



Neutral Citation Number: [2021] EWHC 183 (Fam)

Case No: PR20C00634

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between:

A Borough Council
- and -

Applicant

E
(A Minor by her Children's Guardian)
-and-

First
Respondent

B
-and-

Second
Respondent

N

Third
Respondent

Ms Julia Cheetham QC and Mr Liam Kelly (instructed by the Local Authority Solicitor) for the Applicant

Mr Christopher Blackburn (of John Whittle Robinson) for the First Respondent
Mr Michael Jones (instructed by Woodcocks Haworth) for the Second Respondent
Ms Helen Wilkinson (instructed by Watson Ramsbottom Solicitors) for the Third Respondent

Hearing dates: 1 February 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 5 February 2021.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned once again with the question of whether the court should authorise the deprivation of a child's liberty in a placement *unregulated* by Ofsted in circumstances where she is presently deprived of her liberty in an inappropriate hospital setting, there being no regulated placements currently available or willing to meet her identified welfare needs.
2. Withing the foregoing context, I am concerned with the welfare of E, born in 2005 and now aged nearly 16. E is represented by Mr Christopher Blackburn on the instruction of her Children's Guardian. E's mother is B, represented by Mr Michael Jones of counsel. E's father is N, represented by Ms Helen Wilkinson of counsel. These proceedings for a care order and an order authorising the deprivation of E's liberty under the inherent jurisdiction of the High Court are brought by the local authority, represented by Ms Julia Cheetham of Queen's Counsel and Mr Liam Kelly of counsel.
3. All parties take the same view as to the appropriate way forward in this matter in the particular circumstances of the case, namely that an order be made authorising the deprivation of E's liberty in an unregulated placement. However, in circumstances where that way forward involves the court approving the order sought in the context of an at present unregulated placement, it is necessary for the court to give a short judgment explaining why it has determined that making such an order is in E's best interests.

BACKGROUND

4. E has three younger siblings. The family have been known to the local authority since 2017, following a referral regarding alleged incidents of domestic violence reported between the mother and the father. The local authority contends that the relationship of the mother and father has been volatile and that violent arguments and physical assaults have occurred in the family home in presence of the children, which has resulted in the police attending the family home.
5. Within this context, upon E entering secondary education she presented with selective mutism. On 2 March 2020 E alleged to the Behaviour Manager at her school that she was afraid to be around her father as he showed her pornographic images, had bought condoms for her to use and had asked her to touch him sexually. As a result of E's allegations the father was arrested and bailed pending the completion of a police investigation. E and her siblings moved to live with their maternal grandmother.
6. On 3 March 2020 E told a social worker that she had fabricated the allegations and wished to return to the care of her parents. On 3 April 2020 the police removed the bail conditions on the father and the mother and the children returned to live at the family home with the father. They declined support from the local authority and the local authority closed the case on 21 April 2020.
7. On 9 July 2020 E emailed her school and posed hypothetical questions regarding sexual abuse. E went on to allege that she had been sexually abused by her father

from the age of 12 and that she was now worried about being pregnant. The police commenced a further investigation and the father left the family home. He remains away from the family home to date. The mother gave her agreement to E being accommodated pursuant to s. 20 of the Children Act 1989. On 28 July 2020 E's siblings were made the subject of Child Protection Plans due to concerns regarding emotional abuse. On 21 September 2020 the police informed the local authority that no further action was being taken with respect to E's allegations against her father due to evidential difficulties with the same.

8. E's behaviour deteriorated significantly from the point of being accommodated on 9 July 2020. In particular:
 - i) E has experienced numerous placement breakdowns, which breakdowns have resulted in ten changes of placement.
 - ii) E has been arrested five times due to her aggressive and volatile behaviour towards carers, other young people, police officers and professionals, and for damage to property.
 - iii) Over this period, E has had seventeen episodes of being missing from her placements.
 - iv) E has self-harmed, threatened suicide, and attempted suicide by overdose of paracetamol on 5 November 2020 and 22 November 2020, necessitating admission to hospital.
 - v) E has met up with adult male strangers and has alleged that she has had sex with them.
 - vi) E has alleged that she has misused illicit drugs.
9. As I have noted, E attempted suicide by overdose of paracetamol on 5 November 2020, necessitating admission to hospital. On 18 November 2020 the mother withdrew her consent to the accommodation of E by the local authority and sought her return home following her discharge from hospital. The mother then changed her mind and confirmed her agreement to the continued accommodation of E pursuant to s.20 of the 1989 Act. This caused E significant emotional distress. E returned to her placement following her discharge from hospital.
10. On 22 November 2020 E again stated that she had taken an overdose of paracetamol and was again admitted to hospital. E alleged that her mother had told her that she, E, would be better off dead. On 23 November 2020 E was arrested at hospital following an incident of her being aggressive, threatening to staff and damaging property. On 24 November 2020 E was given a caution and discharged to her placement, where her volatile and aggressive behaviour continued:
11. On 1 December 2020 HHJ Bancroft made an interim care order with respect to E in favour of the local authority and an order authorising the deprivation of her liberty in her then placement. Following the making of that order, difficulties with E's behaviour continued:

- i) On 3 December 2020 E was found in possession of a knife at school.
 - ii) On 3 December 2020 inspection of E's phone revealed that she had been meeting with unknown male adults, raising concerns of child sexual exploitation and drug misuse.
 - iii) On 3 January 2021 E set fire to a carpet in her placement and later absconded from the placement.
 - iv) On 4 January 2021 E again absconded from her placement and, after returning home but being refused admittance by her mother, was found in a property in the company of three unknown male adults to whom she alleged she was being abused in care. The adults become obstructive when efforts were made to recover E and the police had to be called.
 - v) On 7 January 2021 E jumped from a landing, falling some eight feet to the ground. She was taken to hospital by ambulance. E has remained in hospital since her admission on 7 January 2021.
 - vi) During the period of admission E has continued to be disruptive, setting off alarms, throwing food and drink and dancing on her bed. She has assaulted staff on at least two occasions.
12. On 13 January 2021 a Mental Health Act 1983 assessment hereafter (MHA) of E was undertaken. The MHA resulted in two clinicians completing medical recommendations in support of the detention of E under s.2 of the Mental Health Act 1983, although at this time there were no Tier 4 Psychiatric beds available. However, it is important to note that the Mental Health Act 1983 process in respect of E was a two stage process. The second part of the process involved an Approved Mental Health Practitioner (hereafter AMHP), whose role is to consider whether a Mental Health Act 1983 admission is appropriate based on a balancing of all of the circumstances of the case not limited to the medical recommendation of the MHA pursuant to s.13 of the 1983 Act and to make the application for admission if appropriate, and a representative of the proposed Tier 4 provider. In E's case the AMHP declined to apply for the admission of E, considering that secure accommodation under s. 25 of the Children Act 1989 was more appropriate in light of the risks presented by E. In the circumstances, the criteria for admission under s.2 of the 1983 Act were not met. An outreach worker from the relevant CAMHS service was also of this view and a Tier 4 Access Assessment was also completed accordingly. In light of the outcome of that assessment, no Tier 4 bed search was triggered. This completed the assessment process under the Mental Health Act 1983.
13. On 14 February 2021, a second AMHP undertook a further evaluation of E and this time agreed that an application for admission under s.2 of the Mental Health Act 1983 was appropriate, albeit there remained no Tier 4 provision available. The solicitors for the Trust have now helpfully confirmed that that the intervention of a second AMHP on 14 January 2021 was in error, that error having been caused when the original AMHP incorrectly marked the outcome of the 13 January 2021 assessment on the relevant form, leading to the second AMHP misunderstanding the position.

14. However, and within the foregoing context, when the matter came back before HHJ Duggan on 15 January 2021 it continued to appear to the court that there were conflicting decisions within the NHS as to whether or not E should be admitted pursuant to s.2 of the Mental Health Act 1983, with an absence of Tier 4 provision were the decision to be to admit her. In the circumstances, HHJ Duggan renewed the order authorising the deprivation of E's liberty in hospital until 22 January 2021, directed that the NHS Clinical Commissioning Group provide a statement to clarify the position with respect to Tier 4 provision and the decision making with respect to E in that regard and listed the matter for a further hearing on 22 January 2021.
15. Following the hearing on 15 January 2021 the court was notified that the Clinical Commissioning Group was not responsible for the position with respect to Tier 4 provision and the decision making with respect to E in that regard, that being the responsibility of the Lancashire and South Cumbria NHS Foundation Trust. In the circumstances, HHJ Duggan varied his direction so as to allow for the statement dealing with these matters to be provided by the NHS Trust. In circumstances where that statement had not been provided as at the hearing before him on 22 January 2021, and given the then ongoing lack of clarity in the decision reached under the mental health legislation, HHJ Duggan reallocated the matter to me and listed it for a directions hearing before this court on 25 January 2021 with a representative of the NHS Trust directed to attend.
16. At the hearing before me on 25 January 2021 Ms Louise Wilson, Solicitor Advocate on behalf of the NHS Trust, clarified to the satisfaction of the court that a valid decision not to admit E had been taken under the provisions of the Mental Health Act 1983 by the NHS Trust on 13 January 2021 and that that decision was definitive. Further, at the hearing on 25 January 2021 Mr Kelly could point on behalf of the local authority to no jurisdiction by which this court could review or otherwise interfere with the decision made by the Trust under the 1983 Act on 13 January 2021. In the circumstances, I declined to take any further steps with respect to the decision not to make an application with respect to E pursuant to s.2 of the Mental Health Act 1983.
17. Following the hearing before me on 25 January 2021 the local authority identified a placement for E. The placement caters for young persons aged 16 and over and the placement has had two such placements thus far. The placement identified by the local authority is at present unregulated. However, in accordance with the *President's Guidance: Placements In Unregistered Children's Homes in England or Unregistered Care Home Service in Wales*, the care providers have made an application for registration to Ofsted who have been appraised of the current situation by the local authority. Whilst was initially thought by the provider that planning consent would be required because of the changed of use of the premises to a facility, the Senior Planning Support Officer has confirmed a change of use application is not required. Ofsted has confirmed that whilst it will require formal confirmation of this position from the planning authority before registration can be confirmed, in the interim the registration process is able to proceed and that once a complete application has been received it will be expedited.
18. With respect to the regime that will be put in place at the placement, and which all parties submit will amount to a deprivation of E's liberty for the purposes of Art 5 of the ECHR, the following measures will be deployed:

- i) E will be subject to a staffing ratio of 2:1 for twenty-four hours per day.
 - ii) Within this context, E will have twenty-four hour supervision throughout the day and night, including a waking night watch.
 - iii) E will not be provided with a mobile telephone by the placement and will be restricted in the use of her own mobile telephone.
 - iv) E will have limited access to the internet, which will be fully supervised by a member of staff in line with her needs as identified in the care plan.
 - v) Appropriate restrictors and locks will be in place (risk assessments and risk management plans are in place to ensure safeguards against fire and for the purpose of health and safety).
 - vi) E will only be permitted to leave the home when accompanied by 2 members of staff.
 - vii) Should E abscond from the home, in the first instance staff will try and maintain visual contact with E and report her as Missing From Home to the police. Every effort will be made to identify her location and return her to the home safely.
19. With respect to E's own views, in a virtual meeting with Mr Blackburn E has expressed excitement about moving to the placement. In her own words, E is "proper happy", is "well excited" and "can't wait". In a letter to me, E says:
- "I'm really excited for [the placement] I've met most of the staff. I want to go to [the placement] until I can go home to my family. I love my family."
20. Within the foregoing context, whilst not able to consent to the placement of E in an unregulated placement, the Children's Guardian is supportive of E being moved to the placement located by the local authority as being the only realistic option available. Whilst the local authority and the parents each acknowledge that the placement identified is sub-optimal having regard to E's identified needs, the local authority and the parents likewise contend that E should be discharged to the unregulated placement identified.
21. In summary, the parties take these positions in circumstances where (a) it is not in E's best interests to continue to be deprived of her liberty on a hospital ward, (b) the unregulated placement proposed it is the only option available for E, (c) an application has been made to Ofsted which, if granted, will mean the placement is regulated, (d) the local authority will in the meantime deploy measures to ensure that the placement safeguards and promotes E's welfare, (e) the court will continue oversight of the placement in accordance with the President's Guidance pending the outcome of the application for registration and (f) E herself is very enthusiastic about the proposed placement.

THE LAW

22. The law in this area remains as summarised in previous recent decisions of this court. First, 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.”

- 23. 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).
- 24. Second, 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.”

25. Within this context, I note again 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.
26. Third, 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.
27. 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.
28. 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]).
29. 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.
30. 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”.
31. 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.
32. 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.

33. Fourth, where the 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.”

34. 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.
35. Finally, I am compelled to note that this is yet *another* case in which the court is once again faced with approving an unregulated placement by reason of a lack of any other option consequent on the continuing paucity of regulated provision for children in this jurisdiction. I set out the ever growing list of such cases, and the difficulties they cause for the vulnerable children who are the subjects of them, in detail in *Lancashire CC v G (Unavailability of Secure Accommodation)* [2020] EWHC 2828 (Fam). Since that case was published there has been at least one further published judgment, that of Gwynneth Knowles J in *Q (A Child) (DOLS: Lack of Secure Placement)* [2021] EWHC 123 (Fam), dealing with very similar issues. The need for these resource issues to be addressed for the benefit of the highly vulnerable children with which the courts are concerned in these difficult and troubling cases remains as grimly pressing as ever it was.

DISCUSSION

36. In this, as in many other cases of this type that continue to come before me and my brother and sister judges in the Family Division, I have decided I have no option but to grant the relief sought by the local authority and to authorise the deprivation of E's liberty in the unregulated placement identified by the local authority. My reasons for so deciding are as follows.
37. 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 E will be deprived of her liberty for the purposes of Art 5 of the ECHR. In my judgment, the restrictions that I have summarised above will mean that E is subject to continuous supervision and control within the placement and is not free to leave the same. I am further satisfied that E is unable to consent to the deprivation of her liberty.

38. As to best interests, and with considerable reservations, I am satisfied that it is in E's best interests to authorise the deprivation of her liberty at the unregulated placement identified by the local authority. As I have noted in other cases, that best interests decision can only be based on the narrowest of welfare considerations in circumstances where the court is presented with a *fait accompli* by reason of their being only one alternative to the continued restriction of E's liberty on an NHS hospital ward. Those welfare considerations are as follows.
39. First, it is plain that E's continued presence on a hospital ward is unsustainable. Whilst the unregulated placement proposed by the local authority has acknowledged limitations with respect to being properly equipped and sufficiently experienced to deal with E's behavioural needs, an NHS hospital ward is plainly not equipped to do so. Within this context, the support for the identified placement that the local authority intends to put in place ahead of the completion of the Ofsted registration process, as I detail below, can far more easily be applied to that placement than it can in the context of a busy NHS ward.
40. Second, whilst the court must acknowledge that the placement is unregulated, and therefore sub-optimal both *per se* and from the perspective of being able to meet fully E's identified welfare needs, an application has been made by the placement provider to Ofsted for registration. Within this context, in accordance with the President's Guidance, this court will retain a degree of oversight with respect to the progress of the placement, pending confirmation of registration. More fundamentally, the unregulated placement identified by the local authority is the *only* alternative available to leaving E placed inappropriately on an NHS ward. The Local Authority has searched extensively for placements and this is the only placement identified able and willing to take E having regard to her history.
41. Within the foregoing context, it is important to emphasise that an application for registration in accordance with the President's Guidance is not a universal panacea for the difficulties presented in cases of this nature by the nationwide shortage of regulated placements. Whilst registration will result in an unregulated placement becoming subject to the demands of the relevant regulatory regime, it will not automatically turn a placement that is not equipped to meet fully a child's needs into one that is. In many cases registration, whilst bringing a placement within the regulatory regime, will simply result in the conversion of a unregulated placement that is sub-optimal in terms of meeting fully the child's identified welfare needs into a regulated placement that is a sub-optimal means of meeting fully the child's welfare needs. Within this context, the process set out in the President's Guidance does not represent a substitute for the proper provision of regulated placements fully equipped to, and experienced in meeting the acute, varied and complex needs of the cohort of vulnerable children in which E sadly finds herself now a member.
42. Third, and within the foregoing context, the court must acknowledge that the unregulated placement identified by the local authority is sub-optimal having regard to E's identified needs, and in particular the assessment of the Children's Guardian that this placement is not currently equipped or experienced in caring for a child with complex emotional needs of the type exhibited by E. Against this however, the local authority intends to take the following steps to ensure E's safety and welfare during the period in which that placement remains unregistered:

- i) As noted, an application for Ofsted registration has been made. As at this hearing the paperwork is complete and the application is proceeding.
 - ii) There will be continuing communication between the placement and Ofsted to ensure that the registration approval is expedited.
 - iii) The placement will be visited by a Local Authority Registered Children's Home Manager from the local authority prior to E's planned move in order to advise and support the placement in relation to Ofsted registration and to ensure that the providers are fully aware of the expected standards.
 - iv) Statutory visits will be undertaken by E's social worker and the local authority Commissioning Team in order to undertake compliance checks in accordance with the North West Framework.
 - v) The placement will be monitored by an initial Placement Planning Meeting and followed by meetings at least every 14 days between the child's social worker, the service lead for placements within the local authority, the social work manager and the local authority commission team to review the placement and ensure that there is ongoing risk management.
 - vi) A risk management plan will be developed and remain under continual review.
 - vii) Visits to the placement by the local authority commission team will be undertaken regularly in accordance with the North West Placements Framework.
 - viii) There will be a staffing ratio for E of 2:1 for 24 hours per day.
 - ix) E has had her forensic CAMHS assessment and is being supported by the social work team manager
43. In addition to these matters, I am satisfied that it will also be vital that the additional requirements set out in the the Position Statement of the Children's Guardian are also implemented. Namely, that staff are provided with a full account of E's history and any assessments of her therapeutic and care needs and additional training and supervision within that context, that a set of clear boundaries is established within the placement in order to ensure that E feels safe and that the placement readily shares information with professionals.
44. Fourth, I bear in mind that in expressing her views to the Children's Guardian, E is enthusiastic about the identified placement. She has already met staff from that placement and has expressed excitement about the placement in that context. It would, in my judgment, be antithetic to E's best interests now to inform her that it is not possible for her to move to the placement about which she has demonstrated such enthusiasm, particularly in circumstances where that marked enthusiasm represents a considerable improvement in her presentation to that seen over the past number of months.

CONCLUSION

45. In the circumstances, and with the reservations I have outlined, I am satisfied on a narrow analysis that it is in E's best interests for the court to authorise the restriction of her liberty in the unregulated placement identified by the local authority. In accordance with the President's Guidance, and pending Ofsted's decision as to registration, I will list the matter for further review. I will invite leading and junior counsel to draft an order accordingly.
46. That is my judgment.