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IN THE HIGH COURT OF JUSTICE FAMILY DIVISION
IN THE MATTER OF CHILD J

CASE NO: FD20P00530

Neutral Citation Number: [2020] EWHC 2395 (Fam)

The Royal Courts of Justice
The Strand
London
Date: 25 August 2020

Before:

MR DARREN HOWE QC
Sitting as a Deputy High Court Judge

BETWEEN

A LOCAL AUTHORITY

Applicant

And

(1) MOTHER

(2) THE CHILD

(By his Children's Guardian)

Respondents

Mr Thomas Jones (instructed by Local Authority Solicitors) appeared on behalf of the Applicant.

The mother appeared in person

Mr William Metaxa (instructed by Lawrence and Co solicitors) appeared on behalf of the child.

Hearing dates: 24 and 25 August 2020

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down will be deemed to be 5.00pm on 25 August 2020.

JUDGMENT

The Background

1. This application concerns a young man who is 16 ½ years of age. I shall refer to him as J. J is said by the local authority to be beyond parental control to the degree required to satisfy the threshold criteria pursuant to section 31(2) Children Act 1989. That J is beyond parental control is not disputed by his mother, who has represented herself before me at yesterday's hearing and again today.
2. The mother is desperately worried for the safety of her son when he goes missing and does not return for days at a time. J has in recent months lived with his maternal grandmother but he goes missing from her care, with neither the mother nor the grandmother knowing where he is and he ignores their attempts to contact him when he is absent.
3. Although J's home is in London, it is clear from information provided to the local authority by the police that he travels extensively around the country. In July 2019 he was arrested in Basingstoke for drug possession. In April 2019 he was arrested and found to have 70 wraps of crack cocaine concealed in his underwear. In February 2020 he was arrested in Somerset believed to be involved in 'county lines' drug distribution. In May 2020 he was arrested in Kent at a property connected with the cultivation of cannabis. In July 2020 it is believed he was in Peterborough and at a risk of violence as he escaped arrest and was thought to have 'snitched' on others. He has most recently been arrested for possession of heroin, cocaine and when in possession of a knife.
4. The concerns for J's welfare extend well beyond his involvement with drugs. In 2018, J's closest friend died as a result of a gang related stabbing. J had gone missing on many occasions prior to this tragic event as he had already been drawn into gang culture. In March 2020, J himself was the victim of an assault by 3 adult males and, in June 2020, J was with male friend when that friend was attacked with an axe, the friend losing 2 fingers as a result of the assault. J has reported that 2 more of his friends have died due to gang related violence.

5. It is not necessary for the purposes of this urgent application to record the full detail of all the risks to which J has exposed himself when beyond the control of his mother. The brief summary above is sufficient to demonstrate that J's involvement with criminal activity and with gang violence exposes him to a very high risk of significant harm, including a risk of death.
6. Attempts have been made to separate J from gang culture in London. Early Help support was provided in 2018 and the mother was encouraged to move areas; a move the mother was not prepared to make for business and other reasons. J was moved to live with a relative in Yorkshire but her soon returned to London. He was enrolled in a group programme but only attended 2 sessions. Both a 'Rescue and Response' worker and a 'Child Criminal Exploitation' worker have been allocated to work with J but no change in behaviour has been achieved. J is believed by the local authority to be an exploited child given his involvement in county lines drug distribution but all strategies tried so far have failed to effect a change. All efforts the mother, the grandmother and local authority staff have made have failed to protect J from harm or to persuade J to protect himself.
7. A residential placement was offered to J in late 2019 but the offer was not taken up by the mother as she did not want J to believe that the family had given up on him. However, J's move to live with the grandmother has not been successful as he has frequently absented himself throughout this year and continued to put himself at risk. The mother now accepts that a more significant intervention needs to be made to protect J from harm.

The Applications

8. On 18 August 2020 the local authority applied to the court for an interim care order. The social work statement in support of the application states that what is required is "a residential placement with deprivation of liberty attached will ensure J is safeguarded and also afford him the stability he requires while work is completed with him to support him". That application was heard by a Circuit Judge on 21 August 2020. The children's guardian did not feel that she could support the local authority's plan without an identified placement. The guardian was not opposing the application for an interim care order.

9. The Circuit Judge granted the local authority permission to make an application to the High Court to exercise the inherent jurisdiction, pursuant to section 100 Children Act 1989. Of course, for that application to have been granted, it was necessary for the Circuit Judge to be satisfied that, pursuant to section 100(4) that:
- (a) the result which the local authority wished to achieve could not be achieved through the making of any other kind of order, and
 - (b) there was 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.
10. The Circuit Judge did not make an interim care order on 21 August 2020 and on 24 August the applications came before me in the High Court urgent applications list. The local authority had issued an application to invoke the inherent jurisdiction and sought a declaration granting the local authority permission to deprive J of his liberty. It was not until the hearing before me had commenced that a further social work statement was provided identifying the placement being proposed and setting out the restrictions anticipated to be necessary. Those restrictions are listed as follows:
- Restrictions on his use of Phone, internet and Correspondences
 - Restrictions on his use of Windows and Doors
 - Not to be allowed to go out without permission and being accompanied by staff members from his placement and/or other professionals;
 - Two to one supervision;
 - Restraint to be used if required;
 - Not to be permitted to access social media without supervision;
 - Permission is given for the doors of the property to be secured if deemed necessary for security reasons and to prevent him from leaving;
 - To have restricted access to personal allowance;
 - His possessions are to be searched and permission is granted to remove belongings, knives or makeshift weapons.
11. The identity and location of the proposed placement had not been known when the hearing before the circuit judge took place and the statement filed yesterday had not been considered by the guardian with her legal advisors. Given the draconian nature of the order being sought by the local authority, I adjourned the

hearing over to today to enable the Guardian to consider the position. I also required the local authority to provide an explanation for why it was seeking to invoke the inherent jurisdiction of the High Court rather than making an application for a secure accommodation order pursuant to section 25 Children Act 1989. I also required information concerning the registration status of the unit that was proposed as the local authority had not complied with best practice guidance issued by the President in November 2019.

12. Shortly before the commencement of the hearing today, I was provided with a detailed skeleton argument by Mr Jones who did not appear yesterday but today represents the local authority. Within that document Mr Jones properly and fully addresses the relevant factual background, the proposed placement and the arrangements said to amount to a deprivation of liberty, the applicable law, why the local authority has been unable to make an application for a secure accommodation order, the President's best practice guidance concerning unregistered children's homes dated 12 November 2019 and specifically the steps to be taken to ensure that the unregistered placement proposed is monitored by the local authority and that the unit itself has applied for Ofsted registration.

The Law

13. In *Surrey County Council v P and others* (Equality and Human Rights Commission and others intervening), *Cheshire West and Chester Council v P and another* (Same intervening) [2014] UKSC 19, [2014] AC 896 (*Cheshire West*), the Supreme Court described that 3 components of deprivation of liberty at para 37:

"... what is the essential character of a deprivation of liberty? ... three components can be derived from *Storck* ..., confirmed in *Stanev* ..., as follows: (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the state."

14. The mother consents to the restriction of J's liberty in the manner being proposed by the local authority. As a matter of fact, I have no hesitation in finding that the restrictions as outlined at §10 above are a significant restriction of liberty for a 16 ½ year old young man. The objective component of the *Storck* test is met.

15. The Supreme Court decided, in *Re D (A Child)* [2019] UKSC 42 that a parent could not give consent for the deprivation of liberty of 16 and 17-year-olds so the agreement of the mother does not provide the authorisation the local authority requires to implement its plan. There is, therefore, a lack of valid consent unless the court grants the declaration sought. It is the state in the guise of the local authority that is seeking to deprive J of his liberty and the state that will, ultimately be responsible for his confinement. The 3 components of *Storck* are met in this case.

16. In *Re A-F (Children)* [2018] EWHC 138 Fam Munby P said:

26. A judge of the Family Court can make a secure accommodation order in accordance with section 25 of the Children Act 1989 (in Wales, in accordance with section 119 of the Social Services and Well-being (Wales) Act 2014). Where the placement of a child involves a "confinement" for the purpose of *Storck* component (a), but is not "secure accommodation" within the meaning of section 25 (section 119), the judicial sanction required if Article 5 is to be complied with can be provided only by the High Court, in the exercise of the inherent jurisdiction, or, in some circumstances if the child has reached the age of 16, by the Court of Protection.

27. In relation to the inherent jurisdiction, the following points are uncontroversial:

i) The inherent jurisdiction can be exercised only by the High Court (in practice by the Family Division) and *not* by the Family Court (though it can be exercised in an appropriate case by a section 9 judge sitting in the Family Division).

ii) As I said in *In re X (A Child) (Jurisdiction: Secure Accommodation)*, *In re Y (A Child) (Jurisdiction: Secure Accommodation)*[2016] EWHC 2271 (Fam), [2017] Fam 80, para 32, quoting what I had earlier said in *Re PS (Incapacitated or Vulnerable Adult)*[2007] EWHC 623 (Fam), [2007] 2 FLR 1083, para 16:

"It is in my judgment quite clear that a judge exercising the inherent jurisdiction of the court ... with respect to children ... has power to direct that the child ... in question shall be placed at and remain in a specified institution such as, for example, a hospital, residential unit, care home or secure unit. It is equally clear that the court's powers extend to authorising that person's detention in such a

place and the use of reasonable force (if necessary) to detain him and ensure that he remains there."

17. In my judgment, there is no evidence before me to suggest that J lacks capacity in terms of any impairment that would activate the provisions of the Mental Capacity Act. He is a child who is exposing himself to the likelihood of significant harm when beyond the control of his mother by reason of his engagement in criminal activity and when being exploited by drug dealers and gang culture.
18. Once the Court is satisfied that the 3 components of the Storck test are met, I must have J's welfare as my paramount consideration and undertake a welfare evaluation to determine whether the deprivation of liberty proposed by the local authority is in the J's best interests, always having firmly in mind that the intervention must be both a necessary and proportionate response to the need to protect J from the harm to which he will be exposed were the declaration not made.
19. Additional information to be taken into account by a court asked to authorise the confinement of a child in an unregulated placement, when the circumstances would meet the terms of section 25 Children Act 1989 were it not for the absence of an authorised registered placement, was set out by the President in practice guidance provided in November 2019. That document prescribes 'Best Practice' in the following way:

"Best practice

Confirmation of Registration Status

14. When making an application to the court for an order under its inherent jurisdiction to authorise the deprivation of the liberty of a child, 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.
15. Local authorities can contact Ofsted or CIW to obtain confirmation as to whether a person is registered in respect of a children's home or secure accommodation service. Every local authority in England can request access to the register of children's homes from Ofsted; while in Wales every local authority can access CIW's online register of regulated services. In addition,

confirmation as to the registration status of a person/setting can be obtained by the local authority contacting Ofsted and speaking to the Senior HMI (Social Care) assigned to their region. In Wales, a local authority can contact CIW and speak to the Senior Manager – Local Authority Inspection, assigned to their area.

Not registered: Is registration required?

16. 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. Registration may not be required because the provision falls within the terms of “unregulated provision” such as supported living which falls outside Ofsted and CIW’s scope of registration, or that a statutory exemption applies. In such cases 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 . If care rather than support is being provided, then the provision is likely to require registration as a children’s home or, in the case of Wales, a care

If registration is required: Next steps

17. 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. The court will wish to assure itself the provider of the service has confirmed they can meet the needs of the child. In addition, the court will need to 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.

18. 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.”

20. I appreciate that the application put before me yesterday was made on an urgent basis when J had again been missing and a point had been reached when a more interventionist approach was required to actively protect him from harm; harm that includes a risk of death. However, in my judgment it is essential that a local authority making an application to the court complies with the requirements of the President’s guidance. The secure accommodation procedures provide important protections for children confined in such institutions. In my judgment, a placement that does not provide those same protections should only be authorised when absolutely necessary. Sadly, at the current time when there is a significant gap between registered secure accommodation provision and registered secure accommodation need, unregistered placements are often absolutely necessary.

21. Finally, I have considered the judgment of Baker LJ in *Re B* [2020] 2 WLR 568.

The Court of Appeal addressed the criteria to be applied when the court is determining an application for a secure accommodation order but, at paragraph 101, said:

[101] S.25 does not cover all circumstances in which it may be necessary to deprive a child of their liberty. As Lady Black observed in *Re D*, at paragraph 100:

"The children who require help will present with all sorts of different problems, and there will be those whose care needs cannot be met unless their liberty is restricted in some way. But by no means all of these children will fall within the criteria set out in section 25(1)(a) and (b), which are the gateway to the authorisation of secure accommodation. It seems unlikely that the legislation was intended to operate in such a way as to prevent a local authority from providing such a child with the care that he or she needs, but an unduly wide interpretation of "secure accommodation" would potentially have this effect. It is possible to imagine a child who has no history, so far, of absconding, and who is not likely actually to injure himself or anyone else, so does not satisfy section 25(1)(a) or

(b), but who, for other good reasons to do with his own welfare, needs to be kept in confined circumstances."

It is well established that a judge exercising the inherent jurisdiction of the court with respect to children has power to direct that the child be detained in circumstances that amounts to a deprivation of liberty. Where the local authority cannot apply under s.25 because one or more of the relevant criteria are not satisfied, it may be able to apply for leave to apply for an order depriving the child of liberty under the inherent jurisdiction if there is reasonable cause to believe that the child is likely to suffer significant harm if the order is not granted: s.100(4) Children Act. As I have already noted, the use of the inherent jurisdiction for such a purpose has recently been approved by this court in *Re T (A Child) (ALC Intervening)* [2018] EWCA Civ 2136. In *Re A-F (Children) (Restrictions on Liberty)* [2018] EWHC 138 (Fam), Sir James Munby P, in a series of test cases, set out the principles to be applied. It is unnecessary for the purposes of this appeal to revisit those principles in this judgment. Last week, Sir Andrew McFarlane, President of the Family Division, published guidance, focusing in particular on the placement under the inherent jurisdiction of children in unregistered children's homes in England and unregistered care home services in Wales".

Discussion and Decision

22. J has not been served with notice of this application. It was thought, rightly in my judgment, that he would be likely to seek to avoid the confinement proposed by the local authority and hide in the company of those the local authority wish to protect him from. Although direct service on the child is not formally required by the rules, permission not to serve J directly was sought, and approved by me, due to the risk of further absconding and J's interests being protected by his Children's Guardian, who now supports the applications made by the local authority.
23. In my judgment, there is reasonable cause to believe that J will suffer significant harm if the local authority is not granted permission to invoke the inherent jurisdiction of the High Court. I am satisfied on the evidence contained in the 2 social work statements, that are not challenged by the mother, that the risks to J's physical and emotional health are very serious and include a significant risk of serious injury and a very real risk of death. There are no registered secure units

available so the protection the local authority seeks to provide to J cannot be provided by the making of any other order.

24. I accept the evidence of the social worker and agree that what is required is for J to be separated from the gang culture in which he is immersed and for intensive work to be undertaken with him to address his harmful behaviours, with the aim of helping him make the choices necessary to protect himself from harm.
25. I am entirely satisfied that the threshold criteria is satisfied as required for the making of an interim order and, taking J's welfare as my paramount consideration and having regard to the section 1(3) Children Act 1989, I make an interim care order to the local authority until the conclusion of these proceedings.
26. Although J has not had the opportunity to put his own views before the court, I find the local authority's plan is in J's best interests. I have considered whether a less restrictive placement should be preferred but I am satisfied, given J's history of absenting himself from the home of his mother and grandmother, that J will seek to abscond from any placement provided by the local authority unless his ability to absent himself is restricted. J needs protection and the opportunity to build relationships away from the gang culture that has been the dominant influence on him for a number of years. I am satisfied that any placement that does not have the authorisation to deprive J of his liberty as proposed by the local authority is very likely to fail with the result that J will again expose himself to a serious risk of significant harm.
27. In all the circumstances, I am satisfied that the care plan proposed by the local authority is both necessary and proportionate as, in my judgment and for the reasons I have given, no other arrangement is likely to be successful in protecting J from the harm to which he has been exposing himself or from the exploitation he has suffered. Therefore, I authorise the local authority to deprive J of his liberty as may be required both when informing J of my decision, transporting him to the unit and when within the unit.
28. However, the local authority sought an initial authorisation for a period of 6 weeks. The guardian's view was that 6 weeks was unlikely to be enough to enable J to settle and begin to build relationships at the unit. Given J's age, in my judgment it would be wrong for me to grant authorisation to deprive J of his liberty for an extended period without giving J himself the opportunity to be heard. It is likely

that he will not welcome being confined in a unit many miles from the area familiar to him and he must be given the opportunity to communicate to the court his own views for managing and resolving the safeguarding issues I have set out in this judgment. Therefore, I will grant an authorisation for a period of 8 days and list this case back before me for consideration of the local authority's application for a longer period of authorisation.

29. Given J's age it is likely that he will read this judgment for himself. He is likely to think that it is full of jargon and expressions of the law that do not seem relevant to him as he sees the world today. The message that I want to convey to J is simple. He has spent the past year or more engaging in activities that could have led to him being seriously hurt or even killed. His mother wants him to be protected and the local authority has a duty to protect him. I have decided that he needs time away from all those people who encourage him to stay away from home and when not at home, want him to behave in ways that he knows might cause him to be arrested by the police or seriously hurt by other people. I am giving the local authority permission to prevent him from leaving the unit where he will now be living and for them to restrict his access with anyone outside of the unit and prevent him using his mobile telephone and social media. I have decided that these are necessary steps to prevent him from putting himself in danger but I will hear what J himself wants to happen when the case comes before me again next week.

30. That is my judgment.