Neutral Citation Number: [2020] EWHC 2780 (Fam)

Case No: NE20C00407

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2020

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

SOUTH TYNESIDE COUNCIL	**Applicant**
- and -	
MT	**Respondent**
FT	
HT	
(By his Children's Guardian)	

- -

Re H (Interim Care: Scottish Residential Placement)

- -

Tim Donnelly (instructed by **Legal Services**) for the Local Authority
Anne Spratling (instructed by **Duncan Lewis**) for the Mother
Lindsay Webster (instructed by **PGS Law LLP**) for the Father
Andrew Wraith (of **Prism Family Law**) for the Child

Hearing dates: 8 September 2020;
Further written submissions: 15 September 2020 and 12 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their

family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. The application before the court concerns one young person who, for the purposes of this judgment, wishes to be known as Henry[1]; he is aged 15. He was accommodated by the Applicant, South Tyneside Council ("the Local Authority") in August 2019, with the agreement, indeed at the instigation, of his father; just under a year later, on 15 June 2020, the Local Authority applied for, and a short time later[2] obtained, an interim care order in respect of Henry. The proceedings under *Part IV* of the *Children Act 1989* ("*CA 1989*") are currently progressing in the Family Court sitting at Newcastle-Upon-Tyne.

2. When Henry was initially accommodated in August 2019, he was placed in two consecutive short-term unregulated placements, one of which was a caravan. The Local Authority then identified a suitable placement for Henry in a residential children's home in South Lanarkshire, Scotland, which I shall call Ossian House[3]. Ossian House is registered and inspected as a care home by the Care Inspectorate in Scotland and is a registered establishment for the purposes of the *Residential Establishments - Child Care (Scotland) Regulations 1996*[4].

3. Henry is one of a number of young English people in the care system in England who have been, or are, placed in residential children's homes in Scotland.

4. The professionals and family agree that the placement at Ossian House is meeting Henry's needs very well; he himself enjoys life there and does not wish to move, at least for the time being. It is right to note, from my own judicial experience of similar cases, that not all such placements enjoy such high levels of support or approval from the family and/or the child as this one.

5. The issue which arises in this case is one which has, for some time now, confronted judges in the Family Court on the North Eastern Circuit (and I believe elsewhere), namely to identify the legislative or other legal framework under which a placement of an English child in a Scottish residential care home can be achieved, or authorised and/or recognised. In resolving this issue, I proceed on the secure footing that:

> "Scotland and England & Wales share a common commitment to the rule of law and to the principle that the welfare of the child is the paramount consideration when his or her needs or rights are being considered by the courts"[5].

However, beyond that sound and familiar statement of principle, there is no easy answer.

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[1] Henry is not his real name. At the hearing, I offered him the opportunity to choose the name by which he was to be known in the judgment; Henry is his choice.
[2] 7 July 2020
[3] 'Ossian House' is not its real name.
[4] SI 1996/3256
[5] Joint Protocol Regulating Direct Judicial Communications Between Scotland, And England & Wales, In Children's Cases (Lord Carloway, Sir James Munby P): July 2018

6. The absence of a statutory regulation of cross-border issues within the United Kingdom was a matter on which Sir James Munby P commented in *Re X & Y (Secure Accommodation: Inherent Jurisdiction)* [2016] EWHC 2271 (Fam); [2016] 3 WLR 1718; [2017] Fam 80 (‘*Re X & Y*’) at [51]. Insofar as he identified the existence of a limited statutory framework, he observed (at [3]) that “there are serious lacunae in the law”. The particular lacuna identified in *Re X & Y* (i.e. placement in secure accommodation in Scotland pursuant to an English order under *Section 25 Children Act 1989*) was later cured by statutory amendment[6]; but it is plain that the wider lacunae to which Sir James Munby P referred extended beyond those specifically covered by that judgment.

7. More recently, Moylan LJ in *Re C (Schedule 2 Paragraph 19 Children Act 1989)* [2019] EWCA Civ 1714 (‘*Re C*’), again a case concerning an intra-UK (England/Scotland) placement of a young person, commented (at [45]) that the cross-border arrangement which was similar, though not identical, to the one which arises in this case, “may” constitute:

> “… a "gap" in the legislative framework similar to the situation that previously existed in respect of secure accommodation”.

It will be seen that I too, particularly in answering the second and third questions below ([8](ii)/(iii)), confirm lacunae or gaps in the intra-jurisdictional legal framework for the placing of an English child subject to an *interim* care order in Scotland, and the lack of any coherent mechanism for recognition and enforcement in Scotland of the same.

8. I have broken down the core issue which arises on the facts of this case, on which my determination is sought, to the following questions:

   i) Did the Local Authority have the power to place Henry in a placement in Scotland when he was an accommodated child under *section 20 CA 1989* (‘the first question’)?

   ii) Does the English Family Court need specifically to give permission for the temporary placement in residential care in Scotland of a young person such as Henry who is in the *interim* care of an English local authority under *section 38 CA 1989*? And if so, what is the jurisdictional route for the English court to take in giving such approval (‘the second question’)?

   iii) Is an English interim care order recognised and/or capable of enforcement in Scotland? Does the English interim care order give the English local authority any power to take any steps in relation to Henry (or a similar child) in Scotland? Does the English order give those providing the placement any authority over the child? These questions (which I shall take together as ‘the third question’) must be answered in the main by reference to the law of Scotland.

[6] Amendments to *Section 25 CA 1989* were effected by the *Children and Social Work Act 2017* (by *section 10* and *schedule 1*) (the reciprocal secure accommodation provisions) to fill the lacuna identified by Munby P in *Re X & Y*.

iv) Is Henry currently being deprived of his liberty at Ossian House? If so, is this a case in which the court ought to give its authorisation to deprive him of his liberty? How, if at all, can this be formalised in Scotland? ('the fourth question').

9. In determining these questions, I have received and read the statements and reports filed by and on behalf of the parties. I received able written and oral submissions from the advocates at a hearing, conducted remotely, on 8 September 2020. I reserved judgment at least in part to accommodate the filing of further written submissions on the issue identified at [8](iii) above. Having received those submissions, I then invited the parties jointly to instruct a Scottish family lawyer to advise on the relevant law in Scotland; I received the expert opinion from Jonathan Mitchell QC of the Faculty of Advocates on 24 September 2020. I then commissioned further submissions on a discrete issue arising on the evidence, which I received on 9 and 12 October 2020. I am most grateful to all of the advocates, particularly Mr Donnelly who has shouldered the greater part of the research and case management, for obliging this unusually iterative process.

Position of the Parties

10. Mr Donnelly submitted that the Local Authority was entitled to place Henry at Ossian House in Scotland as an accommodated child, and that the authority did not require the specific approval or permission of the court to continue that placement at the point at which he became the subject of a statutory order under *Part IV CA 1989*. Mr Donnelly submitted that once an interim care order under *section 38 CA 1989* was made on 7 July 2020, the authority had power under *section 33(7)/33(8)* to continue the placement of Henry within the United Kingdom (i.e. in Scotland).

11. The respondents each challenged the Local Authority's decision-making in relation to the accommodation of Henry (in particular, the failure to consult with Henry's mother, and the length of the accommodation: both dealt with at [21] below). Ms Spratling, and separately Ms Webster and Mr Wraith, all submitted, with varying shades of conviction, that the route to placement in Scotland once Henry was the subject of an interim care order, was by *paragraph 19* of *Schedule 2 CA 1989*. However, during the hearing, and by the time of their final submissions, they had each retreated somewhat from their positions, acknowledging that there were considerable complications in relying on this provision.

12. All parties agreed that:

i) if there was no statutory route to achieve a placement of an English child in Scotland under the *CA 1989*, the inherent jurisdiction of the English High Court could, and should, be deployed;

ii) the interim care order would not, on any view, be recognised or enforceable in Scotland.

Background facts

13. Henry's parents separated when he was an infant. Public law care proceedings were launched in his early life, arising predominately from concerns about his mother's

historic alcohol dependency; those proceedings concluded with an order that Henry live with his father and paternal grandmother. In 2006 a residence order (*section 8 CA 1989*) was granted in favour of the father. Henry's mother has had only limited contact with Henry during his life. Indeed, she saw Henry only 2 or 3 times over a period of 10 years, and latterly her contact had only been by phone.

14. Henry has complex needs. He has a mild intellectual disability, is reported to suffer from Attention Deficit Hyperactivity Disorder ('ADHD'), for which he is prescribed the drug risperidone, and a possible (though contentious) diagnosis of foetal alcohol syndrome. He has attachment difficulties, struggles to show empathy, and has found it difficult to communicate his feelings. For some time, he has been under the care of his local Child and Adolescent Mental Health Services; there are reported concerns that he may have an autistic spectrum disorder, but he has not yet been formally assessed for this. Henry can still become hyperactive and anxious; his challenging behaviours include displays of anger, aggression, self-harm, screaming, soiling and violence.

15. Over the years, while in the care of his father, numerous referrals were made to social services about the care of Henry; some included expressions of concern about the father's physical chastisement of Henry. Professional support offered by the Local Authority over this time did not, regrettably, ease the father's difficulties (and latterly his partner's difficulties) in caring for Henry; the father felt that the levels of assistance offered were insufficient. In July 2019, the father, who it is recognised had provided overall a "good standard" of care of Henry's basic needs (and is said to "idolise" his son), was finding it too difficult to manage Henry's challenging behaviours, and in particular his aggression; he requested the Local Authority to accommodate Henry.

16. The Local Authority was keen to identify a placement for Henry which would be able to support his complex needs and offer a 2:1 staff ratio in a nurturing and safe environment. While searching in England for a suitable placement, many units which were approached declined to offer Henry a place, advising that they felt that he would require a *secure* environment, and that a simple residential care setting would not be appropriate by reason of the risk he posed to himself and others. Others simply did not have space for him.

17. As I mentioned above ([2]), Henry was initially placed in very temporary, and largely unsuitable, accommodation local to home. After fruitless enquiries of English residential care homes, in early August 2019 the Local Authority identified Ossian House, which provides specialist school provision and other therapeutic interventions which Henry requires, in what is described as a small and "homely" rural environment; it is located in South Lanarkshire. In early August 2019, Henry moved there.

18. It is material to note (I return to this later – see [47](v)) that Henry had very little notice of the move, and was not in a good position to express a view about, let alone give any informed 'consent' to, the proposed placement at Ossian House. The social worker simply reported that Henry and his father "appeared 'fine' about the move albeit anxious". Henry's view of the prospective placement would (or at least could), in my judgment, undoubtedly have been affected by the fact that he had quite wrongly

been told by his father that he was going to a "bad boy's home" because he was a "bad boy".

19. One year on[7], the Guardian reported on Henry's placement at Ossian House, in these terms:

> "[Henry] said he would like to go back home to dad, "but only when the time is right". He agreed that it wouldn't be helpful to rush back home and for things to go wrong again. It was apparent from our discussions, in the presence of his keyworker, that [Henry] is very happy and content with the life that he can enjoy is in his current placement. He clearly finds the staff helpful and supportive".

Did the Local Authority have the power to place Henry in a placement in Scotland when he was an accommodated child under section 20 CA 1989?

20. Henry was accommodated pursuant to *section 20 CA 1989*[8] on 7 June 2019. He then became a 'looked after' child within the meaning of *section 22(1) CA 1989*, and this placed the Local Authority under a number of statutory duties including (but not limited to)[9]:

    i) safeguarding and promoting Henry's welfare[10];

    ii) so far as is reasonably practicable, ascertaining Henry's wishes and feelings regarding the provision of accommodation[11], and giving due consideration to those wishes and feelings;

    and

    iii) placing Henry "in the placement which is, in their opinion, the most appropriate placement available"[12] which must be in the local authority's area and close to his home[13] unless this is not reasonably practicable[14].

21. On reviewing the evidence, I identified at least two ways in which I consider that the Local Authority failed Henry in planning for him as a 'looked after' child:

    i) While the Local Authority obtained Henry's father's consent to his accommodation, it failed to notify, let alone consult with, Henry's mother about this arrangement. Although the mother did not have the statutory right of objection (as mentioned above, Henry's father had the benefit of a *section 8 CA 1989* order and had agreed to the accommodation: see *section 20(9) CA*

[7] July 2020
[8] This was effected either under *section 20(1)(c) CA 1989* or under *section 20(4) CA 1989*; it matters little which statutory provision for present purposes.
[9] See for a discussion of these issues, beyond the scope of this judgment, *Williams & Anor v Hackney LBC* [2019] 1 FLR 310.
[10] See *section 22(3)(a) CA 1989*
[11] See *section 20(6) and section 22(5) CA 1989*
[12] See *section 22C(5) CA 1989*
[13] See *section 22C(8)(a) CA 1989*
[14] See *section 22C(7)(b)&(c) CA 1989*

1989), the Local Authority knew how to contact her and was obliged "so far as is reasonably practicable" to ascertain her wishes and feelings[15]. The fact that Henry's mother had not seen him for several years did not in my judgment absolve the authority of the responsibility of satisfying the important statutory requirement to establish whether she was, for example, "willing and able" to "provide accommodation" for him or "arrange for accommodation to be provided" for him; nor could the Local Authority say that it had complied with its obligation under *section 22C(2)-(4) CA 1989*, namely the requirement to make arrangements for Henry to live with a parent, except where it would not be consistent with his welfare. The statute is clear enough; the guidance reinforces it: "A local authority cannot restrict a person's exercise of their PR, including their decisions about delegation, unless there is a care order or an emergency protection order in place." (The *Children Act 1989 Guidance and Regulations, Volume 2: Care Planning, Placement and Case Review*, para 3.197 (DfE, 2015);

ii) Henry was accommodated for nearly one year before this Local Authority applied for a statutory order under *Part IV CA 1989*. This was, in my judgment, far too long. In this period, Henry did not have the benefit of an independent children's guardian to represent and safeguard his interests at a crucial stage of his life. Further, the court was deprived of the opportunity to consider and/or control the planning for Henry and to prevent or reduce unnecessary and avoidable delay in resolving these important jurisdictional and welfare issues. It transpires that the decision to apply for a care order was in fact made in February 2020, but the application was not issued for four more months. Miss C, social worker, accepted that the application was not issued in a "timely way", a considerable understatement, and commented:

> "Whilst unusual for a child of [Henry's] age to be looked after for such a period of time without court oversight, it is acknowledged that [Henry's] situation was unusual and complex and the aim of the LA was not to delay court oversight, but rather to request it with more understanding of [Henry's] needs to allow more informed care planning".

I am unable to accept this explanation for the delay in issuing proceedings. The blunt criticisms of the relevant local authority laid bare in the judgment of Sir James Munby P in *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11; [2016] 1 FLR 1 at [99]-[101] concerning the misuse of *section 20* are not specifically reproduced at this point in this judgment, but in spite of the explanations offered by Miss C in this case (above), I felt that they could legitimately have been. On this issue, I agree entirely with Mr Wraith when he submitted to me that:

> "As soon as a care plan was formulated for [Henry] that recommended his placement to a care home in Scotland, consideration should have been immediately given to the issuing of care proceedings to have the Court scrutinise the

[15] See *section 22(4) CA 1989*

> care plan and to allow for a guardian to be allocated to the case".

Those criticisms must be noted by the Local Authority but do not, as it happens, impact on my answer to the first question to which I now return.

22. The statutory framework for the provision of accommodation for Henry as a 'looked after child' are covered by *Part III* of the *CA 1989*; I have set out some of the key duties falling within *Part III* at [20] above. I find nothing in *Part III* which specifically prohibits or even contra-indicates placement of Henry, or an English child like him, in Scotland. Those statutory duties are supplemented by the *Care Planning, Placement and Case Review (England) Regulations 2010* ("the *2010 Regulations*").

23. The *2010 Regulations* merit a little attention here. *Regulation 9* makes specific provision for placement of a looked after child, and a placement plan for the child, as follows:

> "**Regulation 9: Placement Plan:**
>
> (1) Subject to paragraphs (2) and (4), before making arrangements in accordance with *section 22C* for C[16]'s placement, the responsible authority must—
>
> (a) prepare a plan for the placement ("the placement plan") which—
>
> (i) sets out how the placement will contribute to meeting C's needs, and
>
> (ii) includes all the matters specified in Schedule 2 as are applicable, having regard to the type of the placement, and
>
> (b) ensure that—
>
> (i) C's wishes and feelings have been ascertained and given due consideration, and
>
> (ii) the IRO has been informed.
>
> (2) If it is not reasonably practicable to prepare the placement plan before making the placement, the placement plan must be prepared [as soon as is reasonably practicable after] the start of the placement.
>
> (3) The placement plan must be agreed with, and signed by, the appropriate person[17].

[16] See *regulation 2(1)*: ""C" means a child who is looked after by the responsible authority".
[17] As defined in *regulation 2*.

> (4) Where the arrangements for C's placement were made before 1st April 2011, the responsible authority must prepare the placement plan as soon as reasonably practicable."

24. In the context of a child who is 'looked after' (namely a child who may be provided with accommodation under *Part III CA 1989* or under a care order under *Part IV CA 1989*) it is necessary to consider *regulation 11*. This provides as follows:

> "**Regulation 11: Placement out of area: Placement decision**
>
> (1) Subject to paragraphs (2) to (4), a decision to place C outside the area of the responsible authority (including a placement outside England)—
>
> (a) must not be put into effect until it has been approved by a nominated officer, or
>
> (b) in the case of a proposed placement which is also at a distance, must not be put into effect until it has been approved by the director of children's services.
>
> (2) Before approving a decision under paragraph (1), the nominated officer [or, as the case may be, the director of children's services] must be satisfied that—
>
> (a) the requirements of regulation 9(1)(b)(i) have been complied with,
>
> (b) the placement is the most appropriate placement available for C and consistent with C's care plan,
>
> (c) C's relatives have been consulted, where appropriate,
>
> [(d) in the case of a decision falling within—
>
> (i) paragraph (1)(a), the area authority have been notified, or
>
> (ii) paragraph (1)(b), the area authority have been consulted and have been provided with a copy of C's care plan, and]
>
> (e) the IRO has been consulted.
>
> (3) In the case of a placement made in an emergency, paragraph (2) does not apply and before approving a decision under paragraph (1) the nominated officer must—

> (a) be satisfied that regulation 9(1)(b)(i) and the requirements of sub-paragraph (2)(b) have been complied with, and
>
> (b) take steps to ensure that regulation 9(1)(b)(ii) and the requirements set out in sub-paragraphs (2)(c) and (d) are complied with by the responsible authority within five working days of approval of the decision under paragraph (1).
>
> (4) Paragraphs (1) and (2) do not apply to a decision to place C outside the area of the responsible authority with—
>
> [(a) F[18] who is a person with whom a placement is made under regulation 24, or]
>
> (b) F who is approved as a local authority foster parent by the responsible authority.
>
> [(5) In this regulation "at a distance" means outside the area of the responsible authority and not within the area of any adjoining local authority.]"

25. The important points to collect from *Regulation 9* and *11* of the *2010 Regulations* it seems to me are as follows:

    i) The *2010 Regulations*, which apply only in England[19], explicitly contemplate the possibility of placement of a child by a local authority *outside* of the area of that local authority, and (importantly) outside England;

    ii) It is acknowledged that the child's placement could be "at a distance" from where he or she lives (i.e. not in the area of the authority or an adjoining authority);

    iii) Where the placement is "at a distance", the local authority of the receiving area needs to have been consulted;

    iv) The placement (whether at a distance or not) needs to have been authorised by the appropriate officer within the placing authority. The further away the placement, the more senior must the local authority officer be to give his/her approval;

    v) In any given situation, the child's wishes and feelings must be ascertained and given due consideration[20].

[18] Per regulation 2: "F" means a person who is approved as a local authority foster parent and with whom it is proposed to place C or, as the case may be, with whom C is placed".
[19] These regulations apply in England only: see *regulation 1*.
[20] *Regulation 9(1)(b)(i)* and *Regulation 11(2)(a)* of the *2010 Regulations*

26. Thus, it will be clear that there is nothing in the primary or secondary legislation which prevents a local authority from placing a child which it is 'looking after' (accommodating) under *section 20 CA 1989* outside of England (i.e. within Scotland) or even outside the UK. On my reading of the legislation (and no party in the instant case demurs), this can be done without recourse to the court, provided that the local authority has complied with its multiple duties under *Part III CA 1989* (specifically *section 22*), is satisfied that this is the most appropriate placement for the child[21], has complied with the placement plan requirements under *Regulation 9* of the *2010 Regulations* and has complied with the detailed consultation[22] and approval[23] provisions of *Regulation 11* of the *2010 Regulations*.

27. Materially, it is a duty on the local authority, when fulfilling its wide obligations under *regulation 11*, to ensure that the child's wishes and feelings have been ascertained and given due consideration, pursuant to *regulation 9(1)(b)(i)*. Accordingly, the child would *not* be required to *consent* to a placement in Scotland which is deemed to be necessary in the short-term or interim to meet his or her needs (contrast the position for a permanent relocation: see [40] below); put another way, the child would not have a right of 'veto' over such a placement.

28. Important statutory safeguards for parents, and others with parental responsibility, are built into this arrangement by reason of the provisions of *Part III CA 1989* (particularly *section 22(7)/(8)* and *section 22C(2)-(4) CA 1989*) discussed above (see [20] and [21](i)).

29. I was not invited to consider specifically what steps were actually taken to prepare the ground for Henry as he moved placement from England to Scotland. Insofar as I have not addressed the requirements above which would have been applicable in his case, I have assumed for present purposes that:

    i) The decision to place Henry in Scotland was approved by the director of children's services[24];

    ii) A signed placement plan was in place before the placement[25];

    iii) Written notification was given to, and consultation[26] undertaken with, South Lanarkshire (the local authority in whose area Henry was to be placed), before the placement was made, including details of the assessment of Henry's needs, the reason why the placement was the most suitable one in response to Henry's needs, and a copy of Henry's care plan;

    iv) The Independent Reviewing officer was consulted[27].

[21] *Regulation 11(2)(b) 2010 Regulations*
[22] With the child, relatives and IRO
[23] By a nominated officer, or in this case, because the placement was outside England, the director of children's services
[24] See *Regulation 11(1)(b)* of the *2010 Regulations*
[25] See *Regulation 9(2)* & *9(3)* of the *2010 Regulations*
[26] See *Regulation 11(2)(d)(ii)* and *regulation 13(4)* of the *2010 Regulations*.
[27] See *Regulation 11(2)(e)* of the *2010 Regulations*.

30. Had the local authority not fallen into error as discussed in [21] above, and subject to satisfaction of the points discussed in [28] and [29] above, Henry's placement at Ossian House in the summer of 2019, while accommodated by the Local Authority, would have, in my judgment, been a perfectly proper one.

31. That said, it may be that in some situations a local authority may wish to have the benefit of the court's oversight of a placement of an accommodated child in Scotland or indeed elsewhere. *Section 100(2) CA 1989* does not (either explicitly or implicitly) preclude the court from exercising the inherent jurisdiction where the child has been accommodated voluntarily by a local authority with the consent of the parent(s), where that consent has not been withdrawn[28]. In those circumstances, it seems to me that a local authority could apply to invoke the inherent jurisdiction to apply for an order to authorise the child's placement in Scotland. Sir James Munby P largely confirmed the appropriateness of this course in *Re X and Y* at [47]:

> "… in principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in secure accommodation in Scotland. So too, in principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in non-secure accommodation in Scotland." (emphasis by underlining added).

Does the English Family Court need specifically to give permission for the temporary placement in residential care in Scotland of a young person such as Henry who is in the interim care of an English local authority under section 38 CA 1989? And if so, what is the jurisdictional route for the English court to take in giving such approval?

32. In June 2020, the Local Authority applied for a care order; in adjourning that application on 7 July 2020, Her Honour Judge Hudson perfectly properly made an interim care order in relation to Henry under *section 38 CA 1989*. Under statute, the court may not make an order under *section 38*:

> "… unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in *section 31(2)*".

This subsection references the 'threshold criteria' in *section 31* (i.e. proof of harm or likelihood of harm, attributable to the care given to him if the order were not made).

33. *Section 31(11)* importantly provides that:

> ""a care order" means (subject to *section 105(1)*[29]) an order under subsection (1)(a) and (except where express provision to the contrary is made) includes an interim care order made under *section 38*" (emphasis by underlining added).

[28] *Re E (Wardship Order: Child in Voluntary Accommodation)* [2012] EWCA Civ 1773 per Thorpe LJ at [12] and [13]; and *Re A (Wardship: 17-Year Old: Section 20 Accommodation)* [2018] EWHC 1121 (Fam) per Williams J

[29] There is nothing in *section 105(1)* (Interpretation section) which is relevant to the issues here.

34. *Section 33 CA 1989* sets out the 'Effect of care order', and therefore, per *section 31(11)* (see [33] above), unless a contrary provision applies, an interim care order. *Section 33* sets out the basic duty of the local authority designated by the order "to receive the child into their care and to keep him in their care while the order remains in force". Significantly, *section 33(3)(a)* invests in the local authority parental responsibility for the child for the duration of the care order / interim care order, and under such order the local authority has the power to determine the extent to which a parent or any other person with parental responsibility may exercise that parental responsibility. It is sometimes said that the local authority acquires 'senior' parental responsibility in this way.

35. *Section 33(7)* and *Section 33(8)* read as follows:

> "(7) While a care order is in force with respect to a child, no person may –
>
> (a) cause the child to be known by a new surname; or
>
> (b) remove him from the United Kingdom,
>
> without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> (8) Subsection (7)(b) does not -
>
> (a) prevent the removal of such a child, for a period of less than one month, by the authority in whose care he is; or
>
> (b) apply to arrangements for such a child to live outside England and Wales (which are governed by paragraph 19 of Schedule 2 [in England….])." (emphasis by underlining added).

36. These sections should be read with *regulation 12* of the *2010 Regulations* which reads as follows:

> **"Regulation 12: Placements outside England and Wales**
>
> (1) This regulation applies if—
>
> (a) C is in the care of the responsible authority, and
>
> (b) the responsible authority make arrangements to place C outside England and Wales in accordance with the provisions of paragraph 19 of Schedule 2 to the 1989 Act (*placement of a child in care outside England and Wales*).

> (2) The responsible authority must take steps to ensure that, so far as is reasonably practicable, requirements corresponding with the requirements which would have applied under these Regulations had C been placed in England, are complied with.
>
> (3) The responsible authority must include in the care plan details of the arrangements made by the responsible authority to supervise C's placement.

37. *Section 33(7) CA 1989* largely replicates in public law the provisions of *section 13(1) CA 1989* in private law, and *section 14C(3) CA 1989* in relation to a Special Guardianship arrangement. In all those sections of the *Act*, the reference to 'United Kingdom' is both interesting and important. It should be remembered that the jurisdictional reach of the *Children Act 1989* is England and (in most respects) Wales. It is plainly not an accident of drafting that the primary legislation contemplates that a child may move around within the United Kingdom, the statutory regime presumably contemplating close intra-UK co-operation in relation to such arrangements. In relation to a child in care, only where the move:

    i) is outside of the UK (*section 33(7)(b)*); or

    ii) reflects an arrangement for the child to leave England and Wales to 'live' abroad (*section 33(8)(b)*),

    is there a requirement for written consent of all those with parental responsibility (albeit that this can be dispensed with in the context of (ii) above under *paragraph 19* of *Schedule 2*) and/or leave of the English court. In my judgment it is highly relevant to the second question that in the public law context, when a child is under a care order (and, given the terms of *section 31(11)*, interim care order) the child may be removed (without the written consent of the parties with parental responsibility or leave of the court) to a place *outside* of England and Wales, possibly "at a distance"[30] from his/her home, provided that he/she is not removed from the United Kingdom; that is to say, this provides a statutory route to remove the child under an interim care order to Scotland or Northern Ireland.

38. I have considered (though I was not addressed specifically on this point) whether the word 'person' in *section 33(7)* ("no person may … remove him from the United Kingdom") can refer to a local authority. I consider that it can, and that it does. Under *section 5* and *Schedule 1* of the *Interpretation Act 1978*, "unless the contrary intention appears", the word "person" is to be read as including "a body of persons corporate or unincorporate". This point was picked up in *Re C* at [31]:

> "Turning to the question of what is meant by "live with a suitable person", the *Interpretation Act 1978* ("the *1978 Act*") provides that the word person "includes a body of persons corporate or unincorporated". As is made clear in *Bennion on Statutory Interpretation*, 7th Edition, the definitions in this Act "apply to Acts in general", paragraph

[30] See *Regulation 11(1)(b)* of the *2010 Regulations*.

> 19.1(1). Specifically, in respect of the definition of the word "person", *Bennion* states that this definition "does not apply if the contrary intention appears, whether expressly or by implication"; a number of cases are then cited as examples to support this proposition, paragraph 19.5. Reference could also be made to the *ejusdem generis* principle of construction, which is dealt with in *Bennion* in Chapter 23".

The Court of Appeal in *Re C* concluded that the word 'person' in *paragraph 19* of *Schedule 2* did *not* refer to a local authority as a body corporate. In my judgment this ruling was specific to the context in which the word 'person' was there being considered:

> "[40]… while a child can live in a residential home which might be owned by a company it would be difficult to argue that, as a result, the child was living with a person. Further, when this is added to the fact that the words "other suitable person" follow a list comprising natural persons, I do not consider it is possible to interpret this provision as meaning other than that it is confined, as decided by Sir James Munby P, to natural persons."

This reference in the last cited sentence above is to [29][31] of *Re X & Y* where Sir James Munby P said:

> ""Person" here does not, in my judgment, extend to a corporate or other organisation or body. It means a natural person."

I have underlined the word 'here' in this extract to emphasise again that Sir James Munby P was specifically referring to the context in which the word appears, namely in *paragraph 19* of *Schedule 2*.

39. By contrast, *Section 33(7)* is concerned with the arrangements for, and specifically the restrictions on, the cross-border movement or expatriation of a child; as mentioned above, the provisions replicate in all material ways those in private law under *section 13* or *section 14C* (see [37] above). Given that the local authority, in this context, holds (senior) parental responsibility for the child, sharing it with the parents, it is appropriate to treat it as a 'person' in this context. The fact that the local authority is referred to specifically in *section 33(8)(a)* as "the authority in whose care he is" does not detract from this conclusion; it simply identifies the local 'authority' as the one 'person' who can remove the child for up to one month, in a similar way to the "person named in the child arrangements order as a person with whom the child is to live" in *section 13(2) CA 1989*, and the special guardian (who may remove the child for up to three months) per *section 14C(3)(4) CA 1989*. It is also material to note in this regard that in *Re J (A minor)(Change of name)* [1993] 1 FLR 645, and in *Re M, T, P, K and B (Care: Change of name)* [2000] 2 FLR 645, the High Court did not question (i.e. in either case) that it was the *local authority* (qua statutory 'parent')

[31] I cite the fuller passage in which this quote appears at [41] below.

which had brought the application for a change of surname under *section 33(7)(a)* in respect of the subject children who at the time of the applications were in their care.

40. What then is the relevance of *paragraph 19* of *Schedule 2*, which is explicitly referenced in *section 33(8)* and *regulation 12* of the *2010 Regulations* (above), and on which the advocates for the respondents in this application initially relied? This paragraph provides as follows:

> "***Arrangements to assist children to live abroad***
>
> (1) A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.
>
> (2) A local authority may, with the approval of every person who has parental responsibility for the child arrange for, or assist in arranging for, any other child looked after by them to live outside England and Wales.
>
> (3) The court shall not give its approval under sub-paragraph (1) unless it is satisfied that –
>
> (a) living outside England and Wales would be in the child's best interests;
>
> (b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
>
> (c) the child has consented to living in that country; and
>
> (d) every person who has parental responsibility for the child has consented to his living in that country.
>
> (4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, special guardian or other suitable person.
>
> (5) Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person –
>
> (a) cannot be found;
>
> (b) is incapable of consenting; or
>
> (c) is withholding his consent unreasonably.

> (6) Section 85 of the Adoption and Children Act 2002 (which imposes restrictions on taking children out of the United Kingdom) shall not apply in the case of any child who is to live outside England and Wales with the approval of the court given under this paragraph.
>
> (7) Where a court decides to give its approval under this paragraph it may order that its decision is not to have effect during the appeal period.
>
> (8) In sub-paragraph (7) 'the appeal period' means –
>
> (a) where an appeal is made against the decision, the period between the making of the decision and the determination of the appeal; and
>
> (b) otherwise, the period during which an appeal may be made against the decision.
>
> (9) This paragraph does not apply –
>
> (a) to a local authority placing a child in secure accommodation in Scotland under section 25, or
>
> (b) to a local authority placing a child for adoption with prospective adopters".

41. A review of the authorities, consistent with wider judicial experience in the Family Courts of the North East, reveals that reliance has in fact been placed on this paragraph in a number of intra-UK cases as founding the statutory jurisdiction for achieving the trans-border *interim* placement of an English child in Scotland, but it has not been possible, following researches in this case, to identify any judgment in which a convincing, indeed any, explanation is given for why. In *Re X & Y*, Sir James Munby P considered whether *paragraph 19* of *Schedule 2* could apply to the *temporary* placement of children abroad, but declined to comment. Having regard to the specific issue raised in that case he was clear that *paragraph 19* of *Schedule 2* could not be used for the purposes of placement in secure accommodation outside England and Wales; he said this:

> "It is difficult to see how the requirements of *paragraph 19* of *Schedule 2* to the *1989 Act* will ever be satisfied where the child is to be sent out of the jurisdiction for the purpose of being placed in secure accommodation; and in the present cases they certainly are not. In the first place, unless dispensed with in accordance with *paragraph 19(5)*, the consent of every person with parental responsibility is required. Secondly, unless dispensed with in accordance with *paragraph 19(4)*, the consent of the child is required, and the child's consent cannot be dispensed with unless "the court is satisfied that the child does not have sufficient understanding to give or withhold his consent," and even

> then only if the child is to live "with a parent, guardian, special guardian, or other suitable person" – wording which, in my judgment, and notwithstanding Mr Rowbotham's[32] submissions to the contrary, cannot include being placed in an institution such as a secure accommodation unit. "Person" here does not, in my judgment, extend to a corporate or other organisation or body. It means a natural person." [29].

He added (at [30]), materially:

> "Ms Cheetham[33] also suggests that the words "arrange for … [a] child in their care to live outside England and Wales" in paragraph 19(1) connote a permanent or at least long term arrangement, in contrast to a short-term placement in, for example, a secure unit. Ms Grocott[34] makes the same submission. Mr Rowbotham begged to differ. There is no need for me to decide the point, which potentially has very wide ramifications, and I prefer not to" (emphasis by underlining added).

42. In a short judgment I delivered in 2017, in *Northumberland County Council v VS and JP* [2017] EWHC 2432 (Fam), a case which was similar factually to the instant case, I noted that *paragraph 19* of *Schedule 2* had been relied on by the court at an earlier hearing to effect a Scottish placement of an English child, and commented thus:

> "[12] It is unnecessary for me to decide whether *Schedule 2 paragraph 19* was ever the appropriate horse on which to run this particular application. Judge Moir thought it was. I, for my part, raise a question over whether or not a placement such as this represents an arrangement for a child 'to live' outside England and Wales, as when one looks more carefully in the language of *Schedule 2 paragraph 19*, there is a clear inference to be drawn that the giving of consent is a once and for all event. 'Has consented' is the phrase used, not 'does consent', an enduring state of affairs; the phrase used is more pertinent to a permanent arrangement 'to live' outside England than a temporary one for interim placement, in this particular instance, in a school for children with challenging behaviours.
>
> [13] In the decision of *Re X and Y* [2016] 3 WLR 1718, the President of the Family Division considered whether *Schedule 2 paragraph 19* would be the appropriate horse on which to run an application of this kind, but declined to make a decision or to even express a view. Similarly, I do not for my part need to conclude whether Judge Moir was

[32] For X's Guardian
[33] For the two Local Authorities
[34] For X and for Y's Guardian

> wrong or that she was right, but I would say that had the application come before me, I would have been far more circumspect about reliance on this statutory provision."

43. In *Re C*, the Court of Appeal did not in fact turn its mind specifically to whether *paragraph 19* of *Schedule 2* applied to temporary or interim placements out of the jurisdiction. The focus of the enquiry on the appeal was the issue of the child's consent, and specifically whether placement in a residential home in Scotland was capable of satisfying the second condition in *paragraph 19(4)*; that is to say, whether the words "live in the country concerned with … a suitable person" included living in a residential home (see *Re C* at [4], and see [38] above). The Court of Appeal concluded that *paragraph 19(4)* of *Schedule 2* does *not* cover placement in a residential care home; it covers only placement with people ("parent, guardian, special guardian or other suitable person"). The result of this is that when a child does not consent "to living in that country", and regardless of whether the child does or does not have sufficient understanding, the court is not permitted to approve their placement outside England and Wales other than with a natural person.

44. Giving the leading judgment in *Re C* Moylan LJ remarked (at [12]) that the child had been placed in Scotland "without the court's approval having been obtained". He addressed this point more fully later in the judgment at [39]:

> "… as the Local Authority recognised, C should *not* have been placed in Scotland without the Local Authority having first sought and obtained the court's approval to the proposed placement. This was not merely a technical failing; it was a substantive failing. I would expect this Local Authority and, indeed, all Local Authorities to be aware of this obligation."

45. I regard Moylan LJ's comments set out in [44] above (i.e. the requirement for a local authority to obtain the court's prior approval) as applying only to that particular class of case where *paragraph 19* of *Schedule 2* is actively engaged. I do not view his comments at [39] of his judgment as applicable to *all* proposed placements by an English local authority of one of its looked after children in Scotland, temporary or otherwise.

46. So, when *is paragraph 19* of *Schedule 2 CA 1989* actively engaged? In my judgment, this statutory provision is engaged only when an English[35] local authority is making arrangements, as the statute specifically provides, for the child to '*live*' abroad; that is to say, for a proposed long-term or permanent arrangement for a child's future outside of the jurisdiction. It is not engaged in my judgment where the proposal of the English local authority is to place a child[36] temporarily, or in the interim or short term, outside of England and Wales.

47. I reach the conclusions set out in [46] above for the following reasons:

[35] Different considerations apply in Wales: *section 124 Social Services and Well-Being (Wales) Act 2014*
[36] In this context, my reference to a 'child' is to a child who is habitually resident in England & Wales

i) The operative verb in *paragraph 19* of *Schedule 2* is to 'live'. To my mind, this suggests a long-term arrangement for the child's upbringing, importing a degree of permanence, particularly when it is used as here in the context of expatriation: that is to say, the place where the child will have his or her home. The notion of a main 'home' is how the word 'live' is used in *section 8 CA 1989*. This is to be contrasted with the language of 'place' and 'placement' found elsewhere in the *CA 1989* to denote a more temporary arrangement (see for example, *paragraph 12C* of *Schedule 2* which refers to 'placements out of area' and "provided with accommodation at a place outside the area of the authority").

ii) Moreover, when a child such as Henry is placed for a period (whether in or out of England and Wales) in a "school or other institution", such period would be disregarded in determining his/her 'ordinary residence' (*section 105(6) CA 1989*); a move across the border to a placement in a school or institution would therefore be inconsistent with the notion that he/she has moved abroad to 'live';

iii) The obtaining of the child's 'consent' in *paragraph 19(3)(c)* of *Schedule 2* reads (in the present perfect tense: the child "has consented") as a once-and-for-all, or evanescent, event; the sub-paragraph does not give of any scope for considering an enduring, active or ongoing consent (i.e. the paragraph is not drafted as "consents" or "does consent"). There are, interestingly, very few provisions of the *CA 1989* which call for the consent of the child, and this is the only place in the Act where the present perfect tense is used. Insofar as any comparison can be made to other provisions, it is illuminating (and in my judgment material) to compare the language of *paragraph 19* of *Schedule 2* (an evanescent consent) with *paragraph 4(4)/5(5) of Schedule 3* for example which contemplates the requirement of an enduring, active or ongoing 'consent' of the child ("where the child has sufficient understanding to make an informed decision") to a psychiatric or medical examination and treatment under a supervision order[37];

iv) Materially, there is no mechanism in *paragraph 19* of *Schedule 2* for a child to withdraw his/her consent once given; this underlines the significance of the consent itself, and highlights how important it is for the consent to be given in a fully informed way, with the child having available to him/her all the relevant facts. Quite apart from any other consideration, temporary placements, such as Ossian House in Scotland, are often required to provide emergency accommodation where there is no suitable alternative in England – a mobile home, static caravan, or staffed holiday home. It may well be that the local authority itself knows relatively little about the residential care provision in question at the time at which it seeks the child's view. The social worker will therefore not be in a good position to advise the child in any detail about what lies in store for him/her, share all the facts and inform the child what he

[37] *Para.4(4), Schedule 3*: "where the child has sufficient understanding to make an informed decision, he consents to its inclusion"

is being asked to 'consent' to. In my judgment, the child cannot be expected to give an irrevocable consent to a temporary placement where there may be such a high level of ignorance on all sides about what is on offer;

v) The consent of the child in *paragraph 19(3)(c)* of *Schedule 2* is consent "to living in that country" (emphasis added); this is different to consent to a particular placement. To my mind, this language contemplates the much wider context for the child of the consequences of expatriation – to a different culture / society / system of education or training (not to mention the losses he/she will suffer by leaving this jurisdiction), about which he/she could reasonably expect to be fully advised before considering whether to consent;

vi) It is revealing to consider, by way of specific illustration on the facts of this case, the circumstances in which Henry's views were taken (see [18] above). On the evidence before me, it appears that he had no real idea what he was being asked to agree to. Although he said he was "fine" about moving to the placement in Scotland, he had not visited it, and he knew little about it. In my judgment, the Local Authority should be cautious before placing much, if any, reliance on a young person declaring that they are 'fine' with a proposal; it is well-recognised that 'fine' is often used as a means of deflection, to avoid engagement on real feelings. If someone declares that they are 'fine', this may be a clue, I suggest, that the very opposite is true. In any event, it is reasonable to assume that almost any option offered by the Local Authority would have compared favourably with the situation in which he then found himself – placed as a sole young person in a caravan, supported by 2 staff members. Tested another way, what if the erroneous view that he was going to a 'bad boys' home had prevailed, and he had therefore objected to going? On the basis of the decision in *Re C*, it would not have been possible to progress with the placement:

> "… when a child does not consent, and regardless of whether they do or do not have sufficient understanding, the court is not permitted to approve their placement in Scotland other than with a natural person" ([41]).

It cannot, in my judgment, be expected that this is the right context for collecting a crucial 'consent' (or conversely establishing a right of veto) of a child, where the temporary placement is in fact (as has proved to be the case) greatly in his interests;

vii) Were the 'consent' provisions in *paragraph 19(3)(c)* of *Schedule 2* to apply to temporary placements, it would mean that the child would paradoxically have a stronger right of veto over a temporary placement in residential care in a southern county of Scotland (which may be close, even very close, to his home in the North East of England) than he/she would (through his articulated wishes and feelings) over a temporary placement which may be many hundreds of miles away in a southern county of England;

viii) In line with the point in (ii) above, *paragraph 19* of *Schedule 2* specifically excludes a placement under the secure accommodation regime, which is also by definition a temporary arrangement.

48. The views expressed above are consistent with the provisions of the *Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013* ('the '*Transfer Regulations 2013*') which appear to contemplate a degree of permanence in circumstances when *paragraph 19* of *Schedule 2* is invoked. *Regulation 3* of the *Transfer Regulations 2013* provides:

> "**Effect of care orders in England and Wales**
>
> "3 (1) This regulation applies where—
>
> (a) a child is subject to a care order made under *section 31(1)(a)* of the *1989 Act*;
>
> (b) the court has given approval under *paragraph 19(1)* of *Schedule 2* to the *1989 Act* to the local authority ("the home local authority") to arrange, or assist in arranging, for the child to live in Scotland;
>
> (c) the local authority for the area in which the child is to reside, or has moved to, in Scotland ("the receiving local authority") has, through the Principal Reporter, notified the court in writing that it agrees to take over the care of the child; and
>
> (d) the home local authority has notified the court that it agrees to the receiving local authority taking over the care of the child.
>
> (2) The care order has effect as if it were a compulsory supervision order.
>
> (3) In this regulation "court" means the court which has given the approval in terms of *paragraph 19(1)* of *Schedule 2* to the *1989 Act*."

It is notable that the 'transfer' arrangements apply in Scotland only where a child is subject to a *final* care order in England and Wales under *section 31(1)(a)* and not an *interim* order under *section 38*. Under these regulations the receiving authority in Scotland "takes over" the care of the child, and the care order "has effect as if it were a compulsory supervision order". Under *paragraph 15* of the *Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013* "the care order, supervision order or education supervision order ceases to have effect for the purposes of the law of England and Wales"[38].

[38] See also *Practice Direction 27 on Cross Border Issues, Scottish Children's Reporter Administration (2015)* [2.4].

49. I now turn back specifically to answer the second question. In my judgment, if the child who is to be placed *temporarily* in a residential children's home outside of England & Wales but within the United Kingdom (i.e. as here, in Scotland) is the subject of an interim care order, the placement can be achieved under *section 38*, relying on *section 33(7)* and *section 33(8) CA 1989*; the details of the proposal for such a placement outside of England and Wales, but within the UK, would be contained in a relevant care plan. The care plan will doubtless be subject to careful scrutiny by the court, as Mr Wraith rightly suggested (see [21(ii)] above). In my view there is no need for a local authority to make specific application to the court for permission to place a child in interim care within the UK. It would however be prudent for the English court, at the time of making the interim care order, specifically to recite on the face of the order that it has considered the care plan for temporary placement in the UK/Scotland, so that the authorities in the relevant part of the UK are aware of the court's endorsement of that arrangement.

50. Although outwith the particular circumstances of this case, I turn briefly here to address the situation if a local authority proposes to place a child who is subject of an interim or full care order *outside* of the United Kingdom (say, for instance, in mainland Europe), on a *temporary* basis. This could only be done, in my view, with the permission of the High Court exercising its inherent jurisdiction. While the inherent jurisdiction may be invoked in an apparently inexhaustible variety of circumstances, the Court's powers to accede to the use of the inherent jurisdiction has its parameters[39], and its use is at least in part materially curtailed by *section 100 CA 1989*. *Section 100(4) CA 1989* is key. This provides:

> "(4) The court may only grant leave if it is satisfied that:
>
> > (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
> >
> > (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.
>
> (5) This subsection applies to any order –
>
> > (a) made otherwise than in the exercise of the court's inherent jurisdiction; and
> >
> > (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)."

51. On the analysis provided above, the outcome which the Local Authority wishes to achieve could indeed be achieved under *section 33(7)*. This allows for placement in

[39] *FS v RS* [2020] EWFC 63 at [100]/[113]; *FS v RS* is a judgment handed down while this judgment was in preparation.

Scotland under the aegis of an English interim care order, with the English Court retaining jurisdiction for Henry. It follows that I do not need to deploy *section 100*.

52. If I am wrong in the analysis set out above, and if there is in fact no statutory route to achieve the result which the Local Authority wishes to achieve, I can confirm that I would have had no hesitation in giving leave to the Local Authority to invoke the inherent jurisdiction to achieve the result contended for (see again *Re X and Y* at [47] quoted above).

Is an English interim care order recognised and/or capable of enforcement in Scotland? Does the English interim care order give the English local authority any power to take any steps in relation to the child in Scotland? Does the English order give those providing the placement any authority over the child?

53. These three related questions have equal, if not greater, importance to those which I have already discussed. For, as Moylan LJ observed in *Re C* at [42][40]:

> "… a court would clearly need to establish who would have parental responsibility or, in broader terms, legal responsibility, for a child before that child could be placed outside England and Wales".

In my judgment, the answer to each of the questions posed above is 'No'.

54. Let me start by disposing of the first limb of the three related questions posed above, by identifying various routes to recognition and enforcement of an English interim care order in Scotland which plainly *do not* apply:

i) An interim care order is not an order "that extends to Scotland" (*section 108(11) CA 1989*);

ii) The *Family Law Act 1986* ('*FLA 1986*') does not provide any intra-jurisdictional framework for public law children cases. An interim care order is not an order made under *Part 1* of the *FLA 1986*, therefore not capable of automatic recognition in Scotland under that legislation (see in particular *Chapter V: Recognition and Enforcement*);

iii) The *Civil Jurisdiction and Judgments Act 1982* does not apply; *section 18(5)(d)* excludes (in relation to enforcement) any judgment which is a provisional (including protective) measure (which would include, in my judgment, an interim care order);

iv) *Council Regulation 2201/2003* (BIIR) is generally understood to have no application to issues arising between territorial units within the same member state of the European Union. The Regulation is of no assistance in relation to the recognition and enforcement of an English judgment in Scotland, or a Scottish decision in England and Wales;

[40] While also highlighting the "regrettable failure to address at an early stage of the process the legal issues which require to be resolved to enable such a placement to take place in a manner which safeguards the child's best interests": referencing, inter alia, *Re K, T and U (Placement of Children with Kinship Carers Abroad)* [2019] EWFC 59

v) As a matter of Scots law, and/or private international law, the expert evidence offered to Sir James Munby P in *Re X & Y*[41] is that the English interim care order would not be recognised in Scotland, see [68]:

> "There is no mechanism in Scottish law for the recognition and enforcement of interim care orders".

None of the research undertaken and advice offered in this case offers any contrary view.

55. This lacuna in the law, on which Sir James Munby P and Moylan LJ have earlier commented (see [6] and [7] above), is all the more striking, I suggest, given that a *final* care order made in England *is* capable of recognition and enforcement in Scotland; this is reflected in *regulation 3* of the *Transfer Regulations 2013* which I have cited in full at [48] above. As Sir James Munby P made clear in *Re X and Y* at [64]:

> "The language of *regulation 3(1)(a)* is very precise and very clear. In my judgment it applies only where there is a 'full' care order made under *section 31(1)* of the *1989 Act*. It does not apply to an interim care order made under *section 38* of the *1989 Act*".

56. A further anomaly (if that is what it is) is revealed by the fact that there is a mechanism for a Scottish Court to make an *interim* or *full* compulsory supervision order (the equivalent of a care order), which contains a requirement for the child to reside a specified place, to determine that that place shall be in England or Wales[42]; that statutory provision "extends to England, Wales and Scotland only"[43] (see the *Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013*).

57. The issues raised within each limb of the 'third question' are essentially matters of Scots Law. In this regard, I have been furnished with two pieces of relevant evidence in these proceedings:

i) A witness statement from Mrs S, the Area Manager for the care agency which runs Ossian House, filed by the Local Authority, dated 7 September 2020;

ii) An expert opinion prepared on the joint instructions of the parties, by Mr Jonathan Mitchell QC of the Faculty of Advocates in Edinburgh, dated 24 September 2020.

I discuss each in turn.

[41] *Re X & Y* is an example of a situation (now superseded, in this particular regard, by statutory reform) in which the *English* court had power to make an order placing a child in secure or non-secure accommodation in Scotland, but that order was without legal authority in Scotland unless the Inner House of the Court of Session applied the *nobile officium*.
[42] See *article 7, 8* and *9* of the *2013 Order*
[43] See *article 3* of the of the *2013 Order*

58. The statement of Mrs S deals with authorisation for placement of an English child in a Scottish residential home, and as a corollary, recognition, and enforcement of any order under which he/she is placed. Mrs S said this:

> "We have sought legal advice … and the advice states:
>
> a) We can place an English young person in Scotland as long as we have (1) a copy of the court order giving permission to place in Scotland and (2) a copy of the care order;
>
> b) We can place young people in Scotland with DOLs orders as long as we have (1) a copy of court order listing approved restrictions (2) Confirmation that the Local Authority is applying to the Scottish Court .
>
> To confirm, we are now in a position to accept young people placed with a DOLS order in Scotland, as long as the placing authority has applied to the Scottish Courts for an order under the *nobile officium*, which our legal counsel has confirmed are not being opposed by any party. Our commissioning team will oversee this process and work with the Local Authority to ensure everything is in place before a placement is confirmed".

59. In a later submission to the court (by e-mail dated 9 October 2020) Mrs S provided the written text of the 'legal' advice which had been provided to her by Mr T of the Care Inspectorate. The e-mail reads as follows:

> "Regarding placements from England and Wales, this is what we have been advised:
>
> According to English law:
>
> - a young person subject to a care order from England or Wales may only be placed in a care home service outwith England or Wales following a judgement that authorises this placement from an English or Welsh Court.
>
> - The young person must also consent for this to happen, but the Court can dispense with consent in certain circumstances, such as where the child cannot consent or withholds consent unreasonably.
>
> We expect services to always, and only, accept the admission of a young person where the placing authority's decision is legally compliant in the jurisdiction in which the placing authority operates.

> We therefore expect care home services looking after a young person subject of a care order from England or Wales to have written evidence of both:
>
> - The court judgement that authorises a placement outwith England or Wales.
>
> - The young person's consent, or the Court's judgement dispensing the need for this consent.
>
> We will therefore be checking at inspections whether young people on a care order placed from England or Wales are being cared for in the service. If they are we will expect managers to be able to explain how they or yourselves as a provider satisfied yourselves, ***prior to admission***, that the child/young person was being lawfully placed by the placing authority. (As per bullet points above)
>
> If providers cannot evidence that the placing authority's decision is legally compliant in the jurisdiction in which the placing authority operates this will be seen as an indicator of poor management and leadership and we will automatically assess Quality Indicator 2.3, "Leaders collaborate to support children and young people" as an additional QI. This is also likely to contribute to a Requirement being made resulting in a maximum grade of 3 and, if we were to find this is still a problem in subsequent inspections of any of your services, it would be likely to result in a weak grade for management and leadership". (emphasis in the original).

60. This evidence does not, in my judgment, assist in answering any of the limbs of the third question:

    i) Unhelpfully, when discussing 'care orders' neither Mrs S nor Mr T (or those advising them) appear to distinguish between *final* and *interim* care orders, when under Scots law they are treated differently (see [55] above, and *regulation 3* of the *Transfer Regulations 2013*);

    ii) Mrs S appears to draw (see [58] above) in part on *paragraph 19* of *Schedule 2* when she refers to the need for the English authority to obtain the court's prior approval for placement in Scotland, but she omits any reference to the requirement under that same statutory provision to the requirement to obtain the child's consent and/or the consent of persons with parental responsibility to the child living in her country, let alone the requirement for the arrangement to be in the child's best interests; it is therefore not clear whether Mrs S is indeed referencing *paragraph 19* of *Schedule 2* at all;

    iii) The advice offered by Mr T (see [59] above) appears to draw more fully, but not completely, from *paragraph 19* of *Schedule 2*; the requirement to obtain the court's permission and child's consent are mentioned, but the need to

> obtain (or dispense with) the consent of those with parental responsibility, and the welfare test, are not. Again, it is not clear whether Mr T is indeed referencing *paragraph 19* of *Schedule* 2. Moreover, Mr T's advice is incorrect when it is suggested that an English court can dispense with a child's consent to being placed in a *residential home* outside England and Wales: see *Re C* (and [38] above).

It appears that Mrs S and Mr T may have both proceeded on the understandable, but in my judgment erroneous, premise that *paragraph 19* of *Schedule 2* applies to *all* placements of English children outside England and Wales whether temporary or permanent. Their apparent willingness to contemplate receiving an English child into a Scottish residential unit and caring for him/her, provided the formalities of the English court are in place, is nonetheless noted and is of course most welcome.

61. I therefore turn to the advice of Mr Mitchell QC. He has expressed the views which appear in the following paragraphs.

62. First, he accepts that the voluntary arrangements put in place in respect of a 'looked after' child under *section 20 Children Act 1989* would be respected as such in Scotland, albeit that the child would not become:

> "… a 'looked after' child in Scots law, for the purposes of the *1995 Act*, the *Looked After Children (Scotland) Regulations 2009, SSI 2009/210*, and the *Children and Young People (Scotland) Act 2014*, because it is an element of the definition that the child is looked after by a 'local authority' which means a Scottish authority constituted under *section 2* of the *Local Government (Scotland) Act 1994*: see *Children (Scotland) Act 1995 section 93*. Certainly the child appears to remain a 'looked after' child in English law in terms of the *Children Act 1989*, and parts of the nexus of rights and duties which would flow from that status may well remain relevant (for example, to any question whether the local authority was in breach of its common law duty of care to the child)".

63. On the issue of the purpose of 'legal regulation', or recognition, of the English interim care order in Scotland, Mr Mitchell QC opines:

> "If its purpose is legal tidiness, to achieve a result in which the interim care order which regulates matters in England is replicated in Scotland, then certainly there is a lacuna and that problem could not be solved without a petition to the *nobile officium*, although I have to say that even then I am not at all clear what order might usefully be sought, as all that seems to be contemplated is a bare declaratory order that the interim care order was to be recognised in Scotland. But if its purpose is to protect [Henry's] best interests and his rights, there is no apparent lacuna, any more than there was between August 2019 and July 2020. And *section 11 (7)* of the [*Children (Scotland) Act 1995*] does make clear in my opinion that the focus, and thus the purpose of legal

> regulation, must be on his best interests. In *Cumbria* and *Salford* and their lookalike cases which have been brought since 2016, the core order sought in the Court of Session was one authorising the deprivation of liberty which was perceived as necessary to protect not only the local authority but also care homes and their staff; that took matters beyond a classic best interests consideration, and the court was prepared in each case to accept that the child's best interest was to be deprived of their liberty."

64. But in this case, as Mr Mitchell rightly observes, there is essentially no current issue, as no party wishes to enforce it:

> "… it is neither necessary nor appropriate for any application to be made to any Scottish court at this time. That is not because the orders made by the English court are entitled to be recognised in Scotland, they are not; it is because the parents parental rights and responsibilities are so entitled and there is at present no issue as to their exercise and in particular there is no issue as to deprivation of the child's liberty. Nor is there any issue as to the powers of the managers of [Ossian House], who appear to be simply exercising their ordinary functions as providers of a residential care home under Scots law".

He added later

> "… there is nothing happening in Scotland which could be complained of as an interference with [Henry's] rights or indeed anyone else's rights. The unenforceability of the interim care order in Scotland would only matter if somebody wished to 'enforce' it in this country against somebody else's wishes. But nobody does. It would be easier, I think, if that order were simply ignored for present purposes as an unnecessary complication: apply Occam's razor. Without it, we have the simple position that the parents still have parental rights and responsibilities which Scots law will recognise in terms of *sections 1* and *2* of the [*Children (Scotland) Act 1995*], because the only basis upon which it might be said that they have lost these is the interim care order".

65. Thus, as Mr Mitchell observes above, if this were a case in which it was felt necessary to achieve recognition and/or enforcement of the order in Scotland, it would probably require a petition to the *nobile officium* of the Inner House of the Court of Session, "the extraordinary equitable jurisdiction vested in the supreme courts of Scotland"[44], for relief in that court. Mr Mitchell does not suggest that the Local Authority would not have 'sufficient interest' to be able to do so: per Lord Robertson in *Beagley v Beagley* 1984 SC (HL) 69 who said at p83:

[44] *Cumbria CC & Others* at [20]

> "There is an inherent power in the Court of Session to exercise its *nobile officium*, as *parens patriae* jurisdiction over all children within the realm, and an application by anyone able to demonstrate an interest may bring a petition to the *nobile officium* if the interest of a child is involved or threatened."

66. In my judgment, there is, currently, no benefit to the parties or to Henry in the Local Authority petitioning to the *nobile officium*. Any desire for mere 'legal tidiness' (see [63] above) would not satisfy the test of 'practicality' which the Inner House of the Court of Session identifies as an important characteristic of the exercise of the jurisdiction, "to address the particular situation that is either unprecedented or has not been adequately foreseen" (*Cumbria County Council & others v X & others* [2016] CSIH 92 ('*Cumbria CC & others*') at [22]). It is nether appropriate nor possible for me to venture any view on whether, if the authority did so petition, this would succeed; it seems to me that much would depend on relief sought and the precise factual circumstances. As the Inner House of the Court of Session further observed in *Cumbria CC & others*:

> "It is equitable in nature, and to that extent the court enjoys a substantial element of discretion in its application…. the *nobile officium* is most commonly used in practice to deal with unforeseen circumstances, or circumstances that have not been adequately foreseen, rather than circumstances that can be described as "highly special" ". [20]

67. As this jurisdiction was discussed in the hearing, and alluded to in Mr Mitchell's advice, it may be helpful to draw attention to two further points which emerged from the *Cumbria CC & Others* decision which may have some relevance to these facts:

    i) It is no bar to the application of the *nobile officium* that no precedent exists, but the court will consider whether there has been "an analogous application in the past … and if there has that will support the exercise of the jurisdiction" ([21]). On these facts (relating to Henry), the parties could probably point to *Cumbria CC & Others* itself as offering an analogous situation; after all:

    > "the application of the *nobile officium* in cases such as the present is also justified by the *parens patriae* jurisdiction. Under that jurisdiction the Court of Session has a duty to safeguard the interests and welfare of any child in Scotland. In the present cases children have been placed in secure accommodation in Scotland by the High Court in England in order to ensure their welfare, for reasons that are explained at length in the decisions of the High Court and accompanying papers. In order to make those decisions effective, and thus secure the welfare of the children, it appears to us to be imperative that the Court of Session should make use of the *parens patriae* jurisdiction to ensure that the children are properly looked after, in secure accommodation, and to provide proper legal authority to achieve that end." [31]

ii) It is also acknowledged that the *nobile officium* will be appropriately invoked "to safeguard the welfare of children" ([23]); this is developed thus:

> "The jurisdiction may apply to a wide range of cases, in greatly varied circumstances. The critical objective is to ensure the welfare of the child concerned, in the particular circumstances which have arisen. This requires a practical approach, so that procedural niceties are not allowed to stand in the way of the fundamental policy that underlies the jurisdiction."[26]

68. MacDonald J helpfully discussed these issues at length in *Salford CC v M (Deprivation of Liberty in Scotland)* [2019] EWHC 1510 (Fam) ('*Salford CC*'); this was cited by Mr Mitchell in the section quoted at [63] above. I do no more here than to highlight two of the key points which MacDonald J addressed in the concluding sections of his judgment as follows:

> "[79] … whilst the *English* court has power to make [an order authorising the deprivation of the child's liberty made pursuant to inherent jurisdiction of the English High Court]…, unless the Inner House of the Court of Session in *Scotland* agrees to invoke the *nobile officium* in respect of such a course of action, such placement may be without legal authority in Scotland.
>
> "[80] … where there is demonstrated a *prima facie* /case that the *nobile officium* might apply to a particular type of order made under the inherent jurisdiction of the English High Court, and the balance of convenience favours an interim order pending full argument, the Court of Session is able, in an appropriate case, to grant *interim* orders under the *nobile officium*."

69. Mr Donnelly appears to accept that it is currently unnecessary for his client authority to petition to the *nobile officium*; he points to the likely cost, delay, and uncertainty of outcome if the authority were to do so. This route would not even need to be considered, he observes, were there in place a coherent intra-jurisdictional legal framework between England and Scotland (and/or other jurisdictions of the UK) for dealing with jurisdiction, transfer of proceedings, recognition and enforcement in family proceedings. The point has considerable force, in my judgment, particularly given that any petition would be used simply to formalise arrangements in this case which are otherwise (a) lawful (the secure accommodation cases involved matters of personal liberty which, if left unauthorised, carried implications for the child and their carers), (b) agreed, and (c) have operated satisfactorily in meeting Henry's welfare for a significant period.

70. What of the second limb of this third question? i.e. Whether the English interim care order give the English local authority any power to take any steps in relation to the child in Scotland. Although the answer is a straightforward 'no' so far as the Local Authority is concerned, it appears that the picture is rather different for Henry's parents. Mr Mitchell QC advises that Henry's mother and father, independently of each

other, retain parental responsibilities and rights in Scotland as these are defined in *section 1* and *section 2* of the *Children (Scotland) Act 1995* until Henry is 16, and that these rights will be recognised in Scotland. These rights include per *section 2 (1) (a)* the right to 'regulate the child's residence'. While the interim care order impacts on the exercise of the parents' parental responsibility in England (as I have discussed above [34]), the interim care order is not recognised in Scotland (see [54] *et seq*. above). The parents each have further rights, in principle, to have 'direct contact' with the child: *section 2(1)(c)*. Mr Mitchell QC goes on to advise as follows:

> "These rights can be sued for in the ordinary courts of Scotland in terms of *section 11*. If a dispute arose, for example if [Henry] refused to have contact with a parent who insisted on it, that would generate a dispute as to his immediate protection. In the ordinary way given [Henry's] age, his clearly-expressed views would normally trump his parent's wishes in terms of *section 6*, but in principle the litmus test is his welfare; *section 11 (7)*. English law, as the law of his habitual residence, would be the proper law for permanent questions, but not for questions of immediate protection in terms of *section 14(3)*."

71. I take from this advice, surprising though this may seem given the existence of the English care proceedings, that the parents could potentially litigate in the courts in Scotland in relation to matters of parental responsibility relating to Henry, provided that they could demonstrate that the issue litigated is, or issues are, matters concerning Henry's "immediate protection" (*section 14(3)(b)* of the *C(S)A 1995*). This gives rise to the unwelcome possibility of concurrent litigation in Scotland and England – a situation which I trust would be avoided or averted by application of the 2018 Joint Protocol[45] (applying in intra-UK border disputes the Principles for Direct Judicial Communications as published by the Hague Conference on Private International Law). In this instance, the 'requesting judge' of one or both jurisdictions would ask the 'liaison judge(s)' of each jurisdictions, to co-operate over the "effective case management" of the applications, having regard to the status of current orders, and the remedies sought.

72. In relation to the third limb of the sub-questions ('Does the English order give those providing the placement any authority over the child?'), the answer seems to be that the interim care order does not give the Scottish placement providers any authority over the child; their authority derives from their ordinary functions as providers of a residential care home under Scots law and the fact that Henry has been placed there with his parents' consent.

73. A final thought. So far as I understand the parties' positions. it is intended that Henry will retain his habitual residence in England, and will indeed return in due course to England; it is a case in which the Local Authority intends to continue to exercise parental responsibility for him with his parents at least for the time being. There is no intention to transfer responsibility for Henry to the Scottish local authority; nor would it be likely, or indeed necessary, that an equivalent order to an interim care order should be made in Scotland to achieve recognition. The scheme of the *Children's*

[45] See footnote 5 above

Hearings (Scotland) Act 2011 is one which does not contemplate concurrent litigation. In *Salford CC* MacDonald J noted (at [22](viii)) that the expert evidence obtained in those proceedings had concluded:

> "It is unlikely that the Principal Reporter would conclude pursuant to *s.66(2)* of the *Children's Hearings (Scotland) Act 2011* that it is necessary for a compulsory supervision order to be made in respect of M where she is already protected by an English interim care order."

74. Even then there has to be agreement of the Principal Reporter of the receiving local authority in Scotland to "take over the care of the child" (*regulation 3(1)(c) 2013 Regulations*) and the 'home' local authority further agrees. In those circumstances, the care order takes effect "as if it were a compulsory supervision order", and in those circumstances "the [English] care order…. ceases to have effect for the purposes of the law of England and Wales" (*regulation 15 2013 Regulations*). I am satisfied, on all that I have heard and read, that this is *not* what is desired here.

Is Henry currently being deprived of his liberty at Ossian House? If so, is this a case in which the court ought to give its authorisation to deprive him of his liberty? How, if at all, can this be formalised in Scotland?

75. Where the provision for a child placed in residential care (whether in England or elsewhere) involves, or may involve, a deprivation of that child's liberty (where the placement is not in secure accommodation as provided for in *section 25 CA 1989*), then the local authority would currently[46] be expected to apply to the English High Court in the first instance for specific authorisation under the inherent jurisdiction to deprive the child of his liberty so as to render lawful that which would otherwise be unlawful by virtue of *Article 5* of the *European Convention on Human Rights*: see, inter alia, *Re T* [2018] EWCA Civ 2136.

76. If an order authorising deprivation of liberty is granted in the English court, and if the placement is in Scotland, the same local authority would then need to petition the Inner House of the Court of Session in Scotland for orders under the *nobile officium*:

> "… to find and declare that the measures ordered by the High Court in respect of [the child] should be recognised and enforceable in Scotland as if they had been made by the Court of Session" (see *Cumbria CC & Ors* at [35]).

It is well-known that there is no method by which a child's liberty can be lawfully deprived in the jurisdiction of Scotland in a placement which is not approved by the Scottish Ministers (see *Salford CC* at [17]).

77. I considered these very issues in *Re RD (Deprivation or Restriction of Liberty)* [2018] EWFC 47 ('*Re RD*'). The advocates in this case have relied on, and specifically referred to, my resumé of the law set out in [21]-[34] of that judgment; I see no need

[46] At the time of drafting this judgment it is known that the judgment of the Court of Appeal in *Re T* is to be heard on appeal to the Supreme Court within a matter of days.

either to alter, or to reproduce, that resumé here. This judgment should be treated as having incorporated those paragraphs by this reference.

78. In short, it is necessary to consider the three limbed test set out in the case of *Storck v Germany* (Application No 61603/00) (2005) 43 EHRR 96, para 71, and 74 ("*Storck*"), a case which clarified that deprivation of liberty under *Article 5* has three elements: (i) the objective element of a person's confinement to a certain limited place for a not negligible length of time; (ii) a lack of valid subjective consent to the confinement in question and (iii) confinement imputable to the state. In this case, I do not need to be troubled with (ii) or (iii). There is no real issue about consent: Henry cannot give consent as he is not deemed competent to do so, his parents cannot do so as Henry is the subject of an interim care order. There is no question but that the regime is imputable to the state. The real issue in the case is whether Henry's confinement, objectively viewed, is under the complete supervision and control of those caring for him, where he is not free to leave.

79. On these facts, rather as in *Re RD*, I find myself focusing on (i). As to which, in *Re RD* I said this at [28]:

> "What amounts to actionable confinement in (i) above has generated much jurisprudence both domestic and European. The considerable body of case law can be helpfully pared down for present purposes to 'the acid test' (the phrase used at [48]/[54]/[105] of *Cheshire West*) of 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." The origin of this acid test has been extensively rehearsed in the authorities on this point[47], and requires no reiteration here."

80. In *Re A-F* [2018] EWHC 138 (Fam) at [33] Sir James Munby P considered various substantive and procedural questions in relation to the interface between care proceedings brought in the Family Court pursuant to *Part IV* of *CA 1989* and the requirements of *Article 5* of the Convention. Specifically, the circumstances in which *Article 5* is engaged in relation to a child in the care of the local authority and, where *Article 5* is engaged, what procedures are required to ensure that there is no breach of the requirements of *Articles 5(2)-(4)*. He helpfully advised that:

> "...whether a state of affairs which satisfies the "acid test" amounts to a "confinement" for the *Storck* component … has to be determined by comparing the restrictions to which the child in question is subject with the restrictions that would apply to a child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability"".

[47] This was the language of *Storck* see [74]: "She had been under continuous supervision and control of the clinic personnel and had not been free to leave the clinic during her entire stay there of some 20 months", deriving essentially from the decision of the *HL v United Kingdom* (2004) 40 EHRR 761, at [91]

81. As it happens, no party contends now on the facts that Henry is deprived of his liberty at Ossian House, having regard to the specific regime under which he lives. This includes the following:

    i) Henry resides in a 4-bed, rurally located, care home; he is one of three young people currently in the home where he is looked after by a minimum of four staff on shift;

    ii) Henry has total freedom of movement around Ossian House;

    iii) Henry is able to spend time in his room alone, and although he has a lock on his door, this is for privacy;

    iv) Henry is on a 2:1 staffing ratio outside of his room and/or the placement, for support and protection rather than control;

    v) Henry is not actively prevented from leaving the placement beyond that which might normally be expected for a child of his age and situation; as Henry has not attempted to leave, it has not been necessary to address efforts necessary to return him;

    vi) Although it was necessary on occasion in the early days of his placement to utilise 'safe-holds' on Henry, again for his own safety, the frequency of these reduced during the initial months and they have not been used at all during 2020. Behaviour management is now addressed by distraction and de-escalation techniques; the only form of 'restrictive' behaviour management is the use of 'time outs' in Henry's room. These are used on an infrequent basis and for limited duration. This does not differ from the rules/sanctions within other age appropriate settings.

82. Henry's liberty is undoubtedly restricted, but the parties agree that the degree or intensity of the constraints are not such as to amount to deprivation of liberty. The doors are not locked, and he is actively encouraged to leave the placement to participate in activities of his choosing. As Lord Kerr said in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another* [2014] UKSC 19

> "All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances."

    The level of restriction here is, as I found in *Re RD*[48], no more "intense or overt than a parent's watchfulness over young adolescent people in a domestic setting, in similar circumstances".

83. It is neither appropriate nor necessary for me to say more on this issue. Had I found that Henry was deprived of his liberty, I would have had to consider if, as a matter of *substance* it is both necessary and proportionate, that is to say, the least restrictive regime which is compatible with the child's welfare; if so, then I would have had to consider adjourning the case in order to give the Local Authority the opportunity to

[48] At [38]

petition to the Inner House of the Court of Session for the application of the *nobile officium* (see [67] above).

Summary

84. I summarise the answers to the questions posed above relating to Henry as follows:

i) There is nothing in the primary or secondary legislation which prevented South Tyneside Council from placing Henry in the summer of 2019 (as a child which it was 'looking after' under *section 20 CA 1989*) in Scotland at Ossian House. The Local Authority would need, if required, to be able to demonstrate that it had complied with its multiple duties under *Part III CA 1989* (specifically *section 22*), was satisfied that this is the most appropriate placement for him, and has complied with the detailed provisions of *Regulation 9* and *11* of the *2010 Regulations*; (see in particular [26]-[30] and [62] above);

ii) South Tyneside Council could place Henry, a child who is the subject of an interim care order (*section 38 CA 1989*), anywhere in the United Kingdom without seeking a specific free-standing order of the English court giving its formal approval. It was, and is, entitled to do so by reliance on the provisions of *section 33(7)(8)*. However, before making any interim care order, a court would need – as it would in any public law case – to scrutinise the care plan. In a case such as this, the court will want to ensure very specific compliance (*inter alia*) with the requirements of the *2010 Regulations*. If satisfied with such compliance, and of the view that the plan for placement in residential care in Scotland meets the needs of the child, it would be appropriate for the order placing the child in the interim care of the authority to be endorsed with the explicit acknowledgement and approval of the plan to place the child across the border in Scotland; (see in particular [35], [37], [49], and [51] above);

iii) The current interim care order in respect of Henry is not recognised and is not capable of enforcement in Scotland. Happily, at present no party seeks its enforcement, and there appears to be no reason in Scots law for taking any step towards recognition other than for 'legal tidiness'. If any party (particularly the Local Authority) seeks recognition or enforcement, it would be appropriate for that party to petition to the *nobile officium* of the Inner House of the Court of Session for an order in that court; I suggest that the success of such an application would depend on a range of factors including the specific facts, and the nature of the relief sought; (see in particular [54], and [63]-[72] above). While it appears possible for the parents to litigate in Scotland in relation to Henry on matters strictly limited to his immediate protection (see [70]/[71] above), it is reasonable to assume that, through judicial liaison under the 2018 Judicial Protocol, steps would be taken to avoid concurrent proceedings being held in the two jurisdictions;

iv) Henry is not, as a matter of fact, currently deprived of his liberty at Ossian House. If I were to have found that he was/is deprived of his liberty, I would have had to consider whether to make a declaration of lawfulness. Had I done so, the Local Authority would currently be obliged to petition to the *nobile*

officium of the Inner House of the Court of Session as in the case of *Salford CC* (see in particular [81]-[83] above).

Conclusion

85. As this judgment was in preparation, the Children's Commissioner published a report entitled "Unregulated: Children in care living in semi-independent accommodation" (10 September 2020) which highlights the lack of capacity in children's homes in England and Wales, and reveals how thousands of children in care in England and Wales are living in unregulated independent or semi-independent accommodation. The report records that "residential care is failing to deliver the right placements in the right areas to meet children's needs". I had cause to discuss one such young person in *Re S (Child in Care: Unregistered Placement)* [2020] EWHC 1012 (Fam) and in that judgment at [16]-[20] outlined the wider context of the problem; HHJ Dancey had similar cause to highlight the problem a few weeks later in *Dorset Council v E* [2020] EWHC 1098 (Fam), and Judd J similarly in *Re Z (A Child: DOLS: Lack of Secure Placement)* [2020] EWHC 1827 (Fam).

86. The problem encountered by the local authority in this case, as I mentioned in *Re S (Child in Care: Unregistered Placement)* and at [16] and [17] above, is not an uncommon one. There is a scarcity of suitable registered children's homes in England and Wales, and local authorities, particularly those in the North and North-East of England, unsurprisingly look across the border to the number of high-quality residential resources there. A child placed in one of the southern counties of Scotland (i.e. Dumfriesshire, Kirkcudbrightshire, or Roxburghshire) could be much closer to his/her home in Tyneside, for example, than if he or she were placed in many parts of England and Wales.

87. The pressing need for more capacity in the system for residential care of teenagers in England and Wales is beyond doubt, and now publicly recognised. But I suggest that, given the number of cases of cross-border placements within the UK such as Henry's, and as this case shows, there is also an increasingly pressing need for a clear and coherent statutory or regulatory framework for achieving intra-jurisdictional recognition and enforcement of *interim* public law orders within the UK.

88. In making this final point, I am doing no more than repeating a plea made by Moylan LJ in *Re C*, at [45][49], and by Sir James Munby P, in *Re X & Y*[50] at [74] that:

> "…what now stand revealed are serious lacunae in the law which, I suggested, need urgent attention. If that is so, and I entirely recognise that others may take a different view, then the question rises as to how the problem should be addressed. On one view, it is the kind of problem which is admirably suited for consideration by a Law Commission – perhaps, given the subject matter, jointly by the Law Commission of England and Wales and the Scottish Law Commission. That

[49] *Re C* [45]: "This may be a "gap" in the legislative framework similar to the situation that previously existed in respect of secure accommodation. I, therefore, propose that this issue be brought to the attention of the President of the Family Division for his consideration"
[50] Notably, over four years ago…. 12 September 2016

> is one possibility. No doubt there are others. But it seems to me that something really does need to be done".

89. That is my judgment.