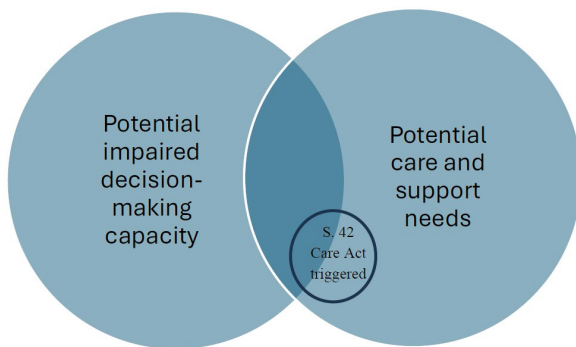
learning disability. But s.2(1) MCA refers to impairment or disturbance, not disability, and a formal diagnosis is not required (paragraph 106, endorsing *North Bristol NHS Trust v R* [2023] EWCOP 5 at [48]).

On ground 2, Baker LJ emphasised that regulation 5 of the 2014 Regulations is mandatory. While recognising *"the very considerable skill and expertise"* of the social worker, the Court held that, given T's complex diagnoses and needs, the local authority ought to have sought the advice of a psychiatrist or psychologist in conducting the Care Act assessment process. The failure to seek psychology input was irrational, and the judge had not engaged with the specific input sought (paragraphs 109–110).

The assessment was quashed. Subject to further submissions, the Court would not order a fresh Care Act assessment, because decisions about T's care were now before the Court of Protection so *"It is for that court to decide on any further assessments"* (paragraph 111).

## Comment

Baker LJ found it "puzzling" that this point had not arisen for consideration in the nineteen years since the MCA came into force. Mind's submissions (set out at paragraphs 84 and 85 of the judgment) set out how capacity can be relevant to consideration of needs under the Care Act 2014, both substantively and procedurally. Those submissions also included a Venn diagram (not reproduced in the judgment, but which Mind have given permission for us to reproduce):



("Potential impaired decision-making capacity" means "the person may lack capacity to make a relevant decision or decisions applying the test under the MCA 2005").

As to the type of decisions which the capacity assessor may need to address, paragraph 104 refers to capacity "to make decisions relevant to his needs" and paragraph 94 refers to the "individual's capacity to make decisions in the various domains in which his well-being is under consideration."

Importantly and to correct a misunderstanding that we have seen the judgment does not say 'assess capacity first; eligible needs second'. Rather, it says that the capacity assessment must happen before the needs assessment is completed. This is because the person's decision-making capacity could be relevant at different stages, both to the identification and characterisation of needs and how they are to be met and may need to be revisited during the care planning stage.

In terms of who assesses capacity, this must be an "appropriately qualified professional". Paragraphs 4.38 and 4.42 of the MCA Code refer to the person proposing to make the decision or take the action, with professional advice where the decision is complex. Similarly, paragraph 10.63 of the Care Act Guidance refers to "a social worker or other suitably qualified professional". The Court noted at paragraph 99 that:

*There is, of course a risk that this judgment may impose an additional layer of work on local authorities, and some extra costs. But the purpose of assessing capacity is to improve the chances of arriving at a more accurate assessment of the individual's needs. That can only be to the benefit of the individual and in due course should lead to a more efficient and effective use of the local authority's resources.*

In terms of needs assessments, the Care Act guidance at paragraphs 6.85–6.90 (reflecting Regulation 5 of the Care Act regulations) provide that assessors must have the "skills, knowledge and competence" to do the assessment, which can include (but is not limited to) registered social workers, occupational therapists and rehabilitation officers. Importantly, and the judgment makes clear, part of the skill set of an assessor is recognising when they need to consult with a person with specialist expertise where required.

### **AGNI – the most comprehensive first instance 'run' at it so far**

*AR (Whether restrictions amount to a deprivation of liberty)* [2026] EWCOP 45 (T2) (HHJ Burrows)

#### **Article 5 – deprivation of liberty**

#### **Summary**

HHJ Burrows has handed down the most comprehensive first instance 'run' at AGNI to date, *AR (Whether restrictions amount to a deprivation of liberty)* [2026] EWCOP 45 (T2), concerning (as he identified at paragraph 1):

*a young man I shall call AR. He is diagnosed as suffering from moderate to severe learning disability and autistic spectrum disorder. He is a man of 25 years who lived for most of his life with his parents. However, since May 2025,*

AR has lived in a placement, initially by way of respite care, but now on a more permanent footing. Although there has been disagreement between the LA and AR's parents in this case, it seems agreed that where he presently lives meets his needs, and I am not being asked to order his return home.

paradigm, particularly in relation to children and those persons of "unsound mind". The NI case makes it clear that it is only those who are closer to that paradigm that should properly be found to be deprived of their liberty.

As he noted:

HHJ Burrows was at pains to note at paragraph 14 that:

*We are in the early days following the Supreme Court's recent judgment in A Reference by the Attorney General for Northern Ireland of a Devolution Issue under Paragraph 34 of Schedule 10 to the Northern Ireland Act 1998 [2026] UKSC 16 (which I will refer to as the Northern Ireland case, or the NI case), as Ms Flanagan stated on a number of occasions, noting that we are awaiting "guidance" from the Courts. I am not sure there can be much guidance as to the use of a test that is fact and therefore case specific and multifactorial. It is certainly not my aim (or job) to give guidance. What I ought to do, however, is to explain how I think the NI case impacts on AR.*

It might be thought that HHJ Burrows was quite well placed to give such an explanation, having (in a previous life) been junior Counsel for the Official Solicitor in Cheshire West, and hence a very hardened veteran of what sometimes has felt like the deprivation of liberty wars.

Having set the scene by reference to the basics of the jurisdiction, HHJ Burrows set out the entirety of Article 5 ECHR

*20. It is, however, also important to note that the purpose of Article 5 is essentially protective. It ensures procedural protection for those who are vulnerable to arbitrary detention. This may be due to the commission, or the suspicion of the commission of a criminal offence. Or maybe unlawful entry into the country. Or carrying contagious diseases. Or being a vagrant. It also includes dysregulated children and young people, a cohort presently of a significant size. It also includes those whose unsoundness of mind ranges from the elderly person in a state of advanced dementia, or a person with a severe brain injury, to the floridly psychotic, the suicidally depressed, homicidal psychopaths and the learning disabled or autistic young person.*

*21. Those Article 5 is designed to protect are various. Hence, although the idea of a paradigm example of deprivation of liberty may appear helpful, it may also lead to highly restrictive regimes in a community setting appearing not to involve deprivation of liberty, because there are no bars on the windows, no 10-metre-high fence around the placement, and the terminology used may reflect a homely setting rather than a penal one.*

*19. [...] just to demonstrate its scope. That is because if, as the Supreme Court says in the NI case, the paradigm example of deprivation of liberty is the prisoner in his cell, the Article's scope strays some distance from that*

HHJ Burrows then set out an elegant precis<sup>2</sup> of how the Supreme Court in *AGNI* reached its conclusion, and an admirably concise summary of what he considered to be the relevant principles, namely:

- *Non-secure environments matter.* Living in a family home, foster placement, supported living or ordinary home is highly relevant and may point away from deprivation of liberty.
- *Purpose matters.* Protective and therapeutic restrictions are relevant and distinguishable from punitive confinement.
- *Relative normality matters.* The more the placement and care plan resembles ordinary life for a person in P's circumstances, the less likely it is to constitute a deprivation of liberty.
- *Protective motivation matters.* Although not decisive, restrictions imposed for care and safety rather than punishment weigh against a finding of deprivation of liberty.
- *Objection and consent matter* profoundly. A person may lack decision-specific MCA capacity yet still possess sufficient factual understanding to express valid consent for Article 5 purposes. Genuine contentment, acceptance or tacit consent may negate the subjective element of deprivation of liberty. Mere acquiescence, however, may not suffice.

What HHJ Burrows does not say, but would have been very aware, is that each of these principles represents a very different take on deprivation of liberty than in *Cheshire West*.<sup>3</sup>

Applying this to the facts of AR's case, HHJ Burrows held as follows (reminding ourselves that this is a fact-specific exercise, rather than a 'cookie cutter' to be applied):

64. Counsel submit this is a finely balanced case. I am not sure that is right. Looking at the matter globally and adopting the evaluative approach mandated by the NI case, I conclude that AR's circumstances do not amount to objective confinement for the purposes of Article 5.

65. In my judgment, and applying the NI case, the following matters are decisive.

- (a) AR suffers from a condition that will always require a significant level of supervision. There is a need in his case to ensure a good level of routine and predictability so as to ensure his relative happiness.
- (b) AR will always require restrictions on his movement. He will never be "free to leave" wherever he safely resides, and significant control has to be placed on his movements in and out of his residence.
- (c) Management of his behaviour will always require a high level of supervision and control, including when necessary, restraint.
- (d) Although he is not at his family home, he is at a place which he is able to treat as his own and

<sup>2</sup> With light editorialising, noting, for instance, that all bar one of the Strasbourg cases considered in *AGNI* had been cited before the Supreme Court in *Cheshire West*.

<sup>3</sup> For more about this, and why this might be so, see the [podcast](#) that Alex did for Community Care, and also this [blog](#) for the British Institute of Human Rights.

to personalise his environment. He is able to make friends, and engage in activities in and out of the placement.

- (e) These restrictions are in place for his own good, and are intended to ensure the best outcome for him.
- (f) Although his residence at the placement involves restrictions, they are far away from the paradigm of the prisoner in his cell, or, for that matter the mental patient in his secure unit.
- (g) These arrangements are relatively normal.

66. One issue I raised in argument was the extent to which his parents' issue with his placement was relevant to the issue of Article 5. The importance of this issue was somewhat diminished by the parents' acceptance that AR should remain where he is. However, there is still a dispute over contact. This raises two issues. First, what if AR's parents had submitted that he ought to come home immediately? The consensus at the bar was that objection from anyone other than P is not relevant to whether P was deprived of his liberty. I accept that, although clearly such an objection can have knock-on effects into the care plan (restrictions on contact, for instance) that can increase the intensity of the restrictions imposed on P. Now that a very wide range of matters need to be taken into account in determining whether Article 5 applies, it is important to recognise that contact is now more significant as a factor when determining whether P is deprived of his liberty.

67. That leads to the second point. There will be restrictions on contact with AR's parents, at least initially. These restrictions are relevant to the issue of deprivation of liberty. However, in the

context of this case, it seems to me that contact is able to take place, and the availability of contact may increase in line with the order I make. There may be situations where restrictions on contact with friends and family may be such as to change the character of the placement away from a home and closer to a place of detention. This is, in my judgment, not one of them.

68. The decisive features in this case are the protective purpose of the restrictions, the relative normality of the placement, the extent of community participation and the absence of institutional or custodial characteristics. AR is not deprived of his liberty. Article 5 is not engaged.

As he recognised, this conclusion meant that HHJ Burrows did not need to go on to consider the 'subjective limb.' However, he continued at paragraph 69: "given the novelty of the issue and the care with which it was argued before me, I consider it appropriate to express a view." Although any such view was clearly obiter (i.e. did not form any part of the reasoning underpinning the decision), I set out his observations here in full as they provide an indication of how it could be possible to interrogate this issue:

70. As the Supreme Court said at [151] of the NI case (emphasis added):

*The discussion above assists us to analyse the series of Strasbourg cases which were particularly relied upon by the parties to this reference. The principle which emerges from the authorities is as follows. An individual without legal capacity, but who is conscious of their environment and has a basic understanding of their living circumstances in a secure care environment, so that they can in*

*some suitable way express their view about their situation, who manifests their acceptance of that situation, should have their opinion respected when an assessment is made whether they are suffering a deprivation of liberty under article 5. Their subjective attitude, as so expressed, carries significant, indeed usually decisive weight, according to the criteria set out in Storck. Conversely, if such a person manifests a view that they do not accept that situation, that opinion should also be respected and will usually lead to the conclusion (if the objective circumstances indicate that they are detained) that they are subject to a deprivation of liberty.*

71. The Supreme Court also made the following comments at [160] when discussing Shtukatur (emphasis added):

*The [ECTHR] held that there had been a deprivation of liberty under article 5(1). The objective element of the test for deprivation of liberty was clearly made out (the applicant was confined for several months, not free to leave and his contacts with the outside world were seriously restricted). As regards the subjective element, the respondent government maintained that the applicant's detention had been voluntary, because his legal guardian had consented to it, whereas the applicant "referred to his own perception of the situation" (para 107). **The court recognised that the applicant lacked de jure capacity to decide for himself, but found that he was de facto able to understand his situation, as his own behaviour showed, and judged by reference to that he had not validly consented to his***

*confinement and there had been a deprivation of liberty* paras 108–109.

72. This approach carries with it some forensic difficulties. Is evidence required as to agreement and disagreement, and can it be challenged? What about the situation where P's position changes from time to time? Who decides? Presumably it's the Court? Nonetheless, it seems to me that a Court, when approaching this expanded definition of the subjective element under the MCA must always err on the side of caution, and provide Article 5 rights if there is any serious doubt that P consents (and is lacking in MCA capacity, of course).

73. This appears to be the view of the Supreme Court in NI. Although the judgment is extremely long, and establishing any succinct guidance is very difficult, there are some passages on this subject that can assist. In the discussion of consent in the ECHR cases (Nielsen, Stanev, HM v Switzerland, DD v Lithuania and HL v UK) paragraph [191] of the NI case is helpful in this regard:

*We recognise that there may be considerable evidential difficulties in ascertaining whether a person who is severely autistic or who has other profound cognitive disabilities is content with and not objecting to their living arrangements. Inevitably there will be a wide spectrum of cases, with cases at one end where eliciting evidence of positive expressions of wishes and feelings about the care placement will be impossible, and at the other end, cases (like MIG's and MEG's in Cheshire West, and the applicant's attitude to the Lielberze home in Mihailovs) where a tacit positive indication of wishes and feelings*

showing contentment with the arrangements can be ascertained. In the latter cases, such evidence is relevant and should not be excluded from consideration. The cases between the two ends of the spectrum will create varying degrees of difficulty and will require anxious consideration to determine what effect the applicable restrictions are having and what attitude the affected individual has to them. *As we have said, it may be that if nothing more than mere compliance or acquiescence is a feature of the case, that is not enough. If the individual is capable of expressing a view and there is serious doubt about their attitude, no inference should be drawn.*

74. Dr Radcliffe's evidence demonstrates that AR has a moderate to severe learning disability and autistic spectrum disorder which result in profound difficulties in communication, adaptive functioning and independent decision-making. Dr Radcliffe concludes that AR requires constant access to support across all areas of daily living and is presently unable to live independently. Whilst AR is capable of expressing simple likes, dislikes and preferences through his own communication methods, there is no evidence that he possesses a developed understanding of the legal, practical or social arrangements underpinning his placement. Rather, Dr Radcliffe's evidence suggests that AR's experience of the placement is mediated through immediate and concrete matters, such as whether he feels safe, whether routines are predictable, and whether those around him are responsive to his needs.

75. That does not, however, mean that his wishes and feelings are unreal or

unreliable. On the contrary, Dr Radcliffe places considerable emphasis upon the importance of understanding and responding to AR's emotional experience. He considers that AR is capable of demonstrating preferences, expressing enjoyment, signalling distress and communicating attachment to important people and places. The evidence therefore supports the proposition that AR's wishes and feelings are genuine and should be accorded significant respect when assessing his welfare. In particular, Dr Radcliffe identifies the importance of ensuring that AR feels safe, secure and emotionally contained within his environment and notes the positive impact which the stability of the current placement appears to have had upon his wellbeing.

76. The more difficult question is whether those abilities amount to the form of understanding required for valid consent as contemplated in the NI case. In my judgment, Dr Radcliffe's evidence does not clearly establish that they do. Whilst AR is capable of expressing preferences and emotional responses, there is little evidence that he understands the nature of the choice between living at the placement and living elsewhere, the restrictions which operate within the placement, or that he has sufficient appreciation of those arrangements to make an autonomous decision either accepting or rejecting them. His ability to communicate contentment or dissatisfaction is real, but that is not necessarily the same as understanding the nature of the arrangements to which that contentment relates.

77. Accordingly, whilst Dr Radcliffe's evidence supports the conclusion that considerable weight should be given to AR's wishes and feelings, it provides only limited support for a finding that AR

is affirmatively consenting to the arrangements in the sense contemplated by the NI case.

78. For all the above reasons, I conclude:

- AR is not deprived of his liberty, and his placement does not engage Article 5 of the ECHR.
- This is because of what I shall refer to as the objective element.
- I do not find in AR's case that he would be able to give valid consent if he were deprived of his liberty.

HHJ Burrows then went on to consider Article 8.

79. The parties were all in agreement that AR's Article 8 rights are engaged by the care plan I am asked to approve. The LA, to their credit, recognise that there is a conflict between them, the provider and AR's family. That is something that needs to be kept under review. AR's voice needs to be heard and his interests represented. If Article 5 applied, of course, there would be an obligation on the LA to bring the matter back before the Court periodically, probably annually: see *Salford City Council v J* (or *Re GJ and BJ*) [2008] EWHC 1097 (Fam) Mr Justice Munby.

80. However, in this case, although the Court has no express obligation under the Convention to build a review into the final order, clearly there is a matter left open by the order I propose to make, and AR's rights may still need to be protected by the involvement of the Court.

81. The Supreme Court in the NI case recognised that many individuals who are not deprived of their liberty for the purposes of Article 5 will nevertheless be subject to significant restrictions

upon their autonomy and private life. The Court emphasised that such persons are not left without protection. Restrictions upon residence, care, contact and personal autonomy may engage Article 8 ECHR and remain subject to review through the Mental Capacity Act 2005, the jurisdiction of the Court of Protection and the statutory duties imposed upon public authorities. The premise underlying that analysis is that these alternative safeguards provide meaningful protection for those whose circumstances fall short of a deprivation of liberty within Article 5.

82. One of the difficulties with the way the NI case reached the Supreme Court, as a reference from the AG of Northern Ireland, is that the Court was not concerned with a real case, with evidence of how restrictions impacted on actual people, and with a first instance and appellate history of how the law dealt with the problems faced by those vulnerable people, their families and professionals at the "coal face".

No doubt reflecting his previous experience, HHJ Burrows pointed to the first instance judgment in *Cheshire West*, which established (in essence) that all was not as it seemed on the papers. He continued:

87. The problem with the removal of Article 5 rights for people like AR, as my judgment will entail, is to ensure how those rights will be kept under review in the absence of Schedule A1 protections, a r 1.2 representative (perhaps), the periodic review to the Court of Protection, or the entitlement to advocates.

88. In this case, however, the LA has decided to fund an advocate (a Care Act

advocate) for a period of 12 months to ensure AR's rights are observed, particularly on contact, but also to ensure that the restrictions are reviewed.

89. This is welcome, particularly as AR's parents are not represented and need to deal with someone who is not representing the LA. They feel excluded from their son's care in these proceedings.

90. The question is what, if anything, is the role for the Court? I think there is no application from the parties that the Court should adjourn this application until near to the end of the 12 months and then restore, perhaps after a round table meeting and further position statements. That would not be attractive to the Court. If there is a need for a review, then the review should be directed, and that probably means directing the LA to bring proceedings in around 12 months time for the Court to review the situation as it then is. The other alternative is to direct that if there is any dispute between the parties in around 12 months time, then the LA should then bring the case back to Court.

91. In this case, I see no reason to order a review. It is not necessary to protect AR's Article 8 rights. Those rights will be protected by the involvement of the LA (with its duties) his family, and his advocate. If before the end of the 12 months it is thought that his rights may be at risk because of there being a dispute over the care plan at that point, then is the time when an application should be made to the Court for the resolution of a dispute.

## Comment

In addition to the comments interspersed above, we would add four things:

- (1) As HHJ Burrows was at pains to emphasise, consideration of deprivation of liberty is both multi-factorial and case-specific. This means that it is not possible (nor, indeed would it be legally correct: see [this video](#)) to take the outcome of this case and transpose it, without more, to other situations which might appear similar. It is therefore extremely useful as a judgment which helps providers and supervisory bodies get themselves into the AGNI zone; it is, however, not a shortcut to thinking about whether a particular situation gives rise to deprivation of liberty;
- (2) It is of no little importance that HHJ Burrows adopted the staged approach of considering the objective limb first: there seems in some quarters to be a tendency to rush first to considering 'valid consent' issues without actually asking the rather important question of 'consent to what?';
- (3) HHJ Burrows was – rightly – at pains to draw attention to the need to have a careful eye to the reality of the protections that are said to be in other parts of the law. We have referred elsewhere to the 'promise' that DHSC might be said to have made to the Supreme Court about those protections: this case gives a clear example of what it means for that promise to be made concrete on the facts of an individual case;
- (4) Whilst it is clearly laudable that the local authority acted in the way that it did, it is not obvious on the face of the judgment under what statutory power "Care Act advocate" came to be appointed. There is no standalone power simply to appoint an advocate for "rights protections reasons;" on the face of it, it appears difficult to see how the criteria in s.67 Care Act would have been met. An advocate can (and, in some circumstances must) be appointed to meet

assessed needs for care and support;<sup>4</sup> however, a need for an advocate for rights protection is very unlikely to satisfy the eligibility criteria under the Care Act and the associated regulations. It might be thought that a standalone power to appoint advocates under the Care Act (and, indeed, the Mental Capacity Act 2005) would be a 'good thing.'

### Short note: can (lack of) valid consent create a confinement?

*Re SM [2026] EWCOP 46 (T2)* is another Tier 2 decision (this time of HHJ Sue Williscroft) as to whether a person previously deemed to be deprived of their liberty for the purposes of A5 ECHR remains so following the Supreme Court's decision in AGNI. SM had diagnoses of severe learning disability, catatonia, major depression and autism. So far as can be ascertained from the judgment, she was living in the community with 2:1 support at all times. Searches for alternative accommodation had been carried out as SM had said she did not like her home, but nothing suitable had been found. She was said to have a history of self-harm and harm to others as well as property damage. She was not subject to physical restraint at such times, with her skilled and familiar staff able to calm or distract her. SM had said she only wanted 1:1 support and wanted to live with other people.

The judge decided SM was not deprived of her liberty. She would require the same level of supervision wherever she lived as a result of her disabilities. Her expressed wish to live somewhere else was not constant, and in any event her mother thought that she could complain wherever she lived. The care provided

to her was support rather than containment. The judge disagreed with SM's ALR that SM experienced the arrangements as imposing a major intrusion into her life, and found that "*in reality it would appear she welcomes the support she has,*" as she only occasionally said that she hated the arrangements for her care. In any event, the judge dismissed a submission that if SM experienced the arrangements as coercive, that could result in Article 5 being engaged even if another person subject to the same restrictions was content with them, saying that such an analysis "*suggest wishes can change the real lived experience into something different.*"

The judge accepted the submissions of the local authority and SM's ALR that SM was not providing valid consent to her care arrangements, although this question was not strictly relevant given the finding that there was no objective confinement.

It appears from the judgment that SM was objecting to her care arrangements, at least from time to time. While SM's legal representatives considered that she was objecting to those arrangements and experienced them as intrusive, the judge rejected this interpretation, based largely it seems on the suggestion that SM would not be happy even if the arrangements were altered. The judge's conclusions about the relevance of SM's objections – had they been found to exist as a matter of fact – are somewhat difficult to reconcile with the following clear statement from the Supreme Court in AGNI at paragraph 187: "*The effect of restrictions on an individual is liable to differ according to whether they are content with or object to their living arrangements, and it is therefore relevant to consider the effect of the*

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<sup>4</sup> Advocacy is mentioned in s.8(1)(a) as an example of what may be provided to meet needs under ss.18-20 Care Act 2014.

living arrangements on them." The Supreme Court were satisfied that the lived experience of the person was a crucial factor in the case-by-case assessment of whether A5 was engaged.

### AGN/wider developments

Whilst we await the publication of further guidance from the DHSC, the Minister of State for Social Care has responded to the Joint Committee on Human Rights' letter of 8 July in which the Committee asking (in effect) what steps they were going to take in the aftermath of the judgment. The letter emphasised that a key safeguard relating to valid consent:

*is that determinations should be made on the facts of the individual case. The Government does not expect superficial or rushed assessments. Local authorities, NHS bodies and providers remain responsible for ensuring that assessments are conducted appropriately and in accordance with their legal obligations.*

In relation to children, the letter also noted that:

*While this was not a children's law case and did not concern the deprivation of liberty of children,<sup>5</sup> Article 5 applies to both adults and children. The government remains committed to protecting the rights of vulnerable children and local authorities have a duty to safeguard and promote the welfare of every looked after child. In exceptional circumstances, this might include placing restrictions on the child where this is required to keep the child safe. Those involved in the child's care must continue to ensure the relevant*

*court approval is obtained where restrictions amount to a deprivation of liberty.*

Alex maintains a resources page on AGNI to be found [here](#).

### Short note: best interests determination without reliable wishes and feelings

In *Re MP* [2026] EWCOP 36 (T3), Lieven J had to consider whether continuation of CANH was in the best interests of MP, a young Greek Orthodox man who suffered a catastrophic brain injury at 18 (he was 19 by the time of the hearing). There was a medical consensus that MP was at the lowest level of the spectrum and the reports all describe him as being in a vegetative state. He did not respond to external stimuli save in a reflexive manner, such that "he has no ability to interact and has no meaningful life" (paragraph 64). Lieven J identified that she was "afraid that the parents are seeing and interpreting what they desperately hope for, namely signs of consciousness. This is neither unusual nor surprising, but it is still immensely sad. However, in my view the medical evidence on MP having no consciousness is overwhelming" (paragraph 67). She considered that the burdens of treatment on MP were significant, and that caselaw was clear that burdens remained regardless of whether MP experienced them or not. Lieven J accepted that MP was a devout young man with a strong Orthodox Christian faith, continuing that:

*72. His family feel strongly that MP would have wished to be kept alive, and that he should only be allowed to die a natural death. The difficulty with*

<sup>5</sup> This is not strictly correct. The NI reference expressly concerned those aged 16 and 17, and the Supreme Court in paragraph 1 of the judgment made clear that, for purposes of the judgment, 'adults' means those aged 16 and over (in circumstances where, for other

purposes, childhood runs to age 18. There is a real question as to whether *Re D* (concerning the application of *Cheshire West* to those aged 16 and 17) remains good law.

*assessing wishes and feelings in a case such as this is that there is no evidence to suggest MP ever contemplated being in his current situation. It is very different from a case where P was elderly or suffered from a degenerative disease, where they may have thought about what they would wish to happen. In this case, before the accident MP was a healthy 18-year-old with everything to look forward to, then tragically in a moment he had suffered a catastrophic brain injury.*

*73. It is therefore not possible to know with any confidence whether MP would have wished to have continued living in his massively diminished state. The Court of Appeal is clear that in those circumstances I should not speculate.<sup>6</sup> In any event, there is in my view a limit to the weight that can be ascribed to wishes and feelings which could only have been given in totally different circumstances, and with no idea of the reality of the life that MP is now facing.*

Perhaps inevitably, therefore, Lieven J reached the conclusion that it was not in MP's best interests for CANH to be continued.

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<sup>6</sup> A reference to *PW v Chelsea and Westminster Hospital NHS Foundation Trust & Ors* [2018] EWCA Civ 1067 at paragraph 53.

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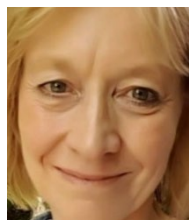
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## Conferences

Members of the Court of Protection team regularly present at seminars and webinars arranged both by Chambers and by others.

Alex also does a regular series of 'shedinars,' including capacity fundamentals and 'in conversation with' those who can bring light to bear upon capacity in practice. They can be found on his [website](#).

### **Advertising conferences and training events**

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to the dementia charity [My Life Films](#) in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

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