



Neutral Citation Number: [2021] EWHC 2556 (Fam)

Case No: BM21P70219

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/09/2021

Before :

MRS JUSTICE LIEVEN

Between :

BIRMINGHAM CITY COUNCIL

Applicant

and

R

First Respondent

and

S

Second Respondent

and

T

Third Respondent

Mr Nick Goodwin QC (instructed by **Birmingham City Council**) for the **Applicants**

The First Respondent was not represented and appeared in person

The Second Respondent was not represented and did not attend

Ms Karen Bailey (instructed by **the Children’s Guardian**) for the **Third Respondent**

Hearing dates: **21 September 2021**

Approved Judgment

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MRS JUSTICE LIEVEN

The Judge hereby gives leave for this judgment to be reported in this anonymised form. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by name or location.

Mrs Justice Lieven DBE :

1. This is an application by Birmingham City Council (hereafter “BCC”) for the court to review a deprivation of liberty (“DOLS”) authorisation made on 30 July 2021 in respect of a child, T. T’s date of birth is 1 Dec 2004 and she is therefore now aged 16.
2. Mr Goodwin QC appeared before me for BCC, together with Ms Bailey, a solicitor instructed on behalf of the Children’s Guardian who could not attend. T’s mother, R, appeared in person and spoke to the court. T’s father, S, unfortunately was not available today (although would have liked to have been) but was happy for us to proceed in his absence.
3. T is subject to a full care order and a deprivation of liberty authorisation for 12 months given on 22 July 2020. She has a diagnosis by mental health experts that she has “*experienced developmental trauma as a result of neglect, generalised and social anxiety, learning difficulties and secondary ADHD symptoms*”. The documents show there have been incidents of extreme emotional dysregulation during which she had put herself and others at risk. The log from her current placement refers to the need for quite extensive physical restraint and police intervention. I understand she has caused property damage at the placement, has threatened and assaulted staff there and has self-harmed.
4. There are real concerns expressed by the social workers that when seriously agitated T’s dysregulation can be such that she places herself and others at very considerable risk. Since, I believe, November 2020 T has been relatively settled in a placement in the Midlands (“the placement”), under the terms of the DOLS order. This is a solo placement supported by at least two care staff at all times and is provided by organisation called Nurtured Future Living (“NFL”). It is not a registered children’s home. There is some disagreement between the mother and the social workers as to how well T has been doing there but it appears from the evidence that she is relatively settled, is now enjoying school and is engaging with education for the first time in some time. The care she is being provided with, although I am sure not perfect, has been reasonably consistent and positive. Her mother points out that T has had to move previously on a number of occasions, which is not good for her mental health and her emotional stability. I am very keen in this judgment to try to ensure that T does not have to move again until there is a reasonably certain and secure place for her where the court can have some optimism she can stay for a reasonable period.
5. The matter came back before me because in November and December 2020 HHJ Rowland reviewed the case, NFL having informed BCC that it was in the process of registering the placement. However no such application materialised and at a further review hearing before HHJ Rowland in July 2021, BCC informed the court that no application had been made. HHJ Rowland continued the order for 12 months but it then transpired that NFL informed BCC that they were not going to apply for registration. I do not have full information about the basis for that decision and one thing I will order is a statement from NFL as to their position in respect of registration, both for the purposes of the placement but also if there is a more general decision not to seek registration from Ofsted in respect of other NFL properties.
6. Ofsted has apparently responded to NFL’s position by threatening to prosecute if T remains at the placement. The consequence of this is that NFL served notice on BCC

on 3 August 2021. I am told that NFL were prepared to keep T and recognise the good progress she has made were it not for Ofsted's position. NFL has indicated they are prepared to continue to look after T until an alternative placement has been found, although their position may change if Ofsted do take action. It is by reason of that threat by Ofsted that Mr Goodwin QC has asked me to give a reasoned judgment so that Ofsted can fully understand why I authorised the continued placement of T.

7. Since 7 July 2021 BCC has undertaken a very significant search to try to find an alternative placement for T. So far they have been unable to identify any suitable Ofsted registered placement for her. This is not the place for me to repeat yet again the concerns raised by multiple members of the Family Division and the President as to lack of suitable placements for young people such as T who require a DOL authorisation and for whom there is a very significant lack of appropriate accommodation. T is yet another young person who is suffering because of this lack. There is a concern by BCC, which I completely support, that if they were to find a placement outside the area, that would disrupt the support network, her school and undermine her hard-won stability. In my view it would be strongly counter-therapeutic for T to be moved out of the area unless there was simply no other alternative.
8. Equally BCC's position is that to put T in an registered multi-placement children's home would not be in her interests. I support that analysis. Evidence suggests she responds best in a solo placement with a supportive team of carers who she knows and who understand her needs.
9. The other difficult factor in finding a placement is that she is 17 in December 2021 and coming close to a transition to adult services. It is therefore more difficult to find a placement for her as a child. BCC is exploring the possibility of a CQC placement where she could stay beyond 18. Ultimately the placement is a matter for the local authority but, I would say, plainly beneficial for T, when she has to move from the placement, in the not too distance future to be in a placement where she could stay beyond the age of 18, otherwise, again, she will be looking at an extra move.
10. BCC seek that I continue the current DOLS order until an alternative is identified. The Children's Guardian supports that approach, although is very keen to emphasise that an alternative placement needs to be found. The mother's position is that an appropriate placement needs to be found, as a long-term placement. No-one is arguing that I should not authorise the DOLS order to continue until an alternative is found.
11. Under s.22 CA 1989:

“(3) It shall be the duty of a local authority looking after any child
(a) To safeguard and promote his welfare.....”

(3A) The duty of a local authority under subsection 3(a) to safeguard and promote the welfare of a child looked after by them includes in particular a duty to promote the child's educational achievement:
12. Further, under s.22A:

“When a child is in the care of a local authority, it is their duty to provide the child with accommodation”.

13. These general provisions are developed in s.22C, entitled ‘Ways in which looked after children are to be accommodated and maintained’. This section requires the local authority, unless to do so would not be consistent with the child’s welfare or reasonably practicable, to make arrangements for the child to live with a parent, with someone with parental responsibility or with a person previously named in a child arrangements order as the person with whom the child was to live. If such arrangements cannot be made, then the local authority “must place [the child] in the placement which is, in their opinion, the most appropriate placement available”.
14. The section then defines, at s.22C(6), what constitutes a ‘placement’. For present purposes this includes:
 - “(c) Placement in a children’s home in respect of which a person is registered under Part 2 of the Care Standards Act 2000....or;
 - (d) Subject to section 22D, placement in accordance with other arrangements which comply with any regulations made for the purposes of this section”
15. Further duties are placed on the local authority under s.22C(8) and s.22C(9):
 - (8) The local authority must ensure that the placement is such that-
 - (a) It allows [the child] to live near [the child’s] home;
 - (b) It does not disrupt [the child’s] education or training;
 - (c) If [the child] has a sibling for whom the local authority are also providing accommodation, it enables [the child] and the sibling to live together;
 - (d) If [the child] is disabled, the accommodation provided is suitable to [the child’s] particular needs.
 - (9) The placement must be such that [the child] is provided with accommodation within the local authority’s area”.
16. An overarching duty is placed on the local authority by s.22G to ensure that sufficient accommodation is available to accommodate children with different needs.
17. The President of the Family Division, Sir Andrew McFarlane in November 2019 issued Practice Guidance. Practice Guidance: Placements in unregistered children’s homes in England or unregistered care home services in Wales. This reads:

“This Practice Guidance is being issued to explain the registration and regulation structure applicable in England and, separately, in Wales for residential care facilities for children and young people. The number of applications made for a court in family proceedings to authorise a residential placement of a young person in circumstances where their liberty may be restricted has increased markedly in recent times. Often the court is invited to exercise its inherent jurisdiction to approve a particular placement at an ‘urgent’ hearing. Where a residential unit is

registered as a ‘children’s home’ in England, or a ‘care home service’ in Wales, the placement will be regulated and inspected by Ofsted (England) or the Care Inspectorate Wales. 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.

....

Where application is made to the High Court under its inherent jurisdiction to authorise the deprivation of liberty of a child, it is highly likely the place at which the child is to be accommodated will meet the definition of a children’s home or, in Wales, a care home service” (emphasis added).

18. The Guidance was updated on 1 Dec 2020 such that “the court must include in any order approving the placement of a child in an unregistered placement, a requirement that the local authority should immediately notify OFSTED (England)...and provide them with a copy of that order and the judgment of the court”.
19. It is important to note that the President’s Guidance is guidance not law. Therefore a local authority and the court is under an obligation to take it into account and would err in law if it failed to do so, but the President cannot create law in that Guidance. It is also important to note that the Guidance and its addendum do not suggest that placing a child in an unregistered placement would make that placement unlawful or that it cannot be done.
20. The President seeks to ensure that firstly, if such an order is being considered, then Ofsted must be notified and secondly that the court very carefully considers the consequences of placing a child in such an unregistered placement.
21. Mr Goodwin QC in his skeleton argument suggests it would be unlawful to place a child in an unregistered placement by reason of the effects of s.22C(6)(c) and s.22C(6)(d) CA 1989 because an unregistered placement such as this does not fall within (c) as it is not registered and, he suggests, would not fall within (d) because to allow it to do so (as “another arrangement”) would be to undermine or bypass Parliament’s intention to ensure children are only placed in children’s homes that are registered. As I indicated orally in court I am not wholly convinced that analysis is correct. It may be possible to argue and to find that “other arrangements” includes placements in an unregistered children’s home so long as there are no regulations that prevent it being done.
22. However for the purpose of today’s hearing, I do not consider it appropriate to make a ruling on that point given that it was simply a matter of judicial comment that Mr Goodwin QC had no forewarning of and necessarily involved a detailed point of statutory construction. I therefore accept for today’s purposes that a placement in an

unregistered children's home does not fall within s.22C(6)(d) but I will return to that matter when the case comes back to court in a few weeks' time.

23. In any event in order to make the order sought today it is not critical for me to determine that matter as the question of whether placement falls within s. 22C(6) or not goes to the vires of the local authority to place the child, not to the court's power as to whether it can authorise the DOL. This much was made clear by MacDonald J. in the *Tameside* case [2021] EWHC 2472 (Fam) when considering the effect of the 2021 amendments to the Regulations on children under the age of 16, where he declined to determine "whether the local authority retains the power to lawfully place a child in an unregistered children's home". However he did go on to find that the court had the power to authorise a DOL pursuant inter alia to what the Supreme Court said in *Re T* [2021] UKSC 35.
24. MacDonald J. also explained at §38-§40 the difference between unregulated and unregistered placements:

“38. When it comes to considering the purpose of the amended statutory regime, it is important in the foregoing statutory context to be clear about the terminology used with respect to placements, which terminology has been apt to cause confusion in the past.

39. An “unregulated” placement appears intended to refer to a placement that is not required to register with Ofsted under the relevant provisions of the Care Standards Act 2000 and the Care Standards Act 2000 (Registration) (England) Regulations 2010, which make provision for the registration and regulation of children's homes, because it does not come within the definition of a children's home and is hence not liable to regulation. Such unregulated placements will include independent and semi-independent settings for older children, such as supported accommodation, supported lodgings or independent accommodation. The Explanatory Memorandum to The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (hereafter “the Explanatory Memorandum”) makes clear that the Government took the view that the term “other arrangements” in s. 22C(6)(d) of the 1989 Act was intended to refer mainly to independent and semi-independent settings for older children.

40. An “unregistered” placement refers to a placement that is required by the Care Standards Act 2000 and associated regulations to register with Ofsted but has not yet done so. Her Majesty's Chief Inspector of Education, Children's Services and Skills (hereafter “HMCI”) is the registration authority for children's homes in England and is responsible for regulating children's homes. HMCI is also responsible for inspecting the overall performance by any local authority in England of various functions, including children's social care services and functions under the Children Act 1989. HMCI is supported by the body corporate known as Ofsted. Within this context, a children's home as defined by in s.105(1) of the

Children Act 1989 that is not registered will nonetheless be liable to regulation under the 2000 Act and associated regulations. Such a placement may not have been inspected by Ofsted and the standards required for registration will be uncertified, but they may be capable of being met. The Addendum to the President's Practice Guidance dated December 2020 introduced a requirement that the court include in any order concerning a child in an unregistered placement, a direction that the local authority must immediately notify Ofsted (or the Care Inspectorate Wales in Wales) and provide them with a copy of that order and the judgment of the Court. This was to ensure that Ofsted is aware of the unregistered children's home in England and could immediately take steps to make certain that either an application for registration is made, or enforcement action is taken if appropriate."

25. In light of this position it is in my view clear that I retain the power to authorise the deprivation of liberty at the placement whether or not the local authority has the vires to place T there. I refer in that regard to the decision of the Supreme Court in Re T. And in particular [75-177] the paragraphs that explain the role of the court in meeting the State's positive obligations under Article 2 and 3 ECHR to protect vulnerable children and young persons both from an Article 2 risk and from an Article 3 risk. Although T is not described in any diagnosis as being suicidal, her extremely dysregulated and violent behaviour at times must put herself at very significant risk as well as those who are caring for her. It is therefore my view that she falls within the principles set out in Re T regarding the court's protective role. At [170] Lord Stevens refers to the need to find "imperative considerations of necessity". I have no doubt that there are such considerations in this case.
26. However having reached this decision, there are two caveats. The first is that given both T's complex presentation at the placement and the complex legal position it is in my view appropriate for the matter to come back before the court as quickly as possible to give the local authority time to try to find an alternative placement but also to be able to understand better the position of NFL and of Ofsted. I am therefore going to order that NFL produce a statement and invite Ofsted to do so as well and put the case back in my list in four weeks' time.
27. The second point I wish to raise at this stage is a concern about Ofsted's position. I would not be making an order to authorise the deprivation of T's liberty at the placement for 4 weeks if I understood Ofsted's concerns to be around the quality of the care provided and T's safety. However I have very limited information about Ofsted's position and think therefore it is of the greatest importance that Ofsted let the court and BCC know their position as to any prosecution and why it was threatening prosecution against NFL. I hope if Ofsted's concerns were not about the quality of care but were rather about the principle of registration then this judgment will assist in explaining to them why I have continued to authorise the DOL.
28. I discharge HHJ Rowland's order of 30 July 2021 authorising a deprivation of liberty for 12 months and, will make a fresh authorisation until 6pm on 19 October 2021 when the court will next hear the case.