



Neutral Citation Number: [2021] EWHC 709 (Admin)

Case No: CO-4835-2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2021

Before :

MR JUSTICE MOSTYN

Between :

CGM
- and -
LUTON COUNCIL

Claimant

Defendant

The claimant was self-represented

Joshua Swirsky (instructed by Luton Council Legal Services) for the defendant

Approved Judgment

Mr Justice Mostyn:

1. In these judicial review proceedings the claimant seeks permission to challenge the defendant's failure to seek from the High Court (a) an authorisation to deprive his daughter NM of her liberty and (b) consequential annual reviews by a judge of her confinement. The defendant denies that NM is deprived of her liberty.
2. This is my judgment on the permission application having considered the matter on the papers. It is a fuller version of the reasons I gave for my order in the standard form on 22 March 2021.
3. NM is a 12 year old girl with a diagnosis of autism and Attention Deficit Hyperactivity Disorder. She is described as being high-functioning but extremely vulnerable.
4. The defendant shares parental responsibility for NM pursuant to a care order made on 17 February 2018. The care plan, approved by the court, was for NM to be looked after at a named school ("the School"). The School is a secure residential school for children with additional complex needs. NM has resided there since 1 April 2018.
5. The School is described as being a former stately home set within extensive grounds. It is a completely secure compound. Access is via a long driveway blocked by gates, which are secured and monitored. A high fence surrounds the estate and no authorised access is permitted. The claimant compares it to a Category B prison.
6. NM is not permitted to leave the School, save when she is accompanied by two members of staff. If NM is transported by car, she is taken in a car adapted so that she cannot release the seat belt herself. Staff monitor NM at all times due to her vulnerabilities, even at night or when she is washing. The defendant has complete control over NM's finances. The School searches NM's belongings from time to time; she has restricted access to them, like her iPad, and is not permitted the use of a mobile phone at all. The safety settings on her internet use is set for a child seven years and older rather than 12 years and older. Use of social media is not permitted. Outside mealtimes NM does not have free access to food. Restrictive physical intervention is at times used on NM. In the event that NM were to leave of her own accord, the police would be called to return NM to the School.
7. The claimant argues that all of the above amounts to a deprivation of NM's liberty contrary to her Article 5 rights.
8. To be clear, the claimant supports NM being looked after at the School, which he views as being in her best interests. However he seeks for NM to have the same safeguards that other people, who have their liberty deprived, benefit from. It is clear also that he questions the ongoing need for a care order and, at the very least, argues that NM should spend more time with her family. Since NM started living at the School, the defendant has not permitted NM to travel to Ireland to visit her family during half terms and school holidays, as requested by the claimant. Further the claimant has complained that he and his wife, NM's mother, were only permitted to visit NM for two hours on Christmas Day and that they were excluded from NM's end of term award ceremony. In general, he complains that the level of spending time

permitted with NM is too little and that this is in breach of NM's and her family's Article 8 rights.

9. The defendant denies that NM is deprived of her liberty. It argues that NM is very young and therefore the restrictions placed on her are in line with those routinely placed on a child of her biological age. In other words, the objective component required for there to be a deprivation of liberty is missing. While there are periodic LAC reviews there have therefore been no reviews of NM's placement by a judge. The defendant denies that the claimant has standing to bring this claim. Further, insofar as the application relates to spending time between NM and her family the defendant maintains that judicial review is not the appropriate remedy and instead a contact application pursuant to section 34 of the Children Act 1989 should be made to the Family Court.
10. The legal test of what amounts to a deprivation of liberty is stated in *Storck v Germany* (2006) 43 EHRR 6. There are three components, summarised by Baroness Hale in *Cheshire West and Chester Council v P and another (Equality and Human Rights Commission and others intervening)* [2014] UKSC 19, [2014] AC 896 at [37]:
 - “(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.”
11. In *Cheshire West*, Lord Kerr addressed how component (a), the objective component, is to be judged in the context of disabled children. At [77] to [79] he explained:
 - “77. The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is *in fact* circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.
 78. All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are - and have to be - applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is - and must remain - a constant feature of their lives, the restriction amounts to a deprivation of liberty.

79. Very young children, of course, because of their youth and dependence on others, have - an objectively ascertainable - curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because they can - and must - now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.”

12. It is clear therefore that the correct comparator is a child of NM’s age and maturity who does not share her diagnoses. In *Re A-F (Children)* [2019] Fam 45, Sir James Munby P at [33] summarised the principle thus:

“...whether a state of affairs which satisfies the "acid test" amounts to a "confinement" for the purposes of *Storck component (a)* has to be determined by comparing the restrictions to which the child in question is subject with the restrictions which would apply to a child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability".’

The test is a matter of law; but whether an individual child does or does not satisfy the test is a matter of fact. In determining the question of fact Sir James Munby P at [43] advanced an indicative rule-of-thumb:

“i) A child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of *Storck component (a)*.

ii) 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.

iii) Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

That said, all must depend upon the circumstances of the particular case and upon the identification by the judge in the particular case of the attributes of the relevant comparator as described by Lord Kerr.”

13. If a child is to be confined for the purposes of *Storck component (a)* in accommodation which is not approved secure accommodation within the terms of section 25 of the Children Act 1989 then such confinement must be authorised by the

High Court exercising its inherent jurisdiction: *Re A-F* at [27]. Further, the placement must be reviewed by a judge at least annually: *ibid* at [55ii].

14. In this case it is agreed that *Storck* components (b) and (c) are engaged. The issue is about *Storck* component (a). The claimant says that NM is clearly being confined for the purposes of *Storck* component (a). In contrast, the defendant disputes the suggestion. This is an issue of fact which may well need resolution by oral as well as written evidence. It is an issue which is not suited to being dealt with in judicial review proceedings, where oral evidence is virtually unknown. Moreover, if an alternative procedure exists then that should be used, as it is axiomatic that judicial review is a remedy of last resort.
15. Although the defendant strongly denies that the placement of NM amounts to a confinement which satisfies the *Storck* component (a), it is clear enough to me that it is arguably the case. In such circumstances para 48 of *Re A-F* applies. This states:

“An application to the court should be made where the circumstances in which the child is, or will be, living constitute, at least *arguably* (taking a realistic rather than a fanciful view), a deprivation of liberty.” (original emphasis)
16. In my opinion the local authority in this case ought to recognise that NM’s placement arguably amounts to a deprivation of liberty and should apply for leave under section 100(3) of the Children Act 1989. But I cannot make them do so at this stage. It is just conceivable, were the judicial review application allowed to proceed, that a mandatory order could result at some point in the future requiring the local authority to take this step. I think that unlikely, and it is certain that it cannot be done at this stage as an interim measure.
17. In his very well written Statement of Facts and Grounds, the claimant argues that there is a lacuna in the procedural rules in circumstances where a local authority or other state organ accommodating a minor does not agree to make the application for authorisation. Is there another process whereby the issue can be brought before the Family Division, or is the only solution judicial review proceedings in the Queen’s Bench Division?
18. In his Statement of Facts and Grounds the claimant eschewed habeas corpus proceedings because the last thing that he wants is for NM to be moved from her current placement. What he wants is for it to be formally recognised that NM is being deprived of her liberty and that therefore her placement (a) must be authorised by the High Court (it not being an order for placement in secure accommodation approved under section 25 of the 1989 Act); and (b) must be the subject of annual reviews thereafter by a judge.
19. Since 6 April 2015 habeas corpus applications in relation to minors have been assigned to the Family Division of the High Court by the Senior Courts Act 1981, Schedule 1 para 3(aa). On the same day FPR 12.42A was inserted into the Family Procedure Rules 2010. Rule 12.42A(1)(a) and (2) applies Part 87 of the CPR in an adapted form. Rule 12.42A(1)(b) allows the adapted CPR procedure to be “subject to any additional necessary modifications”, as may be ordered by the court in the individual case.

20. The claimant unquestionably has standing to issue an application for a writ of habeas corpus in respect of NM: see CPR 87.2(3) and *Justice for Families Ltd v Secretary of State for Justice* [2014] EWCA Civ 1477, at [19] – [22].
21. When the application is issued it will be considered by a judge either on paper under CPR 87.4, or at a hearing under CPR 87.5. If the former, the judge may order, among other things, that the writ be issued; or that the hearing be adjourned; or that directions be made; or that the application be dismissed. Where the application is meritless or abusive then at this stage it will be summarily dismissed. In that event the applicant may request the decision to be reconsidered at a hearing.
22. If the judge considers the matter at a hearing then he or she may make any of the above orders, but, crucially, is additionally empowered on that occasion to order that the detained person be released (see CPR 87.5(g)).
23. CPR 87.4(1)(a), 87.5(a) and 87.10 preserve the historical procedure for the administration of this ancient power namely that the writ may be issued and following service indorsed with a return by the defendant explaining the detention, the legality of which is considered by the judge before whom the writ is returnable. However, in the modern world the legality of the detention may, and normally will, be determined at the consideration by a judge of the application at the CPR 87.5 hearing.
24. The principal writ of habeas corpus is the writ of habeas corpus for release, formerly known as the writ of habeas corpus *ad subjucendum*. If that writ is issued (either pursuant to CPR 87.4(1)(a) or 87.5(a)), then it must be personally served under CPR 87.9(1). As stated above, the defendant must then make a return to the writ (CPR 87.10). That return must state all the causes of the detention of the detained person. It is said in old case law that the court has power to examine the truth of the facts alleged in the return, and if the detention is pursuant to a court order whether there was evidence to justify it. There is old authority which suggests that the power of the court to direct the trial of an issue of fact is exerciseable only on the motion for the writ rather than on the return.
25. In times past it was only on the occasion of the return when the lawfulness of the detention was examined. If the return to the writ showed a lawful detention the writ was discharged and the proceedings dismissed; if the return to the writ was bad, then the court would usually order the release of the ‘prisoner’.
26. Here, on the claimant’s case, if the writ were issued the return would be bad because (i) NM is detained and (ii) the High Court has made no order authorising the detention. In such circumstances, I do not see why the court, faced with a bad return, could not, if the facts justify it, cure the illegality by exercising the inherent jurisdiction.
27. Further, as explained above, on consideration of the initial application at a hearing the court is expressly empowered under CPR 87.5(g) to order the release of the person detained. Obviously, it is implicit within that latter power that the court has the power on that occasion to find that the detention is unlawful. That being so, the court must have power on that occasion if faced with illegality to cure it.

28. To put the matter beyond doubt the court should, on an initial consideration of the application on paper pursuant to CPR 87.4, make an order pursuant to FPR 12.42A(1)(b) for the process to be modified so as to permit the illegality to be cured in this way.
29. I recapitulate. It is my opinion, in a situation such as that with which I am confronted (where a local authority declines to apply to the High Court to determine if the placement amounts to a deprivation of liberty and if so to authorise it), that the appropriate process is for someone in the position of the claimant to issue habeas corpus proceedings, and for the process be modified by initial directions pursuant to FPR 12.42A(1)(b) to allow the claimant to seek no more than a finding in fact and law from the High Court as to whether there is a deprivation of liberty, and, if so, for an order authorising it and for consequential declaratory relief as to reviews by a judge. This relief would be capable of being granted on a hearing under CPR 87.5 as well as (where an order has been made for the issue of the writ) on the return to the writ.
30. In my judgment this flexible arrangement achieves the most convenient and just process for resolution of this particular issue. With great respect to the decision of Charles J in *S v Knowsley Borough Council* [2004] EWHC 491 (Fam)[2004] 2 FLR 716, this process is, in my judgment, more convenient now, following the procedural changes in 2015, than the commencement of judicial review proceedings in the Administrative Court. The advantages are that the application can be issued directly in the Family Division; its disposal can accommodate oral evidence routinely; and it will be heard more expeditiously (I note that in this case the application was issued on 29 December 2020, and it has taken nearly 3 months even to get to the permission stage).
31. Accordingly, I direct that the application for judicial review is stayed and the claim form is to be treated as an application for a writ of habeas corpus. I transfer the deemed application to the Family Division of the High Court.
32. Exercising my powers and functions now as a judge of the Family Division of the High Court I direct that:
 - i) The parties are to file and serve their affidavit evidence in accordance with my order in advance of the next hearing, which will be listed before me on 13 April 2021.
 - ii) Until the next hearing, I authorise the deprivation of NM's liberty, if and to the extent that her placement at the School amounts to a deprivation of liberty. This interim measure is without prejudice to the defendant's contention that NM is not currently deprived of her liberty.
 - iii) In the event that before the next hearing the defendant applies for leave under section 100(3) of the Children Act 1989 to ask the High Court to consider whether the placement of NM amounts to a deprivation of liberty and, if so, to authorise the same, then (a) the claimant's application for judicial review, and deemed application for habeas corpus, shall stand dismissed (but with costs to be dealt with on paper), and (b) the defendant's new application shall be considered on 13 April 2021.
33. That is my judgment.