Neutral Citation Number: [2020] EWHC 2828 (Fam)

Case No: PR20C01113 / PPR20C000547

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Sitting Remotely

Date: 26/10/2020

**Before**:

**THE HONOURABLE MR JUSTICE MACDONALD**

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**Between :**

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|---|---|
| **Lancashire County Council** | **Applicant** |
| **- and -** | |
| **G** | **First Respondent** |
| **-and-** | |
| **N** | **Second Respondent** |
| **-and-** | |
| **NHS England and Lancashire and South Cumbria NHS Foundation Trust** | **Interveners** |

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**Ms Louise Boardman** (instructed by **Lancashire County Council**) for the **Applicant**
**Mr Michael Jones** (instructed by **Roland Robinson and Fenton**) for the **First Respondent**
**The Second Respondent did not appear and was not represented**
**Mr Adam Fullwood** (instructed by **Hill Dickinson LLP**) for the **Interveners**

Hearing dates: 23 October 2020

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# 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.

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**Mr Justice MacDonald:**

INTRODUCTION

1. The maxim that the measure of a society can be obtained from how that society treats its most vulnerable members has been expressed in many different ways, and in many different contexts over time. In relation to children, it was perhaps most eloquently and most memorably expressed as "there can be no keener revelation of a society's soul than the way in which it treats its children" (Nelson Mandela, 8 May 1995).

2. In this case, I am concerned with the welfare of G, born in 2004 and now 16 years old. The local authority, Lancashire County Council, has made two applications with respect to G. On 28 August 2020 the local authority applied for an order under the inherent jurisdiction authorising the deprivation of G's liberty. On 7 October 2020, the local authority applied for a secure accommodation order pursuant to s.25 of the Children Act 1989. The local authority is represented by Ms Louise Boardman of counsel.

3. G's interests acts in these proceedings through her highly experienced Children's Guardian, Gemma Howarth, represented by Mr Michael Jones of counsel. G's mother, N, does not appear and is not represented. G's father is deceased.

4. Also appearing before the court this morning is Mr Adam Fullwood of counsel on behalf of both NHS England and Lancashire and South Cumbria NHS Foundation Trust in circumstances where G is currently admitted to an adult mental health ward (due to a lack of CAMHS psychiatric intensive care beds) and is due to be the subject of a discharge meeting at 10.30am this morning. The court is grateful to NHS England and to the Lancashire and South Cumbria NHS Foundation Trust for seeking to appear before the court this morning with a view to assisting both the court and the parties.

5. As of this morning, 23 October 2020, the local authority contend that G is in urgent need of a secure placement. As of this morning, no such placement is available for G *anywhere* in the United Kingdom. In the alternative, the local authority seek to place G in a regulated non-secure placement under the auspices of an order authorising the deprivation of her liberty. Once again, as of this morning, no such placement is available for G *anywhere* in the United Kingdom. As I have stated, there is no CAMHS psychiatric bed available for her and, in any event, the court has been this morning provided with a report from G's treating clinicians confirming that G does not meet the criteria for continued detention under the mental health legislation.

6. The *only* placement currently available to G when discharged from the adult psychiatric ward is an unregulated placement that has already informed the local authority that it is not prepared to apply to OFSTED for registration. By reason of the fact that this placement was only identified very shortly before this hearing, the precise reasons for this are unclear, as is the manner that the placement will seek to apply the regulatory framework applicable to secure accommodation orders, as the authorities make clear it must, should the court authorise the deprivation of G's liberty. Within this context, the local authority finds itself compelled to advance this placement as being the only option available to safeguard G's welfare. The Children's Guardian is unable to give her support to G being placed in this placement under the auspices of an order depriving G of her liberty, albeit that she recognises that this is, in reality, the only option currently available for G.

7. In the foregoing circumstances G, a vulnerable young woman with multifaceted difficulties and at high risk of serious self-harm or suicide who remains inappropriately placed on an adult mental health ward will, if discharged from her current detention under s.2 of the Mental Health Act 1983 at some point today, have nowhere to go unless the court authorises the deprivation of her liberty at an unregistered placement that has stated its intention not to seek registration and which the Children's Guardian does not feel able to endorse as being in her best interests.

8. The stark choice thus faced by the court is to refuse to authorise the deprivation of G's liberty in an unregistered placement, which will result in her discharge into the community where she will almost certainly cause herself possibly fatal harm, or to authorise the deprivation of G's liberty in an unregistered placement that all parties agree is sub-optimal from the perspective of her welfare because that unregulated placement is, quite simply, the only option available.

BACKGROUND

9. The background to this matter is one that is now depressingly familiar to the Family Division of the High Court.

10. On 20 April 2010 the Court granted a care order in respect of G pursuant to Part IV of the Children Act 1989 and approved the local authority's final care plan for G to continue to be placed in foster care with her siblings. This plan was implemented. G remained with her foster carers from the age of 4 to the age of 16.

11. Sadly, since January of this year, G has been the subject of some twenty in-patient hospital admissions arising out of the risk she poses to herself by reason of her self-harming behaviours and suicidal ideation. Within this context, G continues to demonstrate high risk behaviours, which behaviours include ligatures, cutting and refusing water to the point where she requires medical attention. G reports to hearing voices and has a diagnosis of PTSD.

12. On 8 May 2020 G was detained under section 2 of the Mental Health Act and remained detained for 28 days under assessment. Upon discharge, G was placed in a residential placement. In this placement she was violent and aggressive to staff members and caused damage to property. As at 17 August 2020 G had written nine letters stating she wanted to kill herself. The Mental Health Team attended the placement and tried to assess G but she would not engage. The assessment of the Mental Health Team was that G did not meet the criteria for a Tier Four bed and considered that the last two admissions had not been productive for G. On 17 August 2020, after the Mental Health Team had left, G assaulted staff, damaged property and ran from the placement threatening to kill herself.

13. On 24 August 2020, G knocked at the staff door and collapsed with a ligature around her neck. She reportedly had blue lips and was cold to touch. The ligature had to be cut off by staff and an ambulance was called. G was taken to hospital and was deemed medically and mentally able to return to placement. In the evening on 25 August 2020 G tied a long sock around her neck which, again, had to be cut from her neck. G stated she would run away from the home in order to kill herself. As I have noted, on 28 August 2020 the local authority applied for an order under the inherent jurisdiction

authorising the deprivation of G's liberty and authorisation for the deprivation of G's liberty was granted by HHJ Bancroft on 28 August 2020.

14. Within the foregoing context, on 24 September 2020 G moved from her then placement to X as a result of her escalating behaviours. X is a specialist mental health in-patient home. Regrettably, the court was not informed of this move and, accordingly there was for a period of time no order in place authorising the deprivation of G's liberty at X. In that placement G continued to display high risk behaviours in the form of self-harm including self-strangulation, cutting and swallowing objects. G has been violent and aggressive towards staff and had to be physically restrained.

15. On 6 October 2020 G stole a lighter from another young person in the home and set fire to her mattress in her bedroom. There was extensive fire and smoke damage in G's room. All in the placement had to be evacuated and whilst they were outside, G and another young person went back into the building and set the curtains on fire. G was subsequently arrested for arson. X gave immediate notice on the placement and will not allow G to return.

16. Following G's release from police custody on 7 October 2020, G was placed at Y, a solo placement. Shortly after G was placed, G assaulted staff, caused damage to property and assaulted police officers.

17. Within the foregoing factual context the local authority made an application for a secure accommodation order on 7 October 2020. The matter came before Her Honour Judge Bancroft on 8 October 2020. As of 8 October 2020, the local authority had been unable to identify a secure placement. In the circumstances, the court granted a further deprivation of liberty order until 5 November 2020, for G's then placement, Y. The local authority confirmed that the placement at Y was intended to be an interim placement until a suitable longer-term placement is identified. At the time of the hearing on 8 October 2020, G remained in police custody and Y had agreed to the placement of G to return to placement upon her release from police custody whilst a search for a longer-term placement continued.

18. Subsequent to the hearing on 8 October 2020 G was detained under s 2 Mental Health Act 1983 and was admitted to an adult mental ward. Since that time a search has been ongoing for a CAMHS psychiatric intensive care bed, however none has been available. G has continued to display extreme behaviours whilst on the ward and has spent some time in exclusion. G began to ligature in exclusion and not attempt to self-rescue. Since coming out of seclusion for observation G has been smoking in her room and when asked to extinguish, she has been aggressive and violent and tried to stub her cigarette out on staff. G has also set fire to her room on the ward. The report received today confirming that G no longer meets the criteria for detention under the Mental Health Act 1984 contains the following description of her behaviour whilst on the ward:

> "G is describing suicidal thoughts plans and intent and is not able to identify any protective factors. She has stated that she will abscond from current care home and end her own life. She is at significant risk of acting impulsively to end her own life as she miscalculates the actions of others around her to preserve her safety. Within an inpatient setting she has assaulted staff, targeted vulnerable patients, damaged the ward environment, graffitied racist and homophobic language onto her walls. She has also set fire to her bedroom

> with reported intent to endanger the lives of staff. G said at the time that she wanted to end the life of staff."

19. The Guardian was able to visit G on the hospital ward on 19 October 2020. G presented as dismissive and bordering on aggressive, with her repeatedly swearing at the Children's Guardian. When attempting to discuss placement options her, G made clear to the Children's Guardian that she was "not bothered" where she was placed.

20. As I have noted, G has now been assessed by a multi-disciplinary mental health team as not meeting the criteria for continued detention on a mental health ward. The court has been informed that the psychiatrist and the team working with G consider that G's presentation is driven by behaviour and that she has no underlying diagnosable mental disorder meriting clinical treatment in a hospital setting. The multi-disciplinary team further concluded that G *may* be developing an emerging personality disorder and will need to receive support from appropriate mental health services. Whilst the hospital had planned on reviewing and discharging G on 19 October 2020, the discharge meeting is now scheduled for 10.30am today and, based on the report that the court has seen, the expectation is that G will be discharged.

21. The local authority have been conducting a diligent and comprehensive search for an appropriate secure placement for G across the United Kingdom to no avail. The local authority has likewise diligently searched, as a contingency, for a regulated non-secure placement that could accommodate G under the auspices of an order authorising the deprivation of her liberty but has not been able to locate such a placement.

22. In an attempt to better illuminate the chances of locating an appropriate *secure* placement, that being the local authority's primary application, when the matter first came before me on Wednesday of this week I directed a statement from the Secure Welfare Coordination Unit (hereafter SWCU) operated by Hampshire County Council. Pursuant to that direction, the court has before it a letter from Helen Gunniss, the Team Manager of SWCU. That letter appears designed to make clear to the court that SWCU has only the bare minimum of responsibilities, and certainly no responsibilities towards the children for whom secure placements are sought via the service it offers. In particular, Ms Gunniss informs the court that:

    i) The SWCU provides a single point of contact for local authorities in England and Wales to arrange secure welfare placements and streamlines the process of finding the most suitable placement matching the individual needs of each young person needing secure care.

    ii) The SWCU is commissioned to conduct this work on behalf of the Department of Education (DfE). It does not hold any statutory decision-making powers.

    iii) The decision as to whether to accept an individual child for a placement within a home remains with the manager of the individual unit.

    iv) Neither the SWCU nor the Secretary of State has a direct role in the commissioning of secure places for individual young people on welfare grounds. It is for the local authority to come to a view as to the appropriate placement for an individual child and for the person with management

responsibility for the Secure Children's Home (SCH) with available places to decide whether to take the child.

v) The final decision on making a welfare placement remains with the placing local authority and the manager of the receiving secure children's home.

vi) The SWCU cannot answer for capacity issues in the system, or comment on individual placement decisions.

23. Of particular concern to the local authority in this case is the decision by SWCU to cease providing the names and locations of the secure units available at any given time. In her letter, Ms Gunniss describes the rationale for that decision as follows:

> "Due to the bed capacity and impact of Covid-19 a decision was made by the SWCU in collaboration with the SCH Register Managers, the DfE and the SWCU's Board to amend the previous process of how beds were advertised. The beds are projected beds rather than declared beds to support planned moves and transitioning into the secure welfare estate. As part of this process change it was jointly agreed that it was not felt necessary that the SCH's were named moving forward. This amendment has not impacted the process in any way, with the referrals being sent to all potential SCH's for consideration as they previously would have."

24. I make clear that the reasonableness or otherwise of that decision is not before the court for consideration today, nor have I heard submissions from SWCU. However, given the difficulties for the local authority caused in this case by that decision, I feel compelled to observe that Ms Gunniss' rather blithe assertion that "This amendment has not impacted the process in any way" may be true when looked at from the perspective of those adults who manage SWCU, but it is almost certainly not true from the perspective of the vulnerable children who require secure placements. As Ms Boardman made clear in her submissions, the location of a given placement is central to effective care planning for a child, as is the ability to liaise with a placement that might be available for that child.

25. Within this context, the decision of SWCU not to provide details even of the geographical location of the few placements that may be available means (as will be apparent to anyone with even the most rudimentary understanding of effective care planning) that information central to child-centred care planning is unavailable to a local authority. This may well make things easier for SWCU. The same cannot be said for the vulnerable children that local authorities, and in some cases the court, are charged with protecting. In particular, it not clear how SWCU's stated aim, as articulated in Ms Gunniss' letter, to "streamline the process of finding the most suitable placement matching the individual needs of each young person needing secure care" and to enable "informed decisions about the most appropriate placement for them" is facilitated by not providing the names and locations of the secure units in question to the local authorities that, as Ms Gunniss is at such pains to point out, have responsibility for identifying the appropriate placement for an individual child.

26. Within the foregoing context, the local authority submits that the criteria pursuant to s 25(1)(b) of the Children Act 1989 are satisfied and its primary application is for a secure accommodation order. However, in circumstances where there are no secure beds

available, the local authority today advances its application for order authorising the deprivation of G's liberty in a non-secure placement. Due to a lack of resources, the local authority finds itself compelled to advance an unregulated non-secure placement as being in G's best interests.

27. Whilst Mr Jones makes clear that the Children's Guardian harbours genuine concerns as to whether a secure children's home is an appropriate placement and sufficiently able to meet G's needs, the Children's Guardian submits that, at this point, the reality is that there appears to be no other option available for keeping G safe. Within this context, Mr Jones submits that it is beyond doubt that the criteria at s.25(1)(a) of the Children Act 1989 are established. As I have noted, the Children's Guardian is unable to give her consent to G being placed in an unregulated non-secure placement under the auspices of an order depriving G of her liberty, albeit that she recognises that this is, in reality, the only option currently available for G.

28. Thus it is that G is about to be discharged from an adult mental health ward bed and is in urgent need of a secure placement but no such placement is available anywhere in the United Kingdom for G, nor is there available any regulated non-secure placement. This leaves only the option of an unregulated placement supplemented by an order authorising the deprivation of G's liberty in a placement that has stated its intention not to apply for registration and which the Children's Guardian, whilst recognising the reality that it is the only placement available to prevent G being discharged into the community, cannot consent to.

THE LAW

29. Parliament has enacted a statutory regime to regulate the use of secure accommodation in respect of children. That statutory regime provides as follows:

> **25. Use of accommodation for restricting liberty**
>
> (1) Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England or Scotland provided for the purpose of restricting liberty ("secure accommodation") unless it appears
>
> (a) that: -
>
> (i) he has a history of absconding and is likely to abscond from any other description of accommodation; and
>
> (ii) if he absconds, he is likely to suffer significant harm; or
>
> (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons."

30. The questions that the court must consider when determining whether to grant an application for a secure accommodation order under s.25 of the Children Act 1989 were set out by Baker LJ in *Re B (Secure Accommodation)* [2019] EWCA Civ 2025 at [98] as follows:

i) Is the subject child being "looked after" by a local authority, or, alternatively, does he or she fall within one of the other categories specified in regulation 7 of the Children (Secure Accommodation) Regulations 1991?

ii) Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or have as its primary purpose the restriction of liberty?

iii) Is the court satisfied (a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she absconds, he/she is likely to suffer significant harm or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?

iv) If the local authority is proposing to place the child in a secure children's home in England, has the accommodation been approved by the Secretary of State for use as secure accommodation? If the local authority is proposing to place the child in a children's home in Scotland, is the accommodation provided by a service which has been approved by the Scottish Ministers?

v) Does the proposed order safeguard and promote the child's welfare?

vi) Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?

31. By reason of an increasing shortage of secure placements approved as such by the Secretary of State and, Mr Jones submits, an increasing reluctance on the part of those secure placements to accept children with the level and complexity of needs demonstrated by children like G, the courts have increasingly been asked to sanction the placement of children in G's position in regulated, and even unregulated placements under the auspices of an order made under the inherent jurisdiction of the High Court authorising the deprivation of their liberty as an alternative to secure accommodation authorised under s 25 of the Children Act 1989.

32. Within this context, it is again important to emphasise the fact that secure accommodation is governed by a *statutory* regime laid down by Parliament. As noted by Hayden J in *London Borough of Barking and Dagenham v SS* [2014] EWHC 4436 (Fam) at [15]:

> "It scarcely needs to be said that restricting the liberty of a child is an extremely serious step, especially where the child has not committed any criminal offence, nor is alleged to have committed any criminal offence. It is for this reason that the process is tightly regulated by the Children Act 1989 in the way I have set out, but also in the Children (Secure Accommodation) Regulations 1991 and the Children (Secure Accommodation No.2) Regulations 1991."

33. In these circumstances, whilst the Court of Appeal made clear in *Re B (Secure Accommodation)* that where the Local Authority cannot apply under s 25 of the Children Act 1989 because one or more of the relevant criteria are not met, that local authority may be able to apply for leave to apply for an order depriving the child of

liberty under the inherent jurisdiction, subject to the restrictions imposed by s.100(4), Baker LJ also made clear as follows at [102]:

> "Where, however, the local authority applies under s.25 and all the relevant criteria for keeping a child in 'secure accommodation' under the section are satisfied, the court is required, by s.25(4), to make an order under that section authorising the child to be kept in such accommodation. To exercise the inherent jurisdiction in such circumstances would cut across the statutory scheme."

34. During the course of submissions I raised with counsel whether the foregoing observation by Baker LJ in *Re B (Secure Accommodation)* might prevent the court in this case from exercising the inherent jurisdiction in circumstances where all parties are agreed that the criteria for a secure accommodation order are made out (albeit the Children's Guardian considers that such an outcome would not be optimum having regard to G's welfare needs). On further reflection, I am satisfied it does not because, in fact, not all of the criteria required for making a secure accommodation order are made out in this case. *Re B* makes clear that one of the pre-conditions to the making of a secure accommodation is that the placement proposed is "secure accommodation" as defined in *Re B* (namely, it is designed for or having as its primary purpose the restriction of liberty). In this case such a placement is not available and I am satisfied that the inherent jurisdiction therefore remains available to the court because *all* of the criteria under s.25 are not met, and indeed cannot be met.

35. I summarised the legal principles governing the determination of an application for an order authorising the deprivation of a child's liberty under the inherent jurisdiction of the High Court in *Salford CC v M (Deprivation of Liberty in Scotland)* [2019] EWHC 1510 (Fam) as follows.

36. It is a fundamental principle of a democratic society that the State must adhere to the rule of law when interfering with a person's right to liberty and security of person (see *Brogan v United Kingdom* (1988) 11 EHRR 117 at [58]). Art 5(1) of the ECHR provides as follows in respect of a person's right to liberty and security of person:

> "**ARTICLE 5**
>
> **Right to liberty and security**
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of

having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

37. Whilst Art 5(1)(d) of the ECHR provides a specific example of the detention of children, namely for the purposes of educational supervision, that example is not meant to denote that educational supervision is the only purpose for which a child may be detained (see *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 449).

38. It is well established that the rights enshrined in the ECHR are to be read and given effect in domestic law having regard to the provisions of the UN Convention on the Rights of the Child (see *Al Adsani v United Kingdom* (2001) 12 BHRC 88 at 103, *Dyer (Procurator Fiscal, Linlithgow) v Watson; JK v HM Advocate* [2004] 1 AC 379 and *Smith v Secretary of State for Work and Pensions* [2006] 1 WLR 2024 at [78]). Art 37 of the UN Convention on the Rights of the Child provides as follows with respect to the right to liberty:

"**Article 37**

States Parties shall ensure that:

(a) .../

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or

other competent, independent and impartial authority, and to a prompt decision on any such action."

39. Within this context, I pause to note that deprivation of liberty for the purposes of securing a child's welfare has been deprecated by the UN Committee on the Rights of the Child.

40. The court may grant an order under its inherent jurisdiction authorising the deprivation of a child's liberty if it is satisfied that the circumstances of the placement constitute a deprivation of liberty for the purposes of Art 5 of the ECHR and if it considers such an order to be in the child's best interests.

41. With respect to the question of whether the arrangements in the placement amount to a deprivation of liberty for the purposes of Art 5, *Storck v Germany* (2006) 43 EHRR 6 the European Court of Human Rights established three broad elements comprising a deprivation of liberty for the purposes of Art 5(1) of the ECHR, namely (a) an objective element of confinement to a certain limited place for a not negligible period of time, (b) a subjective element of absence of consent to that confinement and (c) the confinement imputable to the State. Only where all three components are present is there a deprivation of liberty which engages Art 5 of the ECHR. Within this context, in *Cheshire West and Chester v P* [2014] AC 896 the Supreme Court articulated an 'acid test' of whether a person who lacks capacity is deprived of their liberty, namely (a) the person is unable to consent to the deprivation of their liberty, (b) the person is subject to continuous supervision and control and (c) the person is not free to leave.

42. The first limb of the "acid test" does not require examination in the particular circumstances of this case. With respect to the application of the second and third limbs of the test to children and young people, in *Re RD (Deprivation or Restriction of Liberty)* [2018] EWFC 47 Cobb J, having undertaken a meticulous review of the extensive case law, summarised the position as follows:

    i) 'Free to leave' does not mean leaving for the purpose of some trip or outing approved by those managing the institution; it means leaving in the sense of removing herself permanently in order to live where and with whom she chooses (*Re A-F* [2018] EWHC 138 (Fam) at [14], repeating comments made in *JE v DE* [2006] EWHC 3459 (Fam) at [115], which had been cited with approval in *Re D (A Child)* [2017] EWCA Civ 1695, [22]);

    ii) It is accepted wisdom that a typical fourteen or fifteen-year old is not free to leave her home (*Re A-F* at [31](i));

    iii) The terms 'complete' or 'constant' define 'supervision' and 'control' as indicating something like 'total', 'unremitting', 'thorough', and/or 'unqualified' (*Re RD (Deprivation or Restriction of Liberty)* at [31]);

    iv) It does not matter whether the object is to protect, treat or care in some way for the person taken into confinement (*Cheshire West and Chester v P* at [28]);

    v) The comparative benevolence of living arrangements should not blind the court to their essential character if indeed those arrangements constitute a deprivation of liberty (*Cheshire West and Chester v P* at [35]);

vi) What it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities (*Cheshire West and Chester v P* at [46]);

vii) The person's compliance or lack of objection, the relative normality of the placement (whatever the comparison made) and the reason or purpose behind a particular placement are not relevant factors (*Cheshire West and Chester v P* at [50]);

viii) The distinction between deprivation and restriction is a matter of "degree or intensity" and "in the end, it is the constraints that matter" (*Cheshire West and Chester v P* at [56]);

ix) The question whether a child is restricted as a matter of fact is to be determined by comparing the extent of the child's actual freedom with someone of the child's age and station whose freedom is not limited (*Cheshire West and Chester v P* at [77]);

x) The sensible and humane comparison to be drawn is that between the situation of the child with the ordinary lives which young people of their ages might live at home with their families (*Cheshire West and Chester v P* at [47]);

xi) The 'acid test' has to be directly applied on each case to the circumstances of the individual under review. Where that individual is a child or young person, particular considerations apply (*Re A-F* at [30]).

43. In *Guzzardi v Italy* [1980] 3 EHRR 333 the ECtHR observed that to determine whether someone has been "deprived of his liberty" within the meaning of Art 5, the starting point must be his or her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. Within this context I repeat the following, non-exhaustive, list of relevant factors that I set out in *Salford CC v M*:

i) The extent to which the child is actively prevented from leaving the placement and the extent to which efforts are made to return the child if they leave;

ii) The extent to which forms of restraint are utilised in respect of the child within the placement and their nature, intensity, frequency and duration;

iii) The nature and level of supervision that is in place in respect of the child within the placement;

iv) The nature and level of monitoring that is in place in respect of the child within the placement;

v) The extent to which rules and sanctions within the placement differ from other age appropriate settings for the child;

vi) The extent to which the child's access to mobile telephones and the Internet is restricted or otherwise controlled;

vii) The degree of access to the local community and neighbourhood surrounding the placement and the extent to which such access is supervised;

viii) The extent to which other periods outside the placement are regulated, for example transport to and from school.

44. With respect to the application of the 'acid test' to children and young people it will be seen that, as Cobb J made clear in *Re RD (Deprivation or Restriction of Liberty)*, the courts have utilised comparators against which to measure the elements of that test in respect of the subject child. In *Re A-F* at [33] Sir James Munby stated that:

> "...whether a state of affairs which satisfies the "acid test" amounts to a "confinement" for the *Storck* component (a) 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".

45. Within this context, in *Cheshire West and Chester v P* Lord Kerr observed that "All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances". Childhood is not a single, fixed and universal experience between birth and majority but rather one in which, at different stages, in their lives, children require differing degrees of protection, provision, prevention and participation. Within this context, with respect to the subject child, each case must be decided on its own facts.

46. However, with respect to the question of a comparator, in *Re A-F* Sir James Munby sought to lay down a "rule of thumb" whereby, having observed that a child under the age of 15 years old is not 'free to leave' in the context used in *Cheshire West and Chester v P*, he noted that a child aged ten, even if under pretty constant supervision, is unlikely to be "confined", a child aged 11, if under constant supervision, may, in contrast, be so "confined, though the court should be astute to avoid coming too readily to such a conclusion and once a child who is under constant supervision has reached the age of 12, the court will more readily come to such a conclusion.

47. Where the non-secure placement being considered in the context of an application for an order authorising the deprivation of a child's liberty is an unregulated placement, the guidance issued by President of the Family Division entitled *Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales* applies. Paragraph [1] of that guidance provides that:

> "The primary focus of this Guidance is to ensure that, where a court authorises placement in an unregistered unit, steps are immediately taken by those operating the unit to apply for registration (if the unit requires registration) so that the placement will become regulated within the statutory scheme as soon as possible. The Guidance requires the court to monitor the progress of the application for registration and, if registration is not achieved, to review its continued approval of the child's placement in an unregistered unit."

48. The guidance requires the following steps to be taken when an application is made to the court for an order under the court's inherent jurisdiction to authorise the deprivation of the liberty of a child:

    i) The applicant should make the court explicitly aware of the registration status of those providing or seeking to provide the care and accommodation for the child.

    ii) If those providing, carrying on and managing the service are not registered, this must be made clear to the court. The court should be made aware of the reasons why registration is not required or the reasons for the delay in seeking registration.

    iii) The applicant must make the court aware of the steps it is taking (in the absence of the provision falling within Ofsted or CIW's scope of registration) to ensure that the premises and support being provided are safe and suitable for the child accommodated.

    iv) Due to the vulnerability of the children likely to be subject to an order authorising a deprivation of their liberty, when a child is to be provided with care and accommodation in an unregistered children's home or unregistered care home service, the court will need to be satisfied that steps are being taken to apply for the necessary registration.

    v) The court should also be informed by the local authority of the steps the local authority is taking in the meantime to assure itself that the premises, those working at the premises and the care being given are safe and suitable for the accommodated child.

    vi) Where an application for registration has been submitted to Ofsted or CIW, the court should be made aware of the exact status of that application.

    vii) If an order is granted and no application for registration has been made, then the court order should provide that the application for registration should be submitted to Ofsted or CIW within 7 working days from the date of the order.

    viii) Once the court is satisfied that a complete application has been received by Ofsted or CIW, the court will review the situation regarding the registration status of those carrying on and managing the children's home or care home service in a further 12 weeks. Such review (which may be on paper) will be in addition to any review the court requires to ascertain whether the deprivation of liberty should continue.

    ix) If the court has not received confirmation from the local authority within 10 working days of the initial order that a complete application for registration has been received by Ofsted or CIW, the court should list the matter for a further immediate hearing.

    x) If registration is refused or the applications for registration are withdrawn, the local authority should advise the court of this as a matter of urgency. The court will take this into account when deciding whether the placement of the child in

the unregistered children's home or unregistered care home service continues to be in the child's best interests.

DISCUSSION

49. By reason of the lack of adequate provision for secure accommodation and a lack of regulated provision for children, this court is once again driven to the situation where it must consider the use of an unregulated placement supplemented by an order authorising the deprivation of her liberty for a child who, on the local authority's case, meets the statutory criteria for secure accommodation. Further, it is difficult not to conclude in this case that the local authority's application for a secure accommodation order is itself forced upon the local authority in part by inadequate provision in this jurisdiction for children and adolescents who do not meet the criteria for detention and treatment under the Mental Health Act 1983 but nonetheless require assessment and treatment for mental health issues within a restrictive clinical environment. As Ms Boardman submitted, G is, by reason of her highly complex welfare needs, another child who falls through the gaps that exist between secure accommodation, regulated accommodation and detention under the mental health legislation.

50. Within this context, a brief survey of the authorities demonstrates that the courts have repeatedly highlighted the shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment, the shortage of secure placements and the shortage of regulated placements.

51. In *Re X (A Child)(No.3)* [2017] EWHC 2036 (Fam) at [37] Sir James Munby observed, in respect of a child with similar difficulties to G, as follows in respect of the shortage of clinical provision for placement of children and adolescents who do not meet the requirements of the mental health legislation but require assessment and treatment for mental health issues within a restrictive clinical environment:

> "[37] What this case demonstrates, as if further demonstration is still required of what is a well-known scandal, is the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with. We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. X is part of our future. It is a disgrace to any country with pretensions to civilisation, compassion and, dare one say it, basic human decency, that a judge in 2017 should be faced with the problems thrown up by this case and should have to express himself in such terms."

52. In *Re M (A Child: Secure Accommodation)* [2017] EWHC 3021 (Fam) at [20] Hayden J noted that it was impossible not to confront the depressing reality that current secure accommodation resources in England and Wales are inadequate and observed:

> "[20] It is profoundly depressing that having analysed the case in the way I have, the Local Authority has not ultimately been able to find a unit that is prepared to accommodate M. Thus I find myself, once again, in a position of considering the needs of a vulnerable young person in the care of the State

> where the State itself is unable to meet the needs of a child which they themselves purport to parent."

53. In 2018 in *Re T (A Child)* [2018] EWCA Civ 2136 the President, giving the lead judgment in the Court of Appeal, observed as follows:

> "[2] ... This court understands that, in recent years, there has been a growing disparity between the number of approved secure children's homes and the greater number of young people who require secure accommodation. As the statutory scheme permits of no exceptions in this regard, where an appropriate secure placement is on offer in a unit which is either not a children's home, or is a children's home that has not been approved for secure accommodation, the relevant local authority has sought approval by an application under the inherent jurisdiction asking for the court's permission to restrict the liberty of the young person concerned under the terms of the regime of the particular unit on offer.
>
> [3] Despite the best efforts of CAFCASS Cymru (this being a case concerning a Welsh young person), it has not been possible to obtain firm data as to the apparent disparity between the demand for secure accommodation places and the limited number available, nor of the number of applications under the inherent jurisdiction in England and Wales to restrict the liberty of a young person outside the statutory scheme. The data published by the Department for Education referred to in paragraph 2 simply measures the occupancy rate within the limited number of approved secure places without attempting to record the level of demand.
>
> .../
>
> [5] It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament".

54. In *Re B (Secure Accommodation Order)* [2019] EWCA Civ 2025 at [6] the Court of Appeal, having referred to the observations of the President in *Re T* and data provided to the Court of Appeal in the written submissions of the Association of Lawyers for Children, noted as follows with respect to the shortage of secure placements:

> "[6] This significant shortfall in the availability of approved secure accommodation is causing very considerable problems for local authorities and courts across the country. It has been the subject of expressions of judicial concern in a number of cases by judges dealing with these cases on a regular basis, notably by Holman J in *A Local Authority v AT and FE* [2017] EWHC 2458 (at paragraph 6):

> 'I am increasingly concerned that the device of resort to the inherent jurisdiction of the High Court is operating to by-pass the important safeguard under the regulations of approval by the Secretary of State of establishments used as secure accommodation. There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children.'

> The absence of sufficient resources in such cases means that local authorities are frequently prevented from complying with their statutory obligations to meet the welfare needs of a cohort of vulnerable young people who are at the greatest risk of harm. The provision of such resources is, of course, expensive but the long-term costs of failing to make provision are invariably much greater. This is a problem which needs urgent attention by those responsible for the provision of resources in this area."

55. In *Dorset Council v E (Unregulated placement: Lack of secure placements)* [2020] EWHC 1098 (Fam) His Honour Judge Dancey sitting as a judge of the High Court simply observed at the conclusion of his judgment that:

> "I direct that this judgment be sent to the Secretary of State for Education and to the Children's Commissioner. The important message is that E is at risk of harm to himself or others, possibly fatally so, unless a secure placement can be found for him. At the moment, no such placements are available because there simply are not enough of them."

56. In *Z (A Child: DOLS: Lack of Secure Placement)* [2020] EWHC 1827 (Fam) at [23] Judd J, expressing significant misgivings about the deprivation of liberty order she felt compelled to make in the absence of secure placement, noted that:

> "Because of the dire circumstances of this case the Secretary of State for Education was invited to attend this hearing by counsel to see if there was any possible assistance or suggestions that could be offered in circumstances where such a young and vulnerable person is without a suitable placement. I am very grateful that the Secretary of State arranged for Mr. Holborn of counsel to attend, but the response was quite clear. There is nothing that can be done and the local authority will have to keep searching."

57. In addition to the shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment and the shortage of secure placements, there is also a well-recognised shortage of regulated non-secure placements, placing pressure on local authorities to seek and courts to authorise the deprivation of liberty of children in unregulated placements. In *Re S (Child in care: Unregulated placement)* [2020] EWHC 1012 (Fam) at [3] Cobb J noted as follows:

> "[3] Samantha's case is depressingly all too familiar to those working in the Family Court, and is I believe indicative of a nationwide problem. There is currently very limited capacity in the children's social care system for young people with complex needs who need secure care; it appears that demand for registered places is currently outstripping supply. This is the frustrating experience of the many family judges before whom such difficult cases are

> routinely presented. It is also the experience of the Children's Commissioner to whom I forwarded a number of redacted documents in this case, with the agreement of the parties. I have set out her response, having seen those documents, in full at [28] below. She has indicated that she would like the issues raised by this case, which she accepts are illustrative of similar cases up and down the country, to be raised directly with the Secretary of State for Education, the Rt Hon Gavin Williamson CBE MP. With my explicit permission, it shall be."

And at [31]:

> "[31] The President of the Family Division has had sight of this judgment in its final draft. He entirely shares the concerns which I have expressed above about Samantha's situation, and about the significant number of similar cases which are regularly brought before the Family Courts; the essential message of this judgment of course echoes what he himself had said eighteen months ago in *Re T*."

58. Finally, only this week Cobb J again repeated these concerns in *H (Interim Care: Scottish Residential Placement)* [2020] EWHC 2780 (Fam) at [85] as follows:

> "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)*."

59. It is plain that, despite the issue being highlighted in multiple court decisions since 2017, and by the Children's Commissioner, the shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment, the shortage of secure placements and the shortage of regulated placements remains. In this context, children like G with highly complex needs and behaviour continue to fall through the gaps that exist between secure accommodation, regulated accommodation and detention under the mental health legislation.

60. Besides the obvious prejudice to the welfare of highly vulnerable children that this situation creates, leaving society's most vulnerable children without the help they need to address their complex emotional and mental health issues, the situation also has a *highly* corrosive on the decision making process of local authorities and courts that is designed to assure the welfare of those children.

61. In particular, the shortage of appropriate resources increases the risk that the decisions regarding the welfare of children will be driven primarily by expediency, with the welfare principle relegated to a poor second place. Within the context of secure accommodation, the local authority and the court must each consider whether the proposed placement would safeguard and promote the child's welfare (see *Re B (Secure Accommodation Order)* [2019] EWCA Civ 2025). When considering whether to grant an order authorising the deprivation of a child's liberty the court must treat the child's best interests as its paramount consideration. Where a local authority or a court is placed in a position of having to approve a placement because it is the *only* option available it is obvious that these cardinal principles will be at risk of being undermined. Yet this is the situation that local authorities and courts are forced to grapple with everyday up and down the country by the continuing shortage of appropriate resources and as highlighted repeatedly in the authorities that I have referred to above and more widely by the Children's Commissioner for England.

62. What then is the court to do for G? A decision must be made today for this child who is so vulnerable and so at risk of, possibly fatal, harm. I have decided that I am left with no option but to grant relief to the local authority under the court's inherent jurisdiction. My reasons for so deciding are as follows.

63. Having regard to the legal principles that I have set out above I am satisfied on the evidence before the court that if placed in the unregulated placement identified by the local authority G will be deprived of her liberty for the purposes of Art 5 of the ECHR. The restrictions that will be imposed on G in that placement are as follows:

    i) Locked car doors when being transported to the placement with three to one supervision.

    ii) Three to one supervision at all times when in the placement.

    iii) The doors in the placement will be locked where there may be a risk to G and staff and due to the risk of arson.

    iv) G will be escorted whenever she is away from the placement.

    v) Staff will use reasonable and proportionate measures to ensure that she does not leave the placement and to return her to the placement if she does leave.

    vi) Reasonable and proportionate measures may be used to restrain G when she is distressed.

    vii) G will not be permitted access to her mobile phone.

    viii) G will be subject to a 'waking watch' every ten minutes during the night.

64. Within the foregoing context, and applying the legal principles set out above, I am satisfied that G is unable to consent to the deprivation of her liberty, is subject to continuous supervision and control and is not free to leave the placement.

65. With deep reservations, I am further satisfied on balance that it is in G's best interests to authorise the deprivation of her liberty in the placement identified by the local

authority notwithstanding that the placement is plainly sub-optimal from the perspective of meeting G's identified welfare needs and is an unregulated placement.

66. The brutal reality facing the court in this case is that if not deprived of her liberty in an unregulated placement, there is an unacceptable risk that G will end her own life or cause herself, and possibly others, very serious physical harm. Whilst basing the court's decision as to best interests on this narrow consideration in circumstances where the placement identified is otherwise sub-optimal in terms of G's wider welfare risks reducing the application of the best interests test to an almost transactional exercise, it cannot be in G's best interests to be discharged into the community where she will, I am satisfied on the evidence before the court, be at a very high risk of fatal self-harm.

67. Within this context, whilst I am acutely aware that the Children's Guardian is not able to support this placement, I have come to the conclusion that I must authorise G's deprivation of liberty at that placement as being in her best interests notwithstanding that the Children's Guardian is, understandably, not able to lend her support to this course of action as being in G's best interests. In particular, I bear in mind that whilst, for reasons that are plainly justified, the Children's Guardian cannot support the course of action proposed by the local authority, the Children's Guardian also, through Mr Jones, realistically recognises the reality of the situation. Namely, there is nowhere else for G to go upon her discharge from the adult mental health ward and it is not in her best interests to be discharged into the community with the concomitant high risk of harm and death.

68. I have also borne carefully in mind that, as matters stand at the hearing today, the placement identified by the local authority has stated an intention not to seek registration and that, accordingly, this is not a case in which the President's guidance *Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales* can readily be complied with. It is clear from the terms of the guidance that that guidance does not exclude the possibility of it being in a child's best interests to be deprived of their liberty in an unregulated placement. However, in this case the fact that the placement was identified only just prior to this hearing and the fact that court has already been notified that the placement in question does not intend to seek registration must mean that the court can only authorise the placement for the shortest possible time before undertaking a review. That review will be undertaken having directed the local authority to file and serve a statement setting out (a) the reasons for the placement deciding not to seek registration, (b) the steps it being taken by the local authority to ensure that the premises and support being provided are safe and suitable for the child accommodated and (c) the steps the local authority is taking to assure itself that the premises, those working at the premises and the care being given are safe and suitable for the accommodated child. I also bear in mind that the local authority intend over this weekend to put in place twenty four hour support from COVE in respect of G's mental health.

69. Within this context, whilst prepared to authorise the deprivation of G's liberty at the unregulated placement identified by the local authority I make clear that decision is subject to the following caveats:

    i) The local authority has indicated to the court that the placement is an emergency placement and will only be sustained for as long as it takes to identify a more permanent placement for G.

ii) The local authority shall by 3pm today file and serve a statement setting out

a) The reasons for the placement deciding not to seek registration;

b) The steps it being taken by the local authority to ensure that the premises and support being provided are safe and suitable for the child accommodated;

c) The steps the local authority is taking to assure itself that the premises, those working at the premises and the care being given are safe and suitable for the accommodated child.

d) The steps the local authority intends to take to ensure that the regulatory framework applicable to secure accommodation placements is applied to the placement.

iii) The court will list the matter at 2.00pm this coming Monday to urgently review the situation with a view to determining whether the placement should be maintained for a further short period or whether alternative provision for G should be made, if such provision can be found.

CONCLUSION

70. In the circumstances of this case, for the reasons I have set out, I am satisfied that the court is left with no option but to make an order authorising the deprivation of G's liberty at the unregulated placement located by the local authority. In short, this is the only placement available and the priority must be to keep G safe. She has nowhere else to go. As I make clear however, I harbour grave reservations about this decision.

71. As I have noted above, it is a fundamental principle of a democratic society that the State must adhere to the rule of law when interfering with a person's right to liberty and security of person. Within this context, I am left asking myself whether, where there is only one, sub-optimal option open to the court apart from allowing G back into the community where she may well end her own life, the court is really exercising its welfare jurisdiction if it chooses that one option, or if it is simply being forced by mere circumstance to make an order irrespective of welfare considerations. At best, the decision can be based on only the narrowest of such considerations, namely the bare need to prevent G from harming herself. Within this context, I echo the words of the former President in *Re X (A Child)(No.3)* as I am left acutely conscious of my powerlessness, of my inability to do more for G.

72. I direct that this judgment shall be sent forthwith to the Children's Commissioner for England, to the Rt Hon Gavin Williamson CBE MP, Secretary of State for Education, to Sir Alan Wood, Chair of the Residential Care Leadership Board, to Vicky Ford MP, Minister for Children to Isabelle Trowler, the Chief Social Worker, to OFSTED and to SWCU.

73. That is my judgment.