Neutral Citation Number: [2019] EWHC 3481 (Admin)

Case No: CO/4577/19

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2019

Before :

MRS JUSTICE LIEVEN DBE

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Between :

THE QUEEN (ON THE APPLICATION OF FD) **Claimant**

- and –

X METROPOLITAN BOROUGH COUNCIL **Defendant**

- -
- -

Sarah Kilvington (instructed by **Bromleys Solicitors LLP**) for the **Claimant**
Julien Foster (instructed by **X Metropolitan Borough Council**) for the **Defendant**

Hearing dates: 22/11/19

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Approved Judgment

Mrs Justice Lieven DBE:

1. This is an application for judicial review of a purported decision by X Council to continue to detain FD, a girl who is 14 years and 5 months, in secure accommodation. The application came before me on an extremely urgent basis in the applications list in the Family Division, although I sat as a judge of the Administrative Court. The application was for an urgent "interim" injunction challenging the continuing detention of FD under an authorisation under s.25 of the Children Act 1989 and seeking a mandatory injunction that FD "be released from secure accommodation with immediate effect". There was also an application under the inherent jurisdiction to make FD a ward of court, although that was only raised briefly before me, and in the light of the fact that child was placed under the Children Act 1989 I did not consider it appropriate or necessary to make the child a ward at the hearing. The automatic wardship has therefore come to an end.

2. The claim was made on 20 November 2019, and came before me two days later. Therefore, the Defendant had not served an Acknowledgment of Service, and the matter of permission for judicial review was not before me. FD was represented by Ms Kilvington of counsel, and the Defendant by Mr Foster of counsel. FD was present on the telephone. The Guardian, Ms Hyland, was present in court but did not speak and did not have a formal position on whether or not she supported the application for judicial review. Subsequent to the hearing Ms Kilvington has told me that the Guardian said to her she supported the judicial review. As I will explain below I consider the application before me should not be granted as a matter of law, and therefore the Guardian's position is in reality academic.

3. I was told that FD is *Gillick* competent and acted without a litigation friend and I will return to this point below. Although the application was in the end adjourned, I think it appropriate

to give a short judgment given that the matter will come back before another judge and there were a number of matters which troubled me about the application.

4. I only have quite limited information about FD's history, but it is clear she is a very troubled child. She was placed in secure accommodation when she was 13 years old due to significant risks to herself and others. She was made subject to a full care order on 17 May 2018. She then had a period in non-secure accommodation and was readmitted to the same secure accommodation (Y Home) on 27 June 2019, pursuant to an authorisation under s.25 of the Children Act 1989. She has a history of absconding, assault, suicidal ideation and self-harm.

5. The most recent authorisation under s.25 was made by DJ Andrews on 30 September 2019 and is due to expire on 1 January 2020. That application was supported by the children's guardian, Ms Hyland and has never been challenged. FD apparently did not oppose the making of secure accommodation. There can therefore be no doubt that she has been detained pursuant to a lawful authorisation.

6. On 6 November a Secure Review was convened at Y Home, pursuant to the Children (Secure Accommodation) Regulations 1991. There was considerable disagreement at that meeting as to whether FD continued to meet the statutory criteria pursuant to s.25. The staff from the accommodation and the local authority present considered that she did meet the criteria, but the Panel determined that she did not. The Panel's reasons in its conclusion were as follows;

> *"There has been clear progress for F over the past few months. She has not placed herself at significant risk of harm and only one serious incident, that required staff to safely hold F, took place during this period. F continues to engage well with the services offered in the [Y Home] by attending school on a daily basis and completing wellbeing work with JH and RM. F is making good progress through her mobility plan and continues to express her views that she would like to leave Secure Care. If it is agreed that F no longer meets Secure*

> *Criteria then it will be necessary to ensure a robust exit strategy is developed. This exit strategy must recognise F's susceptibility to feelings of rejection and ensure supports are in place to help keep her safe in a community environment."*

7. The Panel's recommendation was sent to the Director of Social Services at X Council. I do not know whether he had it in writing or whether it was orally communicated to him by the Council attendees. The date on the first set of minutes is 7/11/19, but it appears from the email exchanges that the minutes were not seen by the Director of Children Services until 12 November 2019. There was subsequently considerable communication over the minutes and Mr Foster says that the final minutes were not received by the Director until 18 November 2019. This is relevant because one of the grounds of claim is that the Director made the decision without sight of the minutes.

8. FD attended the Review Panel, spoke to the Chair separately and wrote a letter to the Panel. Her position as recorded in the minutes was;

> *"She informed the panel that she was ready to leave the Unit. She had some anxiety as the social worker has not found a placement and did not want to leave the Unit if she was going to be placed at ADA House. She was of a view that same discussions of placements are being held at every Secure Review. She appeared to be frustrated."*

9. Her position in the letter to the Review Panel was somewhat equivocal. It is clear that she feels frustrated by being in the placement and would like to move, but she also shows considerable insight by being clear that she does not want to become unsettled by a move and she says;

> "*I am starting to feel better and stuff which maybe I am a little bit but I don't think if feel better enough to leave just yet. I feel as though I should just have a little bit more time in here and at least when they*

> *have found me a placement I should at least get to meet the staff and visit it first"* [as in original]

Part of the context of this letter is said to be that FD was keen not to be moved to a placement that had been proposed but subsequently rejected. I do not doubt that FD was in a very difficult situation.

10. There was a follow-up meeting on 7 November with the Council's Head of Safeguarding, Head of Service and Team Manager. The notes of that meeting record that the Director of Children Services, MD, had "agreed a 72-hour period in which she would consider all relevant information to determine whether she would overturn the panel outcome in F's best interest, namely her safety". The meeting was said to be to identify the relevant information for the Director to consider before deciding on the next steps. The first factor was FD's wishes and feelings. The second was the CAMHS assessment which recorded that FD had made some progress since her admission. The other factors were her medication; mobilities, care planning, placement search. Under placement search the notes state;

> *"**Placement Search** – The issue has not been placement availability, but placement providers feeling they are unable to manage the risk which they have deemed too high to be managed in a community therapeutic placement. The unit were explicit in the SAR stating they would not accept FD's current risk of self-harm in their step-down facility as a measure of her current risk. It is our aspiration that the work completed with FD in a secure environment will allow a suitable placement to be identified with the required support. A daily search for placements continues and FD's profile will be updated weekly to include further progress."*

11. The notes of the meeting were then sent to the Director on the same day and she emailed as follows;

> *"Having read the documentation and Minutes of yesterday's meeting I am convinced that F needs to remain in secure accommodation for a further period.*

> *I have listened to F's wishes and feelings outlined in her letter where she has eloquently stated her views. F clearly recognises that she needs a little more time in secure to support her emotional health and wellbeing.*
>
> *She is also clear that she doesn't wish to move during the Xmas period and does not want us to pursue the home that rejected her.*
>
> *I will therefore support a further period of secure accommodation."*

12. This is the decision which forms the basis of the challenge. Mr Foster argued that no decision which was amenable to judicial review had been made, and this was only an interim position pending a full consideration or decision in the light of the Review Panel recommendation. He therefore said that the judicial review was premature. Certainly, there was a decision not to immediately release FD from the secure accommodation, but that is hardly surprising given that no alternative placement had been found. As I explain below the Council undoubtedly considered it was in the process of reaching a decision.

13. On 8 November FD's solicitors, instructed at that stage by the Guardian, wrote raising concern about the Director's purported decision and asking for further information. On 12 November 2019 the Council's solicitor replied saying that the Council intended to go back to the Panel to ask for further explanation of its recommendation and saying the Council could not make a decision until this had been undertaken. It was clearly in the Council's contemplation that a further decision would be made once all the relevant material had been gathered.

14. On 18 November FD's solicitors wrote saying that in the absence of confirmation that an alternative placement had been located they would commence judicial review on an emergency basis "*given the position is that she is being retained in an unlawful placement".* The judicial review claim was lodged on 20 November 2019.

15. The claim form is very short and alleges four grounds of claim, in summary form. Those grounds are;

    a) Failure to apply the relevant legal test;

    b) Taking into account irrelevant considerations- the lack of information about other non-secure placements; a perception by the Director that FD felt she needed to remain in secure accommodation at least until Christmas; FD's best interests;

    c) A failure to take into account relevant considerations – a failure to assess the likelihood of absconding and of significant risk of harm;

    d) The failure to have regard to the minutes of the Review Panel.

The Law

16. The power of the local authority to place and thereafter keep a child in secure accommodation is contained within section 25 of the Children Act 1989, as supplemented by the Children (Secure Accommodation) Regulations 1991/1505 ("the Regulations").

17. The relevant provisions of s.25 of the CA 1989 insofar as relevant:

> *1. Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England provided for the purpose of restricting liberty ("secure accommodation") unless it appears—*
>
> *(a) that—*
>
> *(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and*
>
> *(ii) if he absconds, he is likely to suffer significant harm; or*

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

2. The Secretary of State may by regulations—

(a) specify a maximum period—

(i) beyond which a child may not be kept in secure accommodation in England or Scotland without the authority of the court; and

(ii) for which the court may authorise a child to be kept in secure accommodation in England or Scotland;

(b) empower the court from time to time to authorise a child to be kept in secure accommodation in England or Scotland for such further period as the regulations may specify; and

(c) provide that applications to the court under this section shall be made only by local authorities in England or Wales.

3. It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.

4. If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept.

5. On any adjournment of the hearing of an application under this section, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.

18. The regulations make various provisions, including setting out time limits during which the local authority can authorise placement in secure accommodation and for which the court can authorise placement in secure accommodation. Where an order has been made permitting the local authority to place a child in secure accommodation, the Regulations provide for review mechanisms as follows:

[15] Appointment of persons to review placement in secure accommodation in a children's home

Each local authority looking after a child in secure accommodation in a children's home shall appoint at least three persons, at least one of whom is neither a member nor an officer of the local authority by or on behalf of which the child is being looked after, who shall review the

> *keeping of the child in such accommodation for the purposes of securing his welfare within one month of the inception of the placement and then at intervals not exceeding three months where the child continues to be kept in such accommodation.*
>
> ***[16] Review of placement in secure accommodation in a community home***
>
> *(1) The persons appointed under regulation 15 to review the keeping of a child in secure accommodation shall satisfy themselves as to whether or not -*
> *(a) the criteria for keeping the child in secure accommodation continue to apply;*
> *(b) the placement in such accommodation in a children's home continues to be necessary; and*
> *(c) any other description of accommodation would be appropriate for him, and in doing so shall have regard to the welfare of the child whose case is being reviewed.*
>
> *(2) In undertaking the review referred to in regulation 15 the persons appointed shall, if practicable, ascertain and take into account the wishes and feelings of—*
> *(a) the child,*
> *(b) any parent of his,*
> *(c) any person not being a parent of his but who has parental responsibility for him,*
> *(d) any other person who has had the care of the child, whose views the persons appointed consider should be taken into account,*
> *(e) the child's independent visitor if one has been appointed, and*
> *(f) the person, organization or local authority managing the secure accommodation in which the child is placed if that accommodation is not managed by the authority which is looking after that child.*
>
> *(3) The local authority shall, if practicable, inform all those whose views are required to be taken into account under paragraph (2) of the outcome of the review what action, if any, the local authority propose to take in relation to the child in the light of the review, and their reasons for taking or not taking such action.*

19. The Regulations are silent as to the effect of a decision by the review panel that the criteria for keeping the child in secure accommodation are no longer satisfied. However, it can be inferred from Regulation 16(3) that the ultimate decision is for the local authority, and that the view of the panel is a recommendation only. This is accepted on behalf of the Claimant.

20. The statutory guidance to the Children Act 1989 at Chapter 4, para 50 states:

> *Any secure accommodation order made is subject to review. This review must take place within one month of the placement commencing and then at intervals of no more than three months. These reviews are not the same as reviews of the child's overall care plan and are restricted to the specific question about the necessity of a placement in secure accommodation. Where a 'secure accommodation review' concludes the criteria for the child's detention no longer apply, the authority responsible for the child's care should immediately convene a care plan review, chaired by the child's IRO.* (emphasis added)

21. The application before me was for an urgent interim injunction on notice to the Defendant. Therefore, the approach in *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396, by which the court considers on an application for an interim injunction, the balance of convenience, would apply. I asked Counsel for the Claimant whether that was the correct approach given the interplay with article 5 and the right to liberty. She indicated that she did not consider the test was relevant on a deprivation of liberty case, but reserved her position for further consideration at the next hearing. Counsel for the Defendant was not called upon on this issue.

22. The application of the *American Cyanamid* principles to public law cases has been confirmed in *BACONGO v Department of the Environment of Belize (Interim Injunction)* [2003] 1 WLR 2839 per Lord Walker [35]:

> *"Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] AC 396, but with modifications appropriate to the public law element of the case. The public law element is one of the possible "special factors" referred to by Lord Diplock in that case, at p 409. Another special factor might be if the grant or refusal of interim relief were likely to be, in practical terms, decisive of the whole case; but neither side suggested that the present case is in that category".*

23. If the *American Cyanamid* principles do apply in a case which concerns Art 5, one of the 'special factors' will undoubtedly be the fact that if the claim is successfully established, the continued placement in secure accommodation may constitute a breach of Art 5.

24. There are surprisingly few authorities on the application of these principles where the interim remedy is sought so as to prevent an alleged continuing breach of an Article 5 right. Nevertheless, the *American Cyanamid* test was accepted as applying in a case where breach of Article 5 was alleged, in ***Ismail v Secretary of State for Defence*** **[2013] EWHC 3032 (Admin)**. That case arose following the Afghan war when prisoners were held by British forces in Afghanistan. The prisoners challenged the legality of their detention. There had been an undertaking given by the Secretary of State not to transfer the prisoners to Afghan detention until a certain date. Following that date, if the Secretary of State intended to transfer, he was to give notice and a hearing was to be fixed. The Secretary of State gave notice that he intended to transfer the prisoners. It was recognised by the court that there was a serious issue to be tried as to whether the prisoners were lawfully detained in breach of Article 5. In considering whether the Secretary of State ought to be injuncted from transferring the prisoners, Sir John Thomas PQBD. said:

> *"It is common ground that the principles of American Cyanamid must be applied having regard to the wider public interest when considering that balance, or as has been put in the circumstances of a case such as this which is concerned with individual liberty, where in regard to everything do the interests of justice lie?"*

25. The point was not argued in that case but it was uncontentious that it was correct to apply the principles. I proceed for the purposes of this judgment that the principles I have to apply are those contained in *American Cyanamid*, with due regard to the fact that this remains an application for judicial review. In applying the balance of convenience test, I very much take

account of the fact that the case concerns liberty, and that the Claimant argues that she is unlawfully detained. That is a factor that will weigh heavily in the balance.

Conclusions

26. In my view this application was misconceived, and should not have been brought before the Court for a series of reasons.

27. Firstly, I am very concerned as to whether the action should have been brought by FD without the assistance of a litigation friend. Ms Kilvington told me that her solicitor was confident that FD was *Gillick* competent, and Mr Foster said that the Council were content to proceed on that basis. Although I might accept that FD had the capacity to understand the nature of the proceedings, and the form of litigation, I am far from convinced that she can understand the information that has to be considered and the consequences of the order sought. Her lawyers are seeking an urgent injunction that she be moved out of secure accommodation in circumstances where there is presently nowhere else for her to go, and no certainty as to what would happen to her next. Given that it has been considered appropriate by a previous judge to make a secure accommodation order under s.25, in part because of her risk of self-harm and suicidal ideation and the history of absconding, it strikes me as by no means obvious that she has capacity to conduct these proceedings without a litigation friend. I reach no concluded view on this, but this aspect of the case needs to be carefully considered by her lawyers, and a much fuller and more complete analysis put forward before the next hearing. Given that there was insufficient time to fully investigate this issue in the order I allowed FD to continue to the next hearing without a litigation friend. However, as I have

explained, I will need full evidence at the next hearing from FD's solicitor explaining her view of FD's competence to act.

28. Secondly, this is an interim injunction seeking a mandatory order that FD be released from secure accommodation. There is a s.25 authorisation in place and therefore there is no doubt she is detained under lawful authority, and no writ of habeas corpus would run. The grounds of challenge are public law grounds, eg. failure to take into account material considerations and any relief granted is necessarily discretionary. In those circumstances it is in my view appropriate to apply an *American Cyanamid* approach, and consider the balance of convenience for and against making the order. I do that fully taking into account that the case concerns liberty and that has to be a weighty factor in any balance the court strikes.

29. The balance of convenience here is in my view clear. As I have already said, there is at present nowhere else for FD to go, and it is apparent that she is not an easy child to find a suitable place for. On no possible analysis can it be in FD's interests for her to be released from Y Home and either have nowhere suitable to live, and/or no place with a proper and carefully thought out care plan in place. As such it is simply impossible to see how the balance of convenience can at this stage be in favour of release.

30. I was concerned at the hearing that when her counsel was asked where she was suggesting FD should go if I were to grant the order sought, she said that was not her concern but that of the Council, because they should be offering alternative placements. In legal terms that may be correct, but in terms of the balance of convenience and FD's interests it is of fundamental importance. This factor alone means that this order was never going to be granted and the relief sought was inappropriate. If an urgent order had been sought for the Council to draw up

a plan for finding alternative placements, that would be a different matter, but the form of order sought was hopeless. In her submissions after the judgment on the corrections Ms Kilvington argued that it was not open to the Council to effectively hold the review process to ransom. This is precisely why an application for judicial review with urgent relief sought that alternative placements be proposed would have been appropriate, but an application for release was not.

31. Thirdly, and closely related, is the fact that this challenge was brought by way of judicial review and that has consequences for the analysis of the court and the relief that would be granted. Mr Foster for the Council argues that no decision has actually been made. Certainly, the correspondence between the parties suggests that the Council did not intend to make a justiciable decision and the Director was merely seeking to hold the position until further inquiries had been made of the Review Panel. Given that liberty is in issue it is possible that there was an interim decision which could be amenable to judicial review. However, the standard of reasoning and the degree to which all material considerations were expressly considered was clearly a product of the fact that the email from the Director of 7 November was not intended to be a final decision.

32. The nature of the alleged errors of law, as set out above, being errors in the decision-making process, would be likely to lead at the most to a quashing of the decision and a remittal to the Director to make the decision again. This would not lead to FD's release from the secure accommodation, but rather a reconsideration of the decision to depart from the Review Panel's recommendation, taking into account all legally relevant matters. Therefore, even at a final hearing there is very considerable doubt over whether an order for release would be

likely to be granted. The public law error would not by any means necessarily lead to an order that the individuals have to be released.

33. Given that public law analysis, it would obviously be wrong to grant the relief sought at an interim hearing, before the service of Summary Grounds, and without any proper consideration of the merits of the case. The Claimant was seeking an interim order, which was in practice much of the final relief sought, in circumstances where she might well not get that relief even at the final hearing.

34. For all these reasons I refuse to grant interim relief. I have listed the matter for a further hearing, but it may be that in the light of this judgment, and further efforts by the Council to find a new placement, it is not necessary for that hearing to go ahead.