Neutral Citation Number: [2020] EWHC 139 (Fam)

Case No: FD20P00006

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

**Before**:

**THE HONOURABLE MR JUSTICE MACDONALD**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Hertfordshire County Council** | **Applicant** |
| **- and -** | |
| **NK** | **First Respondent** |
| **- and -** | |
| **AK (By his Children's Guardian)** | **Second Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Ms Sarah Branson** (instructed by **the Local Authority Legal Department**) for the **Applicant**
**The First Respondent did not attend and was not represented**
**Mr David Sharp** (instructed by **PS Law**) for the **Second Respondent**

Hearing dates: 23 January 2020

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

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in it) to be published on condition always that the names and the addresses of the parties and the children must not be published.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, the question before the court is whether it should grant a deprivation of liberty order (hereafter a DOL order) under the inherent jurisdiction of the High Court in respect of AK, born in 2003 and now aged 16. The application for an order was made by Hertfordshire County Council on 10 December 2019. The application is opposed by AK's Children's Guardian, Catherine Stephens. AK's mother, NK does not appear and is not represented.

2. I am delivering this judgment *ex tempore* at the conclusion of a short hearing at which I have heard oral submissions from Ms Sarah Branson of counsel on behalf of the local authority and Mr David Sharp of counsel on behalf of AK. I have also had the benefit of reading the helpful Skeleton Arguments provided by counsel and the bundle of evidence submitted by the local authority.

BACKGROUND

3. It is not disputed that AK has a diagnosis of ADHD and a conduct disorder. This has led AK to a history of self-harm, suicidal ideation and low mood. The papers contain examples of the behaviour that AK has, historically, exhibited in consequence of these conditions.

4. In summary, in November 2017 AK was involved in the criminal justice system after committing offences of assault, including assault on a police officer and an assault on his mother. As a result AK was placed in foster care pursuant to s 20 of the Children Act 1989 on 25 November 2017. In February 2018, AK pleaded guilty to two offences of arson. From May 2018, AK was regularly reported missing and has continued to be reported missing throughout the involvement of the local authority. In May 2018 AK was detained under s 136 of the Mental Health Act 1983 due to him threatening suicide. He was later discharged as having been assessed as having no acute mental health issues.

5. In May 2018 AK was moved to the [X] residential home due to concerns about his actions and his safety. At no point was that placement regulated by a DOL order, notwithstanding repeated absconding, repeated concerns about AK's mental state, including the need to section him under s 2 of the Mental Health Act 1983 on 31 August 2018, repeated involvement in criminal activity, multiple incidents of serious self-harm (including drug overdoses) and consequential hospital admissions between May 2018 and November 2019.

6. On 6 November 2019 AK was admitted to hospital as a result of a self-inflicted wound becoming infected. This necessitated him undergoing surgery on two separate occasions, on 7 November 2019 and again on 27 November 2019.

7. Upon his discharge from hospital in December of last year AK was placed at a semi-independent unit called [Y]. This is a solo placement. During his time in this placement AK has demonstrated no further incidents of self-harm (and had not done so in the weeks prior to his placement at this unit) and he has been compliant with his current medication.

8. AK is placed at [Y] under a temporary OFSTED registration which will expire at the end of this month (although there is now a suggestion that this may be capable of extension). Within this context, the local authority have arranged an alternative semi-independent placement for AK with [Z]. [Z] are aware of AK's assessed needs and have confirmed that they are able to meet those needs. However, [Z] have made clear that they will not accept AK under a DOL as they are not equipped administratively to deal with the requirements of such an order (although I understand that discussions continue in respect of this issue).

9. As I have noted, whilst at [X] at no point was that placement regulated by a DOL order, notwithstanding repeated absconding, concerns about AK's mental state, involvement in criminal activity, repeated incidents of serious self-harm and consequential hospital admissions between May 2018 and November 2019. In that placement AK was provided with one to one staffing support and he was checked every 15 minutes by waking night staff.

10. Within this context, it is apparent from the papers that AK's current placement is classed as semi-independent in nature, and that the local authority's plan for AK is to continue in a semi-independent placement, albeit at an alternative venue with [Z]. AK's current regime at [Y], as confirmed to the Children's Guardian during a visit to AK on 20 January 2020, is as follows:

    i) The internal and external doors are not locked and AK is able to exit the property (AK has for example left for a cigarette with the knowledge of the staff and returned of his own accord);

    ii) AK has flexible, unsupervised contact with his mother two or three times a week and the length of those visits is dictated by AK and his mother. AK is dropped off and collected by the staff from [Y]. The collection occurs when *AK* states he is ready to return;

    iii) During his time on the unit he is subject to 2:1 supervision (AK has stated he would like this to reduce to 1:1 supervision).

    iv) AK has *unlimited* access to, and use of his mobile telephone, the Internet and to his X-Box.

    v) When in his room at the unit AK is checked on every 15 minutes;

    vi) AK's room is *not* searched and neither is AK;

    vii) AK has a planned daily schedule and is rewarded financially for compliance.

11. AK confirmed to the Children's Guardian that the regime at [Y] largely reflected that deployed at [X]. Staff at [Y] confirmed to the Children's Guardian that they have seen no evidence of self-harming by AK. Within this context, and as I have noted, [Z], the placement to which AK is due to move to at present would not entertain his placement under a DOL order as they are not set up administratively to administer such a regime, subject to the discussions to which I have referred.

SUBMISSIONS

12. Within the foregoing circumstances, the local authority submits that the criteria for making a DOL order are met in this case on the basis of the care plan (as the local authority describes it) now advanced by the local authority and that it is in AK's best interests for such an order to be made, notwithstanding that this will, self-evidently as matters stand, frustrate the plan of the local authority to move AK to his next semi-independent placement at [Z].

13. The local authority's submission is made on the basis of the local authority assessment of AK's current needs having regard to the chronology of the concerns I have summarised above, the assessments undertaken of AK during his recent stay in hospital and the multi-disciplinary meeting that took place on 18 December 2019. In this context, the local authority relies on the evidence of the social worker, which sets out the following matters prayed in aid by the local authority as underpinning the application that it now advances:

    i) AK is frequently secretive about his self-harm and can refuse to attend for medical attention until infection has set in;

    ii) In the past six months AK has required medical intervention on at least thirteen occasions;

    iii) AK has presented with a low mood over a significant period but will not engage with therapeutic support and there have been concerns he may seek to commit suicide.

    iv) AK has had fifty-three missing episodes since September 2017;

    v) AK is deemed at high risk of death by misadventure by all professionals.

14. Within this context, and noting again the significantly less restrictive regime that is in fact currently being applied at [Y] at this point in time as set out above, the social worker makes clear in her second statement that the *overall* care plan of the local authority is to move AK towards independent living via semi-independent placements, including the next placement that is anticipated for him at [Z] once he moves from [Y] at the end of this month.

15. Notwithstanding this position, the local authority advances a care plan (again, as it is referred to by the local authority) containing the following provisions regarding the restrictions it contends are required to be placed on AK both during his current and future placements:

    i) Two to one staffing at all times;

    ii) Searches of AK's room and person where the situation requires this in accordance with concerns regarding AK having access to items with which he could self-harm, subject to a risk assessment;

    iii) No allocated, unsupervised free time;

    iv) No unsupervised use of money, Internet or mobile phone;

v) Locked doors to prevent missing episodes;

vi) Waking night staff to check on AK every 15 minutes.

16. The local authority submits that, whatever the current position in the placement in which AK resides, this *plan* constitutes a deprivation of liberty for the purposes of Art 5 of the ECHR and that, accordingly, the court should authorise the deprivation of AK's liberty which the local authority contends would abide *if* this care plan were to be fully implemented in the event of a deterioration in AK's behaviour. In the circumstances, the local authority seeks a DOL order on the basis of restrictions set out in a care plan that it *may* become necessary to implement fully *if* AK's behaviours again deteriorate to levels that have been seen in the past (but which behaviours are not currently being seen and have not been seen now for a number of weeks).

17. The application for a DOL order is opposed by the Children's Guardian. Her submissions can be summarised as follows:

i) Whilst the current placement (and the plan of the local authority for the future semi-independent placement) clearly place some restrictions on AK, those restrictions do not amount to a regime of continuous supervision and control where AK is not free to leave such that the current arrangements deprive him of his liberty.

ii) The concept of an anticipatory or contingent DOL order, made on the basis that a child's behaviour may deteriorate in the future necessitating the introduction of restrictions that would constitute a deprivation of liberty would be a novel and risky development.

iii) The authorities emphasise that it is the *actual* rather than the contingent circumstances that must be considered by the court. The Children's Guardian cites the judgment of Cobb J in *Re RD (Deprivation or Restriction of Liberty)* [2019] 1 FLR 173 at [37] where Cobb J makes clear that his focus was on RD's *actual* circumstances in placement.

iv) Where the liberty of the subject is concerned and a restriction constitutes interference with the fundamental rights of the subject, the court should proceed with caution.

v) If it were to exist, fixing the proper boundaries of a jurisdiction to grant an anticipatory DOL order with respect to a child would be challenging.

vi) If it were to exist, such a jurisdiction would be confined to circumstances where it could be shown that it was highly likely that the contingency in question would arise (which is a situation that could hardly pertain in the current circumstances where the existing regime that has proceeded without the need for a DOL order and has been stable over time and over a number of placements).

vii) The shorter the placement, the weaker still the argument for a DOL order based solely on a contingency.

viii) There is nothing to prevent an urgent application being made to the court by the local authority if the local authority considers that, by reason of what is *actually* happening in the placement the care plan requires to be fully implemented and therefore a DOL order is thereby justified.

18. Within this context, the Children's Guardian argues strongly against the making of a contingent DOL order. The Children's Guardian further points out that such an order would be very hard to rationalise to AK at a time when the local authority itself is promoting a plan of semi-independent living. Further, the Guardian makes the cogent point that proceeding in this way will hardly incentivise AK and win his trust if this is now the response to the progress he has made.

19. Finally, the Children's Guardian submits that it cannot be said that the restrictions provided for in the local authority's care plan are necessary, proportionate and the least restrictive option. Within this context, the Children's Guardian highlights the inconsistency between the contingent regime that the local authority argues justifies the making of a DOL order in this case with the statement of the social worker regarding AK's needs, namely:

> "AK requires a consistent placement where AK can develop attachments with staff members and develop his independence skills ready for adulthood. AK would like to remain living near his family [...] the placement at [Y] will offer him this opportunity."

20. More fundamentally, within this context, the Children's Guardian submits that as at the date of this hearing AK has been in placement at [Y] for four weeks, that the regime at [Y] is plainly less restrictive than what is now being proposed by the local authority in its care plan and that, equally plainly, that *less* restrictive regime has met and continues to meet AK's identified needs, as the evidence before the court demonstrates.

21. In particular, in this context the Children's Guardian points out that despite arrangements that allow AK the freedom of unsupervised use of the Internet and telephone, unsupervised free time at home, unlocked doors and no room or person searches, AK has not self-harmed or demonstrated suicidal ideation, has not absconded and has engaged with the greater independence afforded to him in line with the social worker's expressed view of his needs. Within this context, the Children's Guardian submits that it is very difficult to see how an order that will have the effect of frustrating a similar placement for AK at [Z] can be said to be in his best interests or necessary and proportionate.

LAW

22. The law on the making of a DOL under the inherent jurisdiction of the High Court is well settled. I summarised that law in *Salford CC v M (Deprivation of Liberty in Scotland)* [2019] EWHC 1510 (Fam) as follows.

23. 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."

24. 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).

25. 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."

Within this context it is of note 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. In *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.

27. It is accepted 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 reviewed 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]).

28. 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.

29. 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".

30. 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.

31. 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.

DISCUSSION

32. I am not satisfied that AK's *current* circumstances constitute a deprivation of liberty for the purposes of Art 5 of the ECHR. As I made clear to the local authority during the course of submissions, it is very difficult to see how the *current* regime applied to AK can be said to constitute him being subject to continuous supervision and control. In particular:

i) He is not at present actively prevented from leaving the placement. The doors of the placement are not locked, he has left for the purposes of having a cigarette with the knowledge of the staff and he is actively encouraged to leave the placement for unsupervised contact, and may return at a time of his own choosing (being transported to and from such contact with a two to one escort).

ii) There is no evidence before the court that any forms of restraint are utilised in respect of AK.

iii) The nature and level of supervision that is in place in respect of the AK is two to one supervision. However, that supervision is interspersed on a regular basis with extended unsupervised periods outside the unit for the purposes of contact;

iv) The nature and level of monitoring that is in place in respect of the AK within the placement comprises 15 minute checks when he is in his room. However, again this must be viewed in the context that AK has been permitted outside the unit to smoke and is permitted to leave the unit for unsupervised contact with his mother and to return at the time of his own choosing;

v) AK's access to mobile telephones and the Internet is not restricted or otherwise controlled in any way;

vi) AK has a considerable degree of access to the local community and neighbourhood surrounding the placement through regular periods of unsupervised contact with his mother, during which periods he is not supervised at all by staff at the unit save when transported to and from contact.

33. The question of whether AK is restricted to an extent that constitutes a deprivation of his liberty by reference to the applicable criteria set out above is as a matter of fact that falls to be determined by comparing the extent of the AK's actual freedom with someone of the child's age and station whose freedom is not limited. Having regard to the current situation for AK in his placement, I am not satisfied that the level of supervision and control to which AK is subject is sufficiently different from a child of AK's age and station to constitute a deprivation of liberty for the purposes of Art 5 of the ECHR.

34. Further, I am not satisfied, in the circumstances of this case, that this conclusion is altered by the fact that the local authority has in place a more restrictive care plan that would be implemented *if* AK's behaviour deteriorated, assuming for present purposes that the implementation of that care plan as drafted would constitute a deprivation of AK's liberty for the purposes of Art 5 of the ECHR.

35. First, whilst I do not believe that there can be any objection in principle to the making, in an appropriate case, of an anticipatory declaration or order under the inherent jurisdiction of the High Court (for example, the High Court has in the past made anticipatory declarations and orders, including in *Re D (Unborn Baby)* [2009] EWCA 446 Fam [2009] in which Munby J (as he then was) made anticipatory declarations and orders to come into effect upon the birth of the child) the question here is whether the court *should* exercise such a jurisdiction where the application is for a DOL order

in respect of a child made under the inherent jurisdiction of the High Court. Within this context, it is plain that such orders will only be made in exceptional circumstances. Whilst the local authority relies on the decision of Francis J in the Court of Protection in *United Lincolnshire NHS Trust v CD* [2019] EWCOP 24 as authority for the proposition that anticipatory orders can and should be made to protect vulnerable individuals and can be made under the inherent jurisdiction where necessary, Francis J is at pains to emphasise in that case that an anticipatory declaration is an exceptional remedy and one to be used very sparingly.

36. Second, and in any event, I am satisfied that in considering whether given restrictions constitute a deprivation of a child's liberty, it is the *current* situation of the child that ordinarily falls for consideration by the court. The court has not had the opportunity at this hearing to undertake an exhaustive investigation of the authorities. However, in *Cheshire West*, Lord Kerr at [77] formulated the relevant question as one of whether, *in actuality*, a person's liberty is restricted. In *Re RD (Deprivation or Restriction of Liberty)* [2019] 1 FLR 173 at [37] Cobb J made clear that his focus was on RD's *actual* circumstances in placement. In *Re D* at [42] Baroness Hale spoke in terms of children who *are* subject to a level of control beyond that which is normal for a child of their age. Finally, 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*. In this context, the authorities suggest that in determining whether to make a DOL order, ordinarily the task of the court is to consider whether the current circumstances of the child amount to a deprivation of liberty for the purposes of Art 5 of the. In this case, AK is not actuality deprived of his liberty at the present time for the reasons I have described. That is not his concrete situation as matters stand.

37. Third, I accept that by the terms of the care plan that the local authority contends is required to meet AK's identified needs this *might* become his concrete situation *if* the local authority chose to implement its stated care plan upon a future deterioration in AK's behaviour. However, and again assuming that the care plan if implemented would amount to a deprivation of liberty such as to justify a DOL order, this gives rise to a further and significant concern with the granting of a contingent or anticipatory DOL order.

38. The local authority's position amounts to the court being asked to confer upon an applicant local authority a continuing and contingent authority to deprive a child of his or her liberty *if* it becomes necessary to do so at some unidentified future point upon the *local authority's* assessment that this course of action is in the child's best interests. In *Re D* at [41] Baroness Hale made clear that the protection afforded by Art 5 of the ECHR is precisely so that there can be an *independent* assessment whether the arrangements that constitute a deprivation of liberty can be said to be in a person's best interests. It is implicit in the authorities that I have mentioned above that that assessment by an independent authority falls to be made at the point at which it is said the person is deprived of their liberty. Within this context, the making of an anticipatory order in favour of the local authority that will govern a situation that may or may not pertain in the future deprives the court of the ability to conduct an independent assessment of the circumstances of AK at the point in time his liberty is said to be deprived, in a situation that is likely to be highly fluid and that could change on a day by day basis.

39. Whilst on behalf of the local authority Ms Branson submitted, relying the observations of Sir James Munby, P in *A-F* [2018] EWHC Fam 138 at [46] to [49], that a DOL order does not need to authorise each and every element of the circumstances that constitute confinement, the court's *evaluation* prior to granting such an order *must* condescend to the detailed circumstances which are said to justify the order at the point at which it is said that order is justified. In an urgent situation, this can be achieved by an immediate application to the urgent applications judge sitting in the Family Division, made to the Out of Hours Judge if necessary.

40. Fourth, in addition to these difficulties, it is possible to identify wider disadvantages to the making of contingent or anticipatory DOL orders authorising the deprivation of liberty of vulnerable children on the happening of some future event. The current use of DOL orders to restrict the liberty of children in residential placements is a remedy that sits outside the statutory regime established by Parliament, after due consideration and debate, for the secure accommodation of children pursuant to s 25 of the Children Act 1989.

41. In these circumstances, in the absence of a clear legislative intent and where the liberty of the subject is at stake and any restriction on that liberty will constitute a serious interference with the fundamental rights of the individual, the court must be *extremely* chary of proceeding in a manner that would have the effect of conferring on a local authority a wide discretion to regulate the deprivation of a child's liberty (as I am satisfied would be one of the clear effects of granting a contingent or anticipatory order to be implemented at some future date upon the local authority's own best interests assessment at that time) without the strict oversight that comes with granting a DOL order only after the *court* has evaluated the child's *current* situation by reference to the demands of the imperatives contained in Art 5 of the ECHR. I agree with Mr Sharp that this would amount to a significant, and undesirable, extension of the use of the inherent jurisdiction in cases of this nature.

42. All this is not, of course, to say that there will *never* be a case in which a court will grant a DOL order in respect of a child on the basis of a regime (whether set out in a care plan or otherwise) that has not yet been implemented but will be. However, I anticipate that before making such an order the court will need cogent evidence that the regime proposed *will* be the regime that will be applied to the child if the DOL order is granted, rather than the far more speculative situation that pertains in this case. Namely, that the care plan will be implemented *if* in the assessment of the local authority at some future point AK's behaviour deteriorates to the point where the application of those provisions becomes in his best interests and in circumstances where the existing regime that has proceeded without the need for a DOL order has been stable over a period of time.

43. Having regard to these matters, I am entirely satisfied that it would not be appropriate in this case to grant an anticipatory or contingent DOL order on the basis that the local authority's care plan *may* constitute a deprivation of liberty *if* at some unspecified point in the future AK's behaviour deteriorated to the point that, in the assessment of the local authority, the provisions of the care plan should, contrary to the current situation, be implemented.

44. For the reasons I have already given, I am also not satisfied that the current restrictions applied to AK constitute a deprivation of liberty for the purposes of Art 5.

In the circumstances it is not necessary to go onto consider whether an order is in AK's best interests and the question of necessity and proportionality.

45. In the circumstances, I dismiss the application of the local authority for a DOL order in respect of AK and make no order as to costs.

46. It is important that the local authority understands what the decision I have reached does ***not*** do. The decision of the court does ***not*** allow the local authority now to implement its stated care plan in full without a DOL order. Similarly, in circumstances where the local authority has contended before the court that the full implementation of the care plan at some future date would constitute a deprivation of AK's liberty for the purposes of Art 5, my decision does ***not*** absolve the local authority of the need to apply to the court for a DOL order if it decides at some future point to implement its stated care plan in full. In such circumstances, if the local authority determines at that future date that AK's welfare requires the care plan to be implemented in full, the local authority will need to at that point make the appropriate application and the court will make its determination. The decision of the court simply reflects, for the reasons I have given above, the consequence of none of these contingent events having yet come to pass.

47. In closing, I am bound also to observe that on the face of the papers there appears to be a stark contradiction in this case between the position of the local authority over the many, many months over which AK was repeatedly absconding, self-harming, committing crime and suffering with his mental health, during which time the local authority made *no* attempt to seek the relief for which it now contends, and the position now adopted by the local authority at the point that AK is showing improvement and progress, which is to press strenuously for relief that no longer adequately reflects AK's current position. It would be prudent for the local authority to reflect on this paradox.

48. That is my judgment.