Neutral Citation Number: [2022] EWHC 3592 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2022

Before :

UPPER TRIBUNAL JUDGE LANE
sitting as a Deputy High Court Judge

- -

Between :

THE LOCAL AUTHORITY	**Applicant**
and	
EL	**First Respondent**
and	
ML	**Second Respondent**
and	
JL **(Through their Children's Guardian)**	**Third Respondent**

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Ms E. Verity (instructed by Local Authority Solicitor) for the **Applicant**
The First and Second Respondents did not attend
Hearing dates: 6 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.00am on 10 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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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.

UPPER TRIBUNAL Judge Lane sitting as a Deputy High Court Judge:

Background

1. The Applicant (hereafter 'the local authority') has applied for permission to deprive the third respondent, JL (who was born in January 2005 and is now 17 years and 8 months old) of elements of her liberty. JL has been diagnosed with Chromosome abnormality-Deletion of chromosome 6, Autistic Spectrum Disorder, severe learning difficulties, challenging behaviour and depression. A mental capacity assessment has concluded that she lacks capacity.

2. JL lives with her mother, the first respondent, EL. The second respondent is ML, JL's father, who is separated from the first respondent. JL attends respite care at a property called Cherry Trees. She also attends school (from 9.00am – 3.00pm in term). Carers (usually staff members from the school) are paid by the local authority and attend JL at her home 6 hours per week during term and 12 hours per week during the school holidays. The local authority has prepared a safety plan for JL dealing, *inter alia*, with respite care, school and her life at home with her mother. The local authority's Special Educational Needs (SEN) Department has also drawn up an Education and Health Care Plan for JL. When JL achieves her majority in January 2023, her support will thereafter be funded by NHS Surrey Heartlands Integrated Care Board and the provision of her care will fall under the provisions of the Mental Capacity Act 2005. I understand that statutory provisions which could have seen JL's care (as a 17 year old in a domestic setting) regulated under a non-court based scheme have not yet come into force (the Mental Capacity (Amendment) Act 2019 has not been put in force in April 2022, as originally planned).

3. JL has never been subject to a care order. JL was a 'looked after child' when accommodated under section 20 of the Children Act 1989 by the local authority at Ashford Children's Care but that placement ended in May 2022 when JL returned to live at the home of her mother. From that time, she ceased to be a 'looked after child' for the purposes of section 20 but has remained 'a child in need' (see below).

4. The restrictions on JL's liberty proposed by the local authority ('the restrictions') are:

    - JL will have carers on a 2:1 ratio. She is constantly supervised both in the home and in the community including at intervals at night. At times when it becomes necessary the ration will be increased to 3:1, in order to keep Julia safe;
    - JL uses a buggy as a place to regulate her emotional wellbeing. JL will be strapped into the buggy whilst in transit;
    - Door will be locked to prevent JL entering and leaving rooms;
    - In times of heightened anxiety, if JL is not able to be redirected or guided, physical restraint is used as a final resort.

5. On 5 September 2022, Mr P Hopkins KC, sitting as a Deputy High Court Judge, authorised the restrictions sought by the local authority and listed a further hearing on 6 October 2022. The judge directed the filing and service of skeleton arguments addressing the court's use of the inherent jurisdiction on the particular facts in this case.

6. The review hearing took place before me via Microsoft Teams on 6 October 2022.. Ms Verity, who appeared for the local authority, has assisted the court by filing a helpful skeleton argument. As the facts in this application raise issues which do not appear to have been addressed in previous jurisprudence, I reserved my judgment and my reasons for making the order which I now provide.

What is JL's status in these proceedings?

7. As noted above, JL is not subject to a care order and is now beyond the age when she could be made subject to such an order (see section 31(3) Children Act 1989). She has been, but is no longer, a 'looked after child'. She is not 'in accommodation provided for the purpose of restricting liberty' (see section 25 of the Children Act 1989). She is over 16 years and under 18 years of age and her parents are the only persons having parental responsibility for her.

8. Section 17(10) of the Children Act 1989 provides:

> (10) For the purposes of this Part a child shall be taken to be in need if
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> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled,
>
> and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.
>
> (11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part -
>
> "development" means physical, intellectual, emotional, social or behavioural development; and "health" means physical or mental health.

9. The local authority funds JL's carers and her respite care. Moreover, JL is, as a consequence of her conditions, disabled. The parties agree (and I find) that JL is currently 'a child in need' under the terms of section 17. Accordingly, the local authority's duty to 'safeguard and promote the welfare of children within their area who are in need; and, so far as is consistent with that duty, to promote the upbringing of such children by their families' is engaged (section 17(1) of the Children Act 1989). In order the deprive JL of her liberty as detailed at (4) above, the local authority considers that it must seek the authority of the court.

10. JL is therefore (i) a child over 16 years old (ii) who is a child in need (iii) but is not subject to a care order and is not currently a 'looked after' child. Ms Verity's skeleton

argument summarises JL's status as that of a *'17 year old, not 'looked after', child at risk.'*

The Law: Deprivation of Liberty

11. Article 5(1) of the European Convention on Human Rights provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of her/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 her/him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent her/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 her lawful detention for the purpose of bringing her/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 her/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.

12. In exercising its inherent jurisdiction, the court is generally unconstrained. When exercising its inherent jurisdiction with regard to children such as JL, the court's powers are constrained by the operation of Section 100 of the Children Act 1989:

> (1) Section 7 of the Family Law Reform Act 1969 (which gives the High Court power to place a ward of court in the care, or under the supervision, of a local authority) shall cease to have effect.
>
> (2) No court shall exercise the High Court's inherent jurisdiction with respect to children -
>
> (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
> (b) so as to require a child to be accommodated by or on behalf of a local authority; as to make a child who is the subject of a care order a ward of court; or
> (c) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that—

(a) the result which the authority wishes to achieve could not be achieved through the making of any order of a 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, he is likely to suffer significant harm.

(5) This subsection applies to any order—

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and

(b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

13. In *Storck v Germany (2005)* 43 EHRR 6, paras 74 and 89, (confirmed by the Grand Chamber in *Stanev v Bulgaria (2012)* 55 EHRR 22, paras 117 and 120, and adopted by the Supreme Court in *Surrey County Council v P; Cheshire West and Chester Council v P [2014] UKSC 19; [2014] AC 896)*, the European Court of Human Rights identified three components of deprivation of liberty for the purpose of Article 5 ECHR: (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.

14. I shall now address the three limbs of the *Storck* test and the relevance of section 100 of the Children Act 1989 as regards the particular and unusual facts in JL's case.

(a) <u>The objective component of confinement in a particular restricted place for a not negligible length of time.</u>

15. It is now settled law that a child who has mental disabilities should be compared to a child who does not have those disabilities for the purpose of determining whether the restrictions proposed amount to a deprivation of liberty under the definition in *Storck* (see the judgment of the Supreme Court in *D (A Child) [2019]* UKSC 42, at [40-42]). I find that the restrictions proposed amount to a deprivation of J's liberty would not be required for ensuring that another child of JL's age would not be exposed to serious harm; the locking of doors, the use of restraint (when necessary) and the employment of 2:1 (and, when required, 3:1) supervision are manifestly not restrictions to which any other young person of J's age would normally be subjected. Indeed, none of the parties to this application submit otherwise.

(b) <u>The subjective component of lack of valid consent</u>

16. JL cannot consent to the deprivation of her liberty as a consequence of her mental disability. JL's parents cannot, through the exercise of parental responsibility, authorise the deprivation of JL's liberty by way of the measures of confinement proposed by the local authority. As the Supreme Court held in *D (A Child) (supra)* at [49]:

> 49. In conclusion, therefore, it was not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child, as the Secretaries of State acknowledge that they must. In this case, D enjoyed the safeguard of the proceedings in the Court of Protection. In future, the deprivation of liberty safeguards contained in the Mental Capacity Act 2005 (as amended by the Mental Capacity (Amendment) Act 2019) will apply to children of 16 and 17…

17. The local authority cannot consent; JL is not a 'looked after' child and she is not subject to a care order. Ms Verity submitted that it must fall to the court, through the exercise of its inherent jurisdiction, to authorise the deprivation of JL's liberty. I agree with that submission.

18. The High Court (Macdonald J) considered the operation of section 100 of the Children Act 1989 in *A City Council v. LS [2019]* EWHC 1384 (Fam). Macdonald J summarised the issue before the court at [1]:

> Does the High Court have power under its inherent jurisdiction, upon the application of a local authority, to authorise the placement in secure accommodation of a 17 year old child who is not looked after by that local authority within the meaning of s 22(1) of the Children Act 1989, whose parent objects to that course of action, but who is demonstrably at grave risk of serious, and possibly fatal harm. I am satisfied that the answer is 'no'.

19. At [47-49], the court held:

> 47. First, KS is not a "looked after" child for the purposes of s 25 of the Children Act 1989 and does not therefore fall within the terms of that section. In the circumstances, this is not a case where a declaration under the inherent jurisdiction is sought by the local authority in order to render lawful a non-secure placement for a looked after child that amounts to a deprivation of liberty due to a lack of suitable secure beds preventing an application under s 25 of the Children Act 1989. Rather, in this case, the local authority seeks an order under the inherent jurisdiction because s 25 of the Children Act 1989 cannot apply to KS.
>
> 48. Second, and within this context, in circumstances where KS is not and (in circumstances where his mother objects to his accommodation and where KS cannot be made the subject of a care order by reason of his age) cannot be a looked after child, the order the local authority seeks under the inherent jurisdiction is one which would not only authorise the accommodation of KS in a secure placement, but would, a priori, have the effect of authorising his removal from his mother's care without her consent for this purpose in circumstances where his mother, who retains exclusive parental responsibility for him, objects to this course of action. In the circumstances, I am satisfied that the effect of the order sought by the local authority under the inherent jurisdiction would be to require KS to be removed from his mother's care and

be accommodated by the local authority. This course of action is prohibited by s 100(2)(b) of the Children Act 1989.

49. The intention and effect of Section 100(2)(b) is to prevent the court in wardship or under the residual inherent jurisdiction making any order which has the effect of requiring a child to be accommodated by a local authority. That end can only be achieved by satisfying the requirements of the statutory regime for accommodating children provided by (amongst other provisions) s 20 of the Children Act 1989. For the reasons I have given that outcome cannot be achieved in this case under the statutory regime. In such circumstances, it is clearly established that the High Court cannot exercise its inherent jurisdiction to grant authority to the local authority to accommodate a child where the local authority would not otherwise be able to do so under the statutory scheme (*Re E (A Child) [2012] EWCA Civ 1773 at [16] and Re M (Jurisdiction: Wardship) [2016] EWCA Civ 937 at [39]).*

20. The facts in JL's case can be distinguished from those of the child, KS, in *A City Council v. LS*. First, section 20 of the Children Act 1989 is not excluded by the refusal of those with parental responsibility (JL's parents) to give consent to where JL is accommodated (Section 20(7):

> (7) A local authority may not provide accommodation under this section for any child if any person who—
>
> (a) has parental responsibility for him; and
>
> (b) willing and able to—
>
> (i) provide accommodation for him; or
>
> (ii) arrange for accommodation to be provided for him, objects.

The court agreed with the submissions of the counsel for KS which are summarised at [26]:

26. On behalf of KS, Mr Spencer submits that the starting point of any analysis must be that KS has never been made the subject of a care order and has not (save as a result of the interim order made by HHJ Sharpe on 26 April 2019) been accommodated by the local authority. Further, Mr Spencer submits that it is not now possible, by virtue of his age, for KS to be made the subject of a care order and, in circumstances where his mother, who is willing and able to provide accommodation for him, objects to him being accommodated for the purposes of s 20(7), he cannot be accommodated pursuant to s 20(3) of the Children Act 1989. In these circumstances, in common with the position of the local authority, Mr Spencer submits that it is not possible to bring KS within the terms of s 25 of the Children Act 1989 as he is not and has at no point been "looked after" for the purposes of s 25(1).

In JL's case, the effect of the exercise of the court's inherent jurisdiction will not be to require JL 'to be removed from [her] mother's care and be accommodated by the local

> authority … a course of action is prohibited by s 100(2)(b) of the Children Act 1989' as was the case for KS (see paragraph [48] of *A City Council v LS* above).

21. Secondly, JL's parents, who have parental responsibility for her, do not object to the arrangements for her accommodation (as opposed to her proposed confinement); indeed, JL spends the majority of her time living in her mother's home. As the Court of Appeal observed in (*Re E (A Child) [2012] EWCA Civ 1773* (cited by Macdonald J *supra*) at [16]:

> So in the end it seems to me that this is a simple point. Plainly the intention and effect of Section 100 is to prevent the court in wardship making any order which has the effect of requiring a child to be placed in care or under the supervision of a local authority. That end can only be achieved by going through the proper route of threshold finding opening the court's discretionary jurisdiction to make either a care or a supervision order. The same result cannot be achieved under the court's inherent jurisdiction. But there is nothing in Section 100 that either explicitly or implicitly precludes the court from making an order in wardship where the child is not required to be accommodated but is voluntarily accommodated.

22. The application by the local authority does not 'cut across' the Children Act 1989 by seeking to achieve by way of the inherent jurisdiction arrangements for JL's accommodation which could not be achieved by or contradict the statutory regime. Moreover, given that the Court of Appeal and the Supreme Court have now made clear that the court is not authorising the placement itself when making a declaration authorising the deprivation of a child's liberty, it is perhaps unlikely that section 100(b) of the Children Act 1989 would now be infringed on the facts in *A City Council v LS*.

23. Ultimately, as regards the proposed restrictions, it is the absence of consent in JL's case which establishes that a genuine lacuna exists which only the court's inherent jurisdiction can fill. Ms Verity's in her skeleton argument submits that 'if JL were aged under 18 years, had capacity to consent and did not consent to the restrictions and section 25 [of the Children Act 1989] was not available, the court under the current law could not authorise the restrictions under the inherent jurisdiction.' [49] Since JL cannot consent to the restrictions and the consent of her parents, although offered, is ineffective (see *D(a child)* at [15] above) and in circumstances where section 100 of the Children Act 1989 will not be infringed by the proposed restrictions, then, in my opinion, it must fall to the court, through the exercise of its inherent jurisdiction to act in JL's best interests and to keep her safe from serious harm by authorising the deprivation of her liberty.

(c) <u>The attribution of responsibility to the State.</u>

24. In *A Local Authority v A [2010] EWHC 978 (Fam)*, Mumby P held at [96]:

> … whatever the extent of a local authority's positive obligations under Article 5, its duties, and more important its powers, are limited. In essence, its duties are threefold: a duty in appropriate circumstances to investigate; a duty in appropriate circumstances to provide supporting services; and a duty in appropriate circumstances to refer the matter to the court. But, and this is a key message, whatever the positive obligations of a local authority under Article 5 may be, they do not clothe it with any power to regulate, control, compel, restrain, confine or coerce. A local authority which seeks to

do so must either point to specific statutory authority for what it is doing – and, as I have pointed out, such statutory powers are, by and large, lacking in cases such as this – or obtain the appropriate sanction of the court. Of course if there is immediate threat to life or limb a local authority will be justified in taking protective (including compulsory) steps*: R (G) v Nottingham City Council [2008] EWHC 152 (Admin), [2008] 1 FLR 1660, at para [21].* But it must follow up any such intervention with an immediate application to the court.

25. The local authority, having investigated JL's circumstances, continues to fund the care services which involve JL's confinement and restriction under the care plan it has drawn up. It has followed the course of action indicated by the court in *A Local Authority v. A* as appropriate for a state institution which has assumed responsibility for JL, notwithstanding that she resides in her mother's home.

Conclusion

26. For the reasons I have given above, I find that all three components of *Storck* are satisfied and that (i) the restrictions proposed are required in JL's best interests and to keep her safe from serious harm and (ii) are not prohibited by statute. Moreover, given that the duration of the order will, in any event, be short (a little over 3 months) I do not consider it necessary to schedule any further review by the court; the order will continue until it expires upon JL achieving the age of 18 years on 23 January 2023. Thereafter, JL's care and any restrictions on her liberty will fall to be considered under the Mental Capacity Act 2005.

27. That is my judgment.