[2023] EWHC 1574 (Fam)

Case No: FD22P09640

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2023

Before:

MR DAVID LOCK KC
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between:

DERBYSHIRE COUNTY COUNCIL	**Applicant**
- and –	
AB (1) **CD (2)** **EF (3)** **(A child represented by her Guardian, GH)**	**Respondent**

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Mrs Zoe Powles, solicitor, of Derbyshire County Council
CD in person
Ms Jo Taylor, solicitor, of Timms Law Solicitors for the Guardian

Hearing date: 20 June 2023
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JUDGMENT

1. This is a judgment arising from an application which was made by Derbyshire County Council ("**the Council**") for a Declaration that it was acting lawfully in depriving EF of her liberty as part of a care package which is being delivered at a property within the Derbyshire area ("**the Property**").

2. I was only prepared to make a very limited form of order and the purpose of this judgment is to explain the concerns I raised about extending the DOLS order in the form requested by the Council and to give all parties an opportunity to review their positions before the next hearing on 5 July 2023. It also gives all parties the opportunity, an application is made to extend the order, to prepare and file evidence. In the meantime, I have amended the existing order on a strictly temporary basis to provide that the Council will be acting lawfully in instructing its agents, to deprive EF of her liberty at the Property.

The factual history.

3. EF was born on 19 April 2007 and is now aged 16, having turned 16 on 19 April 2023. EF was living with her mother and then, for a period, EF resided with her boyfriend and his family, but this broke down due to escalating conflict in the home. EF went into local authority care in September 2021 and has lived in five placements since then. Initially she was placed in a Derbyshire foster placement and that lasted until November 2021 before breaking down. She then lived in a residential home for three children in Derby until April 2022 and then (under emergency conditions) the Council arranged a Local Authority solo provision in the High Peak area. On 15 August 2022 a care order was made by HHJ Williscroft to place EF in the care of the Council. That order followed EF moving into local authority care in September 2021. EF initially went into local authority care under section 20 of the Children Act 1989 ("**CA**") because she was considered to be beyond the control of her mother, with whom she had been living before starting her history of short placements. She had been violent towards her mother and others, and was absconding from school. She also had a history of self-harming and there was a danger that she would seriously injure herself or worse if she was not properly protected.

4. On 20 June 2022 the director of Derbyshire County Council authorised the use of a secure placement for EF for up to 72 hours under 10(1) of The Children (Secure Accommodation) Regulations 1991. On 23 June 2022, a court order was made under section 25 CA for EF be placed at a Secure Accommodation, namely a secure unit in Liverpool until 15 August 2022. A

further order was made by HHJ Williscroft on 15 August 2022 for EF to continue to be placed at the secure unit until 15 December 2022.

5. EF seems to have done well at the unit and a review was undertaken on 31 October 2022 which stated that the plan was to support EF to transition back into a foster placement or residential home after the secure order expired. That review noted:

> *"You are engaging well in education which is provided by […]. Your attendance is good, and you have gained points because of your attitude and commitment to learning, well done! You are studying functional skills however you have shared that you do not want to do ICT any longer but are continuing to enjoy your PT sessions twice a week. You continue to do really well in British Sign Language and really enjoys the sessions. You are also engaging well in English and Maths, and you aspire to be a paramedic in the future"*

6. A further review was conducted on 29 November 2022 which proposed as follows:

> *"The proposed care plan is that EF moves from secure accommodation on or before the 15th December 2022 into a residential home (a solo home) in the community supported by a DoLS. The long-term plan is residential care with the potential for semi-independent living post 16 should this be safe for EF. EF has expressed a wish to live within a foster care placement and this will continue to be considered however this needs careful matching and consideration. It has been identified by both social care and health services that EF requires a therapeutic residential home in order to provide her with the level of care and support that she currently requires"*

7. In view of what followed, it is noteworthy that the Council's plan appears to have been to apply for a court order from the High Court to permit them to deprive EF of her liberty on discharge from secure accommodation because she was said to "*require [..] a therapeutic residential home in order to provide her with the level of care and support that she currently requires".* Thus, as matters appear from the papers, the justification for the decision to move EF out of secure accommodation and into a residential home was the added focus on therapeutic support.

8. The November 2022 report noted that EF had a good understanding of the reasons for the proposed restrictions and accepted that they are for her and others safety. It said that EF was willing to engage with the restrictions and has been engaged with some therapeutic input in order to understand her feelings and manage her anxiety which can lead to self-harm.

9. An application for a DOLS order to facilitate this placement came before Ms Ruth Henke KC, sitting as a Deputy High Court Judge, on 12 December 2022. It was made clear to the Judge that EF did not consent to the proposed restrictions. There would have been no deprivation of liberty if EF had consented because one of the essential conditions identified by the Supreme Court in the *Cheshire West* would not have been satisfied.

10. Ms Henke KC gave the Council permission under section 100 CA to invoke the inherent jurisdiction and made an order that it was lawful and in EF's best interests for her to be deprived of her liberty by Derbyshire County Council at a named residential home. That Deprivation of Liberty Order lasted for a period of 6 months and was said to have been made pursuant to article 5 (1)(d) and article 5 (1)(e) ECHR. A social work report dated 23 January 2023 noted:

> *"Since EF has moved to XX House, she can quickly become heightened which can be due to varying reasons and can result in oppositional or aggressive behaviour towards others or self-harm towards herself. XX House staff are working hard to use therapeutic responses towards EF during these times to avoid the need for any physical interventions"*

11. The Guardian noted in a Position Statement on 3 February 2023 that "*EF is not currently in education and this is something that EF is finding difficult as she had been engaging with education whilst in her secure placement. EF does have future aspirations and the fact that she is not currently receiving education is causing disruption for her*". As far as I can determine, there are still no clear plans for EF to resume education although this is due to be discussed at a meeting on 28 June.

12. That placement lasted until 15 March 2023 when it broke down due to her behaviour. The Council then moved EF to a holiday let with a support package provided by a domiciliary care provider. A report dated 5 April 2023, which followed this move set out the plan for EF as follows:

"The proposed care plan is that EF remains at XX, a temporary home in the community supported by a DoLS. The long-term plan is residential care with the potential for semi-independent living post 16 should this be safe for EF. EF has expressed a wish to live within a foster care placement and this will continue to be considered however this needs careful matching and consideration. It has been identified by both social care and health services that EF requires a therapeutic residential home. Ongoing professional meetings have been attended in order to monitor the progress of EF within her current placement"

13. No immediate application appears to have been made to change the location at which the Council were entitled to deprive EF of her liberty after she moved from XX House. However, the Council applied on 13 April 2023 to renew the DOLS order and the case came before HHJ George on 24 April 2023. HHJ George made a DOLS order which permitted the Council to deprive EF of her liberty at a new address for a period up to 7 July 2023.

14. On 18 May 2023 a further report was prepared which said:

"6. EF is currently residing in a temporary placement with agency staffing in place with a ratio of 3-1 staffing level due to the level of risk that EF poses to herself and staff.

7. The Local Authority are currently exploring placements for EF. Secure accommodation has been considered however it is felt that EF no longer meets the threshold for secure"

15. The threshold for an order under section 25 CA is that the child has a history of absconding and is likely to abscond from any other description of accommodation, and that the child "*is likely to suffer significant harm*" if the child absconds, or that the child is likely to injure himself or herself or others if kept in any other form of accommodation. EF was, by this stage, aged 16 and was the subject of a care order. It follows that the restriction on making secure placement orders for children over the age of 16 in Regulation 5(2)(a) of the Children (Secure Accommodation) Regulations 1991 does not apply. It would thus have been open to the Council to apply to accommodate EF in secure accommodation.

16. Given the history of this case, I must express some doubts as to whether the Council reached a proper conclusion in May 2023 in deciding that the threshold for section 25 CA was not met

and yet the dangers to her of absconding were so great that it was justifiable to seek an order from the High Court to deprive EF of her liberty. However, given the concession made by Mrs Powles before me that the threshold for section 25 is now met, it is not now necessary to examine that issue.

17. The existing care package also broke down due to her behaviour and EF was moved by the Council to her current placement at the Property with a different domiciliary care provider. on 2 June 2023. An updating statement from the social worker, Ms Stables explains:

> *"[The care provider] is registered with the CQC and are registered under personal care to support individuals with Learning disabilities, Autism, Challenging behaviour, mental health, and complex needs from the ages of 16 years and up. Although the placement at this time is not registered with OFSTED, the placement is in the process of OFSTED registration. All documents went sent to OFSTED in December 2022 and the home is awaiting a response"*

18. The Council applied today to change the location of the placement at which EF was being deprived of her liberty and to extend the period of the DOLS order. Unfortunately, the social worker has recently changed and no notification was given to the Guardian that EF had changed placement earlier this month. The Guardian's solicitor only learned of this hearing yesterday and the Guardian is on holiday at the moment and was unable to visit EF before this hearing. I was thus not provided with any significant input from the Guardian for this hearing. Nonetheless, the Council renewed its application. As I indicated above, save to a very limited extent, I was not prepared to make any fresh DOLS order because I was not satisfied that there was a proper legal basis to do so.

The law.

Issue 1: Is this a case within article 5(1)(d)?

19. Article 5(1) ECHR provides:

> *"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: …*

(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"

20. In *Mubilanzila Mayeka and another v Belgium* [2007] 1 FLR 1726 the ECtHR said at paragraph 96 "*The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision".* It follows that EF can only be lawfully deprived of her liberty if she is being detained in circumstances which come within one of the sub-paragraphs of article 5. I note in passing that it may seem somewhat strange that depriving a child of his or her liberty to protect the child from coming to harm is not one of the grounds under article 5, but we have to work within the wording of the ECHR.

21. There does not appear to me to be any evidence that EF is of "*unsound mind*" or has an infectious disease and I thus do not see that her case can now properly have come within article 5 (1)(e). It follows that the only basis on which I could properly be invited to make a DOLS order would be under article 5(1)(d).

22. A wide scope is given to the concept of "educational supervision" for the purposes of article 5(1)(d). The ECtHR Guide to Article 5 provides as follows:

"In the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching. Such supervision must embrace many aspects of the exercise, by the authority, of parental rights for the benefit and protection of the person concerned (P. and S. v. Poland, 2012, § 147; Ichin and Others v. Ukraine, 2010, § 39; D.G. v. Ireland, 2002, § 80).

"Educational supervision" must nevertheless contain an important core schooling aspect so that schooling in line with the normal school curriculum should be standard practice for all detained minors, even when they are placed in a temporary detention centre for a limited period of time, in order to avoid gaps in their education (Blokhin v. Russia [GC], 2016, § 170)"

23. That broad approach was followed in the UK courts in *In re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] Fam 377* where Judge LJ said at paragraph 107:

> *"107. This goes far beyond school. It is not just about the restriction on liberty involved in requiring a reluctant child to remain at school for the school day. It arises in the context of the responsibilities of parents which extend well beyond ensuring the child's attendance at school. So it involves education in the broad sense, similar, I would respectfully suggest, to the general development of the child's physical, intellectual, emotional, social and behavioural abilities, all of which have to be encouraged by responsible parents, as part of his upbringing and education, and for this purpose, an appropriate level of supervision of the child to enhance his development, where necessary, by restricting his liberty is permitted."*

24. A wide approach to article 5(1)(d) in *Re K* was endorsed by the Supreme Court in *Re T* [2022] AC 723 (see Lady Black at paragraphs 82 to 88). Whilst I accept that "educational provision" is to be interpreted widely in article 5, in my judgment it is not the same as child protection. In this context, child protection is about protecting a child such as EF from coming to harm. "Education" in this context can include a proper protective element but must also, and possibly primarily, be focused on supporting, teaching, coaching and possibly persuading a child to understand the world around herself better and thus to support him or her to develop the skills she needs to protect herself from harm. A child may be protected in the short term from harm by series of restrictions which constrain his or her actions. However, in order to come within article 5 there needs to be a sufficient educational element to the care provision which is aimed at ensuring that the child is being educated to protect himself or herself from harm in the future. If that essential educational input is not present, in my judgment a package of restrictions which are aimed at preventing the child from coming to immediate harm may fall outside article 5(1)(d).

25. In this case there is evidence that the restrictions on EF's freedoms, including her ability to have money or use a phone, are considered by social workers to be necessary and appropriate to prevent her coming to harm. However, there is no evidence about any formal or informal education presently being provided to EF or any evidence about the educational strategies that staff are undertaking to help her to understand the world around her better and thus develop her own skills to protect herself from harm going forward. There is mention in the

social work of the various attempts that have been made to date to provide formal education to EF but this is not the main focus or purpose of the care package. Whilst I accept that "education" is to be interpreted widely, there is no indication in the evidence that care staff consider that providing education in the broadest sense is part of their role, have been trained to deliver that education or are monitored by the Council on whether they are providing any educational input to her.

26. Hence the present position is that there is also no education plan for formal education to be provided to EF and it is not clear on the evidence what steps are being taken by care staff to educate EF with the aim of teaching her the skills she needs to keep herself safe as an adult or that care staff understand that this is an essential role that they have to undertake. She is, for example, not allowed at present to have her own money but it is unclear whether or how she is being taught to handle money, to budget or is being supported to learn much needed financial skills. She will need a level of financial understanding when she becomes an adult and this must be the opportunity to provide her with education on those issues, but there is no evidence that this is happening.

27. It may, of course, be that the care staff who are supporting EF understand the need to provide her with education in the broadest sense, are fully trained to do so and are doing so. However, at this point, there is no evidence that this is a focus of the care plan. It follows that the first area of concern I raised with Mrs Powles for the Council at the hearing was whether there is a sufficient educational element to the care arrangements to bring the case within article 5(1)(d). That is something that the Council will need to address in evidence if they wish to renew this application.

Issue 2: Is this case where the High Court should grant a Declaration having regard to limitations on the cases where the power should be exercised as set out in *Re T*?

28. The question as to whether it was possible for the High Court to authorise a deprivation of liberty under the Court's inherent jurisdiction powers and, if so, when it was appropriate to authorise the deprivation of liberty of a child outside of secure accommodation under section 25 CA was very recently considered by the Supreme Court in *Re T* [2022] AC 723. Lady Black explained the factual background to the case at paragraph 2 as follows:

> *"Some of these children need to be placed in a secure children's home but no place can be found for them in one of the small number of approved secure children's homes that*

there are in England and Wales. Some would be likely to meet the criteria for placement in a secure children's home, but would be better served by highly specialised therapeutic care of a different kind, albeit still with their liberty strictly limited"

29. The Appellants in that case mounted a challenge to the court exercising its powers under the inherent jurisdiction on the basis that, given the statutory framework in the CA, it was not appropriate for the High Court to avoid or bypass that statutory framework by using the inherent jurisdiction because it was wrong in law to use the inherent jurisdiction to authorise the placements in a way that cuts across this statutory scheme. The principles to support that submission were outlined by the House of Lords in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

30. Thus, the Supreme Court had to decide whether the inherent jurisdiction of the High Court could ever be used where a local authority could make use of secure accommodation under section 25. Lady Black decided that those powers were available because, inter alia, there was a shortage of section 25 placements and a local authority should not be left in the position where a child was at risk because it could not find any section 25 provider who had a place and was willing to accept the child and, in the absence of such a provider, local authority could not lawfully impose restrictions on the child which were essential to keep the child safe. Lady Black said at paragraph 141:

"If the local authority cannot apply for an order under section 25 because there is no section 25 compliant secure accommodation available, I would accept that the inherent jurisdiction can, and will have to be, used to fill that gap, without clashing impermissibly with the statutory scheme"

31. However, given the existence of the secure placement framework with its built-in protections for the child, as I read the judgments, the Supreme Court was concerned to impose proper limitations on the circumstances in which it would be appropriate to use the inherent jurisdiction of the High Court where it might cut across the statutory scheme in the Children Act 1989. Lady Black explained her reservations about approving a deprivation of a child's liberty outside of a secure children's home at paragraph 143:

"It has to be recognised that when the local authority applies under the inherent jurisdiction for the court to authorise a secure placement which is either not in a

registered children's home or is in a children's home that has not been approved for secure accommodation, those placements will not satisfy all the requirements of the regulatory framework. If the placement is in an unregistered children's home, a criminal offence will be committed by any person who carries on or manages the home. The important safeguards that come with registration will be absent. If the placement is in an unregulated setting, it will equally escape these safeguards, and it is noted that the Children's Commissioner expresses particular concern about children being deprived of their liberty in unregulated placements, to the point of questioning whether such placements, for example in caravans and outward bound centres, could ever be classed as sufficiently appropriate for article 5 purposes"

32. Lord Stephens picked up these concerns at paragraph 170 where he expressed agreement with Lady Black's approach at paragraph 141 and said:

"Accordingly, the courts, in the exercise of the inherent jurisdiction, must only authorise such a placement where there are "imperative considerations of necessity" and where there has been strict compliance with the matters contained in the Guidance issued by the President of the Family Division on 12 November 2019 in relation to placing a child in an unregistered children's home ("the Guidance") (see para 147 above) and with the addendum dated 1 December 2020 to the Guidance. Furthermore, if a placement is authorised in an unregistered children's home then the court must monitor the progress of the application for registration in accordance with the Guidance and, if registration is not achieved, the court must rigorously review its continued approval of the child's placement in an unregistered home"

33. I thus consider that there are two factors that any local authority has to address in making a DOLS application. First, it must show that there are *"imperative considerations of necessity"* which justify the use of the DOLS on the facts of the particular case. That means showing both why the restrictions are necessary and why the local authority has not discharged its duties to the child by arranging secure accommodation. Secondly, the local authority must demonstrate that the President's Guidance[1] is being followed or, if it is not being followed, to explain why that is the case.

[1] See *https://www.judiciary.uk/wp-content/uploads/2022/07/PG-Placements-in-unregistered-childrens-homes-in-Eng-or-unregistered-care-home-services-in-Wales-NOV-2019..pdf*

34. Paragraph 17 of the President's Guidance provides:

> *"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"*

35. If the Council are to continue with this application, the Council will need to provide proper evidence to explain how the placement meets the above criteria.

36. However, even if the terms of the President's Guidance are met, the Council will also need to address the question as to why EF needs to be deprived of her liberty at the Property as opposed to being supported within secure accommodation. The Council confirmed today that, whatever may have been thought to be the position between December 2022 and June 2023, EF now meets the criteria for a secure placement in section 25 of the Children Act 1989. It was accepted by Ms Pooles who appeared for the Council that it would therefore be open to the Council to apply to the court for an order that EF be accommodated in section 25 secure accommodation.

37. I asked <u>why</u> the Council wished her to be accommodated in this solo unregulated placement under a DOLS arrangement as opposed to being accommodated within a secure placement regulated by section 25 CA. Unfortunately, Ms Pooles, who attended the hearing on behalf of the Council, was unable to advance any reason why this decision had been made. It follows that there is no evidence before me that it is necessary for EF to be deprived of her liberty in an unregulated placement as opposed to being accommodated in a secure placement. It does not appear to me that this issue has been considered by the Council at any point after the plan was developed to move EF on from secure accommodation from December 2022 onwards

despite the fact that she was engaging well with education whilst she was in secure accommodation and has largely failed to engage with education thereafter.

38. I also note that, after being discharged from secure accommodation, each of the unregulated placements has broken down because of EF's conduct towards her carers and it is unclear whether the present placement stands any greater chances of success in the long term and so it is not clear on the present evidence that a series of short-term solo placements can be said to be genuinely in her best interests.

39. The Council also accepted at the hearing before me that the order made by HHJ George on 24 April did not authorise the Council to deprive EF of her liberty at the Property since the order the Judge made was rightly limited to EF being deprived of her liberty at her former accommodation. Thus, the position appears to be that, from 2 June to date, EF has been unlawfully deprived of her liberty. That may well not sound in a substantial damages claim but it does suggest that the Council have not acted with the diligence they ought to in order to ensure that the Council is acting lawfully.

40. Where (as appears to be the case here) there is an alternative possibility of a secure placement, the Council have to lead evidence to explain why there are imperative considerations of necessity which justify EF being accommodated in an unregulated placement instead of being accommodated in a regulated secure placement. That appears to me to involve a challenging test which the Council will have to meet on the evidence, particularly in a case where EF appeared to be making considerable educational progress within the secure placement and where her education has stalled since she was transferred to her current placements.

41. Whilst it will be a matter for the Judge who hears this case on 5 July, I anticipate that it may well be insufficient for the Council to argue that, given that EF is now accommodated at the Property, it would be in her best interests for this to continue and for her to be subject to continuing restrictions on her liberty. In my judgment, no DOLS order should only be made by the High Court where there is evidence to show why there are imperative considerations of necessity which justify EF being accommodated in a solo, unregulated placement as opposed to being accommodated in a secure regulated placement.

What is to happen between now and the hearing on 5 July?

42. I accept that, in the very short term, there is no other alternative accommodation for EF. I also accept that, at least for a short period, the present restrictions on her liberty are needed and are in her best interests. I also accept that these restrictions amount to a deprivation of her liberty. Given the lack of alternatives, I am therefore prepared to amend the existing order so as to authorise Council to deprive EF of her liberty at the Property until 7 July 2023. However, when this case comes back on 5 July 2023 the Council will need to explain:

    a. Why the Council consider there are imperative considerations of necessity which justify EF to be deprived of her liberty in unregulated accommodation as opposed to being placed in a regulated secure children's home;

    b. What steps are being taken to provide EF with educational provision at the Property as opposed to just ensuring that she is safe from harm and what instructions and training have been provided to care staff around educating EF. There will need to be a proper educational plan for EF;

    c. How, if this placement is to continue, the Council propose to scale back the restrictions on EF so that she can gradually develop the skills needed to keep herself safe when she becomes an adult in less than 2 years time; and

    d. What the Council propose for EF in the event that the court is not prepared to make a DOLS order.

43. It will also be necessary for the Guardian to have a chance to discuss things through with EF and set her views before the Court.