



Neutral Citation Number: [2020] EWHC 3038 (Fam)

Case No: FD20P00472

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2020

Before:

MRS JUSTICE KNOWLES

Re Z (A Child: Deprivation of Liberty: Transition Plan)

Joseph O'Brien for the local authority
Lorraine Cavanagh QC and Ben McCormack for the parents
Francesca Gardner for the child through his Children's Guardian

Hearing date: 7 August 2020

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:*Introduction*

1. By an application dated 4 August 2020, the local authority applied pursuant to s.100 of the Children Act 1989 [“CA”] for permission to invoke the inherent jurisdiction in order that a young person, Z, might be deprived of their liberty in order to convey them from their family home to a residential school. The application required resolution as a matter of considerable urgency and so, on 6 August 2020, I appointed a Cafcass Children’s Guardian for Z. Happily, the Children’s Guardian was able to make his enquiries that day and attend the hearing on 7 August 2020.
2. The local authority was represented by Mr O’Brien; the parents were represented by Miss Cavanagh QC and Mr McCormack; and Z was represented by Miss Gardner. I am grateful to them for their assistance in this case and in particular, for the analysis of the relevant legal framework provided by Miss Cavanagh QC and Mr McCormack. I read a bundle of documents which included a moving statement from Z’s father and a detailed transition and conveyance plan.
3. At the hearing and with the agreement of all the parties, I approved an order authorising the transition and conveyance of Z to his new school and, given a busy court list as urgent applications judge, I indicated that I would reserve my judgment. It struck me that a short judgment explaining my decision on the local authority’s application might be of benefit to other local authorities faced by the difficulties with which Z presented.

Background

4. Z is a boy now aged fourteen years. He lives with his parents, A and B, and his younger sister, C. Z is an adopted child and may have been exposed to drugs and alcohol use pre-birth. His early life experiences are likely to have had an impact upon his attachments and relationships. His sister, C, was adopted when she was three years old and Z was five years old.
5. Z’s parents began to need more support when, at the age of four years, Z was referred to Child and Adolescent Mental Health Services [“CAMHS”]. The family engaged with family-based attachment therapy in an effort to resolve Z’s difficulties. However, his behaviour remained challenging in school and at home and, at the age of six years in 2012, Z was diagnosed with attachment difficulties and received an Education Health and Care Plan [“EHCP”]. He continued to have help from CAMHS and in 2016 he was diagnosed with autism, with traits of pathological demand avoidance, and attachment disorder. From 2016 to 2018, Z was difficult to care for as he was frequently violent to his parents. Z had obsessive-compulsive and intrusive thoughts together with a high level of anxiety.
6. From 2018 onwards, Z’s behaviour in the home became increasingly violent and destructive, and the police were called to the family home on numerous occasions. His parents were the main target for Z’s aggression and his sister also witnessed Z’s uncontrolled and worrying behaviour. Z’s parents did not wish to criminalise him, but they were frequently put in a situation where they felt unable to keep themselves and C safe.

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7. Z and his parents received support from the adoption team until 2016. He attended mainstream school until this proved no longer suitable for him. In September 2017 he moved to a school offering enhanced resource provision for autism, where he was able to access a higher level of support with specialist teachers. That school's environment was sensitive to the needs of children with autism since it offered a lower stimulus environment with smaller class numbers and sensory breaks.
8. Z's parents are very committed to him and initially declined a referral for short respite breaks as they did not want him to feel rejected in any way. However, in August 2018, they accepted such support. Unfortunately, short lived links with carers and the long and slow pace of introductions meant that Z and his family did not get the respite they so clearly needed.
9. Sadly, Z's distress and anxiety at school increased over time and his behaviour became even more challenging at home. By November 2018 he had stopped attending school. In January 2019, Z began attending a pupil referral unit which was able to provide him with one to one support and a bespoke curriculum based on his complex needs. Initially, Z settled well but his attendance began to deteriorate, and it would take several hours each day of encouragement before Z would travel to the pupil referral unit. Once there, it was very difficult to support him to engage in any work and there was a constant risk of him absconding. As the pressure for Z to attend the unit increased, he became more challenging at home.
10. The local authority provided Z's family with training to teach them de-escalation techniques and other skills to manage his very difficult behaviour in the family home. Additionally, the family had intensive support, jointly funded by CAMHS and the local authority, to prevent the breakdown of Z's home with his parents and sister. Despite the efforts of his parents and the professionals working with the family, Z's violence towards his parents continued to escalate. In recognition that the home situation was untenable, the local authority funded home care to support his parents and began to look for a residential placement for Z.
11. In February 2020, Z began a transition to a residential school on the basis that he would spend 38 weeks a year living there. Unfortunately, the Covid-19 lockdown intervened and the transition plan was paused. The plan to return to school was resumed at the start of May 2020. On 8 May 2020 there was a significant incident in the family home when Z became highly dysregulated. He smashed security doors and damaged a door architrave in the living room. The parents and C had to retreat to her bedroom and call the police. Z was taken into police custody and returned home once he had calmed down. Calling the police was part of Z's safety plan as a police presence often helped Z to calm down and take his medication. Following this incident, a strategy meeting was held at which it was decided to expedite Z's return to school. He attended school for the first fortnight but by week three he refused to even get into the school transport.
12. On 22 June 2020 there was another police call out after Z pulled a bannister from the stairs and threatened to and indeed tried to attack his parents. They retreated to C's bedroom and barricaded the door. The police attended to calm Z before the parents and C could leave her bedroom. A further professionals' meeting on 24 June concluded that Z required another placement as the transitions to and from school under a 38-week plan were proving too difficult to manage. On 13 July 2020, a 52-

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week placement for Z was agreed at a school some two hours' distance from the family home. When told about this placement on 22 July 2020, Z became verbally aggressive to his mother, smashed his iPad in the car and punched and broke the screen on the car stereo.

Z: Diagnosis, Behaviour, Wishes and Feelings

13. As already indicated, Z had a diagnosis of autism with pathological demand avoidance traits. He also had obsessive-compulsive and intrusive thoughts together with high levels of anxiety. He struggled to manage his emotions and could easily become dysregulated. He had massive difficulties in managing any perceived demands and it was clear that there was a correlation between increased demands on Z, for example, in the school environment, and his violence and challenging behaviour at home.
14. Young people with attachment difficulties and autism often have difficulty transitioning between environments and are likely to find this stress inducing. Z had difficulties in both these areas, making the transition between home and school especially difficult for him. Z wished to remain at home with his parents and he did not want to hurt his family but was not always able to control his anger and physical outbursts.

Proposed Placement

15. The proposed placement was a school with expertise in caring for boys with autism and pathological demand avoidance. The staff were also experts in caring for children with social and emotional mental health needs including attachment disorders and obsessive-compulsive disorder. There were other young people attending the school who had a similar presentation to Z. The school was available to Z for 52 weeks each year and his parents chose it as the most suitable specialist residential school for Z. Should Z settle well and his needs change in the future, he would be able to reduce the time spent at school and increase the time spent at home.
16. Z's parents considered that he had created a "mental prison" for himself at home in which he was bored and frustrated but from which, because of his autism and anxiety, he could not escape. They accepted advice from his treating psychologist that Z would not engage with therapy when living at home and needed to have his situation changed for him in the hope that, in a different environment, he could learn to overcome his anxiety and obsessions.
17. Z was very distressed by his own behaviour and violence. He told his parents repeatedly that he did not like himself but that he cannot stop his behaviour. In addition to not wishing to criminalise Z, his parents were and always have been clear that his behaviour is not criminal. Z was a young person living with disability and mental illness and his problems, including his violence and destructive behaviours, were a direct result of his mental health condition.
18. Both the local authority and Z's parents agreed that his placement in the residential school did not require court authorisation and the parents indicated they would consent to Z being accommodated pursuant to s.20 of the Children Act 1989.

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Additionally, the use of reasonable force to manage Z's behaviour in school would be authorised by s.93 of the Education and Inspections Act 1996.

The Transition Plan

19. Z's parents and the professionals working with him were clear that it was extremely unlikely that Z would go to his new school voluntarily. To facilitate Z's transition to his new school, a plan was devised with the input of Z's parents. It represented an appropriately staged approach using the least interventionist measures possible to encourage Z to travel to school willingly.
20. The plan was intended to be undertaken over a period of five days and was graded, starting with the least invasive options. On day one, Z would be told by his parents that he has a place at a residential school and invited to watch an online virtual tour of the premises. His parents would also give him information about the school which had been adapted to Z's needs. On day two, a member of the school staff who had already met Z would come to the family home to talk to Z, tell him more about the school and answer his questions. On day three, his parents would invite him to travel together with them to his new school. If he refused, he would be told that staff from the local authority would be coming to speak to him the following day to find out what might help him travel to school.
21. On day four, the two local authority social workers, at least one of whom was known to Z, would visit and encourage Z to travel to school with them. If Z refused to travel with the social workers, he would be told that, on the following morning, he could decide to go to the school with his parents. If he did not go with his parents, then the local authority would take him to school using secure transport. He would be given information about secure transport before the social workers left.
22. On day five, Z would be asked by his parents to travel to school with them. If he refused, staff from a company experienced in transferring mental health patients into hospital would engage with Z and encourage him to travel with them to school. If he became dysregulated, he would be offered his medication to calm him. If, however, he refused his medication and his behaviour became unsafe, the police would be called. In the past this has been helpful in calming Z and may also reduce the likelihood for physical restraint. Once Z was calmer, he would be offered the choice to safely access the car independently. The transport staff would make it clear that they were not there to "fight" Z but to help him make a necessary transition. Staff would guide Z into the car by gently leading him by the elbow or with an arm around his back. If this was ineffective, Z would be allowed to calm down though it was eventually envisaged that staff would physically hold him and lead him to the car. Once Z was in the car, his parents would follow that vehicle in their own car all the way to Z's new school.
23. Though the parents hoped that the presence of the police would be sufficient to effect Z's removal from the family home, they have concluded that Z may need to be placed into the car by restraint if this was necessary. They recognised that all the professionals involved must be equipped with the authority to move seamlessly to a position of taking Z with them by holding onto him and guiding him into the car if this became necessary.

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24. There was a degree of urgency to effect Z's move to school as: (a) once aware of the plan, Z would become dysregulated; (b) there was an ongoing risk of physical harm to the parents and C occasioned by Z's behaviour; (c) the current safety plan in the family home was ineffective; (d) Z needed to settle into school before the start of the school term at the end of August and before C started secondary school beginning of September; and (e) Z's mother was on holiday in the transition week and would not be able to take holiday thereafter. It was not in Z's best interests for Z to transition to school whilst his mother was at work.
25. It was obvious from the above that the transition plan foresaw Z being deprived of his liberty during the journey to school and being subject to both physical restraint and chemical restraint by means of medication.

The Legal Framework

26. Section 100 of the CA requires a local authority to seek the court's permission to apply to invoke the inherent jurisdiction. Section 100(4) provides that permission be granted only if the court is satisfied that:

a) the result which the authority wish to achieve could not be achieved through the making of any order of the kind to which subsection (5) applies; and

b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child is likely to suffer significant harm.

The question of leave turns on whether there is an alternative statutory means to achieve the same ends.

27. Parents can, pursuant to the exercise of their parental responsibility, permit or authorise the use of reasonable force on a child particularly if the child will suffer immediate and significant harm by them not so acting: see A Metropolitan Borough Council v DB [1997] 1 FLR 767 per Cazalet J at 777:

“The local authority, which also has parental authority under the care order, is empowered, like the mother, to take such steps as may be appropriate to protect the best interests of the child; that in my view can permit the use of reasonable force for the purpose of imposing intrusive necessary medical treatment on her where a life-threatening situation arises or where a serious deterioration to health may occur if appropriate treatment is not administered”

In this jurisdiction, I note the ambit of parental responsibility to delegate reasonable and measured chastisement of one's child is long-standing in the common law: see R v Hopley [1860] EW Misc J73; (1860) 2 F&F 202; 175 ER 1024.

28. The transition plan may amount to a deprivation of liberty pursuant to Article 5(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). In so far as is relevant, Article 5(1) provides that:

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“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.... of unsound mind....”

29. In Cheshire West and Chester Council v P and another [2014] AC896, Lady Hale said at [37]:

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

Where all three components of Storck are satisfied, then there is a deprivation of liberty within the meaning of Article 5(1) which therefore engages the state’s obligations under Articles 5(2)-(4) (Storck v Germany (2005) 43 EHRR 6 at paras 74 and 89).

30. Manifestly, the arrangements proposed were attributable to the state given that the local authority would be arranging the transition plan.

31. With respect to the objective test, Sir James Munby P (as he then was) held in Re A-F (Children) [2018] EWFC 138 (Fam) at [33] that:

“... whether a state of affairs which satisfies the “acid test” amounts to “confinement” for the purposes of the 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”.”

32. In [43] Sir James Munby P further held that:

“...the best I can do, by way, I emphasise, of little more than ‘rule of thumb’, is to suggest that: (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 upon the identification by the judge in the particular case of the attributes of the relevant comparator as described by Lord Kerr [in Cheshire West].”

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33. The subjective test is met if there is an absence of valid consent to the arrangements which satisfy the objective test. It is not always permissible to rely on consent of parents in order to show that the subjective test is not met. In *Re D (A Child)* [2019] UKSC 42, the Supreme Court considered whether it was in the scope of parental responsibility to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty within the meaning of Article 5. The Supreme Court, by a majority of 3 to 2 (Lord Carnwath and Lord Lloyd-Jones dissenting) determined it was not within the scope of parental responsibility for a parent to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty. With respect to a child under the age of 16, Lady Hale at [50] said that, logically, the conclusion would also apply to any younger child whose liberty was restricted to an extent which was not normal for a child of his age but that question did not arise in *Re D*.
34. Furthermore, the reasoning of Mr Justice Keehan, the judge at first instance in *Birmingham City Council v D (by his litigation friend, the Official Solicitor)* [2016] EWCOP 8, as to the exercise of parental responsibility for those aged under 16, has not been questioned in the Supreme Court. Lord Carnwath noted that Lady Hale did not suggest that there was anything in the Strasbourg jurisprudence which would invalidate that aspect of Keehan J's judgment and concluded "... *For the time being his reasoning remains the law, and as such appears to fit well with the new legislative scheme*" [159].
35. In *Birmingham City Council v D* at [110], Keehan J stated that: "*On the facts of Trust A v X, especially the loving and caring relationships that his parents had with him and the close working relationship they enjoyed with D's medical and other professions, I considered their decision to consent to D's confinement in Hospital to be a proper exercise of parental responsibility. To have held otherwise would, in my judgment, have resulted in unwarranted and unnecessary state interference in D's and his parents' family life.*"
36. If the court accepts that a deprivation of liberty arises (that is, all three components are satisfied), then the court must be satisfied that one of the cases in Article 5(1) is met. The most applicable in the circumstances of this case are either (d) or (e), namely:

"...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... of unsound mind..."

Discussion

37. In this case there was no alternative statutory means to achieve the ends intended by the local authority. The court was asked to invoke the inherent jurisdiction to authorise only Z's move from home to school and not Z's placement at school or the

use of force/restraint at school, all of which were covered by parental consent and legislation.

38. Coupled with the parents' consent, the following statutory schemes addressed the authorisation of any measures and detention of Z at his school placement. First, section 20 of the CA authorised the placement at school and provided Z with the legal status and ensuing protections of a looked after child. Second, section 93 of the Education and Inspections Act 2006, together with the Guidance entitled "*Positive and Proactive Care: Reducing the need for restrictive interventions*", Department of Health 2014 and "*Use of reasonable force - Advice for headteachers, staff and governing bodies*", Department for Education, July 2013, and section 550A of the Education Act 1996 provided, in combination, for staff at a school to use reasonable force in relation to a pupil for the purpose of preventing him committing an offence, causing personal injury (including to himself) or damage to property and engaging in any behaviour prejudicial to the maintenance of good order and discipline. Third, as Z was aged under 16 years and in accordance with the decision of the Supreme Court in Re D, the parents could lawfully consent to Z being deprived of his liberty as long as this was an appropriate exercise of parental responsibility.
39. Pausing there, I recognise that some of the more extreme circumstances that may arise in specialist schools for children with significant behavioural problems could fall outside of the boundaries of parental responsibility, whether delegated or not. Much will depend on the age of the child, the nature of the intervention and the potential for injury to a child or other person. Moreover, the Act contemplates the maintenance of good order or discipline of the school so the measures carried out by a trained behaviour management professional for one purpose may not be objectively reasonable if carried out by a parent for another purpose. There are limits to what a parent can reasonably authorise.
40. This case turned on the fact that the plan to move Z from his home required the authorisation of the use of force in respect to him. On being told that he had to go to a 52-week residential school, Z said he would lock himself away or defend himself. His parents believed that Z was determined to resist any move out of his home and, in those circumstances and given the history, Z's safety and the safety of everyone involved demanded a short and effective process which led seamlessly through the levels of intervention until Z was safely inside the car taking him to his new school.
41. I accepted the submissions of all the parties that what was contemplated here strained the boundaries of what was permitted by a parent with respect to the exercise of their parental responsibility. There was no immediacy of significant harm in this case as would be recognised by necessity. However, it was anticipated that Z would resist and that the level of restraint or force required to move him safely into the car would be outside that which might be considered reasonable chastisement of a child.
42. Additionally, acting to effect the transition plan based solely on parental consent, would deprive Z of any independent objective scrutiny of the proportionality of the measures contemplated. That scrutiny was unavailable under any statutory scheme and its absence provided further justification for invoking the inherent jurisdiction in this case.

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43. I was satisfied that the local authority should be given permission to make the application pursuant to section 100 of the CA.
44. Turning to the transition plan, it was carefully graduated, and Z would be given every opportunity to go to the placement under his own steam. The restraints contemplated on day five of the plan meant that Z would be confined in a vehicle frame for a not negligible length of time and would be under the continuous supervision of carers. In blunt terms, he would not be free to leave the vehicle. If matters escalated to the worst factual scenario – the determined refusal by Z to leave the parental home -, then the circumstances of Z's removal from home into the secure vehicle and the conveyance against his will for a period of two hours followed by removal from the vehicle into the school represented a continuum of force and restraint when he was outside the care of his parents. The measures contemplated appeared to be at, if not beyond, the limits of what a parent could consent to within the proper exercise of their parental responsibility. Moreover, if the worst-case scenario were reached, the components of the detention that involved force were indivisible from the restraint in a confined place (a secure vehicle with persons and locks to prevent Z leaving that vehicle) so as to render the parents' or the child's own consent (even if competent) beyond the scope of what they could lawfully agree.
45. I was satisfied that, in relation to the objective test of confinement, the plan satisfied that criterion.
46. With respect to the subjective test, I was also satisfied that, for the reasons outlined above, it was neither permissible to rely on Z's consent nor that of his parents. Finally, the deprivation of liberty arising out of the transition plan would be attributable to the state given that the local authority would be responsible for the arrangements.
47. In those circumstances, the plan represented a lawful basis for confinement within the meaning of either Article 5(1)(d) or Article 5(1)(e). It was both necessary and proportionate, being the least restrictive regime for transition which was compatible with Z's welfare.
48. Z's parents had responsibly made appropriate parenting decisions for their son on the advice of the local authority and his treating psychologist. His school placement had been chosen with great care and all were satisfied that his complex needs could be met at his new school. He had an urgent need to access the support, therapy and education that the school could offer though it was accepted that this was likely to be very upsetting for him initially but would be very beneficial to him in the long term. His parents had given section 20 consent to the local authority to manage the placement.
49. Considerable thought had been given to the transition plan which required to be urgently implemented. The history indicated the severe pressures on Z's parents and sister arising from Z's behaviour. The transition plan allowed repeated efforts to try and encourage Z to go to his new school willingly but and as a last resort, the plan contemplated the use of the minimum degree of force and restraint to convey Z to his new school.

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50. I was satisfied that I should make declarations authorising (a) that it was lawful and in his best interests for Z to be conveyed from his home address to school and in so far as the conveyance between those two places amounted to a deprivation of his liberty, it was necessary and proportionate to the risk of harm to him; and (b) the local authority its employees, servants and/or agents were authorised to use reasonable restraint will force to give effect to the transition plan approved by the court. Those two declarations were made on the basis that the restrictions authorised were the least restrictive of Z's rights and freedoms and were at all times respectful of his dignity.

Conclusion

51. Following the hearing, I was informed that, in his own time and in his own way, Z had travelled with his parents to his new school rather than using the transport commissioned by the local authority. That journey was not without some difficulty when L became upset and threatened to jump out of the car. There were also some difficulties in getting Z to enter the school and he did so after about an hour. He toured the school and joined everyone for the evening meal. He remained upset but his parents were of the view that he appeared to be beginning to settle in school.

52. I very much hope that Z will benefit from his new school and, in due course, overcome his difficulties so that he may safely rejoin his family.

53. I commend Z's parents for the approach they have taken in what have been uniquely upsetting circumstance for them and their children. The statement made by Z's father radiated love and concern for his son. I wish them well as a family.

54. I also express my great thanks to the local authority staff and the other professionals who have worked with and supported Z and his family. The thoughtful care taken by them was obvious and commendable.

55. That is my decision.